LIABILITY FOR ASSISTING TORTS

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The boundaries of accessory liability in torts are ill defined in Australian law. Indeed, they have not been the subject of much analysis. Outside of the 'procurement' category, it remains unsettled whether liability is restricted to those engaged in a 'common design' with the primary wrongdoer, or whether liability extends to those who knowingly assist in the commission of the primary wrong. After setting out the analytical framework in Part I, this article contends in Part II that the latter is the better position. This contention is supported by an examination of the relevant authorities and academic opinion, a comparison with accessory liability in other areas of law, and an analysis of the influence of intellectual property cases. Part III suggests a framework for considering whether a defendant is liable as an accessory for knowingly assisting in the commission of a tort.

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I Introduction

Accessory liability has been described as 'one of the last great unexplored areas of private law'.[1] This observation is particularly apt in the law of torts, where accessory liability has for the most part received haphazard attention in an eclectic range of cases, and has only recently been subjected to sustained critical analysis.[2] As Philip Sales puts it, the modern position 'is not the product of the accumulated wisdom of common law judges, lawyers and commentators consistently focused to produce analytical coherence'.[3] Nowhere is that more true than in Australian law, where the question of whether a defendant can be liable as a joint tortfeasor for assisting a primary tortfeasor remains unsettled. The aim of this study is to show that such liability should exist, and to set out an appropriate test to ensure that it operates within legitimate bounds. I begin by setting out the analytical framework within which the question arises. Then, after laying out the historical development and the current state of the authorities, I justify why assistance liability should be recognised in the law of torts. Finally, I set out the test that courts should apply when considering the liability of an accessory for assisting in the commission of a tort.[4]

[1] Joachim Dietrich and Pauline Ridge, *Accessories in Private Law* (Cambridge University Press, 2015) xxi. See also Paul Finn, 'Foreword' in Joachim Dietrich and Pauline Ridge, *Accessories in Private Law* (Cambridge University Press, 2015) xvii, xvii.

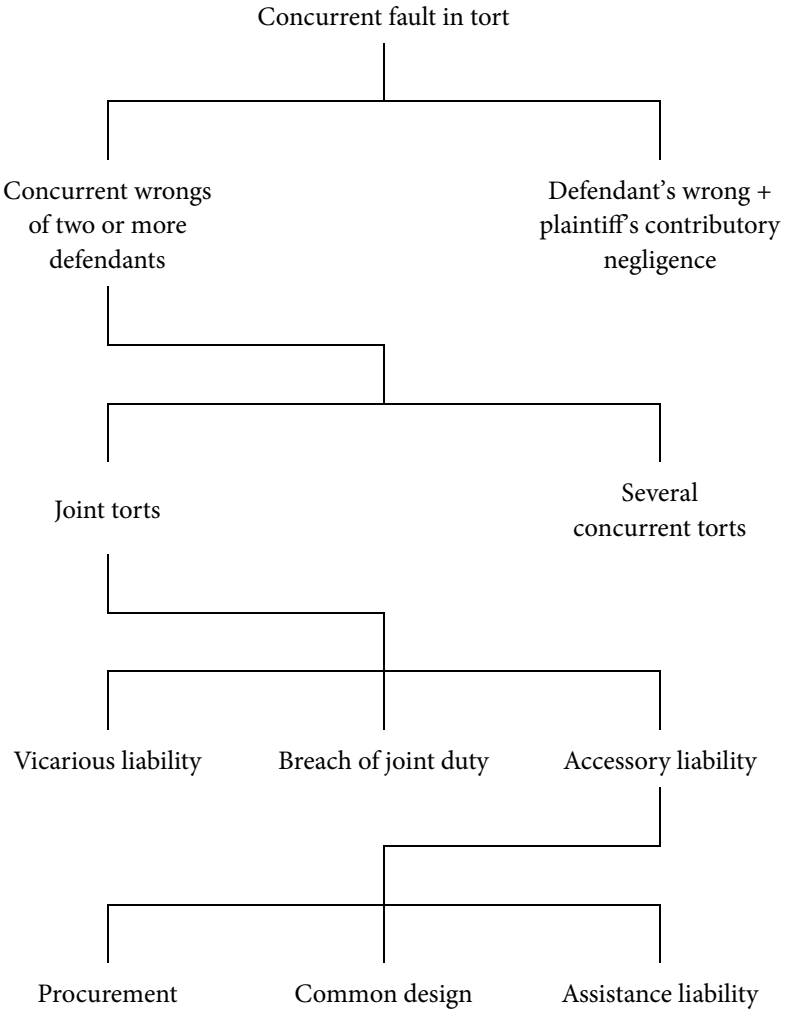
[2] See, eg, Hazel Carty, 'Joint Tortfeasance and Assistance Liability' (1999) 19 *Legal Studies* 489; Joachim Dietrich, 'Accessorial Liability in the Law of Torts' (2011) 31 *Legal Studies* 231; Paul S Davies, 'Accessory Liability for Assisting Torts' (2011) 70 *Cambridge Law Journal* 353; Pey Woan Lee, 'Accessory Liability in Tort and Equity' (2015) 27 *Singapore Academy of Law Journal* 853; Paul S Davies, *Accessory Liability* (Hart Publishing, 2015); Dietrich and Ridge (n 1).

[3] Philip Sales, 'Foreword' in Paul S Davies, *Accessory Liability* (Hart Publishing, 2015) v, v.

[4] I will not address Robert Stevens's rights-based existential attack on accessory liability in torts; I embrace what commentators have said in refuting that analysis: see, eg, Paul S Davies, 'Aid, Abet, Counsel or Procure?' in Stephen GA Pitel, Jason W Neyers and Erika Chamberlain (eds), *Tort Law: Challenging Orthodoxy* (Hart Publishing, 2013) 413, 426–7; Dietrich and Ridge (n 1) 99–101.

A *Analytical Framework*

There is a multitude of ways in which a person other than the primary tortfeasor may be responsible in tort. A short exercise in locating this study within its broader context is therefore warranted. The relevant distinctions are identified in the following diagram:



This study is concerned only with accessory liability, which lies within the category of joint torts. Of the three heads within accessory liability, 'procurement' and 'common design' liability are well established.[5] Conversely, whether or not 'assistance liability' should be recognised is contentious. Procurement exists where an accessory is the instigator of the tortious conduct, and procures, counsels or induces the primary wrongdoer.[6] A common design will be found if the defendant: 'has assisted the commission of the tort by another person … pursuant to a common design with that person … to do an act which is, or turns out to be, tortious'.[7] For concision, I will refer to the primary wrongdoers in examples as 'PW', the accessories as 'A', and the victims as 'V'. As is clear from the above diagram, 'assistance liability' is used to refer to the type of liability where A has assisted PW, but there is no common design between them. This is synonymous with 'aiding-abetting', the nomenclature used in the American cases.[8] The term 'common design' is used where the Americans would use 'conspiracy'.[9]

It is worth justifying the differentiation between 'common design' cases and those of pure assistance. While they will overlap in many instances, they are conceptually distinct. They demand proof of different facts. For a common design, there must be proof of a tacit or express agreement;[10] for assistance liability, there must be evidence of substantial knowing assistance.[11] For Judges Wald, Bork, and Scalia: '[t]here is a qualitative difference between proving an *agreement to participate* in a tortious line of conduct, and proving *knowing action* that substantially aids tortious conduct'.[12] The failure of courts to clearly differentiate between the two creates confusion as to the proper test to apply. This has led to decisions 'made on an ad hoc basis, offering little

[5] *CBS Songs Ltd v Amstrad Consumer Electronics plc* [1988] AC 1013, 1058 (Lord Templeman); *Thompson v Australian Capital Television Pty Ltd* (1996) 186 CLR 574, 580–1 (Brennan CJ, Dawson and Toohey JJ), 591 (Gaudron J), 600 (Gummow J); *Fish & Fish Ltd v Sea Shepherd UK* [2015] AC 1229, 1238 [19] (Lord Toulson SCJ) ('*Fish & Fish (Supreme Court)*').

[6] HLA Hart and Tony Honoré, *Causation in the Law* (Oxford University Press, 2nd ed, 1985) 378; Dietrich and Ridge (n 1) 115–16.

[7] *Fish & Fish (Supreme Court)* (n 5) 1242–3 [37] (Lord Sumption SCJ).

[8] See, eg, *Halberstam v Welch*, 705 F 2d 472, 477 (DC Cir, 1983).

[9] Ibid.

[10] Ibid; *Brooke v Bool* [1928] 2 KB 578, 585; *Unilever plc v Gillette (UK) Ltd* [1989] RPC 583, 609; *Fish & Fish (Supreme Court)* (n 5) 1249 [59] (Lord Neuberger SCJ).

[11] See Part III.

[12] *Halberstam* (n 8) 478 (emphasis in original).

predictive value'.[13] For example, in *Shah v Gale*,[14] Gale reluctantly yet mistakenly identified Shah's address as that of a man whom PW intended to 'beat up'. Tragically, when Shah answered his front door, he was brutally murdered by PW. In a civil battery and assault claim brought by Shah's relatives, Gale was held liable as an accessory on the basis that 'she agreed to assist by pointing out the address … and, in so doing, expressly or by the clearest implication, became part of the common design'.[15] This conflates assistance and common design. If it were enough to implicitly 'agree to assist', it would be difficult to conceive of a case under the assistance head (with its stringent mental element) where a common design would not also be made out. The significance of this confusion was amplified by the fact that mere assistance was insufficient for liability under English law.[16] On that basis, it should be emphasised that the test proposed in Part III should only be applied to determine whether A is liable under the *assistance* head; the individual tests for procurement and common design should be applied where they are at issue. Clarity in the necessary requirements for liability in this area ensures predictability, and guards against the creeping obfuscation of the legitimate boundaries of liability under each head.

