ACCESSORY LIABILITY IN TORT AND EQUITY

Unlike the position in criminal law, there does not currently exist a general doctrine of accessory liability in civil law. Thus, a person may be liable as an accessory in equity for dishonestly assisting with a breach of trust, but there is no tort for dishonest assistance. Rather, one who participates in another's tort will only be liable if he is a joint tortfeasor acting pursuant to a common design with the primary tortfeasor. This article examines the reasons for this divergence and evaluates the case for their assimilation. It observes that, contrary to common perception, the scope of participatory liability in both spheres does not materially differ. It also concludes that the case for assimilation is not made out if the overarching principle for civil accessory liability is defined principally by reference to criminal concepts of complicity. Such an approach overlooks the fundamental distinctions between civil and criminal processes and threatens to extend civil liability beyond acceptable bounds.

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1 In civil as well as criminal law, a person may be liable when he participates in the wrong of another. Such liability is variously described as "accessory", "secondary" or "derivative" because it is contingent upon a wrong being committed by the primary wrongdoer. In criminal law, a general doctrine of accessory or secondary liability exists which applies uniformly to all crimes. In contrast, there does not currently exist a unified doctrine of accessory liability in private law.[1] This absence of a common approach in the civil realm is particularly striking when one considers the distinct approaches in tort and equity. In tort law, participatory liability is traditionally analysed under the rubric of

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1 This is true for both Singapore and England. In Singapore, the question whether there ought to be a general principle of accessory liability has not been considered by our courts, though the High Court has in *Zim Integrated Shipping Services Ltd v Dafni Igal* [2010] 2 SLR 426 commented *obiter* (at [22]) that the suggestion to amalgamate accessory liability in tort and equity is "attractive".

"joint tortfeasance". A person who participates (by authorising, procuring or assisting in another's tort) is liable with the primary wrongdoer as a joint tortfeasor if such participation is made pursuant to a common design.[2] That aside, there is no accessory liability for knowing assistance of another's tort.[3] Equity, on the other hand, characterises a person who induces, procures or assists with a breach of trust or fiduciary obligation as an accessory.[4] The accessory is not liable for having committed the breach himself, but for procuring or assisting such breach. In addition, equity relies on the concept of "dishonesty" to curtail liability, while tort law employs the notion of "common design" for that end.

2 This somewhat untidy state of the law has been criticised, for if all instances of accessory liability are in substance a single phenomenon, underpinned by the common objective of visiting responsibility on those who have deliberately participated in the commission of another's wrong, why should the rules differ according to what primary wrong (tort, contract or fiduciary obligation) has been committed? Commentators critical of this state of the law have advocated judicial reform. For example, Sir Leonard Hoffmann (as he then was) had in an extra-judicial comment[5] called for the abolition of the equitable action

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2 Closely related to this form of joint tortfeasance is the tort of inducing breach of contract, but which has been characterised as a type of accessory liability: See *OBG v Allan* [2008] 1 AC 1 at [3] and [172]. Inducing breach of contract will not, however, be considered in this article given the focus on accessory liability for tortious and equitable wrongs.

3 *CBS Songs Ltd v Amstrad Consumer Electronics plc* [1988] 1 AC 1013; *Credit Lyonnais Bank Nederland NV v Export Credit Guarantee Department* [1998] 1 Lloyd's Rep 19 (affirmed on appeal: [1999] 2 WLR 540); *Sea Shepherd UK v Fish & Fish Ltd* [2015] 2 WLR 694.

4 "Knowing receipt" is not included here as a form of equitable accessorial liability as current orthodoxy appears largely to favour the view that recipient and assistance liability are founded on distinct conceptual bases: see *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 3 WLR 64 at 70 (although Lord Nicholls's suggestion that recipient liability is restitution-based has not been accepted in Singapore: see *Wee Chiaw Sek Anna v Ng Li-Ann Genevieve* [2013] 3 SLR 801 at [108] and [110] and *Raymond Zage III v Ho Chi Kwong* [2010] 2 SLR 589 at [43]). See also Charles Harpum, "The Stranger as Constructive Trustee: Part I" (1986) 102 LQR 114; Charles Harpum, "The Stranger as Constructive Trustee: Part II" (1986) 102 LQR 267; and Yeo Tiong Min, "The Right and Wrong of 'Knowing Receipt' in the Law of Restitution" Yong Pung How Professorship of Law Lecture, Singapore Management University (19 May 2011) at para 18, available at <http://ink.library.smu.edu.sg/yph_lect/4>. Note, however, that there are cogent arguments to the contrary: see Pauline Ridge, "Equitable Accessorial and Recipient Liability in Singapore" [2013] Sing JLS 361 at 374–378.

5 Leonard Hoffmann, "The Redundancy of Knowing Assistance" in *The Frontiers of Liability* vol 1 (Peter Birks ed) (Oxford University Press, 1994). See also Georgina Andrews, "The Redundancy of Dishonest Assistance" [2003] Conv 398 at 408, who argued for abolishing equitable dishonest assistance in favour of a "tort of

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for dishonest assistance, preferring instead to assimilate common law and equitable liability for third party interferences under the "general principle" of *Lumley v Gye*.[6] A broader approach was advocated by Philip Sales, who would, by analogy with criminal accessory liability, unify various instances[7] of "civil secondary liability" under a common analytical framework.[8] This call for harmonisation has since been expanded by David Cooper[9] and Paul Davies.[10] Though differing in details, both Cooper and Davies forcefully argued for a single doctrine of civil accessory liability to apply across tort, contract and equity. On this view, "knowing assistance" would constitute a sufficient form of accessory liability both at common law and in equity.[11]

3 This article considers how participatory liability differs in tort and equity and evaluates the case for their assimilation. It observes that, contrary to common perception, the scope of participatory liability in both spheres does not materially differ. This is because despite their distinct conceptual underpinnings, both sets of rules are ultimately unified by the common aim of restricting liability to minimise interference with liberty of action. Consequently, liability in both regimes is constrained by tight (though dissimilar) concepts of mental fault. This article also concludes that the case for assimilation is not made out if the overarching principle for civil accessory liability is defined principally by reference to criminal concepts of complicity. Such an approach overlooks the fundamental distinctions between civil and criminal processes and threatens to extend civil liability beyond acceptable bounds.

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intentionally assisting with a breach of trust or intentional interference with a fiduciary relationship".

6 (1853) 2 E&B 216.

7 Including inducing breach of contract, joint tortfeasance, dishonest assistance with breach of trust and conspiracy by unlawful means.

8 Philip Sales, "The Tort of Conspiracy and Civil Secondary Liability" (1990) 49 Camb LJ 491. See also Lee Eng Beng, "A Perspective on the Economic Torts" [1996] Sing JLS 482 at 500. In a similar vein, Lord Millett argued, in his dissent in *Twinsectra Ltd v Yardley* [2002] 2 AC 164 at 201, that mental elements of equitable assistance liability and inducing breach of contract in tort ought to be similar as the former is merely an equitable counterpart of the latter.

9 David Cooper, "Secondary Liability for Civil Wrongs" PhD thesis, University of Cambridge (1995).

10 Paul Davies, *Accessory Liability* (Hart Publishing, 1st Ed, 2015).

11 Dietrich has similarly argued for unifying civil accessory principles but in the more limited context of expanding accessory liability in tort: see Joachim Dietrich, "Accessorial Liability in the Law of Torts" (2011) 31 *Legal Studies* 231.

I. Accessory liability

4 It is necessary to state at the outset that "accessory liability" is not a term of art. It does not bear a stable meaning in all contexts. The terminology is more entrenched and better developed in criminal than in civil law,[12] but even there it connotes more than one meaning.[13] Thus, in the context of English common law,[14] an "accessory" may describe a person who (a) commits an inchoate offence (such as criminal conspiracy); (b) knowingly aids, abets, counsels or procures another to commit an offence;[15] or (c) participates pursuant to a criminal joint enterprise.[16] Although the basis of liability differs across these distinct contexts, the term "accessory" is used in each context to describe the person who is in some way involved in a criminal plan or conduct though he is not the primary perpetrator.

5 Those advocating the assimilation of civil accessory liability law typically do so by reference to the doctrine of secondary liability in criminal law, which is exemplified by category (b) above. Under this doctrine, a person who (a) knowingly (b) aids, abets, counsels or procures another to commit an offence, and (c) the offence is in fact committed, is liable as an accessory for the commission of that primary

12 This may be because criminal law has traditionally viewed offences committed by a group of persons more seriously, "inasmuch as they suggest planning and determination to offend and make it difficult for an individual to withdraw, and because group offences against an individual tend to be more frightening": see Andrew Ashworth, *Principles of Criminal Law* (Oxford University Press, 6th Ed, 2009) at p 403.

13 A point made by Hobhouse LJ in *Credit Lyonnais Bank Nederland NV v Export Credits Guarantee Department* [1998] 1 Lloyd's Rep 19 at 42.

14 Here, substantial reference is made to English principles of criminal law as commentators who have argued for the unification of accessory liability in civil law typically did so by reference to principles of English law.

