THE LAW OF CRIMINAL CONSPIRACY IN AUSTRALIA AND ENGLAND

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The law of criminal conspiracy has long been impugned as being both substantively and procedurally formless. Professor Francis Sayre assailed it as "vague in its outlines and uncertain in its fundamental nature . . . a veritable quicksand of shifting opinion and ill-considered thought".[1] Lord Diplock has criticised it (in *Bhagwan*) as the "least systematic" and the "most irrational branch of English penal law . . . ."[2] Its perplexities derive both from its inherent nature and from the failure of the judiciary to develop a coherent theory of criminal combination over the last three hundred years; they are such that it has often been assumed that the cases do not allow a statement of the basis of liability in respect of this common law crime. At the very least it has been universally acknowledged that the doctrine is sufficiently uncertain in its outlines as to conduce to a significant degree of uncertainty in an area of law where certainty is to be especially prized, *viz.*, the penal law.

Conspiracy is theoretically an inchoate crime, though it is most usually charged in the aftermath of a joint wrongdoing. Put simply, an indictable conspiracy is an agreement for such a purpose as to render that agreement criminal. The major contention in conspiracy doctrine has crystallised around the characterisation, or identification of this range of "unlawful" purposes which are central to an evaluation of the basis of liability in conspiracy. The simplest instance of a criminal agreement is, of course, that of a conspiracy to commit a crime. On this basis the ambit of criminal conspiracy is prospectively as broad as the scope of all the statutory and common law offences, provided only that two people (or more) should have agreed to commit a criminal offence. But beyond this massive, implicit liability (which at least is a relatively certain one), criminal conspiracy has long been accepted as not being confined to agreements to commit a crime. There is a further spectrum of purposes which are sufficiently reprehensible as to render an agreement for their effectuation criminal although these purposes are not criminal in them-

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[1] F. B. Sayre, "Criminal Conspiracy" (1923-24) 35 *Harv. L.R.* 393.

[2] *D.P.P.* v. *Bhagwan* [1972] A.C. 60 at 79; [1970] 3 All E.R. 97 at 104.

selves nor even perhaps, such as to attract civil liability in law. Clearly a precise definition of these non-criminal purposes is critical to any quest for a self-limiting legal conception of criminal conspiracy in which the criminality of a proposed consensus can be evaluated with the relative certainty considered necessary and for the most part possible, in the other areas of criminal law.

But is such a characterisation possible — given the present state of the authorities? Do they rather establish that the categories of conspiracy are infinite, able to be declared at will by the courts (or even merely by juries) on the basis of so broad a formulation of liability as, for instance, that a criminal agreement is an agreement for a purpose obnoxious to the law? What in truth are the operative legal principles of substantive liability in criminal conspiracy? How is criminal conspiracy to be legally defined?

For all of its significance and its complexity, even perversity, the English law of criminal conspiracy has only attracted three studies of monograph length: Wright's famous work in 1873,[3] Harrison's in 1924[4] and Robert Hazell's short work *Conspiracy and Civil Liberties* in 1974.[5] All of these recognised the central (if implicit) tension in the conspiracy authorities, between an amorphous, even primitive doctrine of criminal agreements, and an analysis which confined them to a limited number of relatively specific classes. Sayre wrote most provocatively about this tension in competing analyses in an article in the early 1920s.[6] But from about 1800 (or even earlier) until very recently, it could not be said that the formal judicial assumptions about conspiracy doctrine altered markedly. It is because of an unprecedented, and indeed epochal spate of decisions concerning criminal conspiracy by the House of Lords in the last fifteen years, beginning with *Shaw*[7] and culminating most recently in *Withers*[8] and *Scott*[9] that it is possible to make new propositions based upon the cases, as to the basis of liability in conspiracy. The law has undergone a considerable reshaping, in this series of decisions. Paradoxically they have had the effect both of broadening the recognised ambit of the crime in their creation of the new heads of liability of conspiracy to corrupt public morals (in *Shaw*), conspiracy to outrage public decency (in *Knuller*[10]), and conspiracy for the commission of a tort (*Kamara*[11]) —

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[3] R. S. Wright, *The Law of Criminal Conspiracy and Agreements* (1873).

[4] D. Harrison, *Conspiracy as a Crime and as a Tort* (1924).

[5] National Council of Civil Liberties in Britain, "Occasional Papers on Social Administration No. 53" (published by the Social Administration Research Trust).

[6] Sayre, *supra* n. 1.

[7] *Shaw* v. *D.P.P.* [1962] A.C. 220; [1961] 2 All E.R. 446.

[8] *D.P.P.* v. *Withers* [1975] A.C. 842; [1974] 3 All E.R. 984.

[9] *Scott* v. *Metropolitan Police Commissioner* [1975] A.C. 819; [1974] 3 All E.R. 1032.

[10] *Knuller (Publishing, Printing and Promotions) Ltd.* v. *D.P.P.* [1973] A.C. 435; [1972] 2 All E.R. 1242.

[11] *Kamara* v. *D.P.P.* [1974] A.C. 104; [1973] 2 All E.R. 1242.

and of truncating its potential for further expansion, by extinguishing the putative head of conspiracy to effect a public mischief. *Withers* is couched in such terms as to suggest a view of conspiracy as being confined to a fixed number of recognised categories. This latter implication, it will be seen, is found in other recent decisions even as they chart new areas of liability, and the doctrine of *Withers* itself was expressly anticipated in *Bhagwan*.[12] *Withers*, especially, is perhaps the most significant decision in the area since such foundational cases as *The Poulterers' Case*[13] and *Starling's Case*.[14]

Ironically, given this new and restrictive direction in the House of Lords' analysis of the crime, and the seeming promise of a reform of the crime by the courts themselves, the British Law Commission has this year (1976) proposed[15] the legislative reform of conspiracy so as to curtail its ambit to agreements for the commission of a criminal offence, as provided for in the American Model Penal Code,[16] and as mooted many times in the past. The Commission's recommendations are likely to become law.

Both the recent reshaping of the common law and the prospects of its modification by such a statutory reform as the Law Commission has proposed, constitute new incentives to examine the common law doctrine of conspiracy and the outlook for its future development. As a further issue, the effect on its operation of such a legislative curtailment of its scope as the Law Commission has proposed should be examined. The issues raised in these terms are essentially those of liability rather than procedure.

This paper will proceed on the basis that the English decisions in the area of conspiracy are directly applicable in Australia, though it will be suggested that certain recent English decisions (*Shaw, Knuller* and *Kamara*) not as yet considered by the Australian courts, ought not be followed by them. This latter proposal is put on the basis that these decisions are dubious both on the grounds of their reasoning and of policy. Furthermore they are essentially incompatible with the House of Lords' later decision in *Withers*.

It is proposed firstly to review the present common law position in respect of criminal conspiracy, and then to consider the effects in England and Australia of such a reform as the Law Commission has recommended.

I Liability for Criminal Conspiracy According to the Common Law, and its Statutory Modification in Certain Australian Jurisdictions

An obvious point of departure in a consideration of the true basis

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[12] [1972] A.C. 60.

[13] *The Poulterer's Case* (1611) 9 Co. Rep. 55b; 77 E.R. 813.

[14] *Starling's Case* (1665) 1 Sid. 173; 82 E.R. 1039.

[15] *Report on Criminal Conspiracy and Criminal Law Reform*, Paper No. 76, issued on 17 March, 1976 (H.M. Stationary Office, London).

[16] Section 5.03. See H. Wechsler *et al*, "The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute" (1961) 61 *Columbia L.R.* 957.

of liability in the crime is to evaluate the historic and current status of the classic characterisation of conspiracy (whether it be treated as a mere description or as a definition) *viz*: and agreement "either to do an unlawful act, or a lawful act by unlawful means" ("unlawful" not necessarily meaning criminal). The antithesis is Lord Denman's,[17] and it will be referred to by this label. Though it is clear that Lord Denman was not intending a definition of conspiracy in its statement, it has very commonly been recited as such. In practice this antithesis has been universally relied upon by the courts since about 1800, when they have wanted to suggest that criminal conspiracy is to be defined in terms of extreme breadth. On its most common reading the antithesis expresses in substance the simple idea that an agreement for an unlawful "purpose" (for "means" and "ends" are commonly purposes, be they short-term or ultimate) is criminal. A purpose which is not criminal may be "unlawful" if it is for a sufficiently reprehensible purpose according to broadly conceived ideas of public policy. Perhaps the issue is to be decided according to consideration of what "would undermine principles of commercial or moral conduct".[18] On this view of the conspiracy doctrine the supposed categories or heads of conspiracy are of mere discursive convenience rather than legal significance. The operative test of liability is as general as the antithesis itself and is aptly expressed by the antithesis. That is, the categories of conspiracy are not limited. In these terms the legal concept of conspiracy is an extremely elastic one. This flexible and public policy oriented view of conspiracy might be described as the Denman analysis.