II Assistance Liability Should Be Recognised

A *Historical Foundations and Development*

Glanville Williams's statement that '[t]he law relating to parties to a tort has not been so well worked out as that relating to parties to a crime' remains true today.[17] Yet the origins of accessory liability are identical across the civil–criminal divide.[18] As Sir William Holdsworth observed, this followed from the fact that certain torts were also crimes:

[13] *Central Bank of Denver v First Interstate Bank of Denver*, 511 US 164, 188 (1994), quoting *Pinter v Dahl*, 486 US 622, 652 (1988).

[14] [2005] EWHC 1087 (QB).

[15] Ibid [42].

[16] Ibid [40], citing *Credit Lyonnais Bank Nederland NV (Now Generale Bank Nederland NV) v Export Credit Guarantee Department* [1998] 1 Lloyd's Rep 19, 35 ('*Credit Lyonnais*').

[17] Glanville L Williams, *Joint Torts and Contributory Negligence* (Stevens & Sons, 1951) 11. See also W Page Keeton et al (eds), *Prosser and Keeton on the Law of Torts* (West Publishing, 5th ed, 1984) 346.

[18] See *Barker v Braham* (1773) 2 Bl W 866, 868; 96 ER 510, 511; *De Crespigny v Wellesley* (1829) 5 Bing 392, 404; 130 ER 1112, 1117; DJ Ibbetson, *A Historical Introduction to the Law of*

> [T]respasses had … their civil as well as their criminal side; and, seeing that all concerned in a trespass were equally liable to pay damages if sued by the injured party in a civil action, it was only logical to make them equally liable to punishment if prosecuted by the crown.[19]

According to Pollock and Maitland, it could be said at the start of the 14th century that '[t]he law of homicide is quite wide enough to comprise … those who have "procured, counselled, commanded or abetted" the felony'.[20] In Anglo-Saxon law it was pithily said that guilt could attach to 'the slayer by rede as well as the slayer by dede'.[21] Sir Edward Coke said that 'accessories before the fact are divided into three branches: … commandement, force, [and] aide'.[22] In *Petrie v Lamont*, a civil trespass action, Tindal CJ instructed the jury that 'All persons in trespass who aid or counsel, direct, or join, are joint trespassers'.[23] That formulation, which matched the criminal position, was effectively codified into the criminal law in s 8 of the *Accessories and Abettors Act 1861* (UK), which provided that all those who 'aid, abet, counsel, or procure' will be liable as accessories in criminal law. That remains the criminal position today.[24]

While accessory liability for torts and criminal law has diverged at least in England since *Petrie v Lamont*, it is unclear precisely when and why that divergence occurred. Two cases from 1924 illustrate this uncertainty. The *Performing Right Society* case concerned the liability of a concert hall operator for copyright infringements perpetrated by a band playing in the defendant's hall. McCardie J, citing *Petrie v Lamont*, held that the defendant would be liable if he had 'actively directed, counselled or aided' the infringement.[25]

Obligations (Oxford University Press, 1999) 180; Davies, 'Accessory Liability for Assisting Torts' (n 2) 354.

19 WS Holdsworth, *A History of English Law* (Methuen & Co, 3rd ed, 1923) vol 3, 308. See also *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118, 149 (Windeyer J): 'the roots of tort and crime in the law of England are greatly intermingled'.

20 Sir Frederick Pollock and Frederic William Maitland, *The History of English Law before the Time of Edward I* (Cambridge University Press, 2nd ed, 1968) vol 2, 509.

21 Ibid.

22 Sir Edward Coke, *The Second Part of the Institutes of the Lawes of England* (Garland Publishing, 1979) 182.

23 *Petrie v Lamont* (1841) Car & M 93, 96; 174 ER 424, 426.

24 *Giorgianni v The Queen* (1985) 156 CLR 473, 482 (Gibbs CJ), 492–3 (Mason J); *R v Nolan* (2012) 83 NSWLR 534, 542 [43].

25 *Performing Right Society Ltd v Mitchell and Booker (Palais de Danse) Ltd* [1924] 1 KB 762, 765. See also *Pratt v British Medical Association* [1919] 1 KB 244, 254, where McCardie J quoted the 'aid' formulation from *Petrie* with approval.

Meanwhile, in *The Koursk* — which has come to be considered the leading case — the English Court of Appeal examined the position.[26] To begin with, it is worth noting that any comments about assistance liability were not necessary for the decision. V's claim stemmed from an accidental maritime collision between A and PW, which caused PW's vessel to damage and sink that of V. Thus, there was no suggestion that A 'aided' PW's wrong. Bankes LJ cited no cases on accessory liability other than *Petrie v Lamont*, seemingly without doubting its correctness.[27] He went on to note that Clerk and Lindsell state that 'there must be concerted actions towards a common end'.[28] But he did not intend for that to be the exhaustive test, as in his next sentence he said: 'I am not sure that the rule is here stated sufficiently widely'.[29] Scrutton LJ's judgment is often cited as excluding assistance liability, but that drastic conclusion does not follow from a fair reading of his words. In rejecting a formulation proffered by counsel, he said that Clerk and Lindsell's formulation 'is much nearer the correct view'.[30] Like Bankes LJ, he cited the statement that 'there must be concerted action to a common end';[31] he also quoted Clerk and Lindsell for the proposition that there must be a 'common design',[32] apparently conceiving of these as two sides of the same coin. He went on to find that because the wrongful acts of A and PW were separate and unrelated acts of negligent navigation, those acts were too separate to constitute a joint tort.[33] On any view of the correct test, that is plainly correct. Importantly, Sargant LJ quoted Clerk and Lindsell's approval of *Petrie v Lamont* standing for the proposition that '[a]ll persons in trespass who aid or counsel, direct, or join, are joint trespassers'.[34] It is unsurprising that the other judges ignored this aspect of Clerk and Lindsell's analysis, as assistance liability was manifestly irrelevant on the facts of the case.

The decisive rejection of assistance liability in English law did not occur until 1988. In *CBS Songs*, the defendants sold twin-deck tape-to-tape recording machines that enabled purchasers to infringe the plaintiffs'

[26] [1924] P 140.

[27] Ibid 151–2.

[28] Ibid 152, citing JF Clerk and WHB Lindsell, *The Law of Torts* (Sweet & Maxwell, 7th ed, 1921) 60.

[29] *The Koursk* (n 26) 152.

[30] Ibid 156.

[31] *The Koursk* (n 26) 156, citing Clerk and Lindsell (n 28) 60.

[32] *The Koursk* (n 26) 156, quoting Clerk and Lindsell (n 28) 59.

[33] *The Koursk* (n 26) 158, quoting Clerk and Lindsell (n 28) 59.

[34] *The Koursk* (n 26) 159.

copyright by reproducing cassette recordings.[35] Lord Templeman, with whom the other Law Lords agreed, quoted only Scrutton LJ from *The Koursk*, citing it as authority for the proposition that accessory liability in torts requires a common design.[36] The designs of A and PW in *CBS Songs* were different (A to sell machines, PW to obtain free music), so A was not liable.[37] Regrettably, no reference was made to Sargant LJ's express endorsement of assistance liability, nor to the ambiguity in the judgments of Bankes and Scrutton LJJ. While the House was obviously not bound by *The Koursk*, that case was followed remarkably uncritically. It was not questioned or analysed beyond some short, selective quotations from one of the three judges, and an extremely broad view was taken as to what it stood for.[38] Since *CBS Songs*, the common design requirement has been firmly entrenched in English law.[39] This is a good example of a practice criticised by Professor Gummow, being 'the tendency to take passages in older decisions and apply them as if they were statutory enactments, without regard to the setting in which there arose the disputes settled by those decisions'.[40] Put simply, *The Koursk* was a manifestly inappropriate vehicle for deciding whether or not assistance liability should be available, and its profound influence on difficult questions of accessory liability in modern cases is unfortunate.

B *Current State of the Authorities*

The English rejection of assistance liability was reaffirmed by a unanimous Supreme Court in 2015.[41] In contradistinction to that settled position, there have been remarkably few Australian cases concerning accessory liability in torts. The High Court has only considered it in any detail on one occasion, being in *Thompson*.[42] In short, that case relevantly demonstrates no more than

[35] *CBS Songs* (n 5).

[36] Ibid 1056.

[37] Ibid 1057.

[38] See generally KN Llewellyn, *The Bramble Bush: Some Lectures on Law and Its Study* (Columbia University, 1930) 63–6, on the 'strict' versus the 'loose' view of precedent.

[39] See, eg, *Credit Lyonnais* (n 16) 46 (Hobhouse LJ); *Sabaf SpA v Meneghetti SpA* [2003] RPC 264, 284 [59]; *Fish & Fish (Supreme Court)* (n 5) 1239 [21]–[22] (Lord Toulson SCJ), 1248 [55] (Lord Neuberger P).

[40] William Gummow, 'Knowing Assistance' (2013) 87 *Australian Law Journal* 311, 311.

[41] See *Fish & Fish (Supreme Court)* (n 5) 1242–3 [37]–[38] (Lord Sumption SCJ).

