

THE LIABILITY OF ACCESSORIES UNDER STATUTE, IN EQUITY, AND IN CRIMINAL LAW: SOME COMMON PROBLEMS AND (PERHAPS) COMMON SOLUTIONS

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[This article focuses on accessory liability under statute, in equity and in criminal law. One of its purposes is to identify some of the common problems that have arisen in determining the liability of accessories in different areas of civil law, whilst drawing some comparisons with the criminal law. It will be argued that the problems that need to be addressed in determining accessory liability are largely similar in the different contexts, even if they are often formulated in superficially different ways. This article surveys some of the different approaches, though such an overview, of necessity, cannot address (nor attempt to solve) comprehensively all the problems surrounding the liability of accessories in each of the areas of law that are being considered. However, some limited conclusions about possible ways forward will be suggested. Indeed, this article suggests that until the law develops a stable and consistent means of analysis to determine when a person is liable as an accessory to another person's wrongdoing, we cannot begin to resolve the ongoing difficulties relating to accessory liability. Hence, a further aim of this paper is to attempt to articulate a series of common questions that are applicable to civil accessory liability in all circumstances, regardless of the area of law within which it arises. Without such a stable means of analysis, it may be difficult to tackle fundamental normative questions, including what the precise scope or limits of accessory liability ought to be in relation to particular wrongs. Such an attempt is worthwhile, in my view, notwithstanding that the function or goals of accessory liability will depend on the specific context within which such liability operates.]

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I INTRODUCTION

It is not uncommon for different areas of the law to deal with essentially similar problems in disparate ways. Indeed, in an era of increasing legal specialisation, it is easy to remain oblivious to developments and approaches in other areas of the law. The liability of accessories in private law has proved particularly problematic in a number of different legal contexts. It also remains ‘under-theorised’¹ in some areas, or replete with overly technical distinctions and complexities in others. In equity, for example, attempting to articulate accurately the relevant rules of accessory liability for involvement in a breach of trust or fiduciary duty is both difficult and likely to excite controversy. The law is in a state of considerable uncertainty and confusion, ‘in danger of becoming a quagmire of conflicting propositions and rationales’² (especially if one does not confine oneself to one jurisdiction). Yet the questions that need to be addressed in this context are essentially similar to those that arise in other contexts, such as the civil liability of accessories involved in breaches of statutory obligations. In Australia, there is a developing jurisprudence in relation to the *Corporations Act 2001* (Cth) (*‘Corporations Act’*), the *Trade Practices Act 1974* (Cth) (*‘TPA’*), and other legislation, in which essentially the same approaches have been adopted in defining those who are ‘involved in a contravention’ of the relevant legislation.³ Further, because the definitions of accessories in the legislation are

¹ Cf Hazel Carty, ‘Joint Tortfeasance and Assistance Liability’ (1999) 19 *Legal Studies* 489, 489, quoting P Birks, ‘Civil Wrongs: A New World’ in *Butterworths Lectures 1990–1* (Butterworths, 1992) 55, 100.

² *Spangaro v Corporate Investment Australia Funds Management Ltd* (2003) 47 ACSR 285, 302–3 [55] (Finkelstein J). See also Anthony Mason, ‘Fusion’ in Simone Degeling and James Edelman (eds), *Equity in Commercial Law* (2005) 11, 14. For an early attempt to cut through the thicket, see Paul D Finn, ‘The Liability of Third Parties for Knowing Receipt or Assistance’ in D W M Waters, *Equity, Fiduciaries and Trusts 1993* (Carswell, 1993) 195. The recent case of *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 (*‘Farah’*) has done little to quell the uncertainties in relation to many outstanding issues.

³ That phrase is also used in other regulatory legislation to extend civil liability to third parties, and is similarly defined: see, eg, *Australian Securities and Investments Commission Act 2001* (Cth) ss 5(2), 12GF; *Superannuation Industry (Supervision) Act 1993* (Cth) s 194 (former s 17); *Retirement Savings Accounts Act 1997* (Cth) s 21.

derived from criminal law concepts,⁴ not surprisingly, some resort has been made to criminal cases in order to give content and meaning to the civil liability accessory provisions. *HIH Insurance Ltd (in liq) v Adler* ('*HIH*')⁵ is a recent judgment that informs our understanding of accessory liability under the *TPA* and *Corporations Act* by reference to criminal law.

This article will focus on accessory liability under statute (specifically the *TPA*⁶ and *Corporations Act*), in equity (specifically knowing assistance) and in criminal law. Brief references will also be made to other types of accessory liability.⁷

One of the purposes of this article is a modest one: it is to identify some of the common problems that have arisen in determining the liability of accessories in different areas of civil law, whilst drawing some comparisons with the criminal law. It will be seen that the essential questions that need to be addressed are largely similar, even if they are often formulated in superficially different ways (using different legal terminology). By surveying the different approaches that the law has taken to essentially similar questions, it may be possible to identify some common problems and, perhaps, possible solutions to such problems. Such an overview, of necessity, cannot address (or attempt to solve) comprehensively all the problems surrounding liability of accessories in each of the areas of law that are being considered. However, some limited conclusions about possible ways forward will be suggested.

Indeed, arguably, we cannot begin to resolve the ongoing difficulties relating to accessory liability until the law develops a stable and consistent means of analysis to determine when a person is liable as an accessory to another person's — the principal wrongdoer's — wrongdoing. Hence, the less modest aim of this paper is to attempt to articulate a series of common questions that are applicable to civil accessory liability in all circumstances, regardless of the area of law within which it arises. Without such a stable means of analysis, it may be difficult to tackle fundamental normative questions, including what the precise scope or limits of accessory liability *ought* to be in relation to particular wrongs. Such an attempt is worthwhile, in my view, notwithstanding that the function or goals of accessory liability will depend on the specific context

⁴ These definitions also apply to accessory liability for criminal offences under the Acts: see, eg, *TPA* pt VC. *TPA* s 75B is also duplicated in s 79. Although s 75B does not apply to pecuniary penalties, these are covered by s 76, which adopts similar definitions. Criminal offences under the statutory scheme are not of concern in this article.