15 In England, this form of liability is now reflected in s 8 of the English Accessories and Abettors Act 1861 (c 94). In Singapore, the Penal Code adopts a simpler scheme which subsumes the offence of aiding and abetting within the inchoate offence of abetment, thus obviating the need to prove the commission of the primary offence: see s 107 of the Penal Code (Cap 224, 2008 Rev Ed). That does not, of course, alter the fact that liability is accessorial in nature when the abetted offence has in fact been committed.

16 A criminal joint enterprise arises when one party, *D*, agrees with another, *PW*, to commit an offence and the offence is subsequently committed. This type of liability overlaps with but extends beyond accessory liability on account of aiding and abetting, as it may render *D* liable even for an offence that *P* commits but which was not intended by *D*: see United Kingdom, Law Commission, *Participating in Crime* (Cmnd 7084, May 2007) at paras 1.10–1.11. However, whether or not joint enterprises are true cases of accessorial or secondary liability is not entirely settled: at paras 3.47–3.56. In Singapore, joint enterprise liability is encapsulated by s 34 of the Penal Code (Cap 224, 2008 Rev Ed), but this provision is explicit that all parties are liable as joint principals.

offence. For liability to arise, the accessory's participation need not be a "but-for" cause of the primary offence though it seems that it must have in some way "contributed" to that offence.[17] In the absence of a distinct causative link, liability is justified by the fact of complicity (that is, the accessory's participation), which serves as a sufficient nexus between the accessory and the primary offence.[18] Sales,[19] Cooper[20] and Davies[21] argue that accessory liability in civil law should be developed by analogy with this doctrine. For present purposes, the key implications of this approach are twofold: first, that consistently with the criminal doctrine, the modes of participation should be expanded to include assistance or facilitation of another's civil wrong; and second, that the accessory need only have knowledge of the elements constituting the primary wrongdoing to be liable. Taking the analogy further, Cooper contends that civil accessory liability is also duplicative, so that the liability of the accessory should duplicate, or be "joint and equal"[22] to, that of the primary wrongdoer.

6 As shall be seen, however, the term "accessory liability" has not been employed in the civil realm with a view to importing its meaning from the criminal law. Thus, although the House of Lords has in *OBG v Allan*[23] characterised the tort of inducing breach of contract as a form of accessory liability, one may not thereby infer that there exists also a tort of knowingly assisting or facilitating a breach of contract simply because such assistance is an accepted mode of participation in criminal law. This is not to deny that criminal law principles may be relevant in the development of their civil law counterparts, but one should resist the impulse to view the rules in criminal law as definitive. Whether the tort of inducing breach of contract should be so enlarged must ultimately depend on an evaluation of the policy concerns underlying that tort.

7 "Accessory liability" is therefore used in civil law only as a shorthand for *describing* the liability that is imposed upon a defendant,

17 See the discussion in United Kingdom, Law Commission, *Participating in Crime* (Cmnd 7084, May 2007) at paras 2.31–2.33.

18 See Andrew Ashworth, *Principles of Criminal Law* (Oxford University Press, 6th Ed, 2009) at pp 407–408.

19 Philip Sales, "The Tort of Conspiracy and Civil Secondary Liability" (1990) 49 Camb LJ 491 at 503 and 509–510.

20 David Cooper, "Secondary Liability for Civil Wrongs" PhD thesis, University of Cambridge (1995) at p 2.

21 Paul Davies, *Accessory Liability* (Hart Publishing, 1st Ed, 2015) at p 21.

22 David Cooper, "Secondary Liability for Civil Wrongs" PhD thesis, University of Cambridge (1995) at p 153. The notion of secondary liability was subsequently adapted by Elliot and Mitchell to explicate the remedies for dishonest assistance in equity: see Steven Elliott & Charles Mitchell, "Remedies for Dishonest Assistance" (2004) 67 MLR 16.

23 [2008] 1 AC 1 at [8] and [172].

D, who has participated in a wrong committed by a primary wrongdoer, *PW*, against a plaintiff, *P*, with a culpable state of mind. However, precisely what conduct and states of mind would combine to constitute accessory liability may differ from one context to another. One cannot define these elements simply by invoking the "accessory" label. In this article, the term is also used in that general and descriptive sense unless the context indicates otherwise.

II. Accessory liability in tort?

8 In the law of torts, liability for participating in another's tort is conventionally analysed as a form of joint liability. Leaving aside joint liability that is relationship-based,[24] it is settled that *D* may be jointly liable with *PW* if *D* procured *PW* to commit a tort by inducement, incitement or persuasion, or if *D* otherwise took part in *PW*'s tort pursuant to a common design.[25]

9 Although these principles are well established, it is as yet unclear whether procurement is a concept distinct from common design, or merely a subset thereof.[26] On the whole, judicial *dicta* favour

24 *Eg*, the joint liability of a principal/employer for a tort committed by his agent/employee acting within the scope of his appointment. In these instances, liability is imposed not because the principal/employer had participated in the tort of the agent/employee but solely on account of the parties' relationship.

25 *The Koursk* [1924] P 140; *CBS Songs Ltd v Amstrad Consumer Electronics plc* [1998] 1 AC 1013; *Sea Shepherd UK v Fish & Fish Ltd* [2015] 2 WLR 694.

26 In *Unilever plc v Gellette (UK) Ltd* [1989] RPC 583 at 608, Mustill LJ preferred the view that procurement and common design are two distinct strands of joint liability. See also Hazel Catty, "Joint Tortfeasance and Assistance Liability" (1999) 19 *Legal Studies* 490 at 492–500, which analysed procurement and combination as distinct modes of participation. One difficulty with this view is that there are relatively few occasions where joint tortious liability has been established only on the basis of procurement (*ie*, independently of common design). Some examples may be found among cases examining "procurement" for purposes of determining whether directors or company controllers were liable as joint tortfeasors for having procured or authorised their company's torts: see, *eg*, *C Evans & Sons Ltd v Spritebrand Ltd* [1985] 1 WLR 317; *Wah Tat Bank Ltd v Chan Cheng Kum* [1974–1976] SLR(R) 284; *Gabriel Peter & Partners v Wee Chong Jin* [1997] 3 SLR(R) 649; *Niru Battery Manufacturing Co v Milestone Trading Ltd* [2004] 1 CLC 647; and *TV Media Pte Ltd v De Cruz Andrea Heidi* [2004] 3 SLR(R) 543. However, these cases are not particularly helpful in elucidating the concept of "procurement". As Slade LJ had accepted in *C Evans & Sons Ltd v Spritebrand Ltd* [1985] 1 WLR 317 at 330, it is an "elusive question" to ask what a director must have done in order to be regarded as having procured or ordered the company's tort. The best that can be said in this context is that what conduct by a director would count as participation is one of fact and degree to be determined by examining the level of his involvement in each case: *Gabriel Peter & Partners v Wee Chong Jin* [1997] 3 SLR(R) 649 at [35].

the latter. Thus, in *CBS Songs Ltd v Amstrad Consumer Electronics plc*,[27] Lord Templeman appeared to have suggested that the procurer is a joint tortfeasor only if he shares the design of the primary tortfeasor:[28]

> My Lords, I accept that a defendant who procures a breach of copyright is liable jointly and severally with the infringer for the damages suffered by the plaintiff as a result of the infringement. The defendant is a joint infringer; he intends and procures *and shares a common design* that infringement shall take place. [emphasis added]

10 More recently, in *Sea Shepherd UK v Fish & Fish Ltd*[29] ("*Sea Shepherd*"), Lord Sumption cited the above passage to make the point that it is the fact of "common intent" that delineates liability as a joint tortfeasor. This is so even in cases of procurement, because "[i]nducing or procuring a tort necessarily involves common intent if the tort is then committed."[30] In a similar vein, Hacon J concluded in *Vertical Leisure Ltd v Poleplus Ltd*[31] that:[32]

> From this I draw the conclusion that it will seldom if ever be possible to establish joint tortfeasance on the basis of procurement where there is no common design. Procurement is probably a species of common design. Procurement in its various forms – inducement, incitement and persuasion – is sometimes going to be the clearest way to show that there was a common design.

11 These statements thus affirm "common design" as the essence of joint tortfeasance.[33] The rationale, as Gibson LJ explained in *SABAF SpA v Meneghetti SpA*,[34] is that a defendant who acted pursuant to a common design has by that conduct "made the tort his own":[35]

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27 [1998] 1 AC 1013.

28 *CBS Songs Ltd v Amstrad Consumer Electronics plc* [1998] 1 AC 1013 at 1058.

29 [2015] 2 WLR 694 at [41]. The law lords in this case were divided 3:2 as to the final outcome. However, all their Lordships were largely in agreement as to what the applicable principles were, their disagreement pertaining only to how those principles should apply to the facts. So while Lord Sumption was in the minority, the majority did not disagree with his analysis of the law.

30 *Sea Shepherd UK v Fish & Fish Ltd* [2015] 2 WLR 694 at [41].

31 [2015] EWHC 841 (IPEC).

32 *Vertical Leisure Ltd v Poleplus Ltd* [2015] EWHC 841 (IPEC) at [26].