[42] *Thompson* (n 5).

that *The Koursk* represents Australian law.[43] The joint judgment set out the 'concerted action' quotations from *The Koursk*, but did not comment upon Sargant LJ's statement that those who 'aid' tortious conduct may be liable.[44] Gummow J, with whom Gaudron J agreed,[45] did quote that formulation, with neither disapproval nor express approval.[46] Thus, like *The Koursk*, the judgments in *Thompson* do not speak with one voice, and do not answer the question of whether assistance liability is available in torts.

Decisions by courts lower in the Australian hierarchy shed little light on the issue. Lamentably, many such decisions are characterised by an assumption that the Australian position must be the same as that in England. Numerous cases have cited Sargant LJ's dictum that assistance liability is available with approval,[47] or suggested its availability without referring to Sargant LJ.[48] But cases can also be found saying that a common design must be established.[49] Dowsett J has twice considered the issue at first instance in the Federal Court. *Louis Vuitton Malletier v Toea* involved a claim that a market landlord and manager were liable for trade mark infringements perpetrated by stall operators.[50] Dowsett J found that the defendants were not liable as accessories because the requirement that there be a common design, with its participants acting 'in concert', had not been established.[51] He appeared to consider that *Thompson* and *The Koursk* demanded that conclusion.[52] But he modified this view two years later in *Temple v Powell*, where, with respect, he correctly recognised that neither *Thompson* nor *The*

[43] Ibid 580–1 (Brennan CJ, Dawson and Toohey JJ), 591 (Gaudron J), 600 (Gummow J).

[44] Ibid 580–1 (Brennan CJ, Dawson and Toohey JJ).

[45] Ibid 591.

[46] Ibid 600.

[47] See, eg, *Myer Stores Ltd v Soo* [1991] 2 VR 597, 630 (McDonald J); *TS & B Retail Systems Pty Ltd v 3Fold Resources Pty Ltd [No 3]* (2007) 158 FCR 444, 489 [178] (Finkelstein J), approved in *AMI Australia Holdings Pty Ltd v Bade Medical Institute (Australia) Pty Ltd [No 2]* (2009) 262 ALR 458, 483 [98] (Flick J); *Krueger Transport Equipment Pty Ltd v Glen Cameron Storage and Distribution Pty Ltd [No 2]* (2008) 79 IPR 81, 88–9 [22] (Gordon J); *McFadzean v Construction, Forestry, Mining and Energy Union* [2004] VSC 289, [137] (Ashley J); *Hardie Finance Corporation Pty Ltd v Ahern [No 3]* [2010] WASC 403, [177] (Pritchard J).

[48] *Nyoni v Shire of Kellerberrin [No 6]* [2015] FCA 1294, [247] (Siopis J).

[49] See, eg, *Adsteam Building Industries Pty Ltd v Queensland Cement and Lime Co Ltd [No 4]* [1985] 1 Qd R 127, 132 (McPherson J); *Commisso v United Telecasters Sydney Pty Ltd* [1999] NSWSC 51, [63]–[64] (Levine J); *Caterpillar Inc v John Deere Ltd* (1999) 48 IPR 1, 9–11 [22]–[25].

[50] *Louis Vuitton Malletier SA v Toea Pty Ltd* (2006) 156 FCR 158.

[51] Ibid 192–3 [152], 197–8 [171]–[172].

[52] Ibid 196 [164].

Koursk ruled out assistance liability, and given that the case at hand did not demand an answer to that question, it would have been inappropriate to suggest one.[53] In any event, the above examples are predominantly mere dicta, very little of which could be described as seriously considered. Accordingly, the position is unsettled.

While this study cannot provide an exhaustive treatment of the North American cases, considered judicial and academic authority supports assistance liability in North American jurisdictions. The *Restatement (Second) of Torts* says that A will be liable if he or she 'knows that [PW's] conduct constitutes a breach of duty and gives substantial assistance or encouragement to [PW] so to conduct himself'.[54] This formulation was applied in the leading appellate case of *Halberstam v Welch*,[55] and has been cited with approval by Kennedy J in the Supreme Court.[56] In Canada, assistance liability has been applied and never rejected.[57] Unlike Australia,[58] the United States has more than 'one common law',[59] and there is authority in certain jurisdictions against assistance liability.[60] But such views are in the minority, and there is much cogent support for assistance liability amongst American courts and jurists.[61] This support should not be ignored. Sir Owen Dixon told the American Bar Association as long ago as 1942 that Australia stands 'midway between the two great common law systems, that of England and that of America. We study them both; we feel that, in some measure, we understand them both, and we seek guidance from them both.'[62] Professor Gummow, writing on accessory liability in equity, recently criticised 'the persistent failure in the study in Australia … of many fields of law to look to the

[53] (2008) 169 FCR 169, 182–3 [41]–[44].

[54] American Law Institute, *Restatement (Second) of Torts* (1979) § 876(b).

[55] *Halberstam* (n 8) 477.

[56] *Central Bank of Denver* (n 13) 181.

[57] See, eg, *Johnston v Burton* (1971) 16 DLR (3rd) 660 (Manitoba Queen's Bench).

[58] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 563; *Kirk v Industrial Court New South Wales* (2010) 239 CLR 531, 581 [99].

[59] *Black & White Taxi Co v Brown & Yellow Taxi Co*, 276 US 518, 533–4 (1928); *Erie Railroad Co v Tompkins*, 304 US 64, 78–9 (1938).

[60] See, eg, *Meadow Ltd Partnership v Heritage Savings and Loan Association*, 639 F Supp 643, 653 (Williams J) (ED Va, 1986); *Sloan v Fauque*, 784 P 2d 895, 896 (Hunt J) (Mont, 1989); *Federal Deposit Insurance Corporation v S Prawer & Co*, 829 F Supp 453, 457 (Carter CJ) (D Me, 1993).

[61] See, eg, Keeton et al (n 17) 323.

[62] Sir Owen Dixon, 'Address by the Hon Sir Owen Dixon, KCMG, at the Annual Dinner of the American Bar Association' (1942) 16 *Australian Law Journal* 192, 194.

development of those fields in the United States'.[63] These views resonate in the present context. No Australian case on accessory liability in torts has engaged with the American position. Sir Anthony Mason recognised that English jurisprudence should not necessarily hold a privileged position over that of other common law jurisdictions: 'The value of English judgments, like Canadian, New Zealand and for that matter United States judgments, depends on the persuasive force of their reasoning.'[64] That denunciation of over-reliance upon, and especially obedience to, English cases is supported by High Court authority and academic opinion.[65] It informs the approach in this study.

The weight of academic opinion favours allowing assistance liability. Glanville Williams considered that there was little justification for the difference between criminal and torts law on this point.[66] Professor Atiyah made a similar argument:

> Just as in the criminal law relating to misdemeanours any person who 'aids or abets' the commission of an offence is guilty as a secondary party, so it is clear that in the law of torts any one who assists the commission of a tort is liable as a secondary party.[67]

Professor Fleming also advocated assistance liability in torts:

> There is cogent support both in principle and ancient authority for the suggestion that the requisite degree of participation may well correspond with the [position in criminal law]. This would include, besides the actual perpetrator, those who 'aid and abet'.[68]

[63] Gummow (n 40) 311.

[64] Sir Anthony Mason, 'Future Directions in Australian Law' (1987) 13 *Monash University Law Review* 149, 154, quoted in *Paciocco v Australia and New Zealand Banking Group Ltd* (2016) 333 ALR 569, 574 [8] (French CJ).

[65] *Parker v The Queen* (1963) 111 CLR 610, 632–3 (Dixon CJ); *Skelton v Collins* (1966) 115 CLR 94, 134–5 (Windeyer J); *Cook v Cook* (1986) 162 CLR 376, 390 (Mason, Wilson, Deane and Dawson JJ); *D'Orta-Ekenaike v Victoria Legal Aid* (2005) 223 CLR 1, 24 [59] (Gleeson CJ, Gummow, Hayne and Heydon JJ); Paul Finn, 'Common Law Divergences' (2013) 37 *Melbourne University Law Review* 509.

[66] Williams, *Joint Torts and Contributory Negligence* (n 17) 11–12.

[67] PS Atiyah, *Vicarious Liability in the Law of Torts* (Butterworths, 1967) 295.

[68] Carolyn Sappideen and Prue Vines (eds), *Fleming's The Law of Torts* (Lawbook, 10th ed, 2011) 302. Fleming advocated the same in previous editions: see, eg, John G Fleming, *The Law of Torts* (LBC Information Services, 9th ed, 1998) 289.

While each of these comments was made within extensive treatises, which inevitably tend to lack the rigour of scholarly journal articles,[69] commentators have reached the same conclusion in extensive analyses of the question.[70]

C *The Anomaly of the Position*

The exclusion of assistance liability in torts makes it anomalously narrow when compared to accessory liability in criminal law, equity, and contract law. Assistance liability is also available in relation to various civil statutory causes of action.[71] While I do not go as far as Professor Birks, who contended that '[w]e need one law on the civil liability of accessories',[72] it is worth considering whether these differences are justifiable, and whether anything can be gained from attention to those other areas. In equity, 'the second limb of *Barnes v Addy*'[73] imposes liability for 'knowing assistance' in breaches of trust and fiduciary duty.[74] Beatson LJ justified this comparatively strict standard of liability by reference to 'the traditional role of equity in protecting trusts and the beneficiaries of other fiduciary relationships'.[75] This point has some force given that trustees and fiduciaries have always been held to high standards of behaviour.[76] But as Davies points out, the general proposition that accessory liability in equity protects more important rights than in torts cannot be accepted. For example, the right to bodily integrity protected by trespass involves one of the most important rights there are.[77] That observation applies

[69] See generally *Union Shipping New Zealand Ltd v Morgan* (2002) 54 NSWLR 690, 727 [96] (Heydon JA).