⁵ [2007] NSWSC 633 (22 June 2007), aff'd *General Reinsurance Australia Ltd v HIH Insurance Ltd (in liq)* (2008) 65 ACSR 626.

⁶ See generally Michael Pearce, 'Accessory Liability for Misleading or Deceptive Conduct' (2006) 80 *Australian Law Journal* 104; Joachim Dietrich, 'The (Almost) Redundant Civil Accessorial Liability Provisions of the *Trade Practices Act*' (2008) 16 *Trade Practices Law Journal* 37.

⁷ For example, tort law, on which, see generally, Philip Sales, 'The Tort of Conspiracy and Civil Secondary Liability' (1990) 49 *Cambridge Law Journal* 491; Carty, above n 1; Joachim Dietrich, 'Accessory Liability in the Law of Torts' (2010) 30 *Legal Studies* (forthcoming). Some aspects of accessory liability in tort are also discussed in a recent article by Neil Foster, 'Personal Civil Liability of Company Officers for Company Workplace Torts' (2008) 16 *Tort Law Journal* 20.

within which such liability operates.⁸ The fact that accessory liability regimes in different contexts are not identical in all details does not mean they are not different species of the same genus, and able to be subjected to *similar* analysis.⁹

II SOME PRELIMINARY MATTERS

It is necessary to deal with some preliminary matters.

A starting point must be to clearly define what is meant by civil liability as an ‘accessory’. Accessorial liability is the mechanism by which the law holds a third party (the accessory, ‘A’) responsible for ‘legal injury’, often damage, suffered by a plaintiff (‘P’) as a result of a principal wrongdoer’s (‘PW’) wrong, such that A is liable (to the same, or perhaps different, extent as PW) for the legal injury done to P.¹⁰ For convenience, I will focus on liability to compensate for harm suffered, even though other remedies or relief, such as an account of profits or injunctive relief,¹¹ may be available in some contexts.

Critically, A is thus a person against whom it is not possible to prove the elements of the wrong itself, or at least there is some significant impediment to doing so. For our purposes, someone is still an accessory even where the consequences of the liability regime are such that A is treated *as if* he or she were the PW. Similarly, in criminal law, accessories may be held criminally responsible *as if* they had committed the offence themselves, even though the elements of such offences cannot be proved independently against them.¹² (Of course, the

⁸ In *Zhu v Treasurer (NSW)* (2004) 218 CLR 530, 571–2 [121]–[122] (Gleeson CJ, Gummow, Kirby, Callinan and Heydon JJ) (‘*Zhu*’) the High Court noted that knowing assistance is aimed at deterring conduct that ‘undermines the “high standard” required of fiduciaries’, whereas ‘statutory prohibitions to catch conduct of accessories rest on goals peculiar to the particular statute.’

⁹ Cf Robert Stevens, *Torts and Rights* (Oxford University Press, 2007) 282, rejecting the existence of accessory liability in civil law altogether, in part because if there were a general rule of accessory liability of which there were different species, ‘it would be expected that they would share the same characteristics.’ However, there is no reason why specific wrongs cannot generate accessory liability regimes of different scope, which nonetheless broadly conform to a conceptual framework of accessory liability.

¹⁰ Of course, in some cases, A and PW may be closely related, for example, director and company. However, the liability of directors for a company’s wrong may raise issues peculiar to that context; it has been asserted, for example, that general principles of accessory liability in torts must be distinguished from principles that govern directors’ liability for company torts: *Microsoft Corporation v Auschina Polaris Pty Ltd* (1996) 71 FCR 231, 239 (Lindgren J). For a detailed discussion of the latter principles, see Foster, above n 7. See also Ross Grantham and Charles Rickett, ‘Directors’ “Tortious” Liability: Contract, Tort or Company Law?’ (1999) 62 *Modern Law Review* 133.

¹¹ See, eg, *Corporations Act* ss 1324(1)(c)–(f); *Australian Securities and Investments Commission Act 2001* (Cth) s 12GD; *Superannuation Industry (Supervision) Act 1993* (Cth) s 315(1); *Retirement Savings Accounts Act 1997* (Cth) s 163(1); *TPA* ss 80(1)(a)–(f). An injunction may be obtained against third parties including those who aid and abet or counsel or procure a contravention of the legislation, those who induce the contravention and those who are knowingly concerned in, or conspire with others to effect, the contravention.

¹² In criminal law, for example, a person may be treated as a principal offender as a result of their involvement in a common purpose, where a crime is committed in accordance with that common purpose (eg, to murder X). See *Osland v The Queen* (1998) 197 CLR 316. Nonetheless, if in such a case only one party has committed the acts that constitute the crime (without reference to any principles deeming someone as a principal offender), it is conceptually within the definition of ‘accessory’ adopted herein.

offence must have been committed by someone, the principal offender.) In such a case, they are for current purposes an accessory.

Although the elements of the wrong cannot be established against A, nonetheless A has in some way been ‘involved’ in (to use what is intended to be a neutral term) the commission of that wrong and there is some reason, such as A’s ‘dishonesty’,¹³ his or her knowledge of the breaching conduct,¹⁴ or A’s act of ‘procuring’ the wrong,¹⁵ that justifies holding A liable to P. True accessorial liability thus involves ‘secondary liability’ arising from some involvement in another’s wrong, which includes something in the nature of culpable conduct on A’s part that justifies holding A responsible for (the consequences of) PW’s wrongdoing.¹⁶ ‘Secondary liability’ is intended to mean only that no wrong has been committed by A, *other* perhaps than one that is formulated in terms of a wrong having been committed by PW. This qualification is necessary because some examples of true accessorial liability have themselves developed into discrete wrongs; for example, the tort of inducing breach of contract. Importantly, in such cases, liability is still dependent on some act (that amounts to a wrong) being completed by a party other than A, without which there would be no liability; thus, it comes within the definition of ‘accessory’.¹⁷ I will, however, avoid use of the term ‘secondary liability’ as it is used in inconsistent ways, and has some connotations and consequences that are not necessarily intended here.¹⁸

¹³ See, eg, the test of dishonesty formulated by the Privy Council in *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378, 392 (Lord Nicholls for Lords Goff, Ackner, Nicholls, Steyn and Sir John May) (*Royal Brunei*), and accepted by the House of Lords in *Twinsectra Ltd v Yardley* [2002] 2 AC 164 (*Twinsectra*), in the context of liability in equity for knowing assistance in a breach of trust or fiduciary duty.

