ACCOMPLICES, PRINCIPALS AND CAUSATION

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[In this article Professor Lanham discusses the conflicting grounds of accomplice liability. There are the accessory approach and the causation approach. He also argues that there is a point when an accessory becomes so dominant a contributor to the crime in question that he must be considered as a principal.]

Orthodox theory has it that if A instigates B to commit an offence, B is the principal offender and A is merely a secondary party. The terminology to describe the two parties is varied and confusing. B may be called the perpetrator, principal, principal offender, actual offender, principal in the first degree or person actually committing the offence. A may be called an accessory, accomplice (though this term is also used to cover perpetrators) an accessory before the fact (if absent when a felony is committed) principal in the second degree (if present when a felony is committed) a principal, in cases of treason, misdemeanours, summary offences or, where the old terminology based on felonies has been abolished, all crimes, or simply a party. The distinction between principals and accessories in felonies gave rise to procedural problems one of which was that the accessory could not be convicted before the principal was convicted.[1] These difficulties have been overcome by statutory provisions which deem accessories to be principals or simply abolish the accessorial terminology altogether. But whatever the instigator is called he or she remains, as a matter of substantive law, a secondary party.[2]

The main manifestation of this secondary status is that the instigator's liability is, according to the dominant view, dependent on the liability of the perpetrator. In other words an instigator cannot be held liable as a secondary or accessorial party unless the perpetrator is himself or herself guilty of an offence. It is not enough that the perpetrator has committed the *actus reus* of the offence.[3]

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[1] For a particularly inconvenient example see *R. v. Russell* (1832) 1 Mood. 356; 168 E.R. 1302.

[2] For a return to more straightforward terminology which recognizes the reality of the situation see Williams G., *Textbook of Criminal Law* (1978) 285.

[3] *E.g. R. v. See Lun and Welsh* (1932) 32 S.R. (N.S.W.) 363; *State v. Ward* (1978) 396 A. 2d 1041 (accessories before the fact); *R. v. Richards* [1974] Q.B. 776 and *R. v. Hartley* [1978] 2 N.Z.L.R. 199, 203 (accessory not liable for greater crime than principal). Some cases stating the rule can be explained on the basis that B did not even commit an *actus reus, e.g. Morris v. Tolman* [1923] 1 K.B. 166 and possibly *Thornton v. Mitchell* [1940] 1 All E.R. 339; *Cain v. Doyle* (1946) 72

There are some situations, however, where the instigator is regarded not as a secondary party but as a principal offender. It has long been established that the instigator may be liable if the perpetrator is an innocent agent.[4] The High Court of Australia has recently recognised that A may be liable if he is acting in concert with B, even though B may not be liable.[5] These two exceptions however do not cover enough ground to keep the law from falling into possible disrepute. There are cases which cannot comfortably be fitted within either category and yet cry out for the imposition of liability upon A whether or not B is liable.

The thesis of this article is that there is a point at which an instigator becomes a principal offender and may be held liable for causing the *actus reus* of the offence even though the immediate actor is another person. In the first section of this article various examples of liability based on causation will be examined. In the second section an attempt will be made to describe the limits of causation as a head of liability.

EXAMPLES OF LIABILITY BASED ON CAUSATION

Causing an adversary to harm another

Suppose A attacks B and B in resisting the attack kills or injures V. If A's liability is tested under the law of complicity numerous difficulties lie in the way of conviction. If on the other hand A's liability is based on causation, the restrictions inherent in the accessorial approach can be overcome.

A useful starting point is the old English case *Scott v. Shepherd*.[6] A threw a squib at B. B threw the squib away from himself and it injured V. By a majority the court held that A was liable in damages for trespass to V.

C.L.R. 409 (H.C.A.); *Shuttleworth v. Birmingham* (1963) 373 U.S. 262; 10 L. Ed. 2d 335 (Sup. Ct. U.S.A.); *R. v. Van Roy* [1920] C.P.D. 695. Other cases state the rule but nothing turns on the difference between requiring a full offence and requiring only an *actus reus, e.g. Mallan v. Lee* (1949) 80 C.L.R. 198 (H.C.A.); *Walsh v. Sainsbury* (1925) 36 C.L.R. 464; *R. v. Goldie; ex parte Picklum* (1937) 59 C.L.R. 254; *Howell v. Doyle* [1952] V.L.R. 128; *U.S. v. Jones* (1970) 425 F. 2d 1048. In other cases the rule is stated but some other head of liability is found. *E.g. White v. Ridley* (1978) 52 A.L.J.R. 724, 726; *R. v. Tyler and Price* (1838) 8 Car. and P. 616; 173 E.R. 643; *R. v. Paterson* [1976] 2 N.Z.L.R. 394; *People v. Williams* (1977) 142 Cal. Rptr. 704. In *R. v. Barry* (1874) 5 A.J.R. 124 the principle was stated but was irrelevant to the case. There are several authorities which deny the rule: Hale, 1 *Pleas of the Crown* 514; Hawkins, 2 *Pleas of the Crown* Ch. 29 s. 7; *R. v. Parry* [1924] A.D. 401; *Shanahan v. U.S.* (1976) 354 A. 2d 524; *U.S. v. Grasso* (1973) 356 F. Supp. 814; *State v. Graven* (1977) 369 N.E. 2d 1205. Cases discussed in this article are also expressly or impliedly in whole or in part favourable to or against the existence of the rule.

[4] See *e.g.* Hale, *1 Pleas of the Crown* 617; *R. v. Michael* (1840) 2 Mood. 120; 169 E.R. 48; *R. v. Manley* (1844) 1 Cox C.C. 104; *White v. Ridley* (1978) 52 A.L.J.R. 724. There is some overlap between innocent agency and causation. Other cases involving innocent agency will be discussed in the course of this article.

[5] *Matusevich v. R.* (1977) 51 A.L.J.R. 657.

[6] (1773) 2 Black W. 892; 96 E.R. 525.

The case was a civil one but it is noteworthy that De Grey C.J. decided the case on analogy with the criminal law. If A had been prosecuted he could have been convicted as a principal offender on the basis that he had caused the injury to V.

If on the other hand it is sought to impose liability in cases like *Scott v. Shepherd* on the basis of the law of complicity a number of difficulties present themselves. If A is prosecuted as a secondary party two problems arise. First B may be guilty of no offence so that on the orthodox view A cannot be liable because an accomplice's liability is dependent upon that of the perpetrator. Secondly, A's interests are so divergent from B's — a point which appears even more strongly in the cases which follow — that it is unnatural to think of him as an assistant or instigator of B's action. Nor can the problems of accessorial liability be overcome in this kind of case by reliance on the doctrine of innocent agency or concert. If B is doing something which A does not want him or her to do, B cannot properly be regarded as A's agent or instrument.[7] Similarly A cannot be regarded as acting in concert with an adversary.[8]

In *Scott v. Shepherd* B's position as an adversary was somewhat borderline. There have been numerous cases in America however where the opposition of interests between A and B have been more marked and A has very clearly been in the position of B's adversary. Whether A is liable for injury caused by B to V in such circumstances is a question which has given rise to considerable division of opinion, complexity and changes of approach.

At first the American courts refused to hold A liable. The leading case is *Commonwealth v. Campbell.*[9] A took part in a riot in which shots were exchanged between the rioters and soldiers. V was killed by a shot fired by a person, B, who may have been a rioter but could equally have been a soldier. The Attorney-General of Massachussets argued that A was liable whether the shot came from a rioter or a soldier. The court held that A could not be held liable for the acts of his immediate adversary, B.

The court in *Commonwealth v. Campbell* approached the problem via the law of complicity. A different result may be achieved if A is regarded as a principal offender on the ground that he caused the harm.[10] This approach was taken in *Commonwealth v. Moyer.*[11] A took part in the robbery of a petrol station. Shots were exchanged between the robbers and

[7] Williams G., *Criminal Law: the General Part* (2nd ed. 1961) 352; Annotation 56 A.L.R. 3d 239; Contrast *Model Penal Code Tentative Draft No. 1*, 17.

[8] *State v. Campbell* (1863) 89 Mass. 541.

[9] (1863) 89 Mass. 541; see also *Butler v. People* (1888) 18 N.E. 338 and *State v. Oxendine* (1924) 122 S.E. 568.