In opposition to this analysis may be propounded a restrictive view of liability in conspiracy. According to this competing doctrine, although the courts may have taken a broadly based view of criminal conspiracy as an instrument of legal regulation, especially since 1700, and even though this view may have been employed to fashion the various classes of criminal conspiracy, the most logical analysis of the decisions as they have collected over two or three centuries is to see them as establishing a fixed number of well-settled categories, which are now closed to judicial extension. Such heads include conspiracy for a crime, conspiracy to defraud, conspiracy for a tort and conspiracy to pervert the course of justice. The heads are in fact legally significant and discrete. In having their own specialised incidents (which must be put to the jury, as with any other crime) these heads are indeed separate offences. "Conspiracy" consists of a number of different offences, to which certain common rules are, however, applicable. For example, the rules governing the basic concept of "agreement" and the rules of evidence and procedure are applicable. In other words the "unlawful" purposes of the crime can be

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[17] See his remarks in *R.* v. *Jones* (1832) 4 B. & A.D. 345; 110 E.R. 485.

[18] Viscount Simon's remarks in *Crofter Hand Woven Harris Tweed Co. Ltd.* v. *Veitch* [1942] A.C. 435 at 439.

defined solely in terms of this limited number of specific heads. It is because the categories are separate offences, evolved individually by the common law, that the court cannot add to their number, for to do this would be to create a new offence, something now accepted as being against the policy of the law.[19] To accept this view is to perceive conspiracy as being much more certain and narrow in scope than hitherto it was assumed to be.

This view of conspiracy is clearly supported by the almost unfailing insistence of the modern courts in evaluating the criminality of agreements in terms of what are clearly taken to be standard conspiratorial heads each underwritten by its own specific sequence of authorities. It is the only view consistent with such a decision as *Withers*,[20] where the House of Lords affirmed that there was no such head of conspiracy as conspiracy for a public mischief — a finding which represented the dismissal of that putative and vague, residual category in which the public-policy oriented Denman analysis was often invoked. It is also the view to be preferred on the basis of the policy requirement of certainty in the law. And as has been noted, the broader view of liability tends to suggest a broadly conceived discretion in the courts to create new offences, which cannot any longer exist.

It remains now to consider each of these analyses in turn:

(a) The Denman view of conspiracy

There is a good deal of support historically for this analysis, at the level of judicial *dicta*. There can be no doubt that until very recently it was the comforting orthodoxy reiterated almost unthinkingly by many courts even as their decisions may have evinced a repeated regard for the precise limits of well-recognised heads, and have been grounded in them. The emergence of such a doctrine was bound up with the distillation of the central principle that to be indictable a conspiracy did not necessarily need to contemplate the execution of a purpose criminal in itself. Such a development of common law doctrine was not universally acknowledged until the eighteenth century.

A crime based upon the idea of combination is first found in the English law in the Three Ordinances of Edward I which culminated in the Ordinance of Conspirators of 1305 (33 Edw. I, st. 2), which statute created a crime of combinations in abuse of legal procedure. The next development came in the declaration of a common law liability in respect of such combinations by the Court of Star Chamber, in *The Poulterers' Case*.[21] The ensuing half century culminated in *Starling's Case*,[22] in which

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[19] See *Knuller* [1973] A.C. 435.

[20] [1975] A.C. 842.

[21] (1611) 9 Co. Rep. 55b.

[22] (1665) 1 Sid. 173.

a common law liability in regard to a conspiracy allegedly to deplete the King's revenue was upheld. Though the *ratio* of this decision was quite unelaborated, it is clear that a fairly broad concept of conspiracy was recognised quite independently of the Ordinance of 1305. By the time of *Thorp*[23] in which the alleged conspiracy was one to procure a marriage, a court accepted that where the object of an indicted conspiracy was shown to be criminal in itself, the indictment would be sustained. Lord Raymond indicated his view in *Edwards* that indictments for conspiracy are not to be quashed, where the thing that is conspired is in its own nature criminal.[24] And so what Wright characterised as "the Seventeenth Century rule",[25] i.e., the general criminality of all agreements for a crime, was by this date generally accepted.

It is in the evolution of the concept of a criminal conspiracy to defraud — one which comprehended purposes far outstripping the limited substantive offence of a common law cheat, or the statutory liability established by the Statute of False Pretences in 1757, that the courts for the first time consistently and unequivocally gave voice to the idea that criminal conspiracy was not confined to agreements to commit a crime.[26] The evolution of this head was undoubtedly influential in the growth of the general idea that the basis of liability was to be defined broadly. But this is not sufficient to explain the development itself, for the cases are just as compatible with the more specific rule, that liability attaches to combinations merely involving fraud. Another obviously potent factor was the general assertion by Hawkins in 1716 in his *Pleas of the Crown* (at 1, 72, 2) that "there can be no doubt but that all confederacies whatsoever, wrongfully to prejudice a third person, are highly criminal at common law". It is not obvious that Hawkins intended to affirm that liability for conspiracy extended beyond strictly criminal objects, but his declaration is susceptible to this wider construction. And in this wider sense of course the formulation also suggests a very broad test of liability for criminal combinations. Sayre believed that the Hawkins principle was the direct antecedent of the Denman antithesis — the latter was a "reincarnation" of the earlier formula.[27] As stated in 1716, the principle was virtually without authority. It may have been inspired by the broad claims of the common law courts, beginning in a

[23] *R.* v. *Thorp* (1697) 5 Mod. 221.

[24] *R.* v. *Edwards* (1724) 8 Mod. 320; 88 E.R. 229.

[25] R. S. Wright, *The Law of Criminal Conspiracy and Agreements* (1873) pp. 10, 26-27.

[26] Early cases include *Thody's Case* (1674) 1 Vent. 234; *R.* v. *Orbell* (1704) 6 Mod. 42; *R.* v. *Robinson* (1744) 1 Leach 37. The cases of *R.* v. *Wilders* (1720) cited in *R.* v. *Wheatly* (1761) 2 Burr. 1225 at 1228; *R.* v. *Bryan* (1730) 2 Str. 866, and *Wheatly* itself assume the criminality of conspiracy to defraud, even if they were not agreements for a crime (though these latter cases were not themselves conspiracy cases).

[27] Sayre, *supra* n. 1 at 405.

case like *Bagg*,[28] to a general power to punish acts, *contra bonos mores*. In *Sidley*,[29] for instance, the court declared itself "*custos morum* of all the subjects of the King" (the case concerned an indecent exposure), and comparable claims were made in *Taylor*[30] (a case of blasphemy). Such claims were made by Lord Mansfield in the much later case of *Delaval*[31] and *Jones* v. *Randell*.[32] In *Lynn* the court claimed jurisdiction over offences "as being highly indecent, and *contra bonos mores*".[33] (The case concerned the secret exhumation of bodies from graves for the purposes of dissection.) For about one hundred and fifty years the common law courts in cases concerning both substantive offences and conspiracy seemingly asserted a discretion to punish conduct subversive of morals and religion. But it is likely that they were merely asserting their jurisdiction in competition with that of the ecclesiastical courts in certain matters,[34] and the offences affirmed to exist at common law are highly specific. But whatever the origins of the formulation by Hawkins, and irrespective of the lack of specific authority for it as at the date of its publication, it certainly inspired judicial *dicta* in similar terms and so helped to generate a broadly based conception of conspiracy. It was in a sense retrospectively legitimised.

One case clearly influenced by it was *Journeyman Tailors of Cambridge*[35] which charged a combination among workmen to raise their wages by striking. The court committed itself to the notorious observation that "a conspiracy of any kind is illegal, although the matter about which they conspired might have been lawful for them, or any one of them, to do, if they had not conspired to do it . . . ."[36] The suggestion that *every* conspiracy was necessarily criminal was, of course, absurd, a conspiracy being no more than an agreement. Other cases of the 1700s voice with a generally untested confidence, such incipient Denmanisms: Sayre[37] cites *Edwards*[38] one of a curious sequence of cases extending into the nineteenth century[39] in which the doctrine of criminal conspiracy was sought to be invoked to restrain the officials of one parish from marrying off a pauper to the charge of another parish, so as to transfer the burden of her upkeep — a nettle which the courts persistently refused to grasp. In *Edwards* the

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[28] *James Baggs Case* (1616) 11 Co. Rep. 936; 77 E.R. 1271.

[29] *R.* v. *Sidley* (1663) 1 Sid. 168; 82 E.R. 1036.

[30] *Taylor's Case* (1676) 1 Vent. 293; 86 E.R. 189.