¹⁴ Cf the knowledge-based approach preferred by the High Court in *Farah* (2007) 230 CLR 89, 163 [174]–[175] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

¹⁵ See, eg, *Fyler v Fyler* (1841) 3 Beav 550, 561–2, 567–8; 49 ER 216, 221, 223–4 (Lord Langdale MR); *Alleyn v Darcy* (1854) 4 I Ch R 199, 209 (Lord Chancellor Brady); *Eaves v Hickson* (1861) 30 Beav 136; 54 ER 840, cited in *Farah* (2007) 230 CLR 89, 159 [161] n 237 (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

¹⁶ As A P Simester, ‘The Mental Element in Complicity’ (2006) 122 *Law Quarterly Review* 578, 579 states in the criminal law context, a conviction as an accessory ‘must be predicated upon norm-violating conduct’. He writes, ‘[a]t issue is not culpability but responsibility’: at 589 (emphasis altered).

¹⁷ In *Zhu* (2004) 218 CLR 530, 571–2 [121]–[122] (Gleeson CJ, Gummow, Kirby, Callinan and Heydon JJ), the High Court described the tort of inducing breach of contract in the same terms as other forms of accessorial liability. Such a characterisation is rejected, however, by Simon Deakin and John Randall, ‘Rethinking the Economic Torts’ (2009) 72 *Modern Law Review* 519, especially at 520. See also above n 12.

¹⁸ For example, secondary liability is at times used to include ‘vicarious liability’: see, eg, Sales, above n 7, 502–3, who describes it as a different species of secondary liability. In the context of liability in equity for knowing assistance in a breach of trust or fiduciary duty, see Steven B Elliott and Charles Mitchell, ‘Remedies for Dishonest Assistance’ (2004) 67 *Modern Law Review* 16. They use the term ‘secondary liability’ to mean that the accessory is liable for the same wrong as committed by PW: at 17. Hence, the same remedies apply against the accessory as against PW. Cf Pauline Ridge, ‘Justifying the Remedies for Dishonest Assistance’ (2008) 124 *Law Quarterly Review* 445, 447–9 for an alternative approach to that of Elliott and Mitchell, which ‘is implicit in much of the English case law and commentary on dishonest assistance’. This approach treats the accessory’s involvement as generating a separate and independent primary liability. Hence, if the latter is the case, the remedy is at large for that independent wrong. This simplifies the debate somewhat. However, for our purposes, the debate is by the way. Even on the second approach, A’s liability is dependent upon proof of PW’s wrong and A’s involve-

Although the focus is on civil liability, I also propose to consider some of the ways in which the criminal law has dealt with related issues. Of course, criminal law can only ever be relevant to a limited extent, because there are some fundamental differences between civil liability and being charged as an accessory to a criminal offence. First and foremost, civil *liability* raises the question of what remedies are available against an accessory; this is not, of course, an issue in criminal law. This also means that the criminal law does not need to require a sufficient connection between the victim's loss or other harm sought to be remedied, and the accessory's conduct, whereas the civil law *might* do.¹⁹ Further, in a civil claim, P will often seek remedies against an accessory because of practical impediments to seeking relief against PW (such as PW's insolvency). The law is thus focused on who, as between A and P, ought to bear a particular loss.²⁰ In criminal law, however, public policy drives decisions to prosecute, and thus the moral quality of the accessory's conduct may be of more prominent concern.

Finally, it can be argued that the consequences of being found liable as a criminal accessory can in some cases be less severe, and in others more severe, than being found liable as a civil accessory. In some circumstances, being held fully liable for P's (perhaps massive) losses may have far more serious consequences for a civil accessory than suffering a criminal penalty.²¹ Nonetheless, the opprobrium of being found guilty of a crime and the consequent punishment should never be downplayed. Interestingly, where a conviction for a serious crime is at issue, one might thus expect the law to be restrained in extending accessorial liability too far. Yet, as a result of a series of High Court cases, including *McAuliffe v The Queen* ('*McAuliffe*'),²² the liability of accessories now extends to liability for crimes which, while outside the scope of a common purpose, are nevertheless foreseen by the 'accessory' as a mere possibility of the common purpose or enterprise.²³ This has led some to suggest that liability is

ment in it. Hence, it comes within the definition of accessorial liability adopted above. Further, on the first approach, it does not *necessarily* or logically follow that all remedies need to be the same as those available against PW in all circumstances (as Elliott and Mitchell accept: Elliott and Mitchell, above n 18, 40–4).

¹⁹ It is argued below that in equity, at least, such connection is also not required.

²⁰ In the very different context of the tort defence of self-defence, compare the comments of Lord Scott in *Ashley v Chief Constable of Sussex Police* [2008] 1 AC 962, 973 [18], noting that tort law needs to strike a balance between 'conflicting rights' of the plaintiff and defendant, whereas the criminal law does not need to strike such a balance and serves a different purpose. Cf also the comments of Lord Carswell at 989–90 [76].

²¹ For example, accessories under the *TPA* and *Corporations Act* are potentially subject to civil remedies, but they are also potentially liable for criminal offences or contraventions of civil penalty provisions. If losses are substantial, civil liability could eclipse any civil penalty or even criminal punishment. The civil claim being pursued against persons associated with the HIH collapse may prove to be such a case: see *HIH* [2007] NSWSC 633 (22 June 2007).