[10] Perkins R. M., *Criminal Law* (2nd ed.) 720.

[11] (1947) 53 A. 2d 736. See also *Commonwealth v. Almeida* (1949) 68 A. 2d 595. For a criticism of the felony-murder aspect of these cases see Morris N., 'The Felon's Responsibility for the Lethal Acts of Others' (1956) 105 *University of Pennsylvania Law Review* 50.

B, the owner of the station. V, an attendant, was killed by a shot which may have been fired by B. The Supreme Court of Pennsylvania held that A was guilty of the murder of V even on the assumption that the fatal shot had been fired by B. The court came to this conclusion by applying the principle of causation laid down in *Scott v. Shepherd*,[12] which the court cited with approval.

The *Moyer* decision held sway for a number of years but there was a return to the accessorial approach which denies liability in *Commonwealth v. Redline*.[13] A and V, armed robbers, engaged in a gun battle with B, a police officer. V was killed by shots fired by B. The Supreme Court of Pennsylvania refused to hold A guilty of the murder of V. In *Commonwealth ex rel. Smith v. Myers*[14] the same court held that A could not be held guilty in such circumstances even where V was an innocent party, as opposed to a fellow robber. In *Commonwealth v. Root*,[15] A and B took part in an illegal drag race on a public highway. B swerved, crashed into a tree and was killed. The Pennsylvania Superior Court applied the rule in *Scott v. Shepherd* and held A guilty of criminal homicide. By a majority, the Supreme Court of Pennsylvania held that the tort rule of proximate cause had become too wide for criminal responsibility, and reversed A's conviction.

Nonetheless there comes a point at which the causal link between A's action and V's death is so strong that it would be scandalous to acquit A by insisting on an accessorial approach. That point is reached where A directly endangers V's life by using V as a shield against B. In *Wilson v. State*,[16] for example, A and others robbed a bank and, in order to effect his escape, A forced V, a teller, to accompany him as a shield. B, the town marshall, accidentally killed V when shooting at the robbers. The Supreme Court of Arkansas held that A was guilty of murder by shooting.

The shield cases have been left untouched by the recent movement away from the causation approach.[17] The cases discussed above reveal sharp differences of opinion on how far the causation approach can properly be invoked to impose liability.[18] In one of the early shield cases, *Taylor v. State*,[19] Henderson J. cited with approval a passage in Bishop's *Criminal Law* which cautioned

[12] (1773) 2 Black W. 892; 96 E.R. 525.
[13] (1958) 137 A. 2d 472.
[14] (1970) 261 A. 2d 550. See also *State v. Canola* (1977) 374 A. 2d 20 Annotated 56 A.L.R. 3d 239.
[15] (1961) 170 A. 2d 310.
[16] (1934) 68 S.W. 2d 100. See also *Taylor v. State* (1900) 55 S.W. 961; *Keaton v. State* (1900) 57 S.W. 1125.
[17] They were approved and distinguished in *Commonwealth v. Redline* (1958) 137 A. 2d 472, 482, *Commonwealth ex rel. Smith v. Myers* (1970) 261 A. 2d 550, 556 and *State v. Canola* (1977) 374 A. 2d 20, 26.
[18] For a useful survey see Annotation 56 A.L.R. 3d 239.
[19] (1900) 55 S.W. 961, 964.

> [t]he contribution . . . must be of such magnitude, and so near the result, that, sustaining to it the relation of contributory cause to effect, the law takes it within its cognizance.

The shield cases satisfy this test. Other cases may also do so. The main point for present purposes is that at the least when A's contribution is of sufficient magnitude, he ceases to be a mere accessory and becomes a principal in his own right.

Instigating suicide[20]

It would be reasonable to suppose that the law would find it fairly easy to convict persons who instigate others to commit suicide. Those courts which applied an orthodox accessorial approach to the problem, however, ran into all sorts of difficulties. The problem was not made any easier by the existence of the felony-murder rule[21] and doubts as to whether suicide was self-murder.[22] Apart from those complications there were difficulties thrown up by the law of accessories itself.

In England, where suicide was a felony, the main problem related to accessories before the fact. At common law an accessory could not be tried until the principal offender had been convicted. As it was impossible to convict a successful suicide, the accessory could not be tried, however clear his guilt. This remorseless logic was applied in *R. v. Leddington.*[23] The indictment charged that V murdered herself by arsenic poisoning and that A feloniously incited and procured her to murder herself. Alderson B. directed an acquittal on the ground that the jury had no authority to decide a case of inciting suicide. The problem was eventually solved first by statutory abolition of the rule that an accessory could not be tried before the principal was convicted,[24] and later, when the offence of suicide was abolished, by the enactment of a statutory offence of abetting suicide.[25] But for a long period of history the accessorial approach gave undue protection to those who instigated suicide but were absent when the crime was committed.

A different kind of problem arises in South Africa and certain American jurisdictions where suicide is not a crime. No one can be guilty as an accessory to suicide in those jurisdictions because there is no principal offender or offence. In *Grace v. State*[26] it was held that A could not be

[20] For a more detailed discussion see Lanham D. J., [1980] Criminal Law Review 215.

[21] *E.g. R. v. Russell* (1832) 1 Mood. 356; 168 E.R. 1302; *R. v. Gaylor* (1857) Dears. and Bell 288; 169 E.R. 1011; *R. v. Fretwell* (1862) 9 Cox C.C. 152.

[22] *R. v. Gaylor* (1857) Dears. and Bell 288; 169 E.R. 1011; *R. v. Burgess* (1862) Le. and Ca. 258; 169 E.R. 1387.

[23] (1839) 9 Car. and P. 79; 173 E.R. 749. See also *R. v. Russell* (1832) 1 Mood. 356; 168 E.R. 1302 as explained in *R. v. Fretwell* (1862) 9 Cox C.C. 152.

[24] See *R. v. Gaylor* (1857) Dears. and Bell 288; 169 E.R. 1011; *R. v. Croft* [1944] K.B. 295.

[25] Suicide Act 1961 (Eng.), s. 2.

[26] (1902) 69 S.W. 529.

found guilty as a party to murder even if he gave V a pistol so that she could kill herself. In *S. v. Gordon*,[27] a South African court held that A, the survivor of a suicide pact, could not be found guilty of aiding and abetting suicide because suicide was not a crime.

And yet, whether suicide is criminal or not, the way is open to punish at least the worst cases of instigating suicide: a person who deliberately causes another to commit suicide is guilty not as an accessory but as a principal killer. There is authority for this principle in England, America and South Africa.

In *Vaux's* case[28] A gave V poison to drink on the pretext that it was a fertility drug. V drank the poison in A's absence and died. Was A guilty of murder? The court seems to have been tempted to regard A as an accessory before the fact but held that without a principal there could be no accessory. Nonetheless the court held A guilty of murder.

The case was not strictly one of instigating suicide but the reasoning was wide enough to deal with such cases. Hale[29] cites *Vaux's* case as authority for the proposition that, though the victim take the poison in the absence of the persuader, it is a killing by the persuader. East[30] puts it even more clearly:

> If one persuade another to kill himself, the adviser is guilty of murder.

This rather slender line of authority is amply supported in America and South Africa. *Burnett v. People*[31] holds that if a person commits suicide pursuant to the will or direction of an accessory the accessory is liable and that it is immaterial whether any crime is committed by the suicide. In *Ex parte Minister of Justice; in re S. v. Grotjohn*,[32] A was held liable when he gave V a rifle and said 'shoot yourself if you want to because you are a nuisance'.

These authorities apply a welcome corrective to the impotence displayed by the accessorial approach, but there is a danger that they may go too far. In *People v. Roberts*,[33] for instance, A was held to have caused V's death by providing the means of committing suicide. It is understandable that when the choice is murder or acquittal the courts may prefer to take the course which imposes liability, but it is submitted that the mere supply of means should not be enough to meet the test of causation.

There is some support for this submission in *State v. Jones*[34] where the court emphasized that the incitement must be, if not the sole cause, at

[27] [1962] 4 S.A.L.R. 727.
[28] (1592) 4 Co. Rep. 44a; 76 E.R. 992.
[29] 1 *Pleas of the Crown* 431.
[30] 1 *Pleas of the Crown* 228.
[31] (1903) 68 N.E. 505.
[32] [1970] 2 S.A.L.R. 355 (A.D.). The Appellate Division virtually overruled *S. v. Gordon* [1962] 4 S.A.L.R. 727 *supra* n. 27.
[33] (1920) 178 N.W. 690.
[34] (1910) 67 S.E. 160.

least an inducing cause of the crime. Moreover the Model Penal Code section 210.5 provides:

> A person may be convicted of criminal homicide for causing another to commit suicide only if he purposely causes such suicide by force, duress or deception.