[70] See, eg, Dietrich, 'Accessorial Liability in the Law of Torts' (n 2); Davies, *Accessory Liability* (n 2) 177–221. But see Carty (n 2) 503–4, endorsing the rejection of assistance liability.

[71] See, eg, *Corporations Act 2001* (Cth) s 79; *Personal Property Securities Act 2009* (Cth) s 224(1); *Competition and Consumer Act 2010* (Cth) s 75B(1).

[72] PBH Birks, 'Civil Wrongs: A New World' in *Butterworth Lectures 1990–91* (Butterworths, 1992) 55, 101.

[73] JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 8th ed, 2016) 261.

[74] *Barnes v Addy* (1874) LR 9 Ch App 244, 251–2 (Lord Selborne LC); *Consul Development Pty Ltd v DPC Estates Pty Ltd* (1975) 132 CLR 373, 396 (Gibbs J), 409 (Stephen J); *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 140–1 [111]–[112] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

[75] *Fish & Fish Ltd v Sea Shepherd UK* [2013] 1 WLR 3700, 3712 [44] ('*Fish & Fish (Court of Appeal)*').

[76] See *Hasler v Singtel Optus Pty Ltd* (2014) 87 NSWLR 609, 626 [75] (Leeming JA); Carty (n 2) 511–12.

[77] Davies, 'Aid, Abet, Counsel or Procure?' (n 4) 425.

equally when considering accessory liability in contract, where aside from the prohibition on inducing breach of contract recognised in *Lumley v Gye*,[78] courts have recognised liability for assisting breaches of contract.[79] This demonstrates that assistance liability is unexceptional in private law.

The criminal law's allowance of assistance liability is most striking when compared to its rejection in torts. *Winfield and Jolowicz* illuminates the position:

> D1 is attacking C. D2, a malicious bystander, throws a knife to D1, with which D1 stabs C. It seems extraordinary to suggest that D2 is not civilly liable for C's injury. Yet it is difficult to say that there is any procurement, common design or conspiracy.[80]

One would expect that given the more serious consequence of a finding of criminal guilt (which would be found in the above example), accessory liability would be narrower in criminal law than in torts, not broader.[81] This is especially so in relation to crimes that are also torts.[82] As noted above, three of the most eminent torts jurists of the twentieth century — Williams, Atiyah and Fleming — each considered that there is little justification for the broader imposition of accessory liability in criminal law compared to torts.[83]

However, according to Lord Templeman, 'it is a mistake to compare crime and tort' in this context.[84] It is undoubtedly a fraught exercise if done uncritically and without caution. As Graham Virgo points out, '[t]he objectives of the criminal law and the law of tort are fundamentally different'.[85] Broadly speaking, the law of torts is geared towards protecting

[78] (1853) 2 E & B 216; 118 ER 749.

[79] Davies, 'Accessory Liability for Assisting Torts' (n 2) 369, citing *British Motor Trade Association v Salvadori* [1949] Ch 556, 565 (Roxburgh J); *Rickless v United Artists Corporation* [1988] QB 40, 58–9 (Bingham LJ).

[80] WVH Rogers, *Winfield and Jolowicz on Tort* (Sweet & Maxwell, 18th ed, 2010) 993 [21-3] n 30.

[81] See Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (Oxford University Press, 1996) 902.

[82] Paul S Davies, 'Complicity' in Matthew Dyson (ed), *Unravelling Tort and Crime* (Cambridge University Press, 2014) 275.

[83] Williams, *Joint Torts and Contributory Negligence* (n 17) 11–12; Atiyah (n 67) 295; Fleming (n 68) 289.

[84] *CBS Songs* (n 5) 1059.

[85] Graham Virgo, '"We Do This in the Criminal Law and That in the Law of Tort": A New Fusion Debate' in Stephen GA Pitel, Jason W Neyers and Erika Chamberlain (eds), *Tort Law: Challenging Orthodoxy* (Hart Publishing, 2013) 95, 95.

plaintiffs' rights and interests from unreasonable interference.[86] Conversely, '[c]riminal law is public, punitive law, which exists to maintain security through the control of certain forms of behaviour'.[87] The House of Lords relied on this difference in objectives in separating the doctrine of self-defence in criminal law from the doctrine in torts, with the latter being harder for a defendant to satisfy.[88] Lord Scott said that the defendant's 'plea for consistency between the criminal law and the civil law lacks cogency for the ends to be served by the two systems are very different'.[89] It is submitted that the differences in objective do not justify the divergence which today exists in English law. For one thing, the position is actually the reverse of that endorsed in *Ashley's* case, where the House was content for civil liability to be *more* expansive than the corresponding criminal doctrine. Virgo says that such differences are perfectly natural and defensible, but that there would be 'an intolerable fissure in the law's conceptually seamless web' if the result in *Ashley* were reversed (as it is here) such that conduct punishable under the criminal law escaped censure under the corresponding civil law doctrine.[90]

For Davies, the issue is one of avoiding inconsistency.[91] But is inconsistency really the relevant principle to apply in this context? Inconsistency cannot be seen as an evil in itself; plainly, torts and criminal law are fundamentally inconsistent in innumerable respects. Rather, what the High Court has sought to avoid is *incoherence* in the relationship between criminal law and torts.[92] For example, the incoherence at stake in *Miller v Miller* was a civil plaintiff's entitlement to damages stemming from a joint

[86] William L Prosser, *Handbook of the Law of Torts* (West Publishing, 1941) 8. See Glanville Williams, 'The Aims of the Law of Tort' (1951) 4 *Current Legal Problems* 137 for an in-depth analysis.

[87] Virgo (n 85) 95, citing Glanville Williams, 'The Definition of Crime' (1955) 8 *Current Legal Problems* 107.

[88] *Ashley v Chief Constable of Sussex Police* [2008] 1 AC 962, 973–4 [17]–[18].

[89] Ibid 973 [17].

[90] Virgo (n 85) 103–4, quoting *Hall v Hebert* [1993] 2 SCR 159, 176 (McLachlin J), the latter quoting Ernest J Weinrib, 'Illegality as a Tort Defence' (1976) 26 *University of Toronto Law Journal* 28, 42.

[91] Davies, *Accessory Liability* (n 2) 216, citing: *Hall* (n 90); *Gray v Thames Trains Ltd* [2009] 1 AC 1339.

[92] See *Sullivan v Moody* (2001) 207 CLR 562, 576 [42], 580–1 [53]–[55]; *CAL No 14 Pty Ltd v Motor Accidents Insurance Board* (2009) 239 CLR 390, 406–10 [39]–[42]; *Miller v Miller* (2011) 242 CLR 446, 454 [15]; *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498, 513 [23] (French CJ, Crennan and Kiefel JJ).

illegal enterprise with the defendant.[93] In short, the concern in that case, and the cases cited by Davies, is to avoid the incoherent situation where a civil plaintiff could recover damages for engaging in conduct proscribed by the criminal law. It is perfectly acceptable to do one thing in the criminal law and another in torts; the evil to avoid is incoherence, of which there is none in the current position on accessory liability. But that is not to detract from the utility of the comparison, nor to say that there is no burden to justify the difference in this instance: their common origin and concurrent operation are enough to justify it.[94] Simply put, while incoherence is presumptively determinative against a civil rule, the type of difference that exists in accessory liability merely calls for justification. If no justification exists, the rule is presumptively erroneous.[95]

Few serious attempts to justify the difference had been made until recently. The starting point is Lord Hobhouse's enigmatic statement that '[t]he criminal law for obvious policy reasons goes further than the civil law'.[96] Only recently did Lord Sumption and Beatson LJ provide a judicial articulation of those reasons. The latter invoked the criminal law's deterrent function as a justification.[97] But when applied to this specific problem, that merely restates the basic fact that an aim of criminal law is to prevent criminal acts. That does little to justify the striking and anomalous position on accessory liability. Furthermore, Honoré considers that deterrence is within the aims of the law of torts.[98] Indeed, deterrence has been recognised as particularly relevant in accessory liability in private law. Peter Cane has observed that 'the deterrent theory of tort liability is most likely to be relevant to torts involving liability for calculated conduct'.[99] Knowingly assisting torts falls squarely within that class.

Both Beatson LJ and Lord Sumption, however, made the stronger point that aiding and abetting a crime is itself a crime, whereas liability for assisting

[93] *Miller* (n 92) 482 [101].

[94] See Joachim Dietrich, 'The Liability of Accessories under Statute, in Equity, and in Criminal Law: Some Common Problems and (Perhaps) Common Solutions' (2010) 34 *Melbourne University Law Review* 106, 112.

[95] Virgo (n 85) 117.

[96] *Credit Lyonnais* (n 16) 46.

[97] *Fish & Fish (Court of Appeal)* (n 75) 3712 [44].

[98] Tony Honoré, 'The Morality of Tort Law: Questions and Answers' in David G Owen (ed), *Philosophical Foundations of Tort Law* (Oxford University Press, 1995) 73, 76.