²² (1995) 183 CLR 108. For a critical note, see Stephen J Odgers, 'Criminal Cases in the High Court of Australia: *McAuliffe and McAuliffe*' (1996) 20 *Criminal Law Journal* 43.

²³ This is a subjective test, but potentially very easy to meet. See Stephen Gray, "'I Didn't Know, I Wasn't There': Common Purpose and the Liability of Accessories to Crime' (1999) 23 *Criminal Law Journal* 201 for a discussion of the current approach and the potentially broad nature of such liability. Some of the relevant cases are discussed further below. In the *Code* states, the liability extends to the probable consequences of the common purpose. Probability is determined

based on ‘reckless accessoryship’; indeed, recklessness that is established by mere possibilities that have been foreseen.²⁴ Perhaps anomalously, criminal liability of an accessory may thus be founded on broader terms than that of the principal: an accessory must merely have foreseen a possibility of, say, a victim being killed with intent (the intent being to kill or cause grievous bodily harm) to be guilty of murder,²⁵ whereas persons committing the acts that cause a death will not be liable for murder where they have merely foreseen the possibility of death or grievous bodily harm.²⁶ The issue will be discussed further below, but this means that criminal liability founded on involvement in joint illegal enterprises can be more readily established than civil accessorial liability.²⁷ This suggests a need for caution when making comparisons between criminal and civil law.

Does this mean that it ‘is a mistake to compare crime and tort [civil accessorial liability]’, as was asserted by Lord Templeman, for example, in *CBS Songs Ltd v Amstrad Consumer Electronics plc*, in the context of tort accessorial liability?²⁸ Certainly, any idiosyncratic or anomalous features of criminal law need to be highlighted and, where relevant, differences that may be the product of differing policy goals need to be acknowledged. Nonetheless, I would argue that the conceptual similarities between accessorial liability in different categories of law do allow us to make useful comparisons. As will be seen, the analytical framework that is adopted below works equally well for all accessorial liability, because it is of sufficient generality to permit different conclusions in different areas of law, whilst being specific enough to focus the mind on the relevant public policy questions that need always to be addressed.

Before considering the different accessorial liability rules in more detail, I will outline the common questions that, it is suggested, are relevant to all situations of accessorial liability, irrespective of the cause of action.

on an objective test: see *Criminal Code Act 1899* (Qld) s 8; *R v Barlow* (1997) 188 CLR 1, 20 (McHugh J).

²⁴ See Odgers, above n 22, 45–7.

²⁵ *McAuliffe* (1995) 183 CLR 108, 117–18 (Brennan CJ, Deane, Dawson, Toohey and Gummow JJ); *Gillard v The Queen* (2003) 219 CLR 1, 36 [112] (Hayne J) (*‘Gillard’*); *Clayton v The Queen* (2006) 231 ALR 500, 504–5 [17] (Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ).

²⁶ Kirby J points this out in his dissenting judgment in *Clayton v The Queen* (2006) 231 ALR 500, 524–5 [100]. His Honour rejects such broad liability: at 522 [87] onwards. Cf the majority joint judgment of Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ: at 504–5 [15]–[21], especially at [17]. My thanks go to the anonymous referee for bringing this point to my attention. See also Gray, above n 23.

²⁷ Odgers considers that it will result in conviction for ‘constructive murder’: above n 22, 47. This may be stating it too strongly, but certainly, liability for ‘reckless’ conduct based merely on the foreseeability of a possible (serious) crime occurring that is outside the common enterprise is broader than civil liability, as discussed below. The policy reasons that might justify such a broad liability arising from joint enterprises are discussed by Simester, above n 16, especially at 598–600.

²⁸ [1988] AC 1013, 1059.

III COMMON QUESTIONS TO BE ADDRESSED

Four questions will be noted, with an explanation of the burden of each. In Part IV, some of the issues that arise in relation to each of the four questions are discussed under the headings of the different areas of law and, in Part V, some comparative observations are made.

Two further questions that would need to be addressed in order to finally determine any issue of accessorial liability will not be discussed in this paper; namely, what defences are available to an accessory and what remedies are available against a (civil law) accessory (for example, are all the same defences and remedies that are potentially available to or against PW also available to or against A, and are there any other extra defences or remedies that are only available to or against A).

A What Is the Nature of the Principal Wrong That Has Been Committed?

1 Identifying the Wrong and the Relevant Accessorial Liability Rule

This question is important for a number of reasons. Obviously, it is necessary to identify the principal wrong in order to identify which particular accessorial liability rules are activated. (Where multiple wrongs are committed, multiple accessorial liability rules may be activated.) Further, it is important to identify the essential matters or elements of PW's wrongful conduct, as accessorial liability often turns on some consideration of the accessory's knowledge of those 'essential matters'²⁹ (that is, what precisely must the accessory have known). This second point will be discussed further under Part III(C).

Although it may seem fairly straightforward to identify the principal wrong in order to determine the relevant accessorial liability regime that applies, in some areas, the law draws fairly artificial distinctions; hence, there may be difficult questions as to which rules of accessorial liability are determinative of the issue. For example, in the context of breach of trust or fiduciary duty, distinct rules exist in relation to knowing assistance in a breach of duty and knowing receipt of 'trust' property (though, clearly, they have an overlapping operation). The precise boundaries of each have been questioned. Does knowing assistance apply to a breach of trust that is not a 'dishonest or fraudulent design'? The answer is 'yes' in England, but the question has been left open in Australia.³⁰ Does 'knowing receipt' apply to breaches of duty by fiduciaries who are not trustees but who deal with their principal's property? The answer is 'yes' in Australia.³¹ In England, it is doubtful whether knowing receipt has any independent existence:

²⁹ See *Johnson v Youden* [1950] 1 KB 544, 546 (Lord Goddard CJ), in the criminal law context.

³⁰ See *Farah* (2007) 230 CLR 89, 159–61 [159]–[164] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ), which also sets out the English position.