Here as elsewhere the main lesson is that there comes a point at which the instigator's action becomes so dominant that he or she must be treated not as an accessory but as a principal offender.

Perjury, duress and murder

Suppose A forces B to give false evidence against V, an accused in a capital case and that V is convicted and executed as a result of B's false testimony. If B is guilty of no crime at all A could be held guilty of murder through a series of innocent agents — B, the judge, the jury and the executioner. If B is guilty of murder, A may be convicted as a secondary party to that murder. But quite apart from duress the law is reluctant to hold a perjurer guilty of murder.[35] If B in the above situation is held to be guilty of perjury but not of murder, A cannot be held guilty of murder as a secondary party on the orthodox accessorial approach because there is no principal offender and A cannot be liable as acting through an innocent agent because B is not innocent.

The law avoided these problems by making A liable as a principal offender. Hawkins[36] in his chapter on murder says

> And in some cases a man shall be said, in the judgment of the law, to kill one who is in truth actually killed by another . . . as where one by duress or imprisonment compels a man to accuse an innocent person, who on his evidence is condemned and executed.

By dealing with the problem on the basis of causation, the courts can punish the procurer without having to decide whether the witness is criminally liable.

Crimes which require personal action

While some crimes can easily be committed through agents *e.g.* murder, theft and burglary, others are of a personal nature and the idea of committing them through the agency of another is a little incongruous. The most obvious of these are crimes involving sexual intercourse. In *R. v. Bourne*,[37] A forced B, his wife, to have intercourse with a dog. He was charged with aiding and abetting the crime of buggery. He pleaded that he could not be liable unless B was also liable as a principal and that she could not be liable because of A's coercion. He also pleaded that there was no common design. B was not charged and the Court of Criminal

[35] See Howard C., *Criminal Law* (3rd ed. 1977) 28-9; Smith J. C. and Hogan B., *Criminal Law* (4th ed. 1978) 284.

[36] 1 *Pleas of the Crown* Ch. 13, s. 7. See also Coke 3 *Inst.* 48, 91; Staunford, *Pleas of the Crown* (1557) 36.

[37] (1952) 36 Cr.App.R. 125.

Appeal was prepared to assume that she would have been entitled to acquittal on the ground of duress. Nonetheless the court held that A was guilty as a principal in the second degree. There was no attempt to justify the conviction on the ground that A committed buggery with the animal through an innocent agent. The actual reasoning is instructive. The Court said

> The evidence was . . . that he caused his wife to have connection with a dog, and if he caused his wife to have connection with a dog he is guilty, whether you call him an aider and abettor or an accessory, as a principal in the second degree.[38]

While the court did not in this case rely on innocent agency, this concept has featured in a number of cases involving rape or attempted rape. An early American case raised the problem in an extreme form. In *State v. Dowell*,[39] A under threat of death by shooting forced B to attempt to have intercourse with A's wife. A was charged with assault with intent to commit rape. His plea of marital privilege was easily disposed of on the ground that it covered only intercourse with a husband, not with a third party.[40] A's second defence was that, since B was not guilty because of duress, A was not guilty either. Merrimon C.J., dissenting, would have accepted this defence. The majority, however, speaking through Shepherd J., held A guilty of committing the attempted rape through an innocent agent. The majority also flirted with the idea that duress was not a defence to attempted rape, so that A could have been found guilty as an aider and abettor, but they left the question open.

In *R. v. D.*[41] the Appellate Division of Rhodesia was prepared to hold that if A forces V to submit to intercourse with B, A is guilty of rape even if B believes that V is consenting. Liability was based on the maxim *qui facit per alium facit per se*.[42] This appears to be a reference to innocent agency though it might be construed as basing liability simply on causation.

Innocent agency was to some extent relied on to support a conviction in *R. v. Cogan*.[43] A forced his wife V to have intercourse with B. B was charged with rape and A as an aider and abettor. B's conviction was quashed on the ground that he believed that V consented. The Court of Appeal held however that A was liable. There appear to be three grounds for the decision, causation, innocent agency and aiding and abetting.[44]

[38] *Ibid.* 129.
[39] (1890) 11 S.E. 525.
[40] See also *R. v. Cogan* [1976] Q.B. 217.
[41] [1969] 2 S.A.L.R. 591 (R., A.D.).
[42] *Ibid.* 592. The case has been criticized by Burchell E. M. and Hunt P. M. A., *South African Criminal Law and Procedure* (1970) i. 351 apparently on the basis that it misapplied the law relating to co-principals. But it does not appear that B was regarded as a principal at all.
[43] [1976] Q.B. 217.
[44] *Ibid.* 223.

There is a considerable divergence of academic opinion on the correct approach to these cases. One view is that they are properly treated as cases of innocent agency.[45] A second view is that, as sexual intercourse involves personal contact, such offences cannot be performed through innocent agents but the cases can be upheld on the basis of aiding and abetting the *actus reus* of rape.[46] A third view is that neither innocent agency nor aiding and abetting can properly apply so that, regrettable though it is, the instigator must be acquitted.[47] It is submitted that the cases are right on the ground that A has caused the *actus reus* of the crime.[48]

Sexual offences are not the only ones which in their nature require personal action. In *People v. Unger*,[49] D was charged with gaol escape. He pleaded that his life was in danger. The court said *obiter* that where the defence of compulsion is successfully asserted the coercing party is guilty of the crime. It is submitted that this *dictum* is correct. It does not sound convincing however to say that the coercing party has escaped from gaol through an innocent agent. His liability can be based quite simply on causation.

There are other cases, however, of this kind which provide *sub silentio* authority against causation as a head of liability. In *Britto v. People*[50] A and B were charged with vehicular assault. B drove the car. A while sitting in the back seat gripped V's wrist so that V was dragged 120 feet. Under the relevant statute only a person driving or operating the vehicle could directly commit the *actus reus*. It appears that while A clearly intended to assault V, B had no such intention. The Supreme Court of Colorado held that A could not be guilty as an accessory. The Court held it to be an elementary principle that an accessory could not be convicted unless the principal was himself guilty.

Thus must have been the view of the court in *R. v. Kemp and Else*.[51] K was convicted of 'knowingly solemnizing a marriage . . . pretending to be in Holy Orders'. E was convicted of aiding and abetting him. K had put on a cassock and conducted a pretended marriage ceremony in the belief that all present knew that it was not a genuine ceremony. K's

[45] *E.g.* Howard, *op. cit.* 272; La Fave W. R. and Scott A. W., *Criminal Law* (1972) 380.

[46] *E.g.* Smith and Hogan, *op. cit.* 136; Cross R. and Jones P. A., *Introduction to Criminal Law* (8th ed. 1976) 376.

[47] *E.g.* Williams G., *Textbook of Criminal Law* (1978) 319-21. See also Turner J. C. W. (ed.), *Russell on Crime* (12th ed. 1964) i. 138.

[48] Hart H. L. A. and Honoré A. M., *Causation in the Law* (1959) 338-40. Gordon G. H., *Criminal Law* (2nd ed.) 130-1 appears to favour this solution but regards it as inapplicable in English Law. He cites *R. v. Curr* [1968] 2 Q.B. 944 as standing in the way but that was a case of incitement: see Smith and Hogan, *op. cit.* 136.

[49] (1977) 362 N.E. 2d 319.

[50] (1972) 497 P. 2d 325.

[51] [1964] 2 Q.B. 341. See Smith and Hogan, *op. cit.* 690.

conviction was quashed because his defence of lack of knowledge had not been put to the jury. The Court of Criminal Appeal dealt briefly with E's liability:

> It is, of course, clear that Else could not be convicted unless Kemp was found guilty of the charge against him.[52]

In these two cases the question of innocent agency was not canvassed but in any event it does not seem appropriate. It could not plausibly be said that A drove or operated the car in *Britto* or that he pretended to be a priest in *R. v. Kemp and Else.*

A South African case on a similar point came to the same conclusion as the last two cases but there was a division of opinion. In *R. v. Rasool*[53] section 20(9) of the Immigrants Regulation Act 1913 (S.A.) provided that:

> any person who aids or abets any person in entering or remaining within the Union or any Province in contravention of this Act, knowing that person to be prohibited from so entering or remaining . . . shall be guilty of an offence.