[31] *R.* v. *Delaval* (1763) 3 Burr. 1434; 97 E.R. 913.

[32] *Jones* v. *Randall* (1774) Lofft 383; 98 E.R. 706.

[33] *R.* v. *Lynn* (1788) 2 T.R. 733 at 734; 100 E.R. 394 at 395.

[34] Lord Diplock suggested this in *Knuller* [1973] A.C. 435.

[35] *R.* v. *Journeymen Tailors of Cambridge* (1721) 8 Mod. 10; 88 E.R. 9.

[36] The Court cited the case of *Tubwoman* v. *Brewers of London*, which however is an unreported case of unknown date and as such to be discounted as no authority at all.

[37] Sayre, *supra* n. 1 at 403.

[38] (1724) 8 Mod. 320; 88 E.R. 229.

[39] See R. S. Wright, *Criminal Conspiracy and Agreements* (1873), p. 40.

court allowed itself the hollow *dictum* that "a bare conspiracy to do a lawful act to an unlawful end, is a crime, though no act be done in consequence thereof"[40] — without, of course, acting upon such a broadly conceived principle.

Other conspiracy decisions of the eighteenth and early nineteenth century are seemingly compatible with a conception of conspiracy as being broader than purposes criminal in themselves. But at the same time they are usually so briefly reported, or their *ratio* so tersely expressed, that it cannot really be said that their upholding of the indictment for conspiracy was not based on a recognition of the object of the agreement indicted as being itself an offence. The Denman analysis of conspiracy and its antecedents have for instance typically been supported by reference to cases concerning workmen's conspiracies, but it is not clear whether the courts were endorsing such indictments because of the criminality of the agreement charged according to the combination laws before their repeal in the Combination of Workmen Acts of 1824 and 1825, or (in regard to cases after this date) in terms of the criminality of their objects according to the Act of 1825. Certainly the agreement in *Journeyman Tailors of Cambridge* would seem to have been criminal according to statute,[41] and such labour combination cases as *Eccles*[42] and *Hammond and Webb*[43] are comparably unenlightening. Such later cases following the Act of 1825, as for example *Bykerdike*,[43a] *Duffield*,[44] *Rowlands*,[45] and *Bunn*.[46] Virtually all of these reports concern an account of the remarks of a trial judge — there was virtually no treatment of the subject by an appellate court, and none of them dealt unequivocally with the basis of liability. At most a common law liability in respect of labour combinations was assumed by the courts rather than a Denman-type liability in respect of combinations generally: in the one case (the civil case of *Hilton* v. *Eckersley*[47]) where a senior court was concerned with the criminality of an analogous act, one alleged to be in restraint of trade in circumstances where such a liability could *only* be upheld on the basis of a test as broad as the Denman antithesis, such a liability was explicitly repudiated.

Other cases up to the time of Lord Denman's own propounding of the antithesis to which his name has become linked (in *Jones*[48]) represent equally insubstantial support for a broad view of liability. In *Robinson &*

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[40] (1724) 8 Mod. 320 at 321.

[41] D. Harrison, *Conspiracy as a Crime and as a Tort* (1924) p. 116.

[42] *R.* v. *Eccles* (1783) 1 Leach 274; 168 E.R. 240.

[43] *R.* v. *Hammond and Webb* (1799) 2 Esp. 719; 170 E.R. 508.

[43a] *R.* v. *Bykerdike* (1832) 1 M. & Rob. 179; 174 E.R. 61.

[44] *R.* v. *Duffield* (1851) 5 Cox C.C. 404.

[45] *R.* v. *Rowlands* (1851) 17 Q.B.D. 671.

[46] *R.* v. *Bunn* (1872) 12 Cox C.C. 316.

[47] *Hilton* v. *Eckersley* (1855) 6 E.L. & B.L. 47.

[48] (1832) 4 B. & A.D. 345.

Taylor[49] the court upheld an indictment for conspiracy to raise a specious title to a deceased estate. When the defence objected to this charge employing the language of injury "to a third person", the court upheld it in comparable terms, but the case must be regarded as either one of conspiracy in abuse of the legal process (a recognised head), or as a conspiracy to defraud. In *De Berenger* the count alleged a conspiracy to raise the price of public securities by the spreading of false rumours. It was upheld as concerning "a conspiracy to effect an illegal end, and not only so, but to effect it by illegal means, because to raise the funds by false rumours, is by illegal means"[50] — but the case was obviously one of conspiracy to defraud or even conspiracy *for* a crime.[51]

And in a significant case of this period (*Turner*) Lord Ellenborough refused to allow that a conspiracy for trespass to land could be indictable. In remarking that the cases in conspiracy against individuals had gone far enough, and that "I should be sorry that (they) . . . should be pushed still further",[52] Lord Ellenborough was clearly disapproving the broader conception of a criminal conspiracy involving non-criminal objects.

By 1834 the only heads of conspiracy that might reasonably have been supported on the authorities were those of conspiracy *for* a crime, conspiracy to defraud and conspiracy to pervert the course of justice, with some ambiguous support for a qualified liability in respect of labour combinations. Lord Denman's remarks in *Jones*[53] concerned an alleged conspiracy to defraud, and it is in any event clearly apparent in his remarks in the following cases of *Richardson*,[54] *Seward*,[55] *Peck*,[56] and *King*,[57] that he viewed the antithesis now linked with his name as expressing a limitation on the crime and not broad view of its scope. In *Seward*, for example, he specifically required that the object of an indicted conspiracy be disclosed in the indictment as being "something which amounted to an offence",[58] though elsewhere he allowed the validity of a head of conspiracy to defraud. No more unequivocal statement of principle could be cited from this period.

In the succeeding forty years cases invariably fell within these standard heads, even as the Denman formula was repeated. And so it

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[49] *R.* v. *Robinson and Taylor* (1746) 1 Leach 37; 168 E.R. 121.

[50] *R.* v. *DeBerenger* (1814) 3 M. & S. 67 at 75; 105 E.R. 536 at 539.

[51] Lord Killbrandon appeared to regard *De Berenger* as an instance of a conspiracy to defraud in *Withers* [1975] A.C. 842 at 875. The case may even be able to be regarded as one of conspiracy for a crime, according to Wright *supra* n. 3.

[52] *R.* v. *Turner* (1811) 13 East. 228 at 231.

[53] (1832) 4 B. & A.D. 345.

[54] *R.* v. *Richardson* (1834) 1 M. & Rob. 402; 174 E.R. 139.

[55] *R.* v. *Seward* (1834) 1 Ad. & E. 706 at 714.

[56] *R.* v. *Peck* (1839) 9 Ad. & E. 686.

[57] *R.* v. *King* (1844) 7 Q.B. 782; 115 E.R. 683.

[58] *Supra* n. 55.

was in 1873 that Wright concluded that the Denman antithesis did not express the test of liability in conspiracy and that

> on a review of all the decisions . . . there is a great preponderance of authority in favour of the proposition that, *as a rule*, an agreement or combination is not criminal unless it be for acts or omissions . . . which would be criminal apart from agreement . . . and that the modern law of conspiracy is in truth merely an extension of the law of attempts, the act of agreement for the criminal purpose being substituted for the actual attempt as the overt act . . . .[59]

though he allowed the "beneficial exception" of conspiracy to defraud.[60] He acknowledged the possibility that the courts might occasionally seek to exploit such a vague test of liability as the Denman formulation: ". . . there appears to be great theoretical objections to the general rule that agreement may make punishable that which ought not be punished in the absence of agreement".[61] But as at 1873 he could not see that the authorities on a close examination justified such a process of generalisation by the judiciary.

Apart from the extinction of the head of labour conspiracies in the Conspiracy and Protection of Property Act, 1875 (U.K.), there was little development of conspiracy doctrine in English law in the fifty years following Wright's conclusions. And so Professor Sayre felt able to argue in his paper[62] (i) that the Anglo-American authorities did not support either the Hawkins formulation or its successor, the Denman antithesis, as a test of liability in conspiracy; (ii) that notwithstanding the unending repetition of the latter in cases since about 1800 it was invariably employed as a mere embellishment; and (iii) that where an indictment for conspiracy had been upheld it almost always concerned an agreement *for* a crime. Accordingly the cases did not establish that criminal conspiracy embraced purposes that were not criminal in themselves. Only in the area of fraud did the cases suggest a wider ambit, but even here they were not especially persuasive. Accordingly the courts ought formally to recognise and apply a crime of conspiracy limited to agreements for a substantive crime. At the very least there was no authority of substance inhibiting them from doing this and the policy preference for certainty in the law demanded that they do it.

Sayre's analysis was perhaps rather sanguine, at least in relation to English law. He too readily discounted the possibility that the courts

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[59] R. S. Wright, *Criminal Conspiracy and Agreements* (1873) p. 62.