³¹ The issue was left open in *Farah* but it has since been resolved in the affirmative by the New South Wales Court of Appeal: *Kalls Enterprises Pty Ltd (in liq) v Baloglow* (2007) 63 ACSR 557.

it may have been displaced by strict liability on the basis of unjust enrichment.³² If such complexities are not enough, the High Court of Australia has further complicated the situation by reinvigorating the possibility of a separate cause of action for *procurement* of a breach of trust or fiduciary duty alongside the 'knowing assistance' claim.³³ Little seems to have changed since Sir Anthony Mason noted that this area of law 'suffers from over much classification at the expense of sound underlying principle'.³⁴

To draw such excessively technical distinctions as to the purview and scope of each particular operational rule creates difficulties (though this may not be as much of a problem outside of equity). The law may become distracted by the precise boundaries of each operational rule and their differences in scope, rather than focus on substantive questions. Such technical distinctions seem especially inappropriate when we are dealing with broadly the same wrong (breach of trust or fiduciary duty, or perhaps, even more broadly, unconscionable conduct in equity). Hence, there are understandable calls for more broad-based principles of participatory liability,³⁵ which do not depend on fine distinctions as to the precise conduct of PW and of A to trigger specific liability regimes.

2 *The Rationales for the Wrong and the Corresponding Accessorial Liability Rule*

Turning now to a second but related issue: does the rationale for a particular wrong (and the social policies sought to be achieved) affect the extent and nature of the accessorial liability that attaches to that wrong? As an initial observation one might expect that the limits and scope of accessorial liability will vary according to the type of wrong committed; that is, that the accessorial liability regime reflects the policy concerns and aims of the wrong. As there are different rationales for, and different normative, policy or other reasons underlying liability for particular wrongs, so one might expect differing rationales for the imposition of accessorial liability. If this is so, then different tests or standards for imposing accessorial liability may be required for specific wrongs (even perhaps within one area of law, such as tort or equity), and hence, a universal test of accessorial liability (as distinct from a common structure for analysis) is not appropriate. This conclusion could be seen as countervailing the suggestion above for broader-based accessorial liability principles (in equity).

Thus, one might expect that a wrong which applies expansively may also lead to more expansive accessorial liability. For example, the overzealous protection of equity's 'darling', the beneficiary of a trust, could justify an expansive

³² See Joachim Dietrich and Pauline Ridge, "The Receipt of What?" Questions Concerning Third Party Recipient Liability in Equity and Unjust Enrichment' (2007) 31 *Melbourne University Law Review* 47, for a detailed discussion of the issue.

³³ *Farah* (2007) 230 CLR 89, 159–60 [161]–[163] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

³⁴ Sir Anthony Mason, 'Themes and Prospects' in P D Finn (ed), *Essays in Equity* (Law Book, 1985) 242, 247.

³⁵ See Finn, above n 2.

accessorial liability for breach of trust and even fiduciary duty.³⁶ That, indeed, was the trend until recently; when taken too far, however, the dangers of this began to be recognised³⁷ and the courts have now, appropriately, moved back towards a more restrictive approach.³⁸

Is it possible to take this approach even further, however, and argue that the moral quality of PW's wrong (for example, malicious conduct, intentional conduct, negligence, strict liability) may affect the scope of liability of the accessory and in particular, the requisite degree of culpability or moral quality of the accessory's conduct necessary to establish liability? In other words, it may be argued that a lesser degree of moral culpability is required for an accessory to a principal wrong that itself involves a lesser degree of moral culpability. This proposition, however, is probably not the current legal position; nor, arguably, is it a desirable position.

So, for example, if a principal wrong is more readily established because elements such as knowledge or intention are not required to be proved (for example, they are presumed or are simply not requisite elements), it could be argued that establishing accessorial liability similarly ought not to require proof of such matters. This is not the general position, however, in civil law at least: even where a lesser degree of moral culpability establishes the principal wrong, nonetheless, the law generally requires a higher degree of fault to establish accessorial liability.³⁹ Thus, even where PW is strictly liable, the accessory may be required to have actual knowledge of PW's conduct that constitutes the wrong. And there are sound reasons why there need not be a logical connection between the requisite mental element of PW's wrong and that of A. Since the acts that constitute PW's wrong are different to the acts that constitute assistance or involvement as an accessory, there is no reason why the mental state of A needs to be the same as that which constitutes PW's wrongdoing.⁴⁰

This first question sets up the parameters for the relevant accessorial liability rules and it will not need to be further addressed below, other than to highlight circumstances in which differences in approach are justified because of the differing rationales for particular wrongs.

³⁶ Another example can be seen in *Tabé v The Queen* (2005) 225 CLR 418 ('*Tabé*'), in the context of the criminal law. The majority judgments, apparently motivated by the expansive legislative attack on drug-related offences, took a broad approach to accessorial liability: see especially at 460–4 [148]–[151] (Callinan and Heydon JJ). *Tabé* will be discussed further below.

³⁷ See Finn, above n 2, especially at 198–201.

³⁸ See *Royal Brunei* [1995] 2 AC 378, which was even more (and too) restrictively interpreted in *Twinsectra* [2002] 2 AC 164, a point since recognised in *Barlow Clowes International Ltd (in liq) v Eurotrust International Ltd* [2006] 1 All ER 333, 338 [15]–[16], [18] (Lord Hoffman). In Australia, see *Farah* (2007) 230 CLR 89.

³⁹ See discussion in Simester, above n 16, 583–4.

⁴⁰ See *ibid* 588, discussing aiding and abetting in the criminal law context: since A's actus reus is different to PW's actus reus, there is no reason why the same mental element is required.

B *What Is the Nature and Degree of Involvement of the Accessory in the Wrong?*

This question considers what types of physical conduct or acts of complicity/involvement can give rise to accessorial liability. The type of conduct that might lead to accessorial liability ranges considerably. A may have induced, or even have forced, PW to commit the wrong, so that A is the real instigator; A may be a genuine equal partner or co-conspirator with PW, or else may have ‘procured’ or ‘authorised’ the wrong; or A may merely have ‘assisted’ in or facilitated it, actively or (perhaps) passively (by being a facilitative vessel for the commission of the wrong).