[99] Peter Cane, *Tort Law and Economic Interests* (Clarendon Press, 2nd ed, 1996) 470.

a tort makes A liable with PW as a joint tortfeasor.[100] This means that while a criminal court can sentence an accessory according to his or her individual culpability, an accessory to a tort is jointly and severally liable for the whole of the damage.[101] This justification, while the most compelling of those advanced, should not carry the day. A civil accessory can today seek contribution from PW and other joint tortfeasors, which is calculated according to relative responsibility.[102] Where PW is insolvent or unable to pay his or her share, why should the innocent victim suffer the consequences of that and not A, who knowingly assisted PW's wrong?[103] This is especially so in the light of the strict mental and conduct elements of the proposed formulation of assistance liability: this would not be a case of punishing the peripherally involved or the blameless.

Hazel Carty's argument that assistance liability has been too problematic in criminal law to be an attractive import into torts is unpersuasive.[104] It was also relied upon by Lord Toulson in *Fish & Fish*, who said it was an 'understatement' that 'accessory liability in the criminal law has not been joyous'.[105] Given the even greater insistence on certainty in the criminal law, its use there surely indicates that it would not be unmanageable in torts. Further, the detailed test for assistance liability proposed in this paper is no more inherently complex or vague than the current test requiring a 'common design' and a 'common end'. McCombe J recently recognised that the 'precise ambit of [common design] is … far from clear'.[106] Indeed, as posited in Part I, recognition of an established head of liability for assistance would remove the temptation to stretch the legitimate boundaries of common design, thus increasing clarity and predictability. Accordingly, the better view is that there is no sufficient justification for the anomalous position that exists in English law. It should not be imported into Australian law.

[100] *Fish & Fish (Court of Appeal)* (n 75) 3712 [44] (Beatson LJ); *Fish & Fish (Supreme Court)* (n 5) 1243–4 [38]–[39] (Lord Sumption SCJ).

[101] Sappideen and Vines (n 68) 303.

[102] *Wrongs Act 1958* (Vic) ss 23B–24(2) (and analogous provisions in other jurisdictions).

[103] See Davies, 'Complicity' (n 82) 302.

[104] See Carty (n 2) 503.

[105] *Fish & Fish (Supreme Court)* (n 5) 1239 [20], quoting Tony Weir, *Economic Torts* (Clarendon Press, 1997) 32 n 31.

[106] *Mutua v Foreign and Commonwealth Office* [2012] EWHC 2678 (QB), [91].

D *The Influence of Intellectual Property Cases*

The current practice is to treat accessory liability in general torts law as identical to accessory liability for infringement of intellectual property rights. This approach stems from the proposition that infringement of an intellectual property right is a tort.[107] Jordan CJ explains the reasoning behind that approach: 'as a general rule, the doing of any act which violates a legal right is unlawful. If the right is *in rem* the wrongful violation constitutes a tort.'[108] As Hobhouse LJ affirms, 'the principles applied are drawn from the general law of tort. Infringement of a patent or copyright is a tort.'[109] This intersection between general torts doctrine and intellectual property law was commented upon by Mustill LJ, who described it as 'a bold step, since it applies a common law doctrine to the interpretation of a statute'.[110] The translation of a principle from one area of the law to another undoubtedly requires serious caution. That is especially so when, as is the case here, it involves the unification of a doctrine with ancient roots in the common law and a statute-based regime exclusively aimed at the protection of intellectual property rights.

The consequence of drawing the principles of accessory liability from the general law of torts into intellectual property cases is that those principles have been affected by the cases in which they have been applied. This is unsurprising when one appreciates the observation made by Lord Mansfield regarding the development of legal principle in common law systems:

> General rules are, however, varied by change of circumstances. Cases arise within the letter, yet not within the reason, of the rule; and exceptions are introduced, which, grafted upon the rule, form a system of law.[111]

It is difficult to overstate the significance of the influence of intellectual property cases in the present context; as Lord Sumption noted in *Fish & Fish*, 'the principles [of accessory liability in torts] have been worked out mainly in the context of allegations of accessory liability for the tortious infringement of

[107] *Collins v Northern Territory* (2007) 161 FCR 549, 561 [28] (French J), cited in *Australian Mud Co Pty Ltd v Coretell Pty Ltd [No 4]* [2015] FCA 1372, [284] (McKerracher J).

[108] *Independent Oil Industries Ltd v Shell Co of Australia Ltd* (1937) 37 SR (NSW) 394, 414, quoted with approval in *Ryan v Lum* (1989) 86 ALR 670, 679 (Young J).

[109] *Credit Lyonnais* (n 16) 44. See also *BEST Australia Ltd v Aquagas Marketing Pty Ltd* (1988) 83 ALR 217, 220; *Johnson Matthey (Aust) Ltd v Dascorp Pty Ltd* (2003) 9 VR 171, 202 [104].

[110] *Unilever plc v Gillette (UK) Ltd* [1989] RPC 583, 603.

[111] *Ringsted v Butler* (1783) 3 Dougl 197, 203; 99 ER 610, 613, quoted in *Roxborough v Rothmans of Pall Mall Australia Ltd* (2001) 208 CLR 516, 544 [73] (Gummow J).

intellectual property rights'.[112] In practice, therefore, the relationship described above by Hobhouse LJ is reversed: rather than judges deciding intellectual property cases by applying well-settled rules drawn from the law of torts, judges deciding traditional torts cases today draw their analyses mainly from cases that were solely concerned with the infringement of intellectual property rights. It is submitted that this position should be reconsidered.

In *Fish & Fish*, Lord Sumption defended the unification of intellectual property and torts doctrine for accessory liability: 'nothing in these principles [of accessory liability] … is peculiar to the infringement of intellectual property rights. The cases depend on ordinary principles of the law of tort.'[113] That is undoubtedly correct. But the more important point, which the Court in *Fish & Fish* did not address, is that the policy considerations involved in the two fields are different. As Lord Neuberger, speaking extrajudicially, recently argued, the separation of the principles of the law of torts from the policy considerations which underlie them will normally be fraught with problems.[114] It is of the nature of the common law that its principles are developed to deal with the problems thrown up by contested cases; the issues at stake in those cases are thus bound to affect the principles applied to resolve them.

Dietrich argues that 'intellectual property cases raise *sui generis* policy reasons that support a narrower and more restrictive accessorial liability than is otherwise justified'.[115] For example, courts have long held that selling an unpatented item, knowing that the purchaser intends to use it to infringe a patent, does not give rise to liability on the part of the vendor.[116] Each of the intellectual property cases relied upon by Lord Sumption in *Fish & Fish* concerned the liability of manufacturers or sellers to persons using their products to infringe patents or copyright.[117] In *Walker v Alemite Corp*,

[112] *Fish & Fish (Supreme Court)* (n 5) 1244 [40]. See also *Fish & Fish (Court of Appeal)* (n 75) 3711 [40] (Beatson LJ).

[113] *Fish & Fish (Supreme Court)* (n 5) 1244 [40].

[114] Lord David Neuberger, 'Some Thoughts on Principles Governing the Law of Torts' (2016) 23 *Torts Law Journal* 89.

[115] Dietrich, 'Accessory Liability in the Law of Torts' (n 2) 252. See also Joachim Dietrich, 'Using Tort Law Accessory Liability to Protect Intellectual Property Rights' (2016) 23 *Torts Law Journal* 275, 285 n 51.

[116] See, eg, *McCormick v Gray* (1861) 7 H & N 25; 158 ER 377; *Innes v Short and Beal* (1898) 14 TLR 492; *Dunlop Pneumatic Tyre Co Ltd v David Moseley & Sons Ltd* [1904] 1 Ch 164.

[117] *Fish & Fish (Supreme Court)* (n 5) 1244–5 [40]–[43], citing *Townsend v Haworth* (1879) 48 LJ(NS) Ch 770 (A was not jointly liable with PW to whom he sold chemical substances

Dixon J adhered to that principle and explained the rationale behind it: 'The basis upon which these rules rest is that whatever is not included in the monopoly granted is *publici juris* and may be freely used as of common right.'[118] If this is the basis for the principle upon which these cases are decided, it is difficult to justify its application to typical cases of accessory liability in torts. A further basis for a restricted doctrine of accessory liability in intellectual property cases is the concern that an expansive form of liability would have a chilling effect on innovation. As expressed by Breyer J:

> Inventors and entrepreneurs (in the garage, the dorm room, the corporate lab, or the boardroom) would have to fear (and in many cases endure) costly and extensive trials when they create, produce, or distribute the sort of information technology that can be used for copyright infringement. … The additional risk and uncertainty would mean a consequent additional chill of technological development.[119]

Again, such reasoning cannot apply with anywhere near the same force for traditional torts.

While these difficulties are seldom recognised in the modern cases, some judges have expressed concern at the fusion of intellectual property and torts doctrine. In *Yuille*, which concerned accessory liability for negligence causing bodily injury, Willmer LJ raised a patent infringement case, but did not pursue an analysis, as it was 'about infringement of a patent, and, therefore, may be thought to be rather remote from the kind of circumstances with which [he was] dealing in [that] case'.[120] Beyond the context of accessory liability in torts, a more emphatic note of caution was sounded by Jacobs J in

knowing they would be used to infringe a patent); *Dunlop Pneumatic Tyre* (n 116) (A was not liable for making and selling an article capable of being used as one of the component parts of the plaintiff's patented combination); *Belegging-en Exploitatiemaatschappij Lavender BV v Witten Industrial Diamonds Ltd* [1979] FSR 59 (A was not liable for selling diamond grit knowing it would be used in a resin bond by PW as part of a grinding material patented by the plaintiffs); *Sony Corporation of America v Universal City Studios Inc*, 464 US 417 (1984) (A was not liable for supply of video cassette copying equipment used to infringe the plaintiff's copyright); *CBS Songs* (n 5) (A was not liable for selling tape-to-tape recording machines that enabled purchasers to infringe the plaintiffs' copyright); *Metro-Goldwyn-Mayer Studios Inc v Grokster Ltd*, 545 US 913 (2005) (approving *Sony v Universal*, but distinguishing it on the basis that A in this case intended and promoted its file-sharing website to be used to infringe the plaintiff's copyright).