A took B, his three year old child, into Natal Province. It was assumed that B was a prohibited person and that A knew this. Even so the Appellate Division held by a majority that A could not be found guilty of the offence. The majority appears to hold that the child did not even commit the *actus reus* of the crime; Soloman J.A.[54] said that entering required an exercise of volition and a conscious act. He likened the child to a dummy. But it appears that the learned Judge was prepared to take the same view where the prohibited person was a lunatic and so the case is not limited to situations in which there is no *actus reus.* One thing is clear and that is that the majority considered that there could be no question of convicting an aider and abettor in the absence of a criminally liable principal.

Two judges dissented. De Villiers J.A. pointed out that the statute did not require a principal offender and an accessory. All it required was a prohibited immigrant and a person assisting him to enter.[55] On this view it was not necessary to consider the law of accomplices but the learned Judge suggested that a person who commits a crime through an innocent agent can properly be said to aid and abet the innocent agent.[56] Wessels J.A. agreed with De Villiers J.A. on the nature of the statute in question but on the accessory point agreed with the majority that A cannot aid B to commit a crime unless B is criminally liable.[57] He recognized however that there might be guilt through an innocent agent.

[52] [1964] 2 Q.B. 341, 346.
[53] [1924] S.A.L.R. (A.D.) 44.
[54] *Ibid.* 47.
[55] *Ibid.* 57.
[56] *Ibid.* 56.
[57] *Ibid.* 59.

None of these three cases considered the possibility of holding A liable as a principal for causing the *actus reus*. It is submitted that in each case liability should have been imposed on this basis.

Offences requiring special status or quality

Some offences are so defined that they can be directly committed only by persons possessing a particular status or quality like licensee, trader, or seller.[58] Suppose A, who does not possess the designated status or quality causes B who does possess it to commit the *actus reus* of the offence. Can A be held guilty if B for some reason, such as lack of *mens rea* or duress, is free of criminal guilt? An orthodox accessorial approach would lead to A's acquittal, since an accessory's guilt is dependent upon that of the principal offender. If on the other hand A can be regarded as the indirect principal he can be convicted even if B is not liable. A's indirect liability would be based on the fact that he caused the *actus reus*.

The American federal courts have developed just such a head of liability. The development has been one of common law initiative and statutory confirmation. Both sources of law need to be borne in mind in assessing the relevance of the development to other jurisdictions.

The story starts with a case which takes an orthodox accessorial approach to the problem. In *Foreman v. U.S.*[59] Dr A was charged with selling drugs illegally. He had issued a prescription to X. The prescription was illegal because it was issued not for therapeutic purposes but to gratify X's craving for drugs. The drugs were sold to X by B, a druggist. The United States Court of Appeals held that the mere issue of the prescription by a doctor to be dispensed by any druggist, without participation by the doctor in the sale would not be a sale by the doctor. Since the evidence failed to show that Doctor A even knew where the prescription would be dispensed he could not be held guilty.

Two years later the United States Supreme Court came to a different conclusion on the strength of the law of complicity. Section 332 of the U.S. Criminal Code provided at that time:

> whoever directly commits any act constituting an offence defined in any law of the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.[60]

In *Jin Fuey Moy v. U.S.*[61] A wrote a bogus prescription for drugs. B, a druggist, actually sold the drugs to the addict. The Supreme Court recognized the force of the argument that 'selling' meant parting with one's own property.[62] It held however that by virtue of section 332 of the Criminal

[58] In a sense some of the cases discussed in the last section fall into this category, *e.g.* rape can only be directly committed by a man who is not the victim's husband.
[59] (1918) 255 F. 621.
[60] This provision has been held to restate the common law definition of accomplices: *Morei v. U.S.* (1942) 127 F. 2d 827, 831; *U.S. v. Peoni* (1938) 100 F. 2d 401, 402.
[61] (1920) 254 U.S. 189; 65 L. Ed. 214.
[62] *Ibid.* 192.

Code A could be held guilty as a principal and so could be convicted of selling the drugs.[63] The court noted that a number of prescriptions of the same character were dispensed at a single drug store and that the evidence strongly tended to show cooperation between A and B.[64] In view of this the case is perfectly consistent with *Foreman v. U.S.* and can be explained on orthodox accessorial principles. A was guilty of encouraging B to dispense drugs illegally and so was in common law terms an accessory before the fact. By section 332 he was deemed to be a principal. In this way the person prescribing could be held to be guilty of selling.

Some cases show a tendency to restrict *Jin Fuey Moy v. U.S.* to the orthodox principle of accessorial liability. Thus in *Jackson v. U.S.*[65] Dr A wrote out the bogus prescription which was dispensed by B, a druggist. There was no evidence to show that B knew that the prescription was improper. The Circuit Court of Appeals, Eighth Circuit, held that A could not be convicted of selling the drugs. The Court emphasized that in *Jin Fuey Moy v. U.S.* there was evidence of cooperation between the doctor and the druggist.

A wider view of the effect of *Jin Fuey Moy* was taken in *Nigro v. U.S.*[66] Dr A was charged with the illegal sale of drugs. He had issued 500 prescriptions for morphine sulphate to X, a drug addict, over a period of 2 years. X bought the drugs at various pharmacies. The Circuit Court of Appeals, Eighth Circuit, held that A was guilty of selling the drugs. The Court recognized the opposing view applied in cases like *Jackson v. U.S.* but rejected it. Thomas, Circuit Judge, pointed out that if cases like *Jackson v. U.S.* were right, a doctor's liability would depend on the whim of the addict. If the addict went to an innocent druggist the doctor would not be liable but if the addict went to a druggist who knew the prescription was illegal, the doctor would be guilty of participation. The Court was not prepared to sanction such an anomaly. *Nigro v. U.S.* recognizes, then, that if A, though not a 'seller' himself, causes B to sell illegal goods, he may be held liable even if B is not guilty by virtue of lack of *mens rea.* According to this view A is no longer regarded as an accessory or a deemed principal but is regarded as the true principal by virtue of having caused the *actus reus.*

At this point, reference must be made to a slightly different kind of case which may in part explain later developments. In *U.S. v. Giles*[67] A, a bank teller, covered up shortages in his cash by withholding deposit slips from B, a bookkeeper. The result was that B, in good faith, made

[63] *Ibid.*
[64] *Ibid.* 193.
[65] (1924) 297 F. 20. See also *Manning v. Biddle* (1926) 14 F. 2d 518.
[66] (1941) 117 F. 2d 624. See also Annotation 133 A.L.R. 1140 which suggests that *Jin Fuey Moy v. U.S.* impliedly overruled *Foreman v. U.S.*
[67] (1937) 300 U.S. 41; 81 L. Ed. 493.

false entries in the bank's ledger. A was convicted of making a false entry and causing a false entry to be made. The Circuit Court of Appeals by a majority allowed his appeal. It held that A had not made the entries himself and so could not have been convicted without the charge that he caused the false entries to be made. The Court found that there was no evidence that A had done anything which could be considered as a direction to make them.[68] One judge dissented and regarded B as A's innocent agent. On further appeal, the Supreme Court of the United States restored A's conviction. The Court held that as A had caused the false entries to be made he was as guilty as if he had made them himself.[69]

The crime in *U.S. v. Giles* was one which could only be committed by bank personnel but as both A and B fell into that category the status aspect of the case presented no difficulty. Accordingly the case can be regarded as one of innocent agency as indeed was the view of the dissenting judge in the Court of Appeals. The Supreme Court however spoke both in terms of innocent agency and causation, and so the case provides some, though perhaps not very strong, authority to support the view that liability may in the *Nigro* kind of case may be based on causation.

The main significance of *U.S. v. Giles* however is that it may explain later statutory developments in the federal law of complicity. In 1948 the old complicity section was replaced by section 18(2) which read:

> (a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces or procures its commission, is a principal;
> (b) Whoever causes an act to be done, which if directly performed by him would be an offense against the United States is also a principal and punishable as such.