33 *Cf Twentieth Century Fox Film Corp v Newzbin Ltd* [2010] FSR 21, where Kitchin J distinguished between procurement and common design but noted (at [103]) that "[t]here is considerable overlap between the two in that many circumstances will qualify under both heads".

34 [2003] RPC 14. This decision was reversed on other grounds on appeal, but the House of Lords appeared to have accepted that common design was the only route for establishing joint liability: see *SABAF SpA v Meneghetti SpA* [2005] RPC 10 at [39].

35 *SABAF SpA v Meneghetti SpA* [2003] RPC 14 at [59]. In *Sea Shepherd UK v Fish & Fish Ltd* [2015] 2 WLR 694, Lord Neuberger criticised (at [59]) the "making the tort his own" formulation as "ultimately circular" and as being at risk of "being

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> The underlying concept for joint tortfeasance must be that the joint tortfeasor has been so involved in the commission of the tort as to make himself liable for the tort. *Unless he has made the infringing act his own, he has not himself committed the tort*. That notion seems to us what underlies all the decisions to which we were referred. *If there is a common design or concerted action or otherwise a combination to secure the doing of the infringing acts, then each of the combiners has made the act his own and will be liable*. [emphasis added]

12 So understood, joint tortfeasance is conceptually distinct from accessorial liability as it is understood in the criminal context.[36] A joint tortfeasor is not liable for mere participation in another's tort, but for having adopted, by reason of the common design, the tort as a principal.[37] It is, in other words, *his* tort, so there is no separate tort of procuring as an accessory.[38] For the same reason, a person is not a joint tortfeasor merely because he has assisted with the commission of another's tort. Mere assistance is not procurement.[39] Nor is assistance necessarily proof of common design[40] (though it may be).[41] This may be so even if the assistor knew of the assisted person's intention to commit a tort or to do the acts that constitute the tort, for though knowledge is necessary for inferring common design, it may not be sufficient in every case.[42]

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interpreted as putting a potentially dangerous gloss on the need for a common design". It is submitted, however, that the better view is that of Lord Toulson (at [24]), who understood the phrase as an *explanation* of the concept underlying joint liability and not as a test additional to the requirement for common design.

36 *Fish & Fish Ltd v Sea Shepherd UK* [2013] 1 WLR 3700 at [45].

37 Robert Stevens explained joint liability as the result of attributing the primary wrongdoer's *actus reus* to the defendant: see Robert Stevens, *Torts and Rights* (Oxford University Press, 2007) at pp 245–246. In *Credit Lyonnais Bank Nederland NV v Export Credits Guarantee Department* [1998] 1 Lloyd's Rep 19 at 43 and 46, Hobhouse LJ explained the defendant's liability by analogising with agency, in that once the tort is committed, the primary wrongdoer's acts are taken to have been authorised by the defendant or within the implicit authority given by the defendant to the primary wrongdoer by reason of their common design.

38 See *John Hudson & Co Ltd v Oaten* (CA) (19 June 1980) (unreported) and *Smith v Pywell and Spicer* (1959) 173 EG 1009, both approved by Lord Woolf MR in *Credit Lyonnais NV v ECGD* [1999] 2 WLR 540 at 549.

39 *Belegging-en-Exploitaiemaatschappij Lavender BV v Witten Industrial Diamonds Ltd* [1979] FSR 59 at 65.

40 *CBS Songs Ltd v Amstrad Consumer Electronics plc* [1988] AC 1013 ("*CBS Songs*"); *Credit Lyonnais Bank Nederland NV v Export Credits Guarantee Department* [1999] 2 WLR 540; *Sea Shepherd UK v Fish & Fish Ltd* [2015] 2 WLR 694. This aspect of *CBS Songs* has been affirmed by our courts on a number of occasions: see, *eg*, *Ong Seow Pheng v Lotus Development Corp* [1997] 2 SLR(R) 113 at [44]–[45] and *Trek Technology (Singapore) Pte Ltd v FE Global Electronics Pte Ltd* [2005] 3 SLR(R) 389 at [36].

41 See discussion at para 15 below.

42 *Credit Lyonnais Bank Nederland NV v Export Credits Guarantee Department* [1998] 1 Lloyd's Rep 19 at 42.

13 However, that is not to say that acts of assistance may never give rise to joint liability. Whether or not they do depends on proof of common design.[43] Thus, if *D* lends his car to *PW* on the common understanding that *PW* would use it to steal and transport *P*'s goods, *D* is jointly liable with *PW* for converting *P*'s goods. Once the element of common design is proved, *D*'s assistance is a sufficient mode of participation if it is more than a *de minimis* contribution to *PW*'s tort.[44] Provided this minimal threshold is met, it is not necessary for *D*'s assistance to have played an "essential"[45] or "indispensable"[46] part in the commission of the tort.

14 Because common design is often thought to require proof of *agreement*,[47] it is usually difficult to establish common design when *D* has done no more than assist with or facilitate a tort. Absent evidence of an explicit agreement, assistance *simpliciter* does not normally give rise to an inference of agreement because it is usually rendered as part of an otherwise legitimate transaction. So if *D* sells an item to *PW* in the ordinary course of business, *D* is not usually acting in concert with *PW* even if *D* was aware of *PW*'s intention to use the item for a tortious purpose.[48] As far as *D* is concerned, his intention is to conclude a sale and he is under no legal duty to police *PW*'s subsequent use of the article. He cannot therefore be said to have acted pursuant to any agreement or understanding. This is particularly so when the article may be put to both tortious and non-tortious uses, and *D* has no control over *PW*'s choice of use.[49]

15 However, the assumption that "common design" necessarily connotes agreement has not been uniformly adopted. Notably, Lord Sumption has recently explicated "common design" largely as a

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43 *Sea Shepherd UK v Fish & Fish Ltd* [2015] 2 WLR 694 at [41], *per* Lord Sumption.

44 *Sea Shepherd UK v Fish & Fish Ltd* [2015] 2 WLR 694 at [26], [49] and [57]. Whether or not a particular act or acts exceed the *de minimis* threshold may, of course, raise difficult questions of fact and judgment. These difficulties were amply illustrated by the UK Supreme Court's decision in *Sea Shepherd UK v Fish & Fish Ltd* [2015] 2 WLR 694, where the court held by a slender majority that an allegation of joint liability failed. Even though the parties had acted pursuant to a common design, the assistance rendered was found to have been *de minimis*.

45 *Fish & Fish Ltd v Sea Shepherd UK* [2013] 1 WLR 3700 at [58].

46 *Sea Shepherd UK v Fish & Fish Ltd* [2015] 2 WLR 694 at [49].

47 See, *eg*, *The Koursk* [1924] P 140 at 155, where Scrutton LJ said that joint tortfeasors are "two persons who *agree* on common action, in the course of, and to further which, one of them commits a tort" [emphasis added].

48 *Townsend v Haworth* (1875) 48 LJ Ch 770; *Dunlop Pneumatic Tyre Co, Ltd v David Moseley & Sons, Ltd* [1903] 1 Ch 612; *Belegging-en-Exploitaiemaatschappij Lavender BV v Witten Industrial Diamonds Ltd* [1979] FSR 59; *CBS Songs Ltd v Amstrad Consumer Electronics plc* [1988] AC 1013.

49 *CBS Songs Ltd v Amstrad Consumer Electronics plc* [1988] AC 1013 at 1058.

requirement for *intention*. Thus, his Lordship observed in *Sea Shepherd*:[50]

> I do not think that in this passage Lord Templeman [in *CBS Songs*][51] was seeking to limit liability as a joint tortfeasor to cases of inducement or procurement, as opposed to assistance. When read with his general statement of the elements of liability as a joint tortfeasor, *it is clear that he was intending to limit it to cases of common intent. Inducing or procuring a tort necessarily involves common intent if the tort is then committed. Mere assistance may or may not do so, depending on the circumstances. The mere supply of equipment which is known to be capable of being used to commit a tort does not suggest intent. Other circumstances may do so.* [emphasis added]

16 In a later passage, his Lordship explained that the element of intention is a critical mechanism for limiting liability:[52]

> Intent in the law of tort is commonly relevant as a control mechanism limiting the ambit of a person's obligation to safeguard the rights of others, where this would constrict his freedom to engage in activities which are otherwise lawful. The economic torts are a classic illustration of this. The cases on joint torts have had to grapple with the same problem, and intent performs the same role. *What the authorities, taken as a whole, demonstrate is that the additional element which is required to establish liability, over and above mere knowledge that an otherwise lawful act will assist the tort, is a shared intention that it should do so. The required limitation on the scope of liability is achieved by the combination of active co-operation and commonality of intention. It is encapsulated in Scrutton LJ's distinction between concerted action to a common end and independent action to a similar end, and between either of these things and mere knowledge of the consequences of one's acts.* [emphasis added]