118 (1933) 49 CLR 643, 658.

119 *Metro-Goldwyn-Mayer Studios* (n 117) 959–60.

120 *Yuille v B & B Fisheries (Leigh) Ltd* [1958] 2 Lloyd's Rep 596, 618.

response to a submission attempting the translation of a principle from patent law into copyright law:

> The so-called 'logic' of such a translation of a rule or principle from one area of the law to another can seldom be satisfactory, even where earlier decisions have not explained the reasons which prompted the enunciation of the rule or principle.[121]

The principle at stake in that case could not reliably be translated because it had been developed by reference to the objects of the law of patents, which were different from those of the law of copyright.[122] The absence of statements such as these, which acknowledge that intellectual property cases are often implicitly or explicitly decided by reference to considerations that are likely to be foreign to general torts cases, has resulted in an undue narrowing of accessory liability in torts.

For these reasons, it is submitted that courts should not apply identical principles in torts cases to those developed to deal with the specific problems and policy rationales unique to intellectual property law.[123] This need not involve a denial of the basal proposition that infringement of intellectual property rights is a tort. Rather, it requires the recognition of an exception to the effect that principles of accessory liability developed in intellectual property cases do not apply to general torts cases. Such an exception is not unprecedented. For example, general tortious accessory liability principles do not apply to cases of directors' liability for company torts.[124] If assistance liability is unsuited to the realm of intellectual property rights, so be it. But that should not dictate the position in the general law of torts.

III Application of Assistance Liability

A *Sphere of Operation*

It is beyond question that accessory liability in torts requires the main tort to actually be committed.[125] It is purely parasitic in that sense. One consequence

[121] *Interstate Parcel Express Co Pty Ltd v Time-Life International (Nederlands) BV* (1977) 138 CLR 534, 556.

[122] Ibid.

[123] See also Dietrich, 'Accessorial Liability in the Law of Torts' (n 2) 253.

[124] *WEA International Inc v Hanimex Corporation Ltd* (1987) 17 FCR 274, 283; *Microsoft Corp v Auschina Polaris Pty Ltd* (1996) 71 FCR 231, 239.

[125] Davies, *Accessory Liability* (n 2) 183.

of this is that the necessary damage element for the particular tort applies equally to an action against A as against PW. Hence, if the cause of action is, for example, battery — which, as a form of trespass, is actionable per se — the absence of damage will not prevent a claim from succeeding against either PW or A.[126] If the claim is in, for example, negligence — which, as an action on the case, is *not* actionable per se — both PW and A will escape liability if the plaintiff fails to prove that he or she suffered a compensable form of damage.[127]

As indicated above, further to the exception already recognised for directors' liability for company torts, this study advocates the separate treatment of accessory liability for intellectual property infringements. But this fragmentation is only tolerated to deal with those unique and specific anomalies. Outside of limited exceptions, there is no reason why uniform principles, crafted to accommodate appropriate flexibility, cannot apply throughout the law of torts.[128] An exception to that uniform approach is proffered by Dietrich and Ridge, who say that accessory liability has no legitimate operation in negligence cases.[129] They give an example where A encourages PW to speed through a school zone, and PW hits a child.[130] Because the necessary damage element was not contemplated by A and PW, they suggest that accessory liability is impossible.[131] According to this theory, where A assists or acts pursuant to a common design with PW in the commission of PW's negligent act, A's liability should only be considered as that of a primary tortfeasor under the tort of negligence itself.[132] That view is needlessly restrictive. First, there is no principle whereby a defendant's wrongful conduct can be dealt with by only one of two potential causes of action.[133] It is trite that a defendant's single tortious act can give rise to

126 *Ashby v White* (1703) 2 Ld Raym 938, 955; 92 ER 126, 137 (Lord Holt CJ dissenting), upheld by the House of Lords in *Ashby v White* (1703) I Brown 62; 1 ER 417. See *Horkin v North Melbourne Football Club Social Club* [1983] 1 VR 153, 164.

127 *Williams v Milotin* (1957) 97 CLR 465, 474.

128 See Dietrich, 'Accessorial Liability in the Law of Torts' (n 2) 253–6.

129 Ibid 256–8; Dietrich and Ridge (n 1) 158–60. See also Peter Cane, 'Mens Rea in Tort Law' (2000) 20 *Oxford Journal of Legal Studies* 533, 546; Lee (n 2) 878.

130 Dietrich and Ridge (n 1) 159.

131 Ibid 159–60.

132 Ibid 160; Dietrich, 'Accessorial Liability in the Law of Torts' (n 2) 256.

133 See Davies, *Accessory Liability* (n 2) 187.

multiple available causes of action.[134] Secondly, a number of cases have recognised accessory liability for negligent acts.[135] Thirdly, in the proffered example of speeding in the school zone it seems clear that A would be aware of the type of damage that could result from the act he is encouraging. He might think the likelihood remote, and he obviously does not *intend* to hit the child, but the test is one of *knowing assistance*; the knowledge of potential damage to a third party is surely present. Finally, even Dietrich appears to concede that the exclusion of accessory liability from negligence cases does not work in all instances.[136] The best example is the case of *Rogers v RJ Reynolds Tobacco Co*.[137] Tobacco manufacturers, and public relations, research, and advertising firms acting in concert with them, were sued for negligently suppressing information about the dangers of smoking. The Court held that this was an actionable conspiracy, and that each of the parties to that conspiracy was jointly liable. It is submitted that that conclusion should be preferred. It helpfully avoids the obvious difficulties involved in establishing a distinct duty of care and causal path for each party to the conspiracy.

Some commentators advocate creating a uniform test for accessory liability throughout private law.[138] That approach smacks of the type of ahistorical, top-down reasoning that the modern High Court has been astute to reject.[139] Davies justifies the proposed unification, *inter alia*, by saying that '[t]here is no reason why a beneficiary's entitlement that his or her fiduciary act loyally should be protected more strongly than his or her right to bodily

134 See, eg, *Williams v Holland* (1833) 10 Bing 112, 117; 131 ER 848, 850; *Williams v Milotin* (n 127) 470.

135 See Sappideen and Vines (n 68) 302, citing: *Brooke v Bool* [1928] 2 KB 578 (PW and A searched for gas leak with naked flame); *Mason v Burke* (1968) 68 DLR (2nd) 19, 23 (Ontario High Court of Justice) (motorists stopping on an expressway to argue); *McDonald v Dalgleish* (1973) 35 DLR (3rd) 486 (Ontario High Court of Justice) (two motorists agreeing to race each other). See also Williams, *Joint Torts and Contributory Negligence* (n 17) 12; American Law Institute (n 54) § 876(b) cmt (d); Philip Sales, 'The Tort of Conspiracy and Civil Secondary Liability' (1990) 49 *Cambridge Law Journal* 491, 504 n 39; Carty (n 2) 498.

136 Dietrich, 'Accessorial Liability in the Law of Torts' (n 2) 257–8. See also Dietrich and Ridge (n 1) 159.

137 761 SW 2d 788 (Tex, 1988).

138 Sales, 'The Tort of Conspiracy and Civil Secondary Liability' (n 135) 504; Birks (n 72); Davies, *Accessory Liability* (n 2) 283–4.

139 See, eg, *Roxborough* (n 111) 544–5 [72]–[74] (Gummow J); *Bofinger v Kingsway Group Ltd* (2009) 239 CLR 269, 300 [90]–[93] (Gummow, Hayne, Heydon, Kiefel and Bell JJ). See generally Warren Swain, 'Unjust Enrichment and the Role of Legal History in England and Australia' (2013) 36 *University of New South Wales Law Journal* 1030.

integrity'.[140] As noted above, that observation has merit, but it does not follow that the requirements for accessory liability in torts and equity should be unified. Davies's denial of conceptual difference in the search for total substantive unification is a fusion fallacy, which is unlikely to be embraced in Australian law.[141] The strict, conscience-based requirements in accessory liability in equity are foreign to the common law;[142] they should neither be removed from the equitable doctrine nor imported into the common law in the search for substantive unification. Sales argues that just as there is a single concept of accessory liability throughout criminal law, there should be a single concept throughout civil law.[143] That is a false analogy. Clearly, the differences between individual crimes are far less fundamental and conceptually significant than the differences between, for example, torts, equity, and contract. The unification project has been rejected as needlessly ambitious by commentators.[144] As Liau points out: 'Each area of law protects different interests, upholds different values and practices, and responds to different social and economic concerns.'[145] Denial of these differences in the search for uniformity is unnecessary and apt to mislead.

The better approach is that of Professor Gummow, who advocates studying the disparate areas where accessory liability operates in order to recognise and appreciate their similarities and differences.[146] Such an exercise allows for development by analogy, so long as it is undertaken with attention to the historical and functional differences between each area. The conclusion to draw for present purposes is that the formulation of assistance liability in torts should be flexible enough to apply to all torts subject to limited exceptions, but not so malleable as to be applicable throughout each area of private law.