The revisor's note[70] explains that section 18(2)(b) was added to permit the deletion from the definition of particular crimes of such phrases as 'causes or procures'. The note goes on to say that section 18(2)(b) removes all doubt that one who causes the commission of an indispensable element of the offence by an innocent agent or instrumentality is guilty as a principal.

In the light of this explanation and the fact that section 18(2)(b) differs in form from most other complicity sections, there is ample scope for distinguishing federal cases after 1948 which base liability for causation on the new provisions.[71] Nonetheless there is a tendency in later decisions to treat section 18(2)(b) as a declaration of the old position rather than an enactment of a new head of liability.

An interesting example is *U.S. v. Selph.*[72] The Servicemen's Readjustment Act 1944 (U.S.C.) required certain lenders to send a statement to the Veterans Administration. A gave false information to B bank which made a loan and passed the information on. A was charged that he did

[68] *Ibid.* 47.
[69] *Ibid.* 48-9.
[70] See United States Code Annotated Title 18, §2, 57.
[71] *State v. Doyen* (1978) 580 P. 2d 1351.
[72] (1949) 82 F. Supp. 56.

'knowingly cause to be made and knowingly aid and assist in the making of a fraudulent certificate concerning a claim for benefits' under the Act. It was argued that, as B was innocent, A could not be guilty of aiding and abetting and as A was not a lender he could not be guilty as a principal. Yankwich D.J. held that if the prosecution relies solely on aiding and abetting it must prove that B has committed an offence. But the learned judge went on to say that under the old complicity section, a person who caused another to commit a criminal act innocently could be prosecuted for the principal offence.[73] For this proposition his Honour relied *inter alia* on drug cases like *Nigro v. U.S.* The Court regarded section 18(2)(b) as confirming the existing law rather than amending it.[74]

In 1951 Congress enacted a further amendment to the terms of the complicity section. Section 18(2)(a) was altered only in a minor way[75] but section 18(2)(b) underwent more substantial amendment. The new section reads:

> (b) Whoever wilfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

This new formulation was considered in *U.S. v. Lester.*[76] A number of civilians and police officers were charged with conspiracy to deprive V of his constitutional rights by arresting him under colour of law and causing his conviction knowing him to be innocent. Two civilians were convicted. The police officers were acquitted. The appellant civilians argued *inter alia* that as private citizens they were incapable of acting 'under colour of law' and so could not be found guilty of conspiring to commit that offence when the parties who were capable of committing it, the policemen, were innocent. The United States Court of Appeals, Sixth Circuit, rejected this argument:

> It has been beyond controversy . . . at least since the 1951 amendment [to s. 18(2)(b)], that the accused may be convicted as a causer, even though not legally capable of personally committing the act forbidden . . . and even though the agent wilfully caused to do the criminal act is himself guiltless of any crime.[77]

The Court pointed out that there was authority for the causation principle before 1951 and referred with approval to *U.S. v. Selph.* The 1951 provision, like its 1948 predecessor, was regarded as confirming rather than creating a head of liability based on causation.

The principle stated in *U.S. v. Lester* was applied in *U.S. v. Smith.*[78] A statute required licensed dealers to record the sale of every firearm. B was

[73] *Ibid.* 58.
[74] *Ibid.* 59.
[75] The last words read 'is punishable as a principal' instead of simply 'is a principal'.
[76] 363 F. 2d 68.
[77] *Ibid.* 73. See also the note of the legislative history of the 1951 version of s. 18(2)(b) in [1951] 2 U.S. Code Congressional and Administrative Service 2583 to which the court referred.
[78] (1978) 584 F. 2d 731; see also *U.S. v. Ordner* (1977) 554 F. 2d 24.

a licensed dealer. B's son A, who had no licence, sold a firearm to X without making the prescribed record. A was charged with knowingly and wilfully causing B to fail to maintain properly the required record. A argued that since B did not knowingly fail to maintain the record, B was innocent, with the result that A could not be convicted. The United States Court of Appeals, Fifth Circuit, rejected this contention. It restated the principle in *U.S. v. Lester* as follows:

> A person who is incapable of committing a particular offence . . . because he is not a member of a particular class, is nonetheless punishable as a principal, if he wilfully causes an innocent person, capable of doing so, to commit the proscribed act, or . . . to fail to do a required act.[79]

An earlier Australian case with essentially similar facts provides some support for *U.S. v. Smith* and could be rationalized as a case of causation in a similar way. In *Ex parte Coorey*,[80] rationing regulations prohibited traders from obtaining goods without coupons. B was a trader whose business was run by her husband, A. A without B's knowledge obtained goods from X without coupons. A was charged with being knowingly concerned in an offence committed by B. The Supreme Court of New South Wales *in Banco* held that B was vicariously liable for the acts of A and that A could be convicted of aiding and abetting even if B was not herself guilty of an offence because of lack of *mens rea.* Jordan C.J.[81] questioned a statement made by Isaacs J. in *Walsh v. Sainsbury* that a person charged with aiding and abetting another cannot be convicted unless it is proved that the other was guilty too. In the present case he saw no reason why A should not be convicted. Davidson J.[82] decided the case on the basis of a statutory provision which made agents liable for breach of the regulations; Nicholas C.J. in Eq.[83] agreed with both judgments.

An alternative explanation of A's guilt in *Ex parte Coorey* is that by his actions he caused B, an innocent person capable of doing so, to commit the proscribed act.[84] Both approaches to the problem avoid the necessity of holding the innocent licensee, trader or other principal vicariously liable for the acts of the servant A. This has been done on the supposition that A is beyond the law's reach.[85] Recognition that A as the causer of the proscribed conduct is liable in his own right, however, avoids both this injustice and the apparent logical difficulty of convicting an aider and abettor when the principal has committed no offence.

[79] *Ibid.* 734.
[80] (1944) 45 S.R. (N.S.W.) 287.
[81] *Ibid.* 296.
[82] *Ibid.* 311.
[83] *Ibid.* 318.
[84] For the view that B's liability if any is primary rather than vicarious see Glazebrook P. R., in *Reshaping the Criminal Law* (1978) 108 especially 113.
[85] See *Police Commissioner v. Cartman* [1896] 1 Q.B. 655; *Emery v. Nollath* (1903) 20 Cox 507; *R. v. Bosse* (1915) 36 N.L.R. 642; *R. v. Dettburn* [1930] O.P.D. 188. Contrast *R. v. Willett* (1902) 19 S.C. 168 (Juta).

The cases discussed so far in the main support a common law head of liability for causing a person to commit the *actus reus* of an offence. But *Foreman v. U.S.*,[86] *Jackson v. U.S.*[87] and the later reversed decision of the Court of Appeals in *U.S. v. Giles*[88] reveal a line of opposition to liability for the actions of another based on causation. That opposition survived the Supreme Court's reversal of the Court of Appeals in the *Giles* case. In *U.S. v. Chiarella*[89] the United States Court of Appeals, Second Circuit, discussed the law both under the original aiding and abetting section, section 332, and under the 1948 amendment which added 18(2)(b) — the causation section. Of the former Learned Hand J. said:

> Before the amendment of section 2 in 1948, the last and an authoritative expression as to what constituted criminal liability was that in order to aid or abet another to commit a crime it is necessary that a defendant 'in some sort associate himself with the venture, that he participate in it as in something that he wishes to bring about, that he seek by his action to make it succeed'.[90] To do that involves much more than merely 'causing an act to be done', as we pointed out at length in *U.S. v. Falcone*.[91]

This suggests that, before 1948 at any rate, liability for the act of another had to be brought within the law of complicity and that there was no separate liability for 'causing' the *actus reus* of another. Of the argument that such a head of liability was introduced in 1948 by the then section 18(2)(b) the court said:

> in spite of the . . . verbal argument that can be made to the contrary, we cannot bring ourselves to be sure that such baffling language was intended to have so revolutionary a consequence.[92]

It was not necessary to decide the point but the Court clearly had considerable reservations about the causation head of liability, even after the 1948 amendment. These reservations have lingered on even after the 1951 amendment to section 18(2)(b).[93]

The consideration underlying these reservations appears to be that the causation principle will impose too wide a head of criminal liability. The fear is well expressed in *Morei v. U.S.*:[94]

> If the criterion for holding that one is guilty of procuring the commission of an offense, is that the offense would not have been committed except for such a person's conduct . . ., it would open a vast field of offenses that have never been comprehended within the common law by aiding, abetting, inducing or procuring.