The question of the necessary involvement of A that justifies the imposition of liability is often formulated using quite general legal terms and it is not always clear what such terms actually encompass. The issue is varyingly expressed in terms of whether the accessory aided or abetted, counselled or procured, induced, was knowingly concerned or assisted in, or facilitated, the wrong. Indeed, since the courts often attempt to clarify the meaning of such terms by using similar language, there is a proliferation of essentially synonymous terminology.⁴¹

Where attempts have been made to clarify and distinguish the meaning of these words, the efforts are often unhelpful. For example, in relation to the terms aid and abet in criminal law, it has on occasion been said that they have a separate meaning.⁴² Generally, however, they are almost invariably used compendiously (as are ‘counsel or procure’). Indeed, in the context of the statutory use of those terms in the *TPA* and *Corporations Act*, Palmer J has said that the ‘words “aiding” and “abetting” do not have separate meanings. They are synonymous and are used to describe the action of a person who is present at the time of the commission of an offence’.⁴³ He reached this conclusion despite the fact that the words originated in the criminal law, where the words have not always been treated as synonymous.⁴⁴

⁴¹ See, eg, LexisNexis, *Halsbury’s Laws of Australia*, vol 9 (at 3 March 2008) 130 Criminal Law, ‘V General Doctrines’ [130-7255] n 9 (*Halsbury’s Laws of Australia*). In the context of the statutory civil liability provisions, Palmer J in *Australian Securities and Investments Commission v Australian Investors Forum Pty Ltd [No 2]* (2005) 53 ACSR 305, 327 [117] (*Australian Investors Forum*) concluded that paras (b), (c) and (d) of s 79 of the *Corporations Act (TPA s 75B)* ‘seem to be no more than a restatement of the common law definitions of’ the terms in paragraph (a). Similarly, in the criminal law context, the High Court in *McAuliffe* (1995) 183 CLR 108, 113 (Brennan CJ, Deane, Dawson, Toohey and Gummow JJ) considered that the various terms that describe the type of conduct that activates the common purpose doctrine — ‘common purpose, common design, concert, joint criminal enterprise — are used more or less interchangeably’.

⁴² In England, it has been said that all four terms, ‘aid’, ‘abet’, ‘counsel’ and ‘procure’, are *separate* words each to be given their ordinary meaning: *Attorney-General’s Reference (No 1 of 1975)* [1975] QB 773, 779–80 (Lord Widgery CJ for Lord Widgery CJ, Bristow and May JJ). This was noted by Gibbs CJ and Mason J in *Giorgianni v The Queen* (1985) 156 CLR 473, 480 (Gibbs CJ), 492 (Mason J) (*Giorgianni*), who disapproved of the suggestion that the words were to be given their ‘ordinary’ meaning. Cf the view in *R v Georgiou; Ex parte A-G (Old)* (2002) 131 A Crim R 150, 166 [79] (McPherson and Williams JJA and Atkinson J), that the words are ‘ordinary English terms having their usual meanings’.

⁴³ *Australian Investors Forum* (2005) 53 ACSR 305, 327 [115]. Palmer J similarly concluded that the terms ‘counsel and procure’ are synonymous: at 327 [115].

⁴⁴ See above n 42.

This varying terminology creates at least one difficulty: are the different terms intended to connote different concepts? Do the terms articulate *distinct grounds* for accessorial liability, or are they merely different illustrations of the many ways in which one may be a participant in another's wrong? To the extent that they are illustrations, they may be of some limited use.⁴⁵ Any attempt, however, to focus on the individual words as if they connote separate legal concepts, capable of separate *legal* definition, is apt to lead to confusion, in my view. Instead, these terms exemplify some more general notion of what amounts to significant involvement. As Mason J said in the criminal law context in *Giorgianni v The Queen* ('*Giorgianni*'), '[t]he terms are descriptive of a single concept.'⁴⁶

It is better that the question of involvement is formulated in general terms and that, indeed, is what the courts have tended to do. In the context of criminal law, for example, the question is whether the accessory was 'linked in purpose' to the wrongdoer.⁴⁷

I would suggest that the general, normative question that must be addressed in each case is as follows: what degree of involvement in the commission of a wrong justifies liability as an accessory? Formulating the issue in such general terms, however, does not mean that we avoid more specific questions that are subsumed within the general enquiry, questions that have largely been ignored in the context of accessorial liability (in part, I would suggest, because the use of varying terminology tends to obscure them). I will focus on two specific questions:

- 1 What is the necessary causal connection between A's conduct and PW's wrong: must A's involvement be a cause-in-fact of, or a necessary condition for, PW's wrong such that there is a 'but for' causal connection between the accessory's conduct and the wrong occurring?⁴⁸ Or will a lesser degree of involvement suffice? The issue has not been the subject of much judicial discussion in the areas under consideration and there is little academic commentary on the point. What little discussion there is does not tend to put the issue clearly in terms of causation.
- 2 Must the accessory have engaged in positive acts of involvement, or can omissions to act suffice?

⁴⁵ See also *HIH* [2007] NSWSC 633 (22 June 2007) [20] (Einstein J) ('different routes to' and 'different specifications of' involvement).

⁴⁶ (1985) 156 CLR 473, 493.

⁴⁷ *R v Russell* [1933] VLR 59, 67 (Cussen ACJ), approved in *ibid* 480 (Gibbs CJ), 493 (Mason J). The principles are similar under the *Codes*: see M J Shanahan, P E Smith and S Ryan, *Carter's Criminal Law of Queensland* (LexisNexis Butterworths, 16th ed, 2006) [7.45].

⁴⁸ I use the 'but for' test as the appropriate test of whether A's conduct was a cause-in-fact of PW's wrong (or part of the history of how PW got to commit the wrong), accepting that this test, in some rare cases not of concern here, needs to be supplemented. See generally Jane Stapleton, 'Cause in Fact and the Scope of Liability for Consequences' (2003) 119 *Law Quarterly Review* 388; Jane Stapleton, 'Unpacking "Causation"' in Peter Cane and John Gardner (eds), *Relating to Responsibility: Essays for Tony Honoré on His Eightieth Birthday* (Hart Publishing, 2001) 145.