17 This emphasis on intention is a logical consequence of the rationale underlying joint liability – that the defendant must have acted with a view to making the tort his own.[53] For as Hacon J observed in *Vertical Leisure Ltd v Poleplus Ltd*, this requirement "connotes the taking of one or more steps *intentionally and actively to bring about the infringing act*" [emphasis added].[54] On this view, *D* acts pursuant to a "shared intention" if he assists *PW* with the intention that *PW* should commit the tort in question. Importantly, *D* may form such intention

50 *Sea Shepherd UK v Fish & Fish Ltd* [2015] 2 WLR 694 at [41].
51 *CBS Songs Ltd v Amstrad Consumer Electronics plc* [1988] AC 1013 at 1058.
52 *Sea Shepherd UK v Fish & Fish Ltd* [2015] 2 WLR 694 at [44].
53 See discussion at para 11 above. This does not contradict Scrutton LJ's statement in *The Koursk* [1924] P 140 at 156 that "mere similarity of design on the part of independent actors, causing independent damage, is not enough" for his Lordship was there concerned with independent actors causing *independent damage*.
54 *Vertical Leisure Ltd v Poleplus Ltd* [2015] EWHC 841 (IPEC) at [39].

independently of any agreement with *PW*. Such intention may, for example, subsist if *D* supplies a device that may be used for purposes that infringe *P*'s copyrights with "clear expression or other affirmative steps taken to foster infringement".[55] In such a case, it matters not that *D* has had no prior agreement or understanding with purchasers to put the device to such use. It is sufficient that *D* has, by his conduct, evinced the intention to bring about the latter's infringement. That common intent may be inferred from D's conduct does lead to a blurring of the mental (that is, common intention) and conduct (concerted action or co-operation) elements of joint liability.[56] However, this is inevitable when *D*'s conduct is the only evidence from which his state of mind may be inferred.[57]

18 Although this approach may appear to have extended the meaning of "common design" as conventionally understood, it is not without precedent. In *Twentieth Century Fox Film Corp v Newzbin Ltd*[58] ("*Newzbin*"), the English High Court held that Newzbin Ltd ("Newzbin"), an operator of a Usenet indexing website that provided a facility (the "NZB facility") that its members may use to download infringing materials, was jointly liable for the members' infringement. Rejecting Newzbin's argument that its facility was "content agnostic", the court found that it had designed its services primarily to enable access to infringing materials. This was evidenced by the structure of its website (which guides users to the infringing materials of their choice), the provision of a specific means (the NZB facility) of downloading the materials, inducing and encouraging its editors to index copyrighted materials, and assisting its members to engage in infringing acts by giving advice on discussion forums. On these facts, the court was satisfied that Newzbin had "procured and engaged in a common design with its premium members to infringe the claimants' copyrights".[59] This was so even though there was no evidence that it had conspired with specific members to commit the infringing acts.[60] What was critical was that Newzbin had by its conduct clearly *intended* the subsequent infringing activities.

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55 *Sea Shepherd UK v Fish & Fish Ltd* [2015] 2 WLR 694 at [43], contrasting *Sony Corp of America v Universal City Studios Inc* 464 US 417 (1984) and *Metro-Goldwyn-Mayer Studios Inc v Grosker Ltd* 545 US 913 (2005).

56 *Fish & Fish Ltd v Sea Shepherd UK* [2013] 1 WLR 3700 at [47].

57 Hence, it was accepted in *Unilever Plc v Gillette (UK) Ltd* [1989] RPC 583 at 609 that "common design" need not be explicit but is inferable from parties' conduct.

58 [2010] FSR 21 at [111].

59 *Twentieth Century Fox Film Corp v Newzbin Ltd* [2010] FSR 21 at [112].

60 This was due in part to the inability to identify specific instances of infringements because the defendant had not kept a record of the files downloaded using the NZB facility: *Twentieth Century Fox Film Corp v Newzbin Ltd* [2010] FSR 21 at [110]–[111].

19 The reasoning in *Newzbin* has since been employed in a number of other decisions involving infringement of intellectual property rights,[61] but it is clear that the principle at work is of general application and hence not limited to that context. In *Shah v Gale*,[62] it was held that a defendant who pointed out to her friends the address (which turned out to be wrong) of one XI knowing that they were intending to beat him up had, "expressly or by clearest implication, become part of the common design".[63] Lewison J concluded that this inference could properly be drawn from her act of assistance taking into account what she knew (that is, the assailant's plot to assault XI) and her motive in helping them (that is, she was angry with XI for his previous harassments).[64] Though not expressly analysed as such, this decision may be understood as an instance where the court was prepared to infer the defendant's *intention* to join in the assault given her knowledge as well as her motive in rendering assistance.[65]

20 From this survey, one may conclude that there does not currently exist in tort law a principle of accessory liability in the sense that it is understood in criminal law. A person may, however, be liable as a joint tortfeasor if he participates, by way of procurement or assistance, in another's tort pursuant to a common design. The requirement for common design reflects the *raison d'être* of the principle – that liability will only be imposed if the defendant acted with the *intention* to adopt the tort as his own. An agreement (whether express or tacit) between the parties is always sufficient evidence of such intention, but it is not an essential ingredient of common design. In the absence of such agreement, the requisite intention may nevertheless be inferred from the defendant's conduct.

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61 See, *eg*, *Dramatico Entertainment Ltd v British Sky Broadcasting Ltd* [2012] RPC 27 (the operators of a peer-to-peer file-sharing website (The Pirate Bay), who had structured the site such that infringement of claimants' copyrights was not only an inevitable consequence but their very objective and intention, were jointly liable with users who downloaded infringing materials from that site); *Football Dataco v Sportradar* [2013] FSR 30 (a bookmaker which provided a web link that inevitably results in the copying of copyrighted data when clicked intended thereby to procure such infringement and was therefore jointly liable with punters who used the website); and *EMI Records Ltd v British Sky Broadcasting Ltd* [2013] FSR 31 (the operators of peer-to-peer file-sharing website were jointly liable with users who downloaded infringing music files).

62 [2005] EWHC 1087.

63 *Shah v Gale* [2005] EWHC 1087 at [41]

64 *Shah v Gale* [2005] EWHC 1087 at [36] and [41].

65 The defendant's liability as a joint tortfeasor was, however, limited to the tort of assault. She was not liable for the victim's eventual death as the court found that, not being aware of the assailants' intention to attack the victim with a knife, she could not be said to have intended the infliction of grievous bodily harm on the victim: *Shah v Gale* [2005] EWHC 1087 at [44]–[50].

III. Accessory liability in equity

21 Accessory liability in equity has developed largely in connection with the breach of trust or fiduciary obligation.[66] Though previously a distinction was drawn between procuring (or inducing) and assistance, the position since *Royal Brunei Airlines Sdn Bhd v Philip Tan Kok Ming*[67] ("*Royal Brunei Airlines*") has been that accessory liability for breach of trust – whether by procurement or assistance – is governed by a single principle.[68] For liability to accrue, *D* must have dishonestly induced or assisted *PW* (the trustee or fiduciary) to act in breach of trust or of a fiduciary obligation. In this context, dishonesty is primarily an objective concept. It is assessed by the standards of an ordinary honest person, so a defendant cannot escape liability simply by asserting that he did not appreciate that his conduct was dishonest by those standards.[69]

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66 The principle governing accessory liability for breach of trust has been applied to other types of equitable obligations: see, *eg*, *Thomas v Pearce* [2000] FSR 718, where it was held that a third party in receipt of information disclosed in breach of confidence will himself owe a duty of confidence to the confider on the same principle as that for dishonestly assisting with a breach of trust. However, the English Court of Appeal has in the subsequent case of *Campbell v MGN Ltd* [2003] QB 633 declined to endorse *Thomas v Pearce* for the proposition that a third party recipient will only be liable for breach of confidence if he had acted dishonestly in disclosing the information. More recently, in *Primary Group (UK) Ltd v The Royal Bank of Scotland plc* [2014] RPC 727 at [230]–[233], Arnold J doubted whether *Thomas v Pearce* was truly concerned with accessory liability as the real issue appeared to be one of primary liability.

67 [1995] 3 WLR 64.

68 In *Royal Brunei Airlines Sdn Bhd v Philip Tan Kok Ming* [1995] 3 WLR 64 ("*Royal Brunei Airlines*"), Lord Nicholls characterised both assistance and procurement as instances of "accessory liability": see *Royal Brunei Airlines* at 76, where his Lordship concluded that "[a] liability in equity to make good resulting loss attaches to a person who dishonestly procures or assists in a breach of trust or fiduciary obligation". See also Charles Harpum, "Accessory Liability for Procuring or Assisting a Breach of Trust" (1995) 111 LQR 545 at 548. A similar stance was adopted by the Singapore courts: see *Caltong (Australia) Pty Ltd v Tong Tien See Construction Pte Ltd* [2002] 2 SLR(R) 94 at [33]; and *George Raymond Zage III v Rasif David* [2009] 2 SLR(R) 479 at [14]. *Cf* the position in Australia, where the distinction between assistance and procurement is maintained: *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89.