This remark raises the question whether suitable limits can be placed on

[86] (1918) 255 F. 621.
[87] (1924) 297 F. 20.
[88] (1937) 300 U.S. 41; 81 L. Ed. 493.
[89] (1950) 184 F. 2d 903, 909. See also *U.S. v. Paglia* (1951) 190 F. 2d 445, 448.
[90] Citing *inter alia Nye and Nissen v. U.S.* (1949) 336 U.S. 613; 93 L. Ed. 919.
[91] (1940) 109 F. 2d 579, 581.
[92] 184 F. 2d 903, 910.
[93] See *U.S. v. Caplan* (1954) 123 F. Supp. 862. *Pereira v. U.S.* (1953) 202 F. 2d 830.
[94] (1942) 127 F. 2d 827, 831, see also *Commonwealth v. Flowers* (1978) 387 A. 2d 1268; Buxton R. J., 'Complicity in the Criminal Code' (1959) 85 *Law Quarterly Review* 252, 268.

causation as a head of liability for the acts of another. This matter will be discussed in the second section of this article.

THE SCOPE OF CAUSATION AS A HEAD OF LIABILITY FOR ACTS OF ANOTHER

Some of the cases already discussed which deny liability based on causation do so at least in part because of fear of creating too wide a measure of criminal liability.[95] Other cases, while recognizing causation as a head of liability have sought to limit its scope by requiring a high degree of contribution from the instigator.[96] The cases considered in this section are concerned with the meaning the courts have given to 'causing' in the main in cases where there is a specific statutory provision creating liability based on causation.

There are two aspects to the problem, the *actus reus* of causation and the *mens rea.* They will be discussed in turn.

The actus reus of causation

A strong line of authority holds that A does not cause B to act unless he is in a position of control dominance or authority over B and orders the act. Other cases are prepared to recognize that A may cause B to act even if A is not in such a position of dominance. Both sets of cases will be examined and an attempt will be made to provide a solution.

Causation based on control or authority: According to one line of authority A cannot be held guilty of causing B to act unless A is in a position of control or authority over B. In an influential dictum in *McLeod v. Buchanan*,[97] Lord Wright said:

> To 'cause' [a person to do something] involves some express or positive mandate from the person 'causing' to the other person, or some authority from the former to the latter, arising in the circumstances of the case.

This dictum was applied in the High Court of Australia in *O'Sullivan v. Truth and Sportsman Ltd.*[98] A printed and delivered to B, a retailer, copies of a newspaper containing a prohibited report. B sold a copy to X. A was charged under a statute with causing the newspapers to be offered for sale. The High Court regarded the case as one of

> the retail sale of a newspaper, considered as an article of commerce, made by independent retailers, all parties alike being animated by every business motive to promote the sale of the article.[99]

Nonetheless the Court held that A had not caused B to offer the newspaper for sale. After reviewing the authorities including Lord Wright's *dictum*, the leading judgment said that the word 'cause'

[95] *E.g. Morei v. U.S.* (1942) 127 F. 2d 827.
[96] *E.g. R. v. Redline* (1958) 137 A. 2d 472 (causing an adversary to kill); *State v. Jones* (1910) 67 S.E. 160 (instigating suicide).
[97] [1940] 2 All E.R. 179, 187.
[98] (1957) 96 C.L.R. 220.
[99] *Ibid.* 227.

> is not to be understood as referring to any description of antecedent event or condition produced by the first man which contributed to the determination of the will of the second man to do the prohibited act. . . . It should be interpreted as confined to cases where the prohibited act is done on the actual authority, express or implied, of the party said to have caused it or in consequence of his exerting some capacity which he possesses in fact or law to control or influence the acts of the other. . . . What amounts to causing within this view by no means coincides with the definition of an accessory before the fact.[1]

It is worth spelling out the implications of this approach. It is not enough to amount to 'causing' for A to provide B with the opportunity to commit an offence. So in *Lovelace v. D.P.P.*[2] A was not liable when he let his theatre to B and B put on a play which contained illegal material. Nor does A cause B to commit an offence by supplying the materials with which the offence is committed. This is borne out by the *O'Sullivan* case and a similar English case, *Shulton (Great Britain) Ltd v. Slough B.C.*[3] A sold underweight goods to a retailer, B. It was held that A had not caused the retailer to commit an offence in relation to those goods under the Merchandise Marks Act. Similarly in *Shave v. Rosner*[4] where A's servants negligently repaired B's car so that it was unroadworthy, A was held not to have caused B to drive the vehicle in a dangerous condition on a road.

Even more positive assistance may not count as 'causing' under this line of authority. In *Goodbarne v. Buck*,[5] A assisted B to make a fraudulent application for car insurance, which was later set aside at the instance of the insurance company. Even so A was held not to have caused B to drive without insurance.

Nor will it be enough that A permits B to commit an offence. In *Kelly's Directories Ltd v. Gavin and Lloyds*[6] A had a contractual right to print a diary for X. A permitted X to have part of the diary printed by Y. That part of the diary contained material pirated from P. The Court of Appeal held that A had not caused the pirated material to be printed. Similarly in *Ex parte Hop Sing*[7] it was held that permitting cattle to be killed was not the same as causing them to be killed.

In the *O'Sullivan* case[8] the High Court said that even counselling or procuring, which would be enough to make A an accessory before the fact would not necessarily amount to 'causing'. This is supported by *Benford v. Sims*.[9] A, a veterinary surgeon, was charged with illtreating a horse by causing it to be worked by B in an unfit state. The Magistrates' Court dismissed the charge on the ground that though A had counselled B to work the horse he had not caused the cruelty because his advice was

[1] *Ibid.* 228.
[2] [1954] 3 All E.R. 481. See also *Lyon v. Knowles* (1863) 32 L.J.Q.B. 71.
[3] [1967] 2 Q.B. 471.
[4] [1954] 2 Q.B. 113.
[5] [1940] 1 K.B. 771. See also *Watkins v. O'Shaughnessy* [1939] 1 All E.R. 385.
[6] [1902] 1 Ch. 631.
[7] (1887) 4 W.N. (N.S.W.) 59.
[8] (1957) 96 C.L.R. 220 discussed *supra* nn. 98-1.
[9] [1898] 2 Q.B. 641.

too remote. On appeal the court held that A should have been convicted on the ground that the counsellor could be treated as a principal. But on the meaning of 'cause' Ridley J. supported the Magistrates' Court. He held that the word 'cause' was used in a stricter sense than 'procure' or 'counsel' as used in the context of complicity. This line of cases then imposes a strict limitation on the meaning of 'cause' where it takes the form of inducing conduct on the part of another.

Wider interpretations of the word 'cause': A wide interpretation was given to the word 'cause' in *R. v. Harriet Wilson.*[10] B asked A to get her something to procure an abortion. A gave her mercury and directed her to take it in gin. B took the mercury while A was away. A was charged with the felony of causing B to take the poison to procure a miscarriage. A argued that she was not liable as B took the poison herself. In the course of argument before the Court for Crown Cases Reserved, Jervis C.J.[11] suggested B was A's innocent agent. Coleridge J.[12] pointed out that she was not innocent because she was guilty of misdemeanour though not of the statutory felony. Martin B.[13] asked whether the Act required compulsion and Cresswell J.[14] referred to an earlier case[15] which seemed to suggest that persuasion was not enough to amount to 'cause'. Jervis C.J. died before judgment was given and the case was re-argued before a differently constituted court.[16] In a short judgment the court held that there was a 'causing to be taken' within the meaning of the statute.