[140] Davies, *Accessory Liability* (n 2) 283–4.

[141] See *GR Mailman & Associates Pty Ltd v Wormald (Aust) Pty Ltd* (1991) 24 NSWLR 80, 99 (Meagher JA); *Harris v Digital Pulse Pty Ltd* (2003) 56 NSWLR 298, 306 [18] (Spigelman CJ).

[142] See generally MJ Leeming, 'Five Judicature Fallacies' in JT Gleeson, JA Watson and RCA Higgins (eds), *Historical Foundations of Australian Law: Institutions, Concepts and Personalities* (Federation Press, 2013) vol 1, 169, 188–9.

[143] Sales, 'The Tort of Conspiracy and Civil Secondary Liability' (n 135) 510.

[144] Carty (n 2) 505–7; Simon Baughen, 'Accessory Liability at Common Law and in Equity: "The Redundancy of Knowing Assistance" Revisited' [2007] *Lloyd's Maritime and Commercial Law Quarterly* 545, 563; Lee (n 2) 878; Dietrich and Ridge (n 1) 161.

[145] Timothy Liau, 'Accessory Liability' [2015] *Singapore Journal of Legal Studies* 278, 280.

[146] Gummow (n 40) 311.

B *Conduct Element*

Though made in the context of criminal law, this statement of Glanville Williams is a sound starting point: 'As a matter of common sense, a person who gives very minor assistance ought not to be held to be an accessory.'[147] This is best addressed by requiring that A's assistance be characterised as 'substantial' in order for liability to be imposed. Lord Neuberger's formulation of this requirement is orthodox, and should be adopted:

> [T]he assistance provided by the defendant must be substantial, in the sense of not being de minimis or trivial. However, the defendant should not escape liability simply because his assistance was (i) relatively minor in terms of its contribution to, or influence over, the tortious act when compared with the actions of the primary tortfeasor, or (ii) indirect so far as any consequential damage to the claimant is concerned.[148]

In *Fish & Fish*, the defendant had given the names of potential volunteers to the Sea Shepherd, and had some involvement in raising funds from the public for the operation. This was a *de minimis* contribution to the Sea Shepherd's ultimate trespass to and conversion of the claimant's property. Thus, the defendant was not liable. Though *Fish & Fish* was decided under the common design head, this requirement should be identical in both common design and pure assistance cases.

The next question is that of how a court should assess whether or not the assistance was 'substantial'. It is necessary that any prescribed factors be applied flexibly; as Bankes LJ said in *The Koursk*: 'It would be unwise to attempt to define the necessary amount of connection. Each case must depend upon its own circumstances.'[149] It is submitted that it will generally be appropriate to consider the five factors applied in *Halberstam v Welch*, taken from the American *Restatement*: the nature of the act encouraged; the amount [and kind] of assistance given; the defendant's absence or presence at the time of the tort; his relation to the tortious actor; and the defendant's state of mind.[150] This qualitative assessment is an important limiting mechanism by which assistance liability will stay within appropriate bounds, and not render innocent persons responsible for serious wrongs for trifling acts.

147 Glanville Williams, *Textbook of Criminal Law* (Stevens & Sons, 1978) 294.

148 *Fish & Fish (Supreme Court)* (n 5) 1249 [57] (Lord Neuberger P); see also at 1247 [49] (Lord Sumption SCJ).

149 *The Koursk* (n 26) 151.

150 *Halberstam* (n 8) 483–4, citing American Law Institute (n 54) § 876(b) cmt (d).

C *Mental Element*

Many cases and commentators in this area fail to address this question in the depth it demands. Failure to recognise an appropriately stringent mental element may partially explain the modern hesitance to recognise assistance liability. RP Austin's bifurcated framework for assessing the mental requirement for accessory liability in equity is of equal utility in this context. To apply that framework, it must be established both that the defendant has knowledge of the relevant matters, and that he or she has the requisite mental state in relation to those matters.[151] Everyday dealings would be fraught indeed if persons who had themselves performed no unlawful act could be liable to unknown third parties for unwittingly contributing to PW's tortious conduct. It is primarily the mental element that would ensure that A's liability does not extend too far.

1 *Content of Knowledge*

The question here is: what, precisely, does A have to know in order to be liable? One point that can be taken as settled is that A need not know, as a matter of law, that PW's conduct constitutes a tort. Rather, the requirement is that A be aware that PW intends to commit the constituent acts that make up the tort.[152] Dietrich's suggested formulation is as follows: 'knowledge that a specific [PW] will commit specific types of acts (that prove to be tortious) against an identifiable plaintiff or class of plaintiffs'.[153] The knowledge of a specific PW and specific types of acts requirements are appropriate, and would serve as a robust limiting mechanism. A case such as *Dramatico Entertainment Ltd v British Sky Broadcasting Ltd* would have failed at this hurdle, because The Pirate Bay had no specific knowledge of the individuals using its website to infringe copyright.[154]

However, the requirement that there be 'an identifiable plaintiff or class of plaintiffs' is unnecessarily restrictive. This is borne out by the extraordinary

[151] RP Austin, 'Constructive Trusts' in PD Finn (ed), *Essays in Equity* (Law Book, 1985) 196, 235. See also Davies, *Accessory Liability* (n 2) 42, endorsing this approach.

[152] *Unilever* (n 10) 609 (Mustill LJ); *New South Wales v McCloy Hutcherson Pty Ltd* (1993) 43 FCR 489, 494; *McFadzean* (n 47) [137]; *Fish & Fish (Supreme Court)* (n 5) 1249–50 [60] (Lord Neuberger P).

[153] Dietrich, 'Accessorial Liability in the Law of Torts' (n 2) 244.

[154] [2012] EWHC 268 (Ch), [14].

case of *Rice v Paladin Enterprises*.[155] Paladin published a manual that encouraged in the most seductive terms possible, and instructed in minute detail, why and how the reader should become a contract killer. Tragically, Perry, a neophyte hit man, used the book to carry out a brutal triple murder in fulfilment of such a contract. Paladin sold the book to Perry through his order from Paladin's catalogue, so the requirement of specific knowledge of PW's identity was satisfied, as was knowledge of the specific types of acts, which were set out in the book. The Court held that the trial judge should have applied aiding and abetting liability. Yet Paladin had no knowledge of an intelligible 'class' to which the victims belonged. They were only connected to the party with whom Perry eventually contracted.

Such cases are of course exceptional, and in the vast majority of cases the corollary of knowledge of the first two elements would be awareness of the potential victims. But it seems that there is no good reason to exclude liability where, as was the case in *Rice v Paladin Enterprises*, A knows that a specific PW intends to do specific wrongful acts, but has no knowledge of a specific class against which PW intends to commit the acts. A slightly more conventional case is that of *Boim v Quranic Literacy Institute*, where it was held that the defendants could be civilly liable for knowingly aiding and abetting Hamas's terrorist activities through substantial funding.[156] Clearly, the 'class' of potential victims of such attacks is too expansive to be described as 'identifiable'; yet the result seems by no means harsh or unjust.

2 *Type of Knowledge*

In assistance cases, there should be no requirement that A *intend* that PW commit the wrongful act. A case such as *Shah v Gale*, where Gale was reluctant to assist PW, yet was liable because she did so knowing the harm it could cause, illustrates that intention is not required.[157] Where the tort has a specific mental element, such as the dishonesty requirement for the tort of deceit,[158] the best view is that that requirement should apply equally to the

[155] *Rice v Paladin Enterprises, Inc*, 128 F 3d 233 (4th Cir, 1997). The case was subsequently dramatised as a telemovie: *Deliberate Intent* (Directed by Andy Wolk, 20th Century Fox Television, 2000).

[156] *Boim v Quranic Literacy Institute and Holy Land Foundation for Relief and Development*, 291 F 3d 1000, 1028 (7th Cir, 2002).

[157] *Shah* (n 14). See Williams, *Joint Torts and Contributory Negligence* (n 17) 12; Carty (n 2) 502; Dietrich, 'Accessorial Liability in the Law of Torts' (n 2) 244; Davies, *Accessory Liability* (n 2) 206.

[158] *Derry v Peek* (1889) 14 App Cas 337, 374; *AIC Ltd v ITS Testing Services (UK) Ltd* [2007] 1 All ER (Comm) 667, 725 [251].

accessory.[159] Davies argues that this is needlessly restrictive.[160] He asks why, where a tort requires malice, should the accessory who fulfils the usual requirements of accessory liability escape merely because he or she had no malice? The simple answer is that the malice requirement exists for a reason — namely to restrict liability to those who are truly culpable. Davies's point has no less or greater force if redirected to ask why the primary tortfeasor, who satisfied every element of the tort, should be liable for a mere absence of malice.

3 *Degree of Knowledge*

Finally, what *degree* of knowledge is required? Applying the five-tiered analysis of degrees of knowledge postulated by Peter Gibson J,[161] it is submitted that liability should not extend beyond the first two: (1) 'actual' knowledge; and (2) the wilful shutting of one's eyes to the obvious ('Nelsonian knowledge'). This standard has deep roots in jury instructions in the common law,[162] and is advocated by Dietrich and Davies.[163] To extend it to the third category, 'recklessly failing to make such inquiries as an honest and reasonable man would make', would extend liability too far. Importantly, in the second category, the finder of fact draws the inference that A had actual knowledge;[164] in the third, there is no actual knowledge in any sense acknowledged by the common law.[165] To illustrate, a baseball bat vendor should not be liable as a joint tortfeasor merely because he or she did not inquire as to and thwart the specific plans of a suspicious customer.