[60] *Ibid.* He also speculated that "Probably also in the case of agreements 'directly of a public nature and levelled at the Government', and perhaps in the case of agreements to pervert or defeat justice, the law of criminal combinations has gone somewhat beyond the bounds of the criminal law".

[61] *Id.* p. 78.

[62] Sayre, *supra* n. 1.

had evolved such specific heads of conspiracy as conspiracies for a crime, conspiracies to defraud and conspiracies to pervert the course of justice, which have to be regarded as common law offences, whether or not (in the case of the latter two) their objects are criminal *per se*. The general thrust of his argument was that the Denman formula had too often been employed by the judges either as (i) a mere surplusage (the situation in most cases), or (ii) as a cloak of convenience, in those cases where they doubted their ability to sustain an indictment by reference to more specific authority or where they were otherwise unwilling to elaborate the basis of their decision. Accordingly he reached the well founded conclusion that the authorities did not express with any degree of consistency a view of the antithesis as the practical test of liability.

What developments has the doctrine disclosed since that time?

Support for the Denman analysis has in recent times occasionally been sought from that parade of English cases beginning with *Mogul S.S. Co.* v. *McGregor, Gow & Co.*,[63] in which the courts hammered out the modern tort of conspiracy, following the relief from criminal liability accorded to labour combinations in 1875 (by the Conspiracy and Protection of Property Act (U.K.)). The English courts were remarkably coy upon being invited to affirm a tortious liability in regard to combinations. In those early civil cases involving claims against workmen for a "conspiracy to injure" (most claims arose in this context) they tended to assume that the combination needed to be criminal according to the common law principles supposedly enunciated up to 1875, for the claim in damages to be upheld. But in practice there was no real evaluation of such criminality — it was not truly an issue, and as the tort came to be evolved as a separate head of liability independent of the crime the solemn declarations of the Denman formula so characteristic of these cases became the more poignantly ritualistic.[64] But from this aggregate of cases a rich heritage of incidental Denmanisms was to be harvested, and their combined weight was able to be brought to bear in a multitude of less critical commentaries and decisions in the decades up to, say, *Kamara*.[65] Not only were these cases not criminal decisions, the use of the formula was invariably gratuitous in context, rarely being even marginally relevant to the ground of decision.

Before the decision of the House of Lords in *Withers*,[66] support for a broad definition of conspiracy can be found in English cases decided this century concerning the supposed head of conspiracy to do a public mischief. This supposed doctrine found its first real voice in *Brailsford*,[67]

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[63] *Mogul S.S. Co.* v. *McGregor, Gow & Co.* [1892] A.C. 25.

[64] Indeed Viscount Simon's uncritical employment of it in the civil case of *Crofter Hand Woven Harris Tweed Co. Ltd.* v. *Veitch* [1942] A.C. 435 at 439, as late as this date was obviously gratuitous.

[65] [1970] A.C. 104.

[66] [1975] A.C. 842.

[67] *R.* v. *Brailsford* [1905] 1 K.B. 730.

in a rather confusing judgment given by Lord Alverstone, C.J. on behalf of the English Court of Criminal Appeal. This purported head (evidently being able to be defined no less broadly than in the terms of its description) suggested a vague, residual category of conspiracy having an almost boundless ambit involving purposes able to be regarded as reprehensible according to broad propositions of "public policy". It was, of course, fully compatible with the blandest construction of the Denman antithesis. These authorities, starting with *Brailsford*, made great use of a broad and dubious remark by Lawrence, J. in *Higgins* that "all offences of a public nature are indictable".[68] Not surprisingly, this curious dogma was easily wedded to the equally suggestive Denman antithesis — each complemented and underwrote the other — and the cultivation by certain of the courts up to 1974 of so broad a head of criminal combination, naturally made the Denman antithesis more prominent and more plausible. But even in the conspiracy for a public mischief cases, as the House of Lords observed in *Withers*,[69] the courts were by and large affirming indictments for conspiracy in terms of the settled and rather more narrow, traditional heads of conspiracy — especially conspiracy to defraud. The designation of "conspiracy for a public mischief" had in such cases been treated as a mere surplusage. The courts had not in practice affirmed a broad analysis of conspiracy so as to extend its boundaries. This pattern is evident in the two reported Australian cases supposedly concerning conspiracy for a public mischief (*Boston*[70] and *Howes*[71]), which were moreover rather more restrained in their *dicta* than some of the English decisions.

Until about 1960, no English case of any substance gave effect to the Denman analysis of liability. But very recently a series of English cases have undoubtedly employed such a broad, public policy centred view of conspiracy to found a criminal liability for agreements where no such liability could have been confidently asserted hitherto. The decisions are the more beguiling in that their tendency is to delimit specific heads of conspiracy as if to suggest that it was, after all, to be defined in terms of specific classes, and so to that extent limited. But although their underlying reasoning relied upon an expansive view of liability, the courts responsible for these decisions were, with only one blatant exception, careful not to commit themselves to so bland a *ratio*. Rather, they tended to assert the existence of cogent and specific authority, though that which was cited was scarcely persuasive, as if to concede the inadequacy of the Denman formula as a test of liability. The decisions of notoriety in this regard are those of the House of Lords in *Shaw*[72]

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[68] *R.* v. *Higgins* (1801) 2 East. 5 at 21; 102 E.R. 269 at 275.

[69] [1975] A.C. 842.

[70] *R.* v. *Boston* (1923) 33 C.L.R. 386.

[71] *R.* v. *Howes* [1971] 2 S.A.S.R. 293.

[72] [1962] A.C. 220.

and *Knuller*[73] and the decisions of the Court of Appeal and the House of Lords in *Kamara*.[74]

Shaw's Case has been universally criticised in respect of its reasoning and its affirmation of the head of conspiracy to corrupt public morals. Lord Tucker's was the principal speech,[75] and it was blatantly dependent upon an open-ended, public policy conception of conspiracy, manifested in his ready identification of conspiracy to corrupt public morals with a totally unspecified category of conspiracy for a public mischief. He declared that the indictment could be upheld on the basis of general principle (clearly meaning the Denman principle), and further asserted that the characterisation of an agreement as criminal was not dependent upon "the label which is to be attached to a particular conspiracy".[75a] He fortified his conclusion in suggesting that the indictment might be able to be upheld as charging a conspiracy for a crime on the basis that there was an offence of conduct tending to corrupt public morals, but the cases cited by him are quite inconclusive in this regard, and he expressly refused to allow that this consideration was decisive to his conclusion in favour of the indictment.

The decision of the House of Lords in *Knuller*,[76] which affirmed the existence of the twin offence of conspiracy to outrage public decency, evinced a greater concern by the majority to support such an indictment on the basis that a substantive offence of this flavour was known to the common law. Their position, however, was highly equivocal and they must be regarded as having relied ultimately upon the Denman analysis.

The Court of Appeal's decision in *Kamara*[77] is the purest and least critical to be given by a senior court in the context of conspiracy for many years. Their Lordships were content to assert the unqualified criminality of *all* agreements contemplating an act grounding a remedy in tort on no better a basis than that Willes, J.'s "definition" of criminal conspiracy in *Mulcahy*[78] (who cited the antithesis without, however, attributing it to Lord Denman) was "an accurate statement of the law".[79] Such a strain of perverse simplicity was virtually without precedent, and this process of reasoning was questioned by the House of Lords in the same case, where the presumed head of conspiracy for a tort was qualified so that only some conspiracies for a tort would be criminal.

But the House's decision in *Kamara*[80] is equally open to criticism.

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[73] [1973] A.C. 435.
[74] [1973] Q.B. 660; [1974] A.C. 104.
[75] [1962] A.C. 220 at 282.
[75a] *Id.* at 285.
[76] [1973] A.C. 435.
[77] [1973] Q.B. 660.
[78] *Mulcahy* v. *R.* (1868) L.R. 3 H.L. 306 at 317.
[79] [1973] Q.B. 660 at 667 *per* Lawton, L.J.
[80] [1974] A.C. 104.

In specifically qualifying this head of conspiracy it might have been supposed that the House had effectively repudiated the idea that the Denman antithesis was literally definitive of the crime, though Lord Hailsham equivocated as to its present status. If it was the practical test of liability, no qualification of this head could have been entertained, all torts being "unlawful" in the general sense. But in affirming such a head at all, in the absence of specific authority and indeed contrary to *Turner's Case*,[81] the House ultimately relied upon an expansive conception of conspiracy. As this decision disapproved the judgments in the Court of Appeal, it could be regarded as inconsistent with the Denman analysis. However, the House of Lords upheld the indictment for conspiracy to commit a tort, by relying upon general *dicta* from past cases that a criminal conspiracy need not involve a criminal purpose. The decision thus appears not so much paradoxical as self-contradictory. *Ex facie* the decision is logically insupportable, in that it nostalgically looks back to an imaginary freedom on the part of the courts to fashion principles of criminal liability (especially in relation to agreements) at their own discretion, and at the same time it insists in some unelaborated way, that this discretion was always a limited one. It was in an implicit appeal to the Denman analysis that the House (mainly through Lord Hailsham's opinion[82]) sought to relieve this tension.