These questions will be addressed below when the different areas of law are considered; but, as will be seen below, the law generally does not require such a causal connection. In relation to omissions to act, the statutory provisions and criminal law clearly accept such liability,⁴⁹ whereas in equity, liability likely also extends to omissions, but the position is not as clear.⁵⁰

C What Is the Requisite Knowledge/Intention/State of Mind of the Accessory?

This question goes to the moral quality of A's involvement or, to put it in criminal law terms, A's requisite mens rea or mental element for liability. What did A know about PW's conduct or what did A intend should follow from his or her act? Was A dishonest or did A have actual 'knowledge' of certain essential matters? Could A be liable for merely having recklessly disregarded the truth of such matters or having 'constructive knowledge' of the wrongdoing? Irrespective of how the question is formulated, some enquiry as to (1) what A knew and what *precisely* it is that A must have known (the *content* of A's knowledge); and (2) the degree to which A knew those facts (the *level* of A's knowledge) are relevant here.⁵¹ Again, it must be noted that the courts do not always draw clear distinctions in these terms, and that these are overlapping questions (and hence, perhaps, are at times conflated).

D What Causation Requirements Need to Be Satisfied?

This question overlaps with the degree of involvement of A necessary to establish accessory liability. But it encompasses within it two separate enquiries. The first has been noted above: must A's conduct have caused PW's wrong? The second enquiry concerns whether A's conduct must have caused P's loss or harm, for which P is seeking a remedy. This second issue raises no real conceptual difficulties. If there were such a requirement, any attempt to satisfy it would invariably lead to artificial questions and duplication. If PW's wrong has caused P's loss, and if A was sufficiently involved in such wrong (leaving aside what that may mean), it is an unnecessary extra requirement to say that A's conduct must have caused P's loss. One cannot realistically answer such a further question in many situations, I would suggest. And, uniformly, the law does not require that some direct causal connection be drawn between A's conduct and P's loss (or, in the criminal context, the harm to a victim). Hence, the second aspect of this question will only be briefly considered below. The significance of causation rests rather on the involvement part of the enquiry.

We will now explore some of the issues that arise under these four questions, and how the law has attempted to resolve them, by turning to the law of accessories under statute, in equity and in criminal law.

⁴⁹ *TPA* s 79; in criminal law see below nn 109–10 and accompanying text.

⁵⁰ See, eg, *Ansell Rubber Co Pty Ltd v Allied Rubber Industries Pty Ltd* [1967] VR 37, discussed further below.

⁵¹ This distinction is drawn by R P Austin, 'Constructive Trusts' in P D Finn (ed) *Essays in Equity* (Law Book, 1985) 196, 235.

IV THE ACCESSORIAL LIABILITY REGIMES IN DIFFERENT LEGAL CATEGORIES

A Statute: TPA and Corporations Act

The TPA imposes civil (as well as criminal) liability on accessories to contraventions of the Act. Accessorial liability is imposed by ss 82 and 87. These authorise the award of damages or other remedies against parties in contravention of the relevant parts of the Act, *as well as* against parties ‘involved in the contravention’. This phrase is defined in s 75B:

- (1) A reference in this Part to a person involved in a contravention of a provision of Part IV, IVA, IVB, V or VC, or of section 75AU, 75AYA or 95AZN, shall be read as a reference to a person who:
 - (a) has aided, abetted, counselled or procured the contravention;
 - (b) has induced, whether by threats or promises or otherwise, the contravention;
 - (c) has been in any way, directly or indirectly, knowingly concerned in, or party to, the contravention; or
 - (d) has conspired with others to effect the contravention.

As already noted above, an almost identical definition is adopted in the *Corporations Act*⁵² (and other statutes have adopted similar definitions). It has been held that decisions interpreting the provisions in the TPA are equally applicable to the *Corporations Act*,⁵³ and vice versa. For convenience, I will use the term ‘statutory scheme’ without necessarily distinguishing between the specific statutes.

1 Involvement

Turning to the necessary involvement of A in PW’s wrongdoing, the statutory schemes use a number of different terms to describe the requisite conduct. In the context of the TPA and *Corporations Act*, Palmer J has said that the ‘words “aiding” and “abetting” do not have separate meanings. They are synonymous and are used to describe the action of the person who is present at the time of the commission of an offence.’⁵⁴ The subsequent terms describe other circumstances, including ones in which A is not necessarily present during the commission of the wrong; and the general language of para (c) arguably subsumes within it the full range of ways in which one might be an accessory.

Under the statutory schemes, it has been held that A’s involvement need not have had a ‘but for’ causative impact on the commission of the wrong by PW. In *Trade Practices Commission v Australian Meat Holdings Pty Ltd*, Wilcox J stated that:

⁵² The only difference is that under s 79 of the *Corporations Act*, the words ‘by act or omission’ have been inserted before the word ‘directly’ in para (c). It is unlikely that this broadens the definition. Whether an omission can found accessorial liability more generally is an interesting question, discussed in Parts IVA(1), IVB(1) and IVC(1) below.

⁵³ See, eg, *HHH* [2007] NSWSC 633 (22 June 2007) [15] (Einstein J); *Pandee Services Pty Ltd v Roberts* [2006] FCA 68 (11 September 2006) [62]–[67] (Lander J).