This wide approach to causation is supported by the decision of the Supreme Court of the United States in *U.S. v. Kenofskey.*[17] A, a life insurance agent, delivered to B, his superior officer, a fraudulent insurance claim. A knew that B would post the claim in the usual course of business. B signed the claim with no knowledge of its fraudulent character and posted it. A was charged with causing a letter to be placed in the post with intent to defraud. The District Court held that A was not liable. He did not post the letter himself and B was not his agent. The theory that A caused the letter to be posted was too far fetched to be tenable.[18] The United States Supreme Court disagreed. It took the view that 'cause' is a word of very broad import and means 'bringing about'. B was A's agent for the purpose of posting the fraudulent claim and so A was guilty of causing the claim to be posted.[19]

[10] (1856) Dears. and Bell 127; 169 E.R. 945. Followed in *R. v. Farrow* (1857) Dears. and Bell 164; 169 E.R. 961.
[11] (1856) Dears. and Bell 127, 128.
[12] *Ibid.* 128.
[13] *Ibid.*
[14] *Ibid.* 130.
[15] *R. v. Williams and Rees* (1844) 1 Den. 39; 169 E.R. 141.
[16] Pollock C. B., Coleridge J., Williams J., Willes J., and Watson B.
[17] (1917) 243 U.S. 440; 61 L. Ed. 836.
[18] *Ibid.* 838.
[19] *Ibid.*

An even wider meaning was given to the word 'cause' in a case which appears to have turned on section 18(2)(b) — the general causation section of the U.S. Criminal Code. In *Malatkofski v. U.S.*[20] A gave B money knowing that B would use it to bribe V. A was charged with bribery and the question was whether A had caused B to bribe V. A argued that mere knowledge that B would bribe V was not enough: that a specific direction from A to B was necessary. The United States Court of Appeals, First Circuit, held that A was liable. The Court held that one who assists another by supplying the means wherewith the other executes a declared criminal purpose 'causes' the commission of the offence notwithstanding that the offence is immediately committed by the voluntary act of the other criminal actor.[21]

A third American case marks out an even greater territory for the word. In *U.S. v. Scandifia*,[22] A was charged with causing the interstate transportation of counterfeit securities. A had supplied B with counterfeit bonds. B, believing them to be genuine, transported them between New York and New Jersey. The government argued that A had caused the interstate transportation because he did not place any limit on what B could do with the bonds. The United States Court of Appeals, Second Circuit, refused to go that far. The Court held that it was not enough that the interstate transportation was consistent with his instructions. But it was enough that such transportation was a reasonably foreseeable consequence of A's action. The Court held that the requirement of reasonable foreseeability had been satisfied and so A had caused the interstate transportation.

A rather complicated South Australian case supports this line of authority. In *Lenzi v. Miller*,[23] A owned a trailer which was uninsured. He permitted B, his brother, to drive the trailer on a road. He was charged *inter alia* with aiding, abetting, counselling or procuring B to drive the trailer uninsured. The Magistrate was not satisfied that A knew that it was uninsured but nonetheless convicted A of the offence charged. On appeal A contended that he could not be convicted as an accomplice since he did not have the *mens rea* required for accomplice liability, *viz.* knowledge of all the facts constituting the offence. Both Chamberlain J. and, on further appeal, the Full Court of South Australia appear to have held that A could be held strictly liable on the basis that he was a principal offender in that he 'caused' the offence to be committed by B. Chamberlain J. observed that the party treated as accessory is often the party for whom the obligation of the law creating an absolute offence is designed; and that

[20] (1950) 179 F. 2d 905.
[21] *Ibid.* 916. See also *U.S. v. Legett* (1959) 269 F. 2d 35 and *U.S. v. Rapoport* (1976) 545 F. 2d 802. *Cf. U.S. v. Maselli* (1976) 534 F. 2d 1197 (on the relationship between causing and aiding and abetting).
[22] (1968) 390 F. 2d 244.
[23] [1965] S.A.S.R. 1.

a statutory direction to do or not to do certain things is aimed more directly at the 'accessory' in control of the activity than at the 'principal' whose hand does the forbidden act.[24] In the Full Court Napier C.J. and Travers J. held that cases requiring proof of *mens rea* on the part of accomplices

> have no application to the case before us, in which the undisputed fact is that [A] caused [B] to do the act which was the offence.[25]

The case is difficult to interpret because it is not clear what the Court meant by 'causing'. From the report the evidence appears to show no more than that A permitted B to drive the trailer. Chamberlain J. says that there was no dispute that B drove the trailer on the instructions or at least with the permission of A,[26] and in his interview with the police, A merely admitted giving permission[27] not issuing instructions. It may be then that the Full Court equated permission with cause in which case the Court has applied a wide definition of the word 'cause'.

The meaning of 'cause' — a suggested solution: To some extent causation is a question of fact and degree. But some basic principles can be established to bring reasonable certainty. It is submitted that those principles should be developed from the middle ground between the two lines of authority examined in the two sections above. Those principles are as follows:

Assistance or permission: Neither assistance nor permission should be sufficient to amount to cause. If this is all that can be proved against A, it seems plain that the main motivation for the deed has come from B or elsewhere. Assistance or permission may be enough to make A liable as a secondary party where the other conditions for such liability have been met but they should not be sufficient to make A a principal on the basis of causation.[28]

This submission is supported by the authorities in section (a) above. It involves rejecting the reasoning in cases such as *R. v. Harriet Wilson*,[29] *Malatkofski v. U.S.*,[30] *U.S. v. Scandifia*[31] and possibly *Lenzi v. Miller*.[32]

Advice or counselling: These should arguably be enough where A knows the facts which make B's conduct criminal and B does not. They should not amount to causation where B knows that his conduct is criminal.[33] In this latter situation it is reasonable to regard B, the

[24] *Ibid.* 3.
[25] *Ibid.* 13. Bright J. agreed with this reasoning: *ibid.*
[26] *Ibid.* 2.
[27] *Ibid.* 8.
[28] In *Matusevich v. R.* (1977) 51 A.L.J.R. 657 Mason and Aickin JJ. appear to have had similar reservations about regarding a mere assistant as acting through an innocent agent. Contrast Gibbs A-C.J. and *R. v. Tyler and Price* (1838) 8 Car. and P. 616; 173 E.R. 643.
[29] (1856) Dears. and Bell 127; 169 E.R. 945.
[30] (1950) 179 F. 2d 905.
[31] (1968) 390 F. 2d 244.
[32] [1965] S.A.S.R. 1.
[33] It may be that this view lies behind the law's refusal to recognize guilty agents

immediate actor as the principal offender and to relegate A's position to that of secondary party.

Duress, influence or trickery: There can be little doubt that one who forces another to commit a criminal offence can be held to have caused the crime. The cases in the first section of this article go further and recognize that influence, authority or control will be enough. The cases in the second section recognize this *a fortiori.*

More debatable is causation by trickery. The cases in the first section appear to rule this out as sufficient for causation, though once again there is no problem in holding trickery to be enough under the line of cases in the second section. Most of those cases have been criticized in this article as laying down too wide a test and so it would be inconsistent to rely on them as authority at this point. But *U.S. v. Kenofskey*[34] has so far been left in peace and can now be pressed into service. This is the case in which A, an insurance agent, got B, his supervisor, to post off his fraudulent claim. A did not force B to post the claim nor was he in a position of control, though it could be argued that the supervisor may have been controlled by office procedure. He did not counsel or advise B to commit an offence yet he clearly went much further than assisting B to do so. Quite simply he tricked B into committing the acts prohibited. That would have been enough to dispose of the case. The observation that 'cause' is a word of very broad import, which has exerted an undue influence on later American cases, was simply *obiter.* The result is that the actual decision in *U.S. v. Kenofskey* provides the support of the Supreme Court of the United States for the via media suggested in this article.

Physical performance or force: In some cases the only action may be that of A. If A by his own act makes B commit the *actus reus* of an offence, it can be said that A has caused the offence. Thus in cases like *Ex parte Coorey*[35] where B's servant A, through his own act causes B to commit the *actus reus* without involving any act on the part of B at all, causation is readily established.

Causation is also established where A uses B as an inanimate object. Thus a person who carries a baby into a country causes the baby to enter that country.[36]

or semi-innocent agents: Hawkins, 2 *Pleas of the Crown* Ch. 29, s. 7 (absent wife who 'causes' B to kill her husband liable for murder, not petty treason); Hale 1 *Pleas of the Crown* 437-8; *R. v. Richards* [1974] Q.B. 776; *R. v. Hartley* [1978] 2 N.Z.L.R. 199, 203. *Cf. R. v. Harriet Wilson* (1856) Dears. and Bell 127; 169 E.R. 945 where the rule against liability for semi-innocent agents was mentioned in argument but apparently forgotten when judgment was delivered.

[34] (1917) 243 U.S. 440; 61 L. Ed. 836. *R. v. Cogan* [1976] Q.B. 217 could also be regarded as causation by trickery.