69 *Royal Brunei Airlines Sdn Bhd v Philip Tan Kok Ming* [1995] 3 WLR 64 at 73. This objective test was restored by *Barlow Clowes International Ltd v Eurotrust International Ltd* [2006] 1 WLR 1467, when it implicitly rejected the "combined" test adopted by the House of Lords in *Twinsectra Ltd v Yardley* [2002] 2 AC 164 (that in addition to dishonesty by ordinary standards, the defendant must have subjectively appreciated that his conduct was dishonest by those standards). In *George Raymond Zage III v Rasif David* [2009] 2 SLR(R) 479 at [22], the Singapore Court of Appeal likewise affirmed that:

> … for a defendant to be liable for knowing assistance, he must have such knowledge of the irregular shortcomings of the transaction that ordinary honest people would consider it to be a breach of standards of honest conduct if he failed to adequately query them.

However, the defendant must know of those elements of the transaction that would render his participation dishonest by normal standards of honest behaviour.[70] In addition, the court may take into account his personal attributes – such as his experience, intelligence and the reasons for acting as he did – in assessing honesty.[71] These subjective elements remain relevant because it is ultimately his subjective mental state that is being assessed, albeit by reference to objective standards.[72]

22 Because claims based on dishonest assistance are usually resisted on the ground that the requisite mental element is absent, legal debate has largely focused on the mental aspect of the cause of action. In contrast, relatively little has been said about the scope of "assistance". The general view appears to be that "assistance" is to be broadly construed since it is the element of dishonesty that effectively constrains liability. Thus, the assistance in question need only be of more than minimal importance,[73] though it must in fact have assisted the fiduciary to commit the breach of trust or fiduciary duty.[74] Provided these requirements are met, there is no further requirement that the assistance must inevitably have resulted in loss to the claimant.[75] Nor is it necessary for assistance to comprise any mental element other than the distinct requirement for dishonesty.[76]

23 Once the relevant ingredients are established, the dishonest assistant is personally liable to account for the breach of trust or fiduciary obligation as if he were a fiduciary to the claimant. In general, this means that the dishonest assistant will be liable in equity to

70 *Barlow Clowes International Ltd v Eurotrust International Ltd* [2006] 1 WLR 1467 at [15]–[16].

71 *Royal Brunei Airlines Sdn Bhd v Philip Tan Kok Ming* [1995] 3 WLR 64 at 74–75.

72 *Abou-Rahmah v Abacha* [2007] Bus LR 220 at [16], [66] and [92]; *Attorney General of Zambia for and on behalf of the Republic of Zambia v Meer Care & Desai* [2007] EWHC 952 at [334] and [340] (reversed on appeal but with no criticism of the legal principles applied: *Attorney General of Zambia (for and on behalf of the Republic of Zambia) v Meer Care & Desai* [2008] EWCA Civ 1007). See also Simon Gardner, "Knowing Assistance and Knowing Receipt: Taking Stock" (1996) 112 LQR 56 at 66, but *cf* criticisms in Alastair Hudson, *Equity and Trusts* (Routledge, 8th Ed, 2015) at pp 990–999.

73 *Baden v Société Général pour Favoriser le Dévéloppement du Commerce et de L'Industrie en France SA* [1993] 1 WLR 509 at [276].

74 *Brinks Ltd v Abu-Saleh (No 3)* (1995) *The Times* (23 October). Here, a wife who accompanied her husband on various trips to make cash deposits (proceeds of stolen goods) at Zurich banks had not "assisted" her husband as she had done no more than provide welcome company on long and tiring drives. In *George Raymond Zage III v Rasif David* [2009] 2 SLR(R) 479 at [43], the Singapore Court of Appeal also clarified that passive receipt would not, by itself, constitute "assistance".

75 *Baden v Société Général pour Favoriser le Dévéloppement du Commerce et de L'Industrie en France SA* [1993] 1 WLR 509 at [276].

76 *Madoff Securities International Ltd v Raven* [2014] Lloyd's Rep 95 at [351].

compensate the claimant for any loss resulting from the breach.[77] As far as English law is concerned, the Court of Appeal has recently clarified in *Novoship (UK) Ltd v Mikhaylyuk*[78] that an assistant may also be liable to account for profits made in connection with the assistance rendered even in the absence of a corresponding loss suffered by the claimant. However, the availability of this remedy as against an assistant is subject to considerations different from those that apply to a fiduciary.[79] First, an assistant is only liable to account for any profit made *as a result* of his participation.[80] There must, in other words, be a sufficient causal link between the profits made and the assistance rendered. For this purpose, the common law rules on causation, remoteness and measure of damages apply by analogy,[81] so a simple "but-for" link may not suffice.[82] In contrast, a fiduciary's duty to account is not dependent on proof of common law causation. It is sufficient that the profits were made in connection with conduct that fell within the scope of his fiduciary duty,[83] and it is no defence that he would have made the profits even if there had been no breach.[84] Second, while a fiduciary is *bound* to account for any profit that he makes in connection with a breach of fiduciary duty, the assistant's liability to account is subject to the court's *discretion*. Thus, the court may withhold the remedy if it deems it to be "disproportionate in relation to the particular form and extent of wrongdoing".[85] As the assistant has not, unlike the fiduciary, assumed any obligation of single-minded loyalty to the beneficiary, the strict rules for profit-stripping cannot be justified.[86]

24 To sum up, accessory liability is indubitably a part of equity's landscape but it is not duplicative in nature. The liabilities of the accessory need not mirror those of the fiduciary because they are ultimately accounting for distinct wrongs. This is so even if the former's liability is a derivative of the latter. A further point to note is that while equity's conception of accessory liability is broadly similar to that in

77 *Royal Brunei Airlines Sdn Bhd v Philip Tan Kok Ming* [1995] 3 WLR 64.

78 [2015] 2 WLR 526, relying (*inter alia*) on *Consul Development Pty Lyd v DPC Estates Pty Ltd* (1975) 132 CLR 373 at 397. See also *Fiffyes Group Ltd v Templeman* [2000] 2 Lloyd's Rep 643.

79 *Cf Canada Safeway Ltd v Thompson* [1951] 3 DLR 295, which held several assistants jointly and severally liable for their own as well as the defendant's profits for the latter's breach of fiduciary duty. The author is grateful to her colleague Assistant Professor Yip Man for drawing her attention to this case.

80 *Novoship (UK) Ltd v Mikhaylyuk* [2015] 2 WLR 526 at [94]–[95].

81 *Novoship (UK) Ltd v Mikhaylyuk* [2015] 2 WLR 526 at [107].

82 *Novoship (UK) Ltd v Mikhaylyuk* [2015] 2 WLR 526 at [108] and [114].

83 *United Pan-Europe Communications NV v Deutsche Bank AG* [2000] 2 BCLC 461 at [47]; *Murad v Al-Saraj* [2005] WTLR 1573 at [57]; *Button v Phelps* [2006] EWHC 53 at [66].

84 *Murad v Al-Saraj* [2005] WTLR 1573 at [67].

85 *Novoship (UK) Ltd v Mikhaylyuk* [2015] 2 WLR 526 at [119].

86 *Novoship (UK) Ltd v Mikhaylyuk* [2015] 2 WLR 526 at [104].

criminal law, the mental elements of both forms of action differ: an accessory in equity must have acted dishonestly, but a criminal accessory need only have acted with knowledge of the elements of the offence.[87] Although the two standards may converge in practice because an assistant with actual or blind-eye knowledge of the elements of a breach of trust will often be regarded as dishonest, dishonesty is nevertheless a distinct concept that connotes a higher degree of moral culpability.

IV. Tort and equity compared

25 If one focuses only on the *conceptual* bases on which participatory liability is imposed, the approaches adopted in tort and equity appear contrastingly different, for while accessory liability is long regarded as elemental in equity, tort law has shunned it in favour of joint tortfeasance. The two concepts are, as seen above, distinct in that accessory liability recognises the secondary role of the accessory, but under joint tortfeasance an assistant will only be liable as a joint-principal wrongdoer if he has acted pursuant to a common design. This difference has engendered the impression that participatory liability in tort law – given that it does not recognise accessory liability for knowing assistance with another's tort – is narrower than that in equity.[88]

26 However, when one turns to consider their substantive application as outlined above, the difference between the two regimes may in fact be slender. Despite the distinct conceptual tools employed, acts of assistance and facilitation that are more than *de minimis* are adequate modes of participation in both contexts. Having adopted this liberal definition of the conduct element, both regimes then rely on narrow (albeit dissimilar) mental states to restrict liability. Thus, in neither context is mere knowledge thought to be sufficient. It may be that the divergent theoretical underpinnings of the two regimes will entail different remedial consequences,[89] but that aside, it will seem that

87 Andrew Ashworth, *Principles of Criminal Law* (Oxford University Press, 6th Ed, 2009) at p 415. In Singapore, s 107(*c*) of the Penal Code (Cap 224, 2008 Rev Ed) provides that a person must have acted "intentionally" to be liable for abetment.

88 *Fish & Fish Ltd v Sea Shepherd UK* [2013] 1 WLR 3700 at [42]. See also Joachim Dietrich, "Accessorial Liability in the Law of Torts" (2011) 31 *Legal Studies* 231 at 245.