What is of specific relevance in the context of this decision is the persuasiveness of Lord Hailsham's attempt to demonstrate the central proposition that an agreement may be indictable even though its object is not criminal, nor even "unlawful" according to a well-settled head of conspiracy — in other words that the test of liability is general and open-ended. If such a principle cannot be demonstrated, the Denman analysis must founder. And tellingly, this aspect of his argument left much to be desired. Lord Hailsham cited the primitive decision of *Starling*[83] (which was stated to be an instance of conspiracy for a public mischief — an extraordinarily loose usage); Hawkins' dubious precept; and a number of cases[84] identified as conspiracy for a public mischief cases, some of which clearly fall within much narrower, well-recognised heads of conspiracy. From this he concluded that "the categories of conspiracy to effect a public mischief" are not closed, "or even . . . capable of being closed".[85] This remark plainly endorsed an expansive concept of conspiracy. That his reasoning was too generalised and unqualified was exposed in the House's repudiation of the very idea of a head of conspiracy for a public mischief, in *Withers*.[86] This decision retrospectively dissolves the very substratum of his reasoning at this

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[81] (1811) 13 East. 228.

[82] [1974] A.C. 104 at 113.

[83] (1665) 1 Sid. 173.

[84] See *Kamara* [1974] A.C. 104 at 122.

[85] *Id.* at 123.

[86] [1975] A.C. 842.

point. Lord Hailsham acknowledged that the "extension" of these categories of conspiracy for a public mischief (which expression was euphemistic, for his remarks come close to suggesting the courts' untrammelled freedom to create new offences and thus to repeating under another guise Viscount Simonds' universally reprobated pretensions in *Shaw*[87]) "should be very closely and jealously watched by the courts, owing to the difficulty of riding the horse of public policy . . . ."[88] If this broad concept of liability were accepted, how exactly was this ambiguously characterised discretion of the common law courts to be checked? Ultimately there was no escaping the implication, unwished for though it may have been on the part of Lord Hailsham, that the courts could create new offences — and this surely *could* not have been so in 1973.

Lord Hailsham fortified himself with citations from various authorities to the effect that a criminal conspiracy need not be for a criminal purpose[89] — some of these statements were simply reiterations of the Denman antithesis. In doing so he made too little allowance for the context of these assertions, which in general were "loose *dicta*" (in Sayre's phrase).[90] *Mogul S.S. Co.* v. *McGregor, Gow & Co.*[91] and *Boots v. Grundy*[92] were civil cases. *Warburton*[93] was a conspiracy to defraud case (which head was an established category of conspiracy not dependent upon the Denman antithesis). In *Whitaker*[94] the indictment could have been, and was, sustained as alleging a conspiracy for a crime, even as the court unnecessarily asserted an independent liability with reference to the Denman antithesis. The report of *Parnell*[95] records the broad remarks of a trial judge in relation to an undoubtedly dubious indictment. The defendants were acquitted and the indictment was never considered by a senior court.

In general, Lord Hailsham's speech simply ignored the long-standing view of conspiracy as being composed of a number of settled heads. In any case, the existence of such residual heads as conspiracy for a public mischief, or conspiracy to injure (which were canvassed in support of a broad test of liability), could have been disputed. The former was subsequently demolished by the House of Lords in *Withers*, and the latter by the formulation of the more narrow head of conspiracy to commit a tort in *Kamara* itself. For if the smaller area of liability is to be hedged, how can a large head which encompasses it, be affirmed? In his citations and inferences Lord Hailsham was doing no more than

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87 [1962] A.C. 220.

88 [1974] A.C. 104 at 123.

89 *Id.* at 122 *ff.*

90 Sayre, *supra* n. 1 at 406.

91 (1899) 23 Q.B.D. 590 at 616 *per* Bowen, L.J.

92 *Boots* v. *Grundy* (1900) 82 L.T. 769 at 712 *per* Bignam, J.

93 *R.* v. *Warburton* (1870) L.R. 1 C.C.R. 274 at 276 *per* Cockburn, J.

94 *R.* v. *Whitaker* [1914] 3 K.B. 1283 at 1299 *per* Lawrence, J.

95 *R.* v. *Parnell* (1881) 14 Cox C.C. 508 at 518-19 *per* Fitzgerald, J.

generating the general idea that indictments for conspiracy have occasionally been upheld where their objects have not been criminal. But to affirm this did not answer questions as he seemed to think, but merely raised them . . . how have the courts evaluated liability in such circumstances? What are the specific rules? The open-ended drift of Lord Hailsham's remarks leads us nowhere. In doing this it harmonised with a preference for the broadest conception of conspiracy discernible in the House of Lords' earlier decisions in *Shaw*[96] and *Knuller*.[97] It is tempting to imagine that it was in the interests of restoring order to conspiracy doctrine that the House of Lords, in an opposite reaction, expressed a restrictive view of conspiracy in *Withers*.[98] Following *Withers* the decision in *Kamara* (in regard to its general doctrine, if not to its specific affirmation of a head of conspiracy for a tort) must be regarded as moribund.

In the Australian jurisdictions the general pattern has parallelled the bulk of English cases up until about 1960, *viz*, notwithstanding that the courts may commonly have resorted to a general recitation of the Denman antithesis (or a formula closely analogous to it) as in some sense "definitive" of conspiracy, the courts have evaluated the criminality of indicted agreements in terms of a standard category. Such cases include the well-known ones of *Orton*[99] (a conspiracy to defraud case); *Boston*[100] (ostensibly a case concerning conspiracy for a public mischief, in fact this case involved a conspiracy to bribe which was in fact a conspiracy for a crime); *Weaver*[101] (a case of conspiracy to defraud); *Ongley*[102] (a case of conspiracy to defraud); *Kempley*[103] (concerning a conspiracy for a crime, by the criminal breach of regulations). Other Australian decisions have evaluated such indictments likewise, ignoring the antithesis altogether, as for instance *Dean & Meagher*,[104] or *White*[105] both of which cases concerned conspiracies to pervert the course of justice. If the Australian courts have been uniformly less outspoken in the terms which have marked the recent English decisions of *Shaw*, *Knuller* and *Kamara*, they have also been less concerned to declare expressly a restrictive view of conspiracy than has the House of Lords in the last six years. These later decisions might now be examined.

(b) **D.P.P. v. Withers and a restrictive analysis of liability in conspiracy**

It is in the recent cases of *Bhagwan*,[106] *Knuller* (in respect of Lord

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96 [1962] A.C. 220.
97 [1973] A.C. 435.
98 [1975] A.C. 842.
99 *R.* v. *Orton* [1922] V.L.R. 469.
100 (1923) 33 C.L.R. 386.
101 *R.* v. *Weaver* (1931) 45 C.L.R. 321.
102 *R.* v. *Ongley* (1940) 57 W.N. (N.S.W.) 116.
103 *R.* v. *Kempley* (1944) 44 S.R. (N.S.W.) 416.
104 *R.* v. *Dean and Meagher* (1896) 17 N.S.W.L.R. 132.
105 *White* v. *R.* (1906) 4 C.L.R. 152.
106 [1972] A.C. 60.

Diplock's dissenting judgment[107]) and *Withers*, that a judicial acknowledgment of a conspiracy limited by specific categories has been most recently and authoritatively expressed. In *Bhagwan* the House of Lords refused to allow that an agreement merely to defeat the presumed policy of a statute could be criminal, if such contravention was not criminal in itself, or in the absence of a fraudulent deflection of a public official from rendering a duty imposed upon him by statute (which would constitute a conspiracy to defraud). Lord Diplock's was the only speech and it was unanimously concurred in by the House. He spoke of the need for an agreement to fall within one of "the established categories of public mischief" to be criminal.[108] The usage of "public mischief" was ambiguous, but he evidently had in mind such settled heads as conspiracy for a crime and conspiracy to defraud.

In *Knuller* Lord Diplock's was a minority judgment,[109] in that he refused to affirm the existence of the heads of conspiracy to corrupt public morals or conspiracy to outrage public decency, but his more general comments on conspiracy directly anticipated the House of Lords' reasoning in *Withers*. He attributed the Denman antithesis to Willes, J. in *Mulcahy*, and considered that the context of its utterance in *Mulcahy* was such that Willes, J. must be taken to have intended to confine the meaning of "unlawful" to "criminal". In general he felt that conspiracy was confined to agreements for a crime: only in the areas of fraud and of trade and employment (one of historical and not present relevance), had the courts recognised a liability for agreements going beyond strictly criminal purposes. The authorities certainly did not

> justify the continued existence in the courts of any power to create new criminal conspiracies to do acts of a kind which have not previously been held to be criminal in themselves.[110]

This sentence is a succinct statement of a principal objection to a broad Denman-type analysis of conspiracy.