159 Carty (n 2) 501; Dietrich, 'Accessorial Liability in the Law of Torts' (n 2) 254, citing *Johnson Matthey (Aust)* (n 109) 213–14 [150].

160 Davies, *Accessory Liability* (n 2) 203–5.

161 *Baden v Société Générale pour Favoriser le Développement du Commerce et de l'Industrie en France SA* [1993] 1 WLR 509, 575–6 [250].

162 *English and Scottish Mercantile Investment Co Ltd v Brunton* [1892] 2 QB 700, 707–8.

163 Dietrich, 'Accessorial Liability in the Law of Torts' (n 2) 246–7; Davies, *Accessory Liability* (n 2) 208–9.

164 *English and Scottish Mercantile Investment* (n 162) 708.

165 JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) 285.

D *Causation*

The requirement of causation is much under-analysed and presents difficulties in each area of accessory liability.[166] In this context, as in the general law of negligence,[167] it involves two questions: first, whether 'but for' causation is required; and secondly, what is the scope of A's liability? As Combs states, '[k]eeping the two concepts separate is important for a thorough understanding of civil aiding and abetting'.[168] The first question appears settled: 'but for' causation is not required.[169] This has the sensible result that, for example, if A supplies PW with a weapon to kill V, A will not escape liability simply because PW would (on the balance of probabilities) have killed V without that specific supply being effected.[170] Thus, Lord Sumption has said that '[t]here is no justification in principle for requiring … that the assistance should have been indispensable to the commission of the tort'.[171] The requirement that A's conduct 'substantially' assist PW's tort is an appropriate substitute for a requirement of 'but for' causation. This is consistent with the United States position.[172]

The *scope* of A's liability is the more difficult question. This has been the subject of more attention in the United States than in Anglo-Australian law.[173] The type of situation in which the issue arises is typified by *Shah v Gale*, where Gale assisted PW knowing that PW intended to 'beat up' Shah.[174] Gale was held liable for PW's unlawful entry to Shah's home, but not for his brutal stabbing murder.[175] Conversely, in *Halberstam v Welch*, Hamilton knew that her live-in partner, Welch, was habitually committing some type of personal property crime at night, and was held liable for his killing of Halberstam, an

166 Davies, *Accessory Liability* (n 2) 31–2.

167 See *Strong v Woolworths Ltd* (2012) 246 CLR 182, 190–1 [18]–[19]; Jane Stapleton, 'Factual Causation' (2010) 38 *Federal Law Review* 467.

168 Nathan Isaac Combs, 'Civil Aiding and Abetting Liability' (2005) 58 *Vanderbilt Law Review* 241, 292.

169 Dietrich and Ridge (n 2) 120.

170 Cf *Adeels Palace Pty Ltd v Moubarak* (2009) 239 CLR 420, 440–2 [45]–[53], where the court held that factual causation was not established because the plaintiff had not shown that the presence of security personnel would have prevented an armed gunman from entering a restaurant and shooting a patron.

171 *Fish & Fish (Supreme Court)* (n 5) 1247 [49].

172 See Combs (n 168) 292–5.

173 Dietrich and Ridge (n 2) 132.

174 *Shah* (n 14) [36].

175 Ibid [42], [49].

intended burglary target.[176] It is in deciding whether a defendant's liability should extend to such harm that the inquiry must accommodate the broader normative questions concerning legal responsibility that are inevitably raised by these cases. The issue is addressed in § 876(b) cmt (d) of the American *Restatement*, which provides that '[i]n determining liability, the factors are the same as those used in determining the existence of legal causation when there has been negligence'.[177] Applying that in the United States context, the court undertakes a 'proximate cause' analysis, the focus of which is to determine whether the specific act was reasonably foreseeable for the defendant.[178] Thus, Hamilton was liable on the basis that 'violence and killing is a foreseeable risk in any [personal property crime at night]'.[179] It is submitted that the approach advocated in the *Restatement* is appropriate, and should be adopted with appropriate modification to reflect the Australian common law test for legal causation in negligence.

The current state of the High Court authorities dictates that this entails application of the 'common sense' approach, which may involve value judgments and policy choices, and 'is not susceptible of reduction to a satisfactory formula'.[180] In this area, 'abstract discussion is seldom valuable for courts and those who practise in them'.[181] Thus, I will not pursue an in-depth analysis of the legal causation test. But it has been said that the term 'common sense' invites oversimplification of 'the deeply analytical approach' demanded by the inquiry.[182] More trenchantly, Professor Stapleton argues that

> [i]t brings the law into disrepute if, when confronted with a hotly disputed complex dispute about the appropriate point at which legal liability should be

[176] *Halberstam* (n 8).

[177] American Law Institute (n 54) § 876(b) cmt (d).

[178] Combs (n 168) 256. See, eg, *American Family Mutual Insurance Co v Grim*, 440 P 2d 621, 626 (Kan, 1968) (a young boy who broke into a Church to steal soft drinks was liable for a fire started by his companions' negligent failure to extinguish lit torches).

[179] *Halberstam* (n 8) 488.

[180] *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506, 515 (Mason CJ), quoting *Fitzgerald v Penn* (1954) 91 CLR 268, 278 (Dixon CJ, Fullagar and Kitto JJ). See *Allianz Australia Insurance Ltd v GSF Australia Pty Ltd* (2005) 221 CLR 568, 581–2 [41] (McHugh J) for a recent affirmation that this is the common law position.

[181] *ACQ Pty Ltd v Cook* (2009) 237 CLR 656, 661 [14].

[182] *Waller v James* (2015) 90 NSWLR 634, 666 [167] (Beazley P). Beazley P's discussion of the relevant principles is, with respect, a sound modern restatement: at 666–70 [167]–[184].

> truncated, a court accepts the 'glib submission' that its resolution rests on nothing much more than 'common sense'.[183]

In a recent case about negligent advice by a bank, Applegarth J formulated the question in this way:

> What is there … in the justice and equity of the particular case that might lead to a conclusion that [the respondent] should not be regarded as legally responsible for the whole of the loss, even though the contravention was a cause of the whole of the loss?[184]

An inquiry along these lines, which is faithful to Stapleton's entreaty to detach the scope of liability inquiry from the causation inquiry,[185] is apt to accommodate the range of considerations that may become relevant in any given case. As Stapleton points out by reference to decided cases, these considerations may include, amongst other relevant things: whether the consequence was foreseeable; whether it was coincidental; whether it was a result of one of the risks that made the conduct careless; a desire to protect a particular class of defendant; and concern to avoid disproportion and attenuation.[186] That the test is not reducible to a neat and rigid formula makes it a particularly suitable limiting mechanism in the context of accessory liability in torts, which has historically given rise to an eclectic and unpredictable range of cases.

IV Conclusion

The key conclusions of this study are that accessory liability in torts should not be dictated by the intellectual property jurisprudence, and that assistance liability should be recognised in the general law of torts. Acceptance of that thesis, leading to application of the relatively strict test proposed in Part III,

[183] Jane Stapleton, 'Reflections on Common Sense Causation in Australia' in Simone Degeling, James Edelman and James Goudkamp (eds), *Torts in Commercial Law* (Lawbook, 2011) 331, 334, quoting Justice Keith Mason, 'Fault, Causation and Responsibility: Is Tort Law Just an Instrument of Corrective Justice?' (2000) 19 *Australian Bar Review* 201, 210 (citations omitted). Cf James Allsop, 'Causation in Commercial Law' in Simone Degeling, James Edelman and James Goudkamp (eds), *Torts in Commercial Law* (Lawbook, 2011) 269, 330.

[184] *Westpac Banking Corporation v Jamieson* [2016] 1 Qd R 495, 535 [106], quoting *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109, 122 [33] (Gleeson CJ).

[185] Stapleton (n 183) 365.

[186] Ibid 349–50.

would not have dramatic consequences. The recognition that a tacit agreement can found a common design has made the line between common design and assistance liability incredibly fine in many instances. Moreover, as Carty observes, the vast majority of controversial, high-stakes disputes concerning assistance liability are intellectual property cases.[187] As Judges Wald, Bork, and Scalia colourfully put it, accessory liability precedent in the field of traditional torts 'is largely confined to isolated acts of adolescents in rural society'.[188] Further, it is often unnecessary to invoke accessory liability because some other basis of concurrent liability is readily available, such as vicarious liability, breach of a non-delegable duty, or several concurrent liability.[189]

Recognition of assistance liability would, however, have genuine, practical advantages. Where the primary tort is also a crime, accessory liability has a potentially significant role as a supplement to the criminal justice process, both in improving victims' lots, and in deterring those who knowingly assist criminal acts. Perhaps most importantly, recognition of assistance liability would ensure that the boundaries of so-called 'common designs' are respected. Where A has culpably given substantial knowing assistance to PW, the justice of the case seems to demand recognition of A's wrongdoing. This can be achieved through assistance liability, without having to strain the concept of 'common designs' beyond recognition. That would significantly improve predictability in this field.

[187] Carty (n 2) 489 n 3.

[188] *Halberstam* (n 8) 489.

[189] Dietrich, 'Accessorial Liability in the Law of Torts' (n 2) 238.