89 Joint tortfeasors are liable for the whole of the claimant's recoverable loss regardless of their contribution to the tort. In equity, an accessory is also liable for the whole loss resulting from the fiduciary breach but is accountable only for his own gain and not that of the fiduciary (as discussed at para 23 above).

participatory (and in particular, assistant) liability in both tort and equity are similarly restrictive in scope.[90]

27 So viewed, there is in fact substantial convergence in the manner by which equity and tort regulate third party participatory liability despite their different formulations. This is unsurprising given that both regimes are, at one level of generality, concerned with a single phenomenon (*viz*, to ascribe responsibility for wrongful contribution to another's wrong). Though the two regimes differ in their conceptual bases (accessorial liability *versus* joint tortfeasance) and mental components (dishonesty *versus* common intent), these differences are explicable by their contexts. In equity, the express trust is the paradigm equitable relationship. A stranger who assists with a breach of trust can only be liable as an accessory for his *own* assistance but not as a joint trustee[91] since he has not assumed any obligation as a trustee.[92] For that reason, liability for dishonest assistance has to be structurally distinct from joint tortfeasance.[93] Likewise, the choice of "dishonesty" as the relevant fault element appears apt as against the trust paradigm because the misapplication of another's property is intuitively improper. Tort law, on the other hand, prescribes minimum standards of behaviour in a wide range of contexts so liability is *imposed* rather than assumed. Freed from any structural constraint, it could and did insist that participatory liability be limited on the basis of joint tortfeasance. Intention, rather than dishonesty, is also the more appropriate measure of fault given the diverse conduct and interests that tort law seeks to (respectively) regulate and protect.

28 While some may dismiss these contextual variances as the accidental and anomalous consequences of rigid categorisation in

90 Hence, Lord Sumption's observation that knowing assistance for breach of trust "is not in reality a broader basis of liability" because "knowledge is only relevant to establish dishonesty": see *Sea Shepherd UK v Fish & Fish Ltd* [2015] 2 WLR 694 at [39].

91 This is so even though he is regularly described as a "constructive trustee". The accessory is not a trustee in the true sense since he does not hold any property on trust but is simply liable to account by reason of his assistance: *Paragon Finance plc v DB Thakerar & Co* [1999] 1 All ER 400 at 409.

92 Except where he has so conducted himself as to be liable as a *trustee de son tort*.

93 Duncan Sheehan, "Disentangling Equitable Personal Liability for Receipt and Assistance" (2008) 16 RLR 41 at 56. The same structural constraint applies to contracts, which explains why a stranger to a contract cannot be "jointly" liable for a breach of contract: see Robert Stevens, *Torts and Rights* (Oxford University Press, 2007) at pp 275–276. For the same reason, Baughen characterises accessory liability for contract and fiduciary obligation as "mixed" or "indirect" joint liability: see Simon Baughen, "Accessory Liability at Common Law and in Equity – The Redundancy of Knowing Assistance' Revisited" [2007] LMCLQ 545 at 556–557.

private law,[94] an alternative (and, it is submitted, better) view is to see them as evidence of a consistently restrictive approach towards participatory liability in civil law. Such liability has to be narrowly delimited because it would otherwise unduly encroach upon a person's right to do things that are in themselves entirely lawful.[95] To that end, the common law when presented with a choice of different conceptual tools selects, *in that context*, the most restrictive tool that would both recognise the claimant's right to redress and protect the participant against undue interference. Though this results in the use of varying concepts in different contexts, the law as a whole is nevertheless coherent, unified by the overriding concern of optimising the participant's right to engage in lawful activities.

29 Of course, it may be asked if this unity can be taken further. Given that civil participatory liability may broadly be seen as a single phenomenon, and that substantial overlap already exists across different contexts, is there not a case for further assimilation in the interest of consistency and simplicity? In the next section, the key arguments made in favour of such a development are considered.[96]

V. The case for assimilation

30 Proponents of a unified approach contend that a common principle is already at work throughout private law and therefore such a principle should be explicitly recognised so as to render the law more logical and just. The case for assimilation is put forth most forcefully by Cooper and Davies, both of whom have sought to draw from disparate areas of private law to reveal an underlying unity in the law that was hitherto obscure. Both accounts are detailed, insightful and clearly merit careful study. An article of this brevity cannot do justice to these important works by attempting to summarise them here. The discussion that follows will therefore highlight only those arguments most pertinent to the present discussion.

31 A notable consensus among those favouring assimilation is that *knowing assistance* ought to be a sufficient basis for imposing accessory liability in civil law.[97] Although general accessory liability may be

94 *Viz*, those of tort, contract and equity: see David Cooper, "Secondary Liability for Civil Wrongs" PhD thesis, University of Cambridge (1995) at p 1.

95 *Sea Shepherd UK v Fish & Fish Ltd* [2015] 2 WLR 694 at [39]. In equity, this restrictive attitude is said to be evident even in the foundational case of *Barnes v Addy* (1874) LR 9 Ch App 244: see Charles Harpum, "The Stranger as Constructive Trustee: Part 1" (1986) 102 LQR 114 at 146.

96 See paras 30–36 below.

97 See Philip Sales, "The Tort of Conspiracy and Civil Secondary Liability" (1990) 49 Camb LJ 491 at 507–510; David Cooper, "Secondary Liability for Civil Wrongs" (*cont'd on the next page*)

justified on various grounds,[98] liability for knowing assistance is commonly defended by analogising with criminal law. As previously noted,[99] the argument is that since criminal law recognises liability for aiding, abetting, counselling and procuring a crime, civil law should likewise recognise accessory liability in the same circumstances.[100] If this were not the case, odd results may follow. For example, to deny assistance liability in tort when the same conduct constitutes a criminal offence may lead to an unjust outcome, a point strikingly illustrated by this passage in *Winfield and Jolowicz on Tort*:[101]

> 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 see there is procurement, common design or conspiracy.

Indeed, the case for consistent treatment may appear even more compelling when one considers the fact that criminal liability is subject to a higher standard of proof, attracts greater stigma and imposes more severe penalties.[102] Where criminal liability is established against this higher yardstick, should not civil (usually compensatory) liability then follow as a matter of course?

PhD thesis, University of Cambridge (1995) at p 2; and Paul Davies, *Accessory Liability* (Hart Publishing, 1st Ed, 2015) ch 9. However, they differ in their conception of what other modes of conduct would also suffice for establishing liability. For example, Sales and Cooper include conspiracy as a sufficient mode of participation but Davies does not: see Philip Sales, "The Tort of Conspiracy and Civil Secondary Liability" (1990) 49 Camb LJ 491 at 500–502; David Cooper, "Secondary Liability for Civil Wrongs" PhD thesis, University of Cambridge (1995) at pp 11–12; and Paul Davies, *Accessory Liability* (Hart Publishing, 1st Ed, 2015) at pp 61–62.

98 Davies identifies the principles that underlie the general imposition of accessory liability in civil law to include, *inter alia*, responsibility (a person who has contributed to another's injury should bear responsibility for it); culpability (one who has acted in a morally culpable manner should be liable); protecting rights (to strengthen the rights of the innocent victim); deterrence (to deter third parties from participating in the wrongs of others); loss-shifting (to allow a victim to shift the burden of loss to culpable persons); and consistency (that one area of law should not undermine another): see Paul Davies, *Accessory Liability* (Hart Publishing, 1st Ed, 2015) at pp 12–19.

99 See para 5 above.

100 See, *eg*, Philip Sales, "The Tort of Conspiracy and Civil Secondary Liability" (1990) 49 Camb LJ 491 at 502–503 and 509–510; David Cooper, "Secondary Liability for Civil Wrongs" PhD thesis, University of Cambridge (1995) at pp 7, 10 and 17; and Paul Davies, *Accessory Liability* (Hart Publishing, 1st Ed, 2015) at pp 19, 21–22 and 216–218.

101 W V H Rogers, *Winfield and Jolowicz on Tort* (London: Sweet & Maxwell, 18th Ed, 2010) at para 14–23, cited in Paul Davies, *Accessory Liability* (Hart Publishing, 1st Ed, 2015) at p 189.

102 Philip Sales, "The Tort of Conspiracy and Civil Secondary Liability" (1990) 49 Camb LJ 491 at 509–510; Paul Davies, *Accessory Liability* (Hart Publishing, 1st Ed, 2015) at p 216.

32 To conceive of civil and criminal assistant liability as co-extensive regimes may, however, extend civil accessory liability in two ways. First, acts of assistance may be enlarged to include encouragement and even advice in the civil context,[103] as is the case in criminal law.[104] Second, substituting knowledge for common intent in tort law and dishonesty in equity lowers the standard of culpability required to establish liability in both contexts. However, Davies has argued that such a scheme would not unduly extend liability as liability may be restricted by restricting knowledge to actual knowledge and wilful blindness,[105] and by developing the defence of justification.[106] These suggestions will be considered in turn.