⁵⁴ *Australian Investors Forum* (2005) 53 ACSR 305, 327 [115].

it seems to me to be erroneous to read s 75B as being limited to conduct without which the relevant contravention could not have occurred. The words ‘knowingly concerned’ are commonly found in statutory provisions creating criminal offences. In that context the word ‘concerned’ has been read as requiring facts connecting the accused with the commission of the relevant offence ...⁵⁵

This view was affirmed in the *HHH* case:

Indeed, it is arguable that a person may be knowingly concerned in a contravention for the purposes of s 75B(1)(c) even if the defendant’s particular conduct turns out not to have been causally connected with the contravention.⁵⁶

The courts have also equally broadly interpreted the statutory schemes in relation to whether an omission can amount to a sufficient involvement. This is clearly correct. Although s 75B of the *TPA* merely notes that one must have been ‘directly or indirectly’ concerned in a contravention, s 79 of the *Corporations Act* has added the words ‘by act or omission’ before ‘directly’. The signal given by s 79 is unequivocal, although it was probably not necessary to add these words since the same position equally applies under the *TPA*. For example, a party who merely passively stands by whilst false information is conveyed may be liable as an accessory, *if* such standing by is done with knowledge of the falsity. In *Sutton v A J Thompson Pty Ltd (in liq)*,⁵⁷ an accountant, by remaining silent, withheld vital information from purchasers of a business and accepted joint responsibility for false statements made by the vendor.

2 Knowledge

Under the statutory scheme, the first point to note is that persons alleged to be accessories need not have known that the conduct in question was unlawful, that is, a breach of a (particular) section of the *TPA*⁵⁸ or other legislation. Instead, the question is expressed in terms of whether the accessory had ‘knowledge of the essential elements of the contravention’. This statement is oft repeated, but what precisely does it mean? In the context of accessorial liability for breach of s 52 of the *TPA*, it would generally require that A know of the falsity of a representation or of the misleading character of particular conduct.⁵⁹ However, breach of s 52 also occurs where PW engages in conduct that is merely ‘likely to mislead’. Establishing what A needs to know where PW’s conduct was merely likely to mislead is problematic. This does not need to be considered here, however (it has

⁵⁵ (1988) 83 ALR 299, 357.

⁵⁶ [2007] NSWSC 633 (22 June 2007) [37] (Einstein J).

⁵⁷ (1987) 73 ALR 233.

⁵⁸ See, eg, *Wheeler Grace & Pierucci Pty Ltd v Wright* (1989) 16 IPR 189.

⁵⁹ However, in *Medical Benefits Fund of Australia Ltd v Cassidy* (2003) 135 FCR 1, 11 [15] (Moore J) (*MBF*) took a slightly broader approach (finding support in some earlier authorities), namely that it is not necessary in establishing accessorial liability for there to be ‘an affirmative answer to the question whether the alleged accessory knew the representations were false or misleading. All that would be necessary would be for the accessory to know matters that enabled the representation to be characterised in that way.’ Cf at 32 (Stone J). Stone J’s views find support in the majority of the cases. The competing views are discussed in detail in Dietrich, above n 6, 42–4.

been discussed elsewhere),⁶⁰ because in the context of civil *liability* it is not sufficient that PW's conduct was merely likely to mislead. This is because the remedy sections of the *TPA* generally⁶¹ only apply if P can show reliance on the misleading conduct. And for this, the conduct must be actually misleading.

To focus on the example of breach of s 52, the *content* of knowledge question thus focuses on whether A knew that certain representations are false, or certain conduct is misleading, or is leading the plaintiff into error. Knowledge that such conduct is in breach of the relevant statute is not required.

Much of the focus of the case law has been on the question of the degree of knowledge necessary to activate liability. Despite the different wording used in each paragraph of the accessory provisions, the High Court in *Yorke v Lucas*,⁶² in relation to these four paragraphs (relevantly, of the *TPA*), held that they all import an element of knowledge. The Court noted that the words are taken from the criminal law (they are derived from former s 5 of the *Crimes Act 1914* (Cth) (now s 11 of the *Criminal Code Act 1995* (Cth)).⁶³ In accordance with criminal law concepts, the only third parties captured by these terms are those who acted in relation to the contravention with *actual* knowledge (or *mens rea*) of the essential matters that constitute the contravention.⁶⁴ This is so even though PW's liability for breach of the *TPA* is in some cases strict. In relation to para (a) of s 75B(1), the Court noted that it requires intentional participation:

To form the requisite intent [the accessory] must have knowledge of the essential matters which go to make up the offence whether or not he knows that those matters amount to a crime. ...

Notwithstanding that s 75B operates as an adjunct to the imposition of civil liability, its derivation is to be found in the criminal law and there is nothing to support the view that the concepts which it introduces should be given a new or special meaning.⁶⁵

Similarly, the Court held in relation to paras (b), (c) and (d) that they import 'intent based upon knowledge', the relevant knowledge being 'knowledge of the essential elements of the contravention.'⁶⁶ This is also the case in relation to the words 'party to' the contravention in para (c). Even though the words 'knowingly concerned in' do not qualify this phrase, the words 'party to' refer to intentional participants.⁶⁷

⁶⁰ See the discussion in *MBF* (2003) 135 FCR 1, 5–11 [2]–[16] (Moore J) and the consideration of this question in Dietrich, above n 6, 43, where it is suggested that the courts have generally been too restrictive in determining knowledge.

⁶¹ The exception is where a defendant's conduct that is merely *likely* to mislead is directed at customers of a plaintiff, thereby damaging the plaintiff's business.

⁶² (1985) 158 CLR 661.

⁶³ *Ibid* 666–7 (Mason ACJ, Wilson, Deane and Dawson JJ).

⁶⁴ *Ibid*.

⁶⁵ *Ibid* 667, 669 (Mason ACJ, Wilson, Deane and Dawson JJ). The Court relied on *Giorgianni* (1985) 156 CLR 473, where the relevant authorities were examined.

⁶⁶ *Yorke v Lucas* (1985) 158 CLR 661, 670 (Mason ACJ, Wilson, Deane and Dawson JJ).

⁶⁷ *Ibid*. See also *Australian Competition and Consumer Commission v Universal Sports Challenge Ltd* [2002] FCA 1276 (23 October 2002) [45] (Emmett J).

Actual knowledge clearly suffices. The courts have gone a little further, however, and it has been held that wilful blindness suffices as ‘actual knowledge’,⁶⁸ but that recklessness or carelessness do not.⁶⁹ This