Withers[111] concerned the conviction of the appellants (who ran an investigation agency) on two counts of conspiracy — (i) a conspiracy to obtain information by deception from certain private corporations; (ii) a similar conspiracy in relation to named public authorities. In both counts this conspiracy was identified as a conspiracy for a public mischief.

The trial judge had made use of this category of "conspiracy for a public mischief" in his charge to the jury. The appellants claimed that such an offence was unknown to the law, and that the convictions ought

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107 [1973] A.C. 435 at 469 *ff.*

108 [1972] A.C. 60 at 80-81.

109 [1973] A.C. 435 at 469 *ff.*

110 *Id.* at 479.

111 [1975] A.C. 842.

therefore be quashed. Their Lordships affirmed that an offence of this character did not exist.

Viscount Dilhorne (in whose speech Lord Reid concurred) clearly acknowledged the existence of a conspiracy confined to a limited number of well-settled categories: the agreements charged could only be viewed as criminal if they came "under one of the other heads form[ing] a separate class recognised by law". When a conspiracy is indicted, the question is this: is "the object . . . of the conspiracy . . . of such a quality . . . as has already been recognised by the law as criminal?"[112] The use of the label conspiracy for a public mischief was objectionable even if employed as a mere surplusage because (Viscount Dilhorne evidently considered) there was no settled category of liability of this character. He specifically objected to such a head in principle, on account of the extreme breadth which would be associated with it, whereby a judge (or jury) would be able to "create a new offence by deciding that conduct not previously held criminal is criminal".[113]

Lord Dilhorne did not expressly state that these "well-known heads" of conspiracy were not to be extended by the courts, but this is the clear implication of his reasoning, especially his caveat against any pretension by the courts to a power to create new offences.

Lord Simon considered that the authorities favouring such a head of conspiracy were to be impugned as being derived from Lawrence, J.'s dubious *dictum* in *Higgins*.[114] The head was to be disapproved in principle as allowing courts to create new offences. He spoke of the "well-recognised and universally accepted class[es] of criminal conspiracy",[115] noting that not all cases have been "readily assignable" to any one of these categories. To the extent that such "unconforming" cases were still to be respected, they may be able to be applied "specifically not generically, to analogous circumstances". He specifically disapproved such a supposed category as that indicated in *Kenny's Outlines of Criminal Law*, of agreements for acts "outrageously immoral or . . . in some way, extremely injurious to the public".[116] His reasoning then, like Lord Dilhorne's, accorded with a restrictive view of conspiracy as definable in terms of a limited number of settled and relatively narrow categories.

Lord Killbrandon reasoned likewise finding it useful to refer to Wright's classification of established or supposed heads (in *The Law of Criminal Conspiracies and Agreements*) and found it to be significant that a category of conspiracy for a public mischief was not included among these. *Kenny's* fourth class of conspiracy (cited above) was to be dis-

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[112] *Id.* at 860.

[113] *Id.* at 857.

[114] (1801) 2 East. 5 at 21.

[115] [1975] A.C. 842 at 863.

[116] *Kenny's Outlines of Criminal Law* (19th ed. by J. W. Cecil Turner, 1966) p. 429.

approved: "it will be observed that [it] . . . exists for the purpose of accommodating all those reported instances which do not fall under the first three [more specific categories]".[117]

Withers is in fact a watershed decision in conspiracy law, not merely for applying a conception of conspiracy as being composed of a number of legally significant categories — for as has been suggested, the courts in most cases have in practice evaluated liability according to a specific category, but especially because of their Lordships' explicit recognition of this restrictive analysis in terms so unequivocal that the decision would seem to make it pointless for future courts even to propound the Denman generalities, much less act upon them.

A residue of the broader analysis is, however, discernible in Viscount Dilhorne's remark, at the outset of his speech, that a "criminal conspiracy may take many forms and it has been customary to attach labels to different categories . . . but whatever the label, there is only one offence, conspiracy".[118] This is allowable in the purely descriptive sense, and it is true in that certain principles, both procedural and substantive, are commonly applicable to each of the heads of conspiracy, such as the rules governing the concept of "agreement", or rules of evidence. It is also true in relation to drawing an indictment. A count need not identify the conspiracy it charges according to one or another of the heads, it is sufficient that the count allege an agreement that is in fact criminal. But this criminality is to be evaluated ultimately in terms of one or another of the various heads. Thus in *Withers*, although the facts recited in the second count may have constituted a conspiracy to defraud, the counts employed the language of conspiracy for a public mischief (and its associated suggestion of certain rules of liability) and the trial judge developed such a theme instead of dismissing the label as surplusage. Therefore the convictions on this count could not stand. The usage, of course, suggested the existence of certain rules of liability: Viscount Dilhorne for instance believed that the trial judge's reference to "public mischief" in his summing up was such as to vitiate the trial, in that this introduced a wide measure of uncertainty into matters.[119] It is evident that, given a categorised conspiracy consisting of a number of related but independent offences involving combination, in future the trial judge will have to put to the jury the legal ingredients of the head of conspiracy alleged (such as conspiracy to defraud) in his charge to them. This is, of course, the case in respect of the trial of substantive offences, where the judge has to apprise the jury of the specific tests of legal liability which are applicable.

If the restrictive analysis of conspiracy is accepted the issues of its indeterminateness become those of the precise number and ambit of its

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[117] [1975] A.C. 842 at 877.

[118] *Id.* at 856.

[119] *Id.* at 861.

heads. It is proposed that the English and Australian cases may be regarded as resolving themselves into some generally recognised heads: conspiracy for a crime, conspiracy to defraud, conspiracy to pervert the course of justice, the twin offences of conspiracy to corrupt public morals and conspiracy to outrage public decency, conspiracy for a tort and conspiracy for certain purposes involving workmen's combinations. As well, there may be certain minor heads such as conspiracy to defame, conspiracies in relation to marriage and conspiracy to bribe a public officer, though when examined these are found to be merely manifestations of such a general head as conspiracy for a crime or conspiracy for a tort. It is clear that there is no independent head of conspiracy to the prejudice of the State, as Lord Diplock confirmed in *Bhagwan*.[120] It is also clear that there is no residual head of great generality encompassing principles not covered by the settled heads, such as conspiracy for a public mischief or conspiracy to injure. Such a head would, of course, have the effect of rendering conspiracy open-ended, even if it might formally be confined to a limited number of specific heads. Some remarks might be made as to each of these heads:

(1) *Conspiracy for a crime*: this is the basic category of criminal conspiracy, and its existence is, of course, beyond controversy. This head in practice would comprehend most of the counts for conspiracy reported in the cases, whether or not the courts so classified the count in issue.

(2) *Conspiracy to defraud* is firmly established: its ambit (and it is a very broad one) has been made much clearer by two recent decisions of the House of Lords (*Withers*[121] and *Scott*[122]). It is clear that an indictable conspiracy to defraud need not have as its object a substantive offence involving fraud. The head is therefore independent of conspiracy for a crime, and is an instance of a criminal conspiracy which is not necessarily for a criminal purpose. There is no reason to suppose that the ingredients of this offence differ as between the Australian and English jurisdictions. In particular, there is no reason to suppose that the House of Lords' recent decisions in this area will not be followed by the Australian courts.

(3) *Conspiracy to pervert (or obstruct) the course of justice*: as it emerges from the cases, this head might well be assimilated with conspiracy for a crime, in that the courts have clearly recognised a substantive offence of conduct tending to pervert, or obstruct the course of justice (an offence which in turn might be regarded as an aspect of criminal contempt of court). It seems clear, however, that both the English and Australian courts have from time to time recognised an independent head of conspiracy to pervert the course of justice (or at the very least, have not supported such indictments in an express reliance on the

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120 [1972] A.C. 60.

121 [1975] A.C. 842.

122 [1975] A.C. 819.

existence of a substantive offence of this character). The scope of this head is logically no broader than a conspiracy for the commission of such a substantive offence.

(4) *Conspiracy to corrupt public morals*: this head was virtually created by the House of Lords in *Shaw*[123] and *Shaw's* decision was affirmed by the same court in *Knuller*,[124] though with evident reluctance. It is not clear whether the House recognised the existence of a substantive offence of conduct tending to corrupt public morals — the *ratio* of the decision in *Shaw's Case* is ambiguous. If there is such an offence, then this head is, of course, merely an aspect of conspiracy for a crime.