33 Once the conduct element is broadly construed to include all forms of participation that contributed to the primary wrong, the burden of restricting liability falls on the mental component. For Cooper and Davies, this function is adequately served by requiring proof of subjective knowledge, *viz*, that of actual or blind-eye knowledge.[107] Analogising with criminal law, they suggest that *D* must know that *PW* intends to commit acts that constitute the primary wrong with the relevant culpable state of mind.[108] *D* must also know that his conduct will have some causative connection with the commission of the primary wrong.[109] So defined, "knowledge" is preferable to "common design" as the latter has the tendency to (unduly) restrict liability to instances of conspiracy.[110] "Knowledge" is also a better proxy for culpability than "dishonesty" in the context of equity since a person's

103 Davies argues that acts of advice should suffice as a possible mode of participation: see Paul Davies, *Accessory Liability* (Hart Publishing, 1st Ed, 2015) at p 28. Cooper, on the other hand, interprets "encouragement" as conduct that either constitutes assistance and/or inducement, but excludes mere advice as a sufficient mode of participation: see David Cooper, "Secondary Liability for Civil Wrongs" PhD thesis, University of Cambridge (1995) at pp 9–10.

104 Andrew Ashworth, *Principles of Criminal Law* (Oxford University Press, 6th Ed, 2009) at pp 407–408.

105 Paul Davies, *Accessory Liability* (Hart Publishing, 1st Ed, 2015) at pp 127, 213–215 and 282.

106 Paul Davies, *Accessory Liability* (Hart Publishing, 1st Ed, 2015) at pp 213–215, 222 and 282.

107 David Cooper, "Secondary Liability for Civil Wrongs" PhD thesis, University of Cambridge (1995) at pp 17–19; Paul Davies, *Accessory Liability* (Hart Publishing, 1st Ed, 2015) at p 53.

108 David Cooper, "Secondary Liability for Civil Wrongs" PhD thesis, University of Cambridge (1995) at p 18; Paul Davies, *Accessory Liability* (Hart Publishing, 1st Ed, 2015) at p 43.

109 David Cooper, "Secondary Liability for Civil Wrongs" PhD thesis, University of Cambridge (1995) at p 18; Paul Davies, *Accessory Liability* (Hart Publishing, 1st Ed, 2015) at p 43.

110 David Cooper, "Secondary Liability for Civil Wrongs" PhD thesis, University of Cambridge (1995) at p 25; Paul Davies, *Accessory Liability* (Hart Publishing, 1st Ed, 2015) at p 205.

honesty is ultimately founded on his knowledge. The concept of "dishonesty" thus adds little to the analysis, and may even be conducive to error.[111]

34 As a further measure to contain liability, Davies contends there should be a broad defence of justification that applies to accessory liability for all types of civil wrongs.[112] Although the contours of this defence have yet to be defined, Davies identifies five situations where this defence could arise.[113] For present purposes, it suffices to briefly consider two of the categories, *viz*, situations where the defendant has acted to protect a superior or equal right, and where he is acting to discharge a duty owed to a third party.[114] The first-mentioned category is currently recognised principally in the contractual context, where it is established that a person may be justified in inducing a breach of contract if he had done so to protect an equal or superior right.[115] Once extended, the application of this defence will depend not on the context (that is, whether it is tort, contract or equity) but on the rank of the interest that the defendant seeks to protect. This presupposes that private law recognises a hierarchy in the interests it protects. Davies gives the example of a defendant who participates in a nuisance because he was threatened with bodily harm if he did not.[116] The defendant's participation would be justified as he was merely acting to protect his (superior) right to bodily integrity.

35 An accessory's participation may also be justified if it was committed for the purpose of performing a duty owed to a third party.

111 Paul Davies, *Accessory Liability* (Hart Publishing, 1st Ed, 2015) at p 121, citing *Twinsectra Ltd v Yardley* [2002] 2 AC 164 at [134], *per* Lord Millet.

112 Paul Davies, *Accessory Liability* (Hart Publishing, 1st Ed, 2015) at p 222. Cooper also considered the defences applicable to the accessory but did not advocate their expansion: see David Cooper, "Secondary Liability for Civil Wrongs" PhD thesis, University of Cambridge (1995) ch 6.

113 See generally Paul Davies, *Accessory Liability* (Hart Publishing, 1st Ed, 2015) ch 7.

114 The other categories are situations involving the supply of staple articles of commerce, the protection of public morals and statutory justification.

115 *Edwin Hill & Partners v First National Finance Corp plc* [1989] 1 WLR 255. In this case, the defendant bankers had lent money to a developer secured by a first legal charge over the latter's property. When the developer required further financing, the defendant agreed to provide the necessary funding on the condition that developer dismiss the plaintiff architects to appoint a more prestigious firm of architects. The developer reluctantly acceded to this request. On the plaintiff's suit for inducing breach of contract, it was held that the defendant's conduct was justified. This was because as legal chargee, the defendant could in any case have recalled the loan and enforced the security, which would also have resulted in the termination of the plaintiff's contract. So in procuring the breach of the plaintiff's contract, the defendant was really doing no more than protecting its equal or superior right as legal chargee.

116 Paul Davies, *Accessory Liability* (Hart Publishing, 1st Ed, 2015) at p 233.

This defence may explain why a police officer is not liable for encouraging a primary wrongdoer to disclose confidential information if the disclosure would assist in the prevention of crime[117] or why a director who authorised a company's breach of contract is not liable for inducing breach of contract.[118] In each case, the accessory's conduct is justified because he owes a prior (respectively employment and fiduciary) duty to another.

36 The foregoing suggests that a unified principle of accessory liability may be achieved by adopting across private law a uniform definition of the mental and conduct elements constituting liability, and of the defences available to an accessory. This approach has the merits of forging coherence and consistency across civil and criminal law. Both Cooper and Davies also maintain that such an approach would not result in an over-inclusive regime that unfairly inhibits freedom of action.[119] However, adopting this approach will necessitate adjustments to existing principles. Specifically, "knowing assistance" will have to be recognised as a sufficient basis for liability in both tort and equity.

VI. Reasons for differentiation

37 At its core, the case for assimilation rests on the familiar adage that "like cases should be treated alike": consistency is good because it leads to fairness. However, in practical terms, this adage is of value only if there is consensus on what cases may be treated as like cases, and what is a fair rule to apply to such cases. Those who favour assimilation place considerable weight on the structural similarity of all "accessory" cases as the chief reason for treating such cases alike: in each case a person is held responsible for participating in a wrong that he may not have "caused". However, there are other structural and procedural distinctions between different legal domains (particularly that between civil and

117 Paul Davies, *Accessory Liability* (Hart Publishing, 1st Ed, 2015) at p 234.

118 On the principle of *Said v Butt* [1920] 3 KB 497. Although Davies seeks to rationalise this decision as an instance of justification (see Paul Davies, *Accessory Liability* (Hart Publishing, 1st Ed, 2015) at pp 234–238), it is suggested that a simpler explanation is that it is merely a consequence of contractual privity. A person who contracts with a company ought to normally look to the company alone as the person responsible for its performance or breach. The fact that a company necessarily acts through a human agent should not render such agents liable under the contract. However, the agent may be liable for inducing breach if he did not act in good faith and is, in that limited sense, not completely immune from liability. *Cf*, however, David Cooper, "Secondary Liability for Civil Wrongs" PhD thesis, University of Cambridge (1995) at p 170 for criticisms of this explanation.

119 David Cooper, "Secondary Liability for Civil Wrongs" PhD thesis, University of Cambridge (1995) at pp 2–3; Paul Davies, *Accessory Liability* (Hart Publishing, 1st Ed, 2015) at pp 214–215 and 285.

criminal law) that may justify variations in the formulations of accessory liability in different contexts. These distinctions ought to be kept in view when evaluating the call for fusion.

38 Although there is considerable overlap between torts and crimes, the two types of legal wrongs serve fundamentally different ends. Criminal law is largely concerned with censuring and deterring conduct that represents a serious transgression of shared social values. A conviction also carries with it greater social stigma, and is followed by more punitive sanctions. Tort law, on the other hand, protects personal rights and interests by mediating between conflicts when they arise.[120] It aims to redress rather than condemn. Owing to these differences, the paradigm of crime is serious intentional wrongdoing,[121] whilst that of tort is the failure to meet a prescribed level of conduct – typically that of negligence.[122] In general, therefore, the threshold of liability in tort is lower than that in crime. That being the case, applying the same breadth of accessory liability to tort and crime may lead to a greater expansion of liability in tort. For instance, accessory liability for theft is in one sense restricted by the requirement that the accessory must have known of the thief's dishonest intention, but no equivalent check applies if accessory liability were imposed on the same basis for conversion. All that needs to be proved is that the accessory has rendered assistance with the knowledge that the converter is dealing inconsistently with another's title to goods. Where the converter has acted honestly (but is nevertheless liable for conversion), it is not clear that the victim's loss should automatically be sheeted to third parties who had knowingly assisted the converter. Similarly, criminal liability for breach of trust is usually predicated on dishonesty but civil liability is not. An equally liberal approach to accessory liability in both contexts may thus lead to more extensive liability in equity. So while a criminal offence and a civil wrong may broadly be seen as analogues when they address the same conduct or harm, it does not follow that they are necessarily "like" cases that warrant identical treatment for purposes of accessory liability.