[35] (1944) 45 S.R. (N.S.W.) 287. See also *U.S. v. Smith* (1978) 584 F. 2d 731.

[36] *Cf. R. v. Rasool* [1924] A.D. 44 discussed *supra* nn. 53-7.

Causation and mens rea

It is now well established that even in crimes of strict liability an accomplice cannot be convicted without proof of *mens rea.* Does the recognition of primary liability based on causation mean that the requirement of *mens rea* will be undermined? The answer is that it is open to the courts to build a *mens rea* requirement into causation in this context if they wish to but they are not forced to do so by the very nature of the concept of causing another to act. In other words, this head of liability can, as far as *mens rea* is concerned, be kept within the same bounds as accessorial liability, so that there need be no concern that the courts will be forced to extend strict liability to a new class of morally innocent defendants. But the courts can do so if they wish.

There is some conflict in the authorities. A useful starting point is *O'Sullivan v. Truth and Sportsman Ltd*,[37] the case which holds that mere supply of newspapers to retailers does not amount to causing the retailers to sell them. Having stated that 'cause' involved control or influence the High Court of Australia held that the person causing 'must moreover contemplate or desire that the prohibited act will ensue'.[38] This phrase is open to several interpretations. If it means that in the nature of things a person cannot cause another to commit an offence unless he or she contemplates or desires that the law will be broken, the statement is untenable.[39] It could mean that the courts will as a matter of law impose that requirement as one of *mens rea.* It may however simply require that A contemplate or desire the particular act to be done whether or not he is aware of circumstances which make the act illegal.

Suppose for example that A forces B at gunpoint to sell a copy of a newspaper to C, B's sworn enemy. It could hardly be denied that A caused the publication of the newspaper. If the publication of such a newspaper is an offence of strict liability, A would still be able to plead lack of *mens rea* if the second interpretation of the High Court's judgment is adopted but would not be able to do so on the third interpretation.

There is support for the third interpretation in *Lenzi v. Miller.*[40] There it was held that where A, a trailer owner, caused B to drive his trailer without insurance, A was liable even if he did not know that the trailer was uninsured. It has been argued above that the case may give too wide a meaning to causation[41] but on the assumption that A did instruct rather than permit B to drive, it represents a perfectly tenable application of the strict liability principle.

[37] (1957) 96 C.L.R. 220. Discussed *supra* nn. 98-1.
[38] *Ibid.* 228.
[39] See *infra* nn. 48-50.
[40] [1965] S.A.S.R. 1.
[41] See *supra* nn. 32-36.

Less defensible is the decision of the Divisional Court in *Sopp v. Long*.[42] A was the licensee of a number of railway refreshment rooms. B, a barmaid in one of the rooms, served whisky in short measure to V. A had delegated supervision of the refreshment rooms to supervisors and had given instructions requiring strict compliance with the licensing laws. A was charged with causing a short measure to be delivered to V. The Magistrates' Court convicted A. His appeal to Quarter Sessions was allowed on the ground that A could not 'cause' a short measure to be delivered unless he caused or counselled the lesser quantity to be delivered. The Divisional Court restored the conviction, holding that it was A who, through his servant, had sold the short measure and caused it to be delivered. *Lovelace v. D.P.P.*[43] was distinguished on the ground that it was not a case involving a master and servant relationship.

Sopp v. Long was doubted and distinguished in *Ross Hillman Ltd v. Bond*.[44] A, a limited company, warned its employees not to overload its lorries. B did so without A's knowledge. A was charged with causing the unlawful user of the vehicle. The Divisional Court quashed A's conviction and held that 'causes' required knowledge. The Court held that *Sopp v. Long* could be justified only as turning on the special position of a licensee. Unless limited in that way it was irreconcilable with *Lovelace v. D.P.P.*, which was to be preferred.[45]

Finally an earlier English case which appears to require *mens rea* for causing must be examined. In *Callow v. Tillstone*[46] A, a veterinary surgeon, negligently examined a carcase owned by X and certified that it was in good condition. Relying on this certificate, B, a butcher, bought the carcase and exposed it for sale. A was charged with abetting the exposure of unsound meat for sale. The justices, finding that A was negligent and that his negligence caused the unlawful exposure, convicted him. The Divisional Court held that negligence was not sufficient and allowed A's appeal.

The case is not directly in point on the question of the *mens rea* required for 'causing' since A was charged with abetting. But the Divisional Court clearly rejected the view of the justices that A was liable on the ground that he negligently caused the exposure for sale.

It is submitted that it was because A had not 'caused' the exposure which prevented liability from arising via causation, rather than that the 'causing' was merely negligent. The Divisional Court relied on *Benford v. Sims*[47] which itself turned on the meaning of 'cause' rather than the *mens rea* required for causing. Thus while *Callow v. Tillstone* is authority for

[42] [1970] 1 Q.B. 518.
[43] *Supra* n. 2.
[44] [1974] Q.B. 435.
[45] *Ibid.* 447.
[46] (1900) 83 L.T. 411.

the requirement of *mens rea* in aiding and abetting it is of little weight on the question of the *mens rea* required for causing. It might have been different if A had forced B to expose the meat for sale. He would then have caused the exposure and the question of *mens rea* would have arisen directly on the causation head of liability.

The relationship between causation and knowledge is a little complex. Clearly, a person can cause harm without knowing it. In *Alphacell v. Woodward*,[48] D was held strictly liable for causing river pollution. But where the defendant is to be held liable via causation for the act of another the courts have required some form of pressure rather than the mere provision of opportunity, assistance or permission. A will not normally be in a position to apply pressure unless he knows something about the relevant conduct. That is why the decision in *Sopp v. Long* is contrary to principle. An employer may be in a position to coerce his employees to break the law but he does not do so merely by providing them, especially innocently, with an opportunity to do so.

This does not mean however that full *mens rea* must in the nature of things be proved for liability based on causation. A may know enough facts to force B to do an act without knowing all the circumstances which make the act unlawful. So if A orders his employee B to drive a particular vehicle and its load on a road, A may be held to have caused an overloaded vehicle to be driven, even if A is unaware that the vehicle is overloaded. It is then a matter of policy whether, if the crime is one of strict liability, such liability should apply to A, the employer, as well as to B, the driver.

If it is thought that liability for causation must be kept within narrow limits, the law can insist on full *mens rea* in every case on analogy with the rules relating to aiding and abetting. The 1951 Amendment to section 18(b) of the U.S. Criminal Code has sought to provide this limitation by limiting liability to 'wilful' causation.[49] There is no difficulty in reaching a similar position at common law.

On the other hand there may be cases where justice demands that the causer rather than the direct actor should be held liable. In *Lenzi v. Miller*,[50] Chamberlain J. gives the example of the owner of a fleet of trucks who instructs an employee to drive one which he has forgotten to insure. The learned judge intimates that it would be unjust if the driver were held strictly liable and the owner acquitted, a view with which few would disagree. Probably the best solution is to decide each case on the construction of the particular statute, bearing in mind that strict liability is

[47] [1898] 2 Q.B. 641.
[48] [1972] A.C. 824.
[49] But see *U.S. v. Scandifia* (1968) 390 F. 2d 244.
[50] [1965] S.A.S.R. 1, 3.

prima facie objectionable and that strong justification must be found for imposing it at all. Once that justification has been found however there seems no reason why strict liability should not be imposed on the real causer of the harm.

CONCLUSION

This article has not set out to support or challenge the rule that an accessory's liability is dependent on that of the principal.[51] Nor does it seek directly to examine the scope of the techniques of innocent agency and acting in concert, though these are touched on briefly at various points. Reversal of the accessorial rule would render much of the learning on innocent agency, concert and indeed causation redundant. But there is enough thoughtful authority in favour of the rule to raise apprehensions that its reversal would extend the law too far.

Any solution falling short of holding that an accessory may be liable for the *actus reus* committed by a non-liable principal is bound to allow some rogues to escape the embrace of the law. This may be an acceptable price to pay where the accessory is truly just that — a minor participant in the enterprise. But when in reality the so-called accessory is so central a figure that he can be held to have caused the prohibited act or event, he should no longer be treated as an accessory with liability dependent on that of the immediate actor but as the principal offender in his own right.

[51] See n. 3 for a brief outline of the authorities.