(5) *Conspiracy to outrage public decency*: this head was virtually created by the House of Lords in *Knuller*. Certain of the majority speeches in *Knuller* suggest the criminality of conduct tending to outrage public decency: the existence of such an offence is highly debatable, but if its existence is accepted then this head is merely a sub-category of conspiracy for a crime.

Both these latter two heads have yet to be considered by an Australian court. It is suggested that because of the obvious inadequacies of the House of Lords' reasoning in *Shaw* and *Knuller* (decisions which moreover, are essentially incompatible in their reasoning with the House's later decision in *Withers*[125]), the decisions and the offences that they establish ought not be applied in Australia.

(6) *Conspiracy for the commission of a tort*: the existence of such a head was very doubtful before the House of Lords' decision in *Kamara*.[126] This case would seem to have entrenched it in the United Kingdom. Given the manifest shortcomings of the House's reasoning in *Kamara* and the same court's later decision in *Withers*, which would seem to have repudiated the very basis of Lord Hailsham's reasoning in *Kamara*, the Australian courts may feel that such a decision ought not be given effect to in Australia. The stated qualifications on this head are vague and uncertain in application. From the standpoint of policy the decision is absurd, seeking to criminalise agreements to do acts which in themselves generally ground a merely civil liability.

(7) A category of criminal agreements in respect of certain types of labour conspiracies was seemingly asserted by certain English trial judges in the century and a half leading up to the Conspiracy and Protection of Property Act, 1875 (U.K.), which gave a practical immunity from the penal law. It has not been resorted to since. It is not certain that such a head is really known to the common law. In any event it has not been invoked since 1875. It has never been resorted to in Australia: the existence of the various systems of compulsory arbitration, each

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123 [1962] A.C. 220.
124 [1973] A.C. 435.
125 [1975] A.C. 842.
126 [1974] A.C. 104.

commonly having its own penal sanctions,[127] and a different social climate in the nineteenth century, combined to make the head otiose.

(8) *Conspiracy for a public mischief*: following *Withers* the possibility of such a head has, of course, been dissolved in Britain. A handful of indictments containing this usage have been considered by Australian courts in cases where the alleged agreement was clearly comprehened by a settled head, such as conspiracy to defraud.[128] On these occasions the courts exhibited a pronounced scepticism as to the use of such nomenclature in indictments, and with one exception (in *Tasmania*, where the Criminal Code Act provides in s. 297(1)(h) for such a liability) there is no reason to suppose that they will not give effect to *Withers*. Even in the instance of the Tasmanian Code the better view of its provisions would be that the legislature did not intend to provide for a specific head of liability in the usage "conspiracy for a public mischief", and that such a provision clearly looks towards the restatement of a general common law liability. (The provisions of such statutory formulations of the crime found in Australia are examined shortly.)

(9) *Conspiracy to injure a person* (or conspiracy to prejudice a third person) as a head independently of the above categories: to affirm such a general residual head capable of encompassing such a broad array of agreements would, of course, be effectively to establish an open-ended conception of criminal conspiracy. Notwithstanding a number of loose *dicta* to the effect that there is such a category, its existence has never been the basis of a reported decision. *Kamara's* decision would seem clearly to disapprove such a broad head, in qualifying the much smaller head of conspiracy for a tort (which would in theory be totally comprehended by the broader head as one of its sub-categories). The existence of such a head might be affirmed in two different ways:

(a) by indirect authority — the argument would be that the civil cases which have evolved a tortious conspiracy to injure, have also been expounding the ambit of a criminal head involving this purpose, because the basis of liability as between civil and criminal conspiracy is ultimately the same;

(b) directly, by criminal decisions.

In regard to the first possibility, it is suggested that when examined the civil cases have clearly evolved the tort of conspiracy independently of the crime, even supposing a common law head of labour combinations to have existed. There are significant differences between the tort and this suggested head — to take but one, the tort is not confined to labour combinations, nor even trade combinations generally. As to the second possibility, no reported criminal case of any sophistication establishes such a liability, though stray *dicta* suggesting such a liability can be cited.

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[127] See *McKernan* v. *Frazer* (1931) 46 C.L.R. 343 at 380 *per* Evatt, J.

[128] [1971] 2 S.A.S.R. 293.

Such a head would in any event be quite inconsistent with the House of Lords' general reasoning in *Withers*.

Statutory provisions for a crime of conspiracy in Australia

Such provisions are found in Federal law and in Tasmania, Queensland and Western Australia. Only the Commonwealth Crimes Act clearly contracts the liability for conspiracy that would otherwise exist at common law, in providing (in s. 86) for a conspiracy limited to agreements for a crime under Commonwealth law, to defraud the Commonwealth and its public authorities, and to prevent or defeat the execution or enforcement of a law of the Commonwealth. Only these objects render an agreement criminal. Subsections (1)(d) and (1)(e) are ambiguous, but the most obvious view of them is to see them as superfluous, simply reiterating the criminality of agreements for a crime under Commonwealth law. The State provisions are now considered:

(a) Queensland and Western Australia

The Criminal Code Acts of Queensland (ss. 541 ff.) and W.A. (ss. 556 ff.) provide in identical terms for statutory crimes based upon combination. Apart from the separate provision for the criminality of agreements for a crime (in s. 541 of the Queensland Code and s. 558 of the W.A. Code) — which, of course, preserves this common law head, these Acts also enumerate specific purposes which render criminal an agreement for their effectuation — in s. 543 of the Queensland Code, s. 560 of the W.A. Code. Both of these sections faithfully reproduce the Denman antithesis in its two branches — in the Queensland Code s. 543(6) provides that an agreement to effect any unlawful purpose is criminal, and by s. 543(7) an agreement to effect any lawful purpose by any unlawful means is made criminal (s. 560(6) and (7) are the corresponding sections of the W.A. Code). It is clear that these very general subsections were intended to be construed as retaining the entire common law liability for the crime, that is, all of the problems of defining the limits of liability according to the authorities have been neatly preserved by these codifications. If the restrictive analysis of the common law is preferred then these subsections may be interpreted as providing for a limited number of specific heads. In these terms the specific heads provided for in ss. 543(1)-(5) of the Queensland Code (ss. 560(1)-(5) of the W.A. Code) are to be regarded as independent of and additional to the ambit of liability provided for in the last two subsections of these sections — for example, the criminality of agreements to injure any person in his trade or profession as provided for in s. 543(4) of the Queensland Code (s. 560(4) of the W.A. Code).[129] Some of these may when examined be found to overlap the general common law heads — for example, s. 543(1) in the Queensland Code (concerning agreements to prevent or defeat the execution or enforcement of any Statute law

[129] Though note the protection given to labour combinations in certain circumstances in s. 543A of the Queensland Code and s. 561 in the W.A. Code.

(s. 560 (1) in the W.A. Code): obviously such agreements may be able to be indicted as conspiracies for a crime or to defraud, in certain circumstances (in the latter instance the doctrine of conspiracy to defraud comprehends agreements to deflect a public official from the proper rendering of his duty, by fraudulent means).

(b) Tasmania

The Tasmanian Criminal Code Act provides in s. 297 for a number of purposes which when made the objects of an agreement, render that agreement a criminal conspiracy. It is less clear that Parliament intended to preserve the entire liability defined by the common law authorities, in that there is no simple reiteration of the Denman formula, but so broad are some of the subsections of s. 297 — for example, ss. (1)(f) (which concerns agreements to inflict by any unlawful means any injury on the public or any person or class of persons), ss. (1)(h) (which concerns agreements for a public mischief), and ss. (1)(i) (which concerns agreements to do any act without lawful justification or excuse with intent to injure any person) — that probably the best construction of the section is that it was intended to retain the common law liability. Professor Colin Howard suggests that as in the case of the Queensland and W.A. Codes, this section ought be interpreted no more widely than this. Certainly he seems to have felt that they could not be interpreted much more narrowly.[130] That the doctrine of "conspiracy for a public mischief" has been exploded in *Withers* as an extravagant and dangerous generality and no basis of liability at all, would seem to make it the more likely that the grand generalities of the Tasmanian Code would need to be read down according to the restrictive view implicit in the common law authorities.

The Tasmanian Code also provides for a further number of rather more specific heads of liability in the other subsections of s. 297; most of these are comprehended by the common law categories (for example, s. 297(1)(d) — dealing with conspiracy to defraud); only ss. (1)(g) (which concerns conspiracy to seduce a woman) would seem to add to common law liability.

In N.S.W., Victoria and South Australia, of course, the common law offence of conspiracy applies directly.

II The Law Commission's Proposals, and the Outlook for the Crime

In its draft Conspiracy and Criminal Law Reform Bill the Law Commission provides for the curtailment of criminal conspiracy to the sole head of conspiracy for a crime. As an interim measure merely, pending the enactment of a generalised substantive offence of fraud, the Commission also proposes the retention of the head of conspiracy to defraud.[131] So that the heads of conspiracy to corrupt public morals

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[130] C. Howard, *Australian Criminal Law* (2nd ed. 1970) pp. 272 *ff.*

[131] See *Report on Conspiracy and Criminal Law* (Law Commission No. 76) p. 10, and the draft Bill s. 6 (Report p. 166).

and conspiracy to outrage public decency will not survive as conspiracies for a crime, the Bill provides for the abolition of substantive offences of this flavour, supposing them to exist.[132] The Bill does, however, create a number of substantive offences in these and other areas, so as to fill any gaps left in such a truncation of conspiracy.

How necessary is such a reform? Disregarding for the moment the particular issues raised by the codification of conspiracy in Australian jurisdictions, and even accepting that common law conspiracy is limited to a fixed number of specific heads as confirmed in *Withers*,[133] it is clear that such a measure would result in a much greater degree of certainty in the law. As to whether or not criminal conspiracy ought to be confined entirely to agreements for a crime (the common ground in most proposals for legislative reform), or whether additional heads ought also to be retained, depends, of course, upon an evaluation of each such potential head, from the obvious policy standpoints of the need for a reasonably precise statement of (and ambit of) liability, and the availability of substantive offences in the general area of legal regulation represented by that head, in a given jurisdiction. These issues will be canvassed shortly, but firstly the preliminary question might be considered: what would be the immediate effect of the enactment of the Law Commission's Bill in England and Australia?

(1) England

It is clear that conspiracies to pervert the course of justice would continue to be indictable as conspiracies for a crime, conduct to this end being a substantive offence. The qualified heads of conspiracy for a tort, and the heads of conspiracy to corrupt public morals and conspiracy to outrage public decency would be nullified. Liability for conspiracy would accordingly be confined to agreements for a crime and to defraud. The practical effect of such an emasculation of the crime would not be inconsiderable, in that two of the heads completely sterilised (corruption of morals, and outraging public decency), have regularly been resorted to by the Crown. As well, the further development of the qualified head of conspiracy for a tort cannot be discounted, though these conclusions need to be modified by the Law Commission's proposal of certain substantive offences in these areas. The practical ambit of conspiracy in England and Wales (which jurisdictions would be affected by the proposed enactment) according to the restrictive view expressed in *Withers*, may not therefore be very much diminished by the enactment of the draft Bill.

(2) Australia

Given that as a matter of history the only heads of conspiracy

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[132] *Id.* pp.72 *ff*, 198.

[133] [1975] A.C. 842.

which have been charged in Australia are conspiracy for a crime and conspiracy to defraud (assuming that conspiracy to pervert the course of justice falls within the head of crime), and that the handful of conspiracy for a public mischief cases are in fact classifiable under one or another of these two heads, the practical effects of such a reform might be supposed to be inconsequential. This conclusion is strengthened in relation to the States possessing criminal codes, in that the prosecuting authorities have rarely invoked the various minor specific heads prescribed in addition to common law liability. But such a general conclusion is based upon the historic pattern of prosecutions; this is not to say that the law does not possess an additional potential reach of liability as yet unexploited by prosecutors.

To return then to the issue of whether or not such a reform ought to be effected — in regard to both England and Australia, notwithstanding the restrictive analysis of liability applied in the majority of reported cases, culminating in *Withers*, there can be no doubt that conspiracy doctrine is substantively as well as procedurally, an uncertain and elastic doctrine. Even though a conception of crime as being limited to a fixed number of settled categories is today inescapable, these nonetheless admit a certain fluidity, or subjectivity in their statement. And even as the decision in *Withers* is unequivocal in implication, the very degree to which the Denman analysis has entrenched itself in the judicial memory and habits of analysis guarantees a residual potential in the crime for its further development. The passage of time may well leaven the decision in *Withers*, and even as its caveat on the expansion of the "well-settled" heads of conspiracy may be formally acknowledged, the very vagueness of some of these heads (as for instance, conspiracy for a tort as stated in *Kamara*[134]) is such as to conduce to an expansion of conspiracy doctrine from within one or another of them.

In the case of the Australian jurisdictions specifically such a reform would, of course, foreclose the possibility of an Australian court adopting *Shaw*, *Knuller* or *Kamara* and so affirming the heads of conspiracy represented by these decisions. Not only have the local prosecuting authorities not found it necessary to launch speculative indictments alleging conspiracies in these terms, but the supposed heads of conspiracy for a tort, conspiracy to corrupt public morals and conspiracy to outrage public decency are objectionable both in their vagueness and (to repeat a basic and well-recognised objection to conspiracy) because of their effect of penalising agreements for conduct not itself criminal as performed by an individual acting alone — an obviously illogical situation. Comparable objections might be made to that miscellany of minor specific heads provided for by the Criminal Code Acts of Tasmania, Queensland and Western Australia, in addition to their apparent preservation of a general common law liability. To the extent that they are not comprehended by the primary head of conspiracy for a crime, these heads

[134] [1974] A.C. 104.

penalise agreements for behaviour not considered to be so intrinsically criminal as to be penalised by the substantive law. In certain instances moreover, they are wholly imprecise and their scope impervious to precise statement and in practice the Crown has rarely felt the need to resort to them.

On the other hand the restriction of conspiracy solely to agreements for a crime would leave an unacceptable gap in the law in respect of combinations to defraud, given the lack of a substantive offence of fraud of any degree of generality. Until this is enacted, any legislative reform ought make the same interim saving in respect of conspiracy to defraud as the Law Commission's Bill provides.

In summary then, in regard to Australia the practical ambit of conspiracy does not extend beyond agreements for a crime or to defraud, but the statutory restriction of the doctrine to these purposes would pre-empt the technical possibility of speculative prosecutions designed to chart new heads of liability especially in the areas of morals and tortious acts, in reliance upon specific recent English authorities. If the law of conspiracy in Australia has not displayed the relative dynamism found in England this is merely because of the conservatism, or forebearance of the State prosecuting authorities. The potential in the doctrine for its further amplification by the local courts, even within the limits expressed by *Withers*, cannot be ignored.

The ultimate aim of legislative reform ought to be to restrict conspiracy to agreements for the commission of a crime. The Law Commission has found it convenient to retain conspiracy to defraud as an interim measure, but this head is still itself susceptible to the basic objection that it renders criminal agreements for acts which are not criminal *per se*, or to take a converse view, makes the regulation of fraudulent activity dependent upon the presence of the element of consensus. This is an arbitrary and illogical boundary between permissibility and prohibition. What ought be legally significant is not the number of people engaging in a wrongdoing but the gravity of the wrongdoing. This interim saving of conspiracy to defraud may be convenient, but it is also crude.

If conspiracy is eventually confined to conspiracy for a crime, debate as to the role of this doctrine will finally have to be focused on its status as an inchoate crime, for it is only on this basis that its continued retention is properly to be supported. And an examination of its presumed functioning in these terms will disclose that it is almost universally charged after a joint scheme of wrongdoing has been effected. Conspiracy, that is, is invoked to punish joint crime. And in these terms its principal rationale becomes one of procedural convenience — one enjoyed exclusively by the prosecutor. Why in fact is conspiracy so frequently charged where a substantive crime might have been charged? The answer is to be found in a scrutiny of the trial process in conspiracy cases, in questions of evidence, indictment and verdict. The cases disclose

a considerable potential danger in conspiracy procedure to the right of an accused to be convicted only for that for which he has actually been responsible. And when these issues are examined, the lines of enquiry ultimately lead back to the most basic rules governing substantive liability — those concerned with the whole idea of agreement in conspiracy. In their often overly simple view of procedural issues the courts disclose an almost primitive grasp of conspiracy doctrine. There is e.g. a distinction to be made between the consensual liability subjective to the individual (that is, one for that range of conspiratorial objects he has knowingly encompassed) and the objective, overall scheme to which he has attached himself at some point (that is, one able to be perceived objectively by the world at large, but as to the existence of which the individual may be uncertain or ignorant). This distinction has received no development and virtually no recognition by the Australian and English courts. Such a distinction can be vital to the isolation of those illegal purposes an accused has actually agreed to perform. The procedural doctrines — and these very general substantive rules associated with criminal conspiracy, manifest a strong tendency to exaggerate, or broaden the true scope of an individual's complicity in joint crime. Perhaps the lasting result of a legislative contraction of the "unlawful purposes" of conspiracy doctrine will be to transfer the critical attention for so long monopolised by such problems of definition, to these other equally significant, and perhaps more menacing because less obvious, issues of conspiracy doctrine.