39 Another crucial distinction is that criminal proceedings are initiated and controlled by the State. In practice, the exercise of prosecutorial discretion is guided by two main considerations: the

120 *Ashley v Chief Constable of Sussex Police* [2008] 1 AC 962 at [17]–[18].

121 See Grant Lamond, "What is a Crime?" (2007) 27 OxJLS 609. According to Lamond, strict liability offences constitute a different paradigm which performs a function different from those of conventional common law crimes.

122 Peter Cane, "*Mens Rea* in Tort Law" (2000) 20 OxJLS 533 at 552–553. This is not to deny that intentional conduct does have a role in tort, only that its role is relatively minor role compared to that of negligence.

sufficiency of evidence and public interests.[123] So it is not the case that every reported offence will be prosecuted. In particular, it is unlikely that the Prosecution would expend valuable public resources to prosecute technical or trivial transgressions. Thus, the risk of excessive liability is likely minimal even when a broader regime of accessorial liability is adopted in respect of crimes. This relative breadth may also be needed for the pragmatic purpose of overcoming difficulties of proof[124] so as to effectively facilitate the deterrence of serious crimes. In contrast, civil wrongs are privately enforced. The merits of an expansive regime must therefore be evaluated against the increased risk of "defendant shopping". Although it is true that a claim based on venial participation is unlikely to succeed even in the civil context, the mere threat of litigation will almost certainly put the threatened party to trouble and expense, and in some cases bring pressure to bear on him to settle.

40 As noted, the harmonised approach as envisioned by Cooper and Davies is underpinned by the belief that a tight notion of knowledge is sufficient to reign in liability. However, equity's experience suggests that exclusive reliance on "knowledge" breeds uncertainty once it is extended beyond actual knowledge to encompass constructive knowledge.[125] Even if knowledge were restricted to blind-eye or Nelsonian knowledge, the question will arise as to what it is the defendant must have known to warrant the inference of such knowledge. Focusing thus on the quality of the defendant's knowledge will likely revive some of the difficulties associated with the *Baden* scale[126] because "knowledge" (mis)directs attention to discrete facts when the true objective is the identification of a range along a continuum of an increasingly blameworthy state of mind.[127] Dishonesty, by contrast, provides an *external* standard by which that identification may be made. That is not to deny the importance of knowledge as a basis for inferring dishonesty, but only to emphasise that it is not always a sufficient means of identifying culpability.[128] At the margins where the

123 See Kumaralingam Armirthalingam, "Prosecutorial Discretion and Prosecutorial Guidelines" [2013] Sing JLS 50 at 58. On the fetters of prosecutorial discretion, see Gary Chan, "Prosecutorial Discretion and the Legal Limits in Singapore" (2013) 25 SAcLJ 15.

124 Resulting from the higher standard of proof and more stringent rules on admissibility of evidence.

125 *Fish & Fish Ltd v Sea Shepherd UK* [2013] 1 WLR 3700 at [44].

126 *Baden v Société Général pour Favoriser le Dévéloppement du Commerce et de L'Industrie en France SA* [1993] 1 WLR 509 at [250].

127 Charles Mitchell, "Assistance" in *Breach of Trust* (Peter Birks & Arianna Pretto eds) (Hart Publishing, 2002) at pp 194–195.

128 Indeed, it is noteworthy that even in the context of crime, there is some recognition that a stricter mental component is justifiable: see United Kingdom, Law Commission, *Participating in Crime* (Cmnd 7084, May 2007) at para 3.5.

underlying fiduciary breach is not unambiguously motivated by bad faith, the test of dishonesty helps to isolate the type of knowledge that would render an assistant culpable.[129]

41 It is plausible, as Davies suggests, that a broad defence of justification may curb any excessive encroachment on personal freedom resulting from an expanded regime of accessory liability. However, this model of liability effectively shifts the burden of justification to the defendant. Davies considers this allocation of burden defensible, for:[130]

> … [it] is not unduly onerous for such defendants to bear the burden of justifying their actions: it should be recognised that it is *prima facie* wrong knowingly to participate in wrongdoing, and therefore legitimate to require a defendant to justify such conduct.

Thus, Davies suggests that a checkout cashier in a supermarket who sells a can of spray paint to a tortfeasor knowing that the latter intends to use it to graffiti a neighbour's wall is *prima facie* liable as an accessory but would nevertheless be allowed to justify her action since it is carried out pursuant to an employment obligation.[131] Equally, a turnstile operator of a stadium who admits spectators knowing that they will inevitably cause a nuisance may be similarly justified.[132] However, it is not obvious why the checkout assistant or the turnstile operator should be put to the trouble of having to justify their actions in the first place or, more fundamentally, why the mere fact of knowledge should taint an otherwise lawful act in these circumstances. In effect, such a regime places upon ordinary traders and their agents the duty to police the activities of their customers. Whether this strikes an appropriate balance between the traders' freedom and the victim's interests is a question that will require careful calibration in each context, and thus militates against the adoption of a general principle that is context-insensitive.

42 Finally, it may fairly be contended that participatory liability is not under-inclusive in tort law even though stricter concepts are employed in this context. One reason is, as seen above,[133] that the requirement of "common design" has been extended to include common intent, and such intention may sometimes be inferred from the

129 See *Royal Brunei Airlines Sdn Bhd v Phlip Tan Kok Ming* [1995] 3 WLR 64 at 74. On this view, dishonesty is not a redundant concept as Davies contended: see Paul Davies, *Accessory Liability* (Hart Publishing, 1st Ed, 2015) at p 122.

130 Paul Davies, *Accessory Liability* (Hart Publishing, 1st Ed, 2015) at p 222.

131 Paul Davies, *Accessory Liability* (Hart Publishing, 1st Ed, 2015) at p 239.

132 Paul Davies, *Accessory Liability* (Hart Publishing, 1st Ed, 2015) at p 240. However, Davies also acknowledges that the operator's act may be too insignificant to constitute accessory liability in the first place: see Paul Davies, *Accessory Liability* (Hart Publishing, 1st Ed, 2015) at p 215.

133 See discussion at paras 15–19 above.

participant's conduct. Where the primary tort is clearly also criminal, the participant's knowing assistance would usually also support a finding that he has intended the commission of the tort. So returning to the example cited above,[134] the malicious bystander, D2, would in all likelihood be liable as a joint tortfeasor with D1 because he has clearly intended that D1 would stab C with the knife. It is therefore probable that the ambit of joint tortfeasorship would in practice approximate (and even exceed)[135] that of criminal accessory liability in so far as the underlying wrong is in the nature of a serious crime. A second reason why tortious participatory liability is not under-inclusive even in the absence of an overarching principle of accessory liability is that the appropriate boundary of such liability has, to a large extent, already been drawn in the elements of the primary torts. So it is well established, for example, that the tort of defamation may be committed by anyone who has knowingly participated in the publication of a libellous statement either as a primary or secondary publisher.[136] Likewise, a person may also be liable for nuisance if he has authorised or directly and actively participated in another's nuisance.[137] Where the primary wrong is one of negligence, the liability of a person who has induced or encouraged the tort is also more appropriately analysed as a form of primary and direct liability for negligence. To apply accessory principles in this context would inappropriately subvert the policy concerns that underpin the tort of negligence.[138]

43 These considerations demonstrate that there may be fundamental differences in the ingredients and processes governing civil and criminal liability that may warrant a more nuanced treatment of accessory in each context. A standard approach that applies in all contexts may appear simpler and more rational, but it may also blunt the law's agility in mediating conflicting rights and interests.

VII. Conclusion

44 Although participatory liability is defined differently in tort and equity, the two regimes are largely consistent and coherent. In both contexts, acts of assistance that are more than *de minimis* qualify as a sufficient mode of participation, and liability is predicated on a mental

134 See para 31 above.

135 As was the case in *Shah v Gale* [2005] EWHC 1087, where a defendant who had assisted in the battery and assault of the claimant-victim was acquitted in criminal proceedings but was nevertheless liable as a joint tortfeasor.

136 *Bunt v Tilley* [2007] 1 WLR 1243; *Tamiz v Google Inc* [2013] 1 WLR 2151; *Oriental Press Group Ltd v Fevaworks Solutions Ltd* [2014] EMLR 11.

137 *Smith v Scott* [1973] Ch 314; *Coventry v Lawrence* [2014] 3 WLR 555.

138 See Joachim Dietrich, "Accessorial Liability in the Law of Torts" (2011) 31 *Legal Studies* 231 at 256–257.

fault that is more than mere knowledge. Their differences reflect the distinct paradigms on which the law was constructed in each context, but do not result in material disparity in scope of liability. Advocates of further convergence typically argue for alignment by reference to the principles of complicity in criminal law, but such arguments overlook the evidential, procedural as well as contextual differences between civil and criminal law. Coherence and consistency are undoubtedly important hallmarks of fair and just rules, but they do not always require identical treatment in different contexts. In the absence of strong evidence that the existing approaches do lead to unjust outcomes, a sweeping reform that requires the overturning of a large *corpus* of case authorities is arguably not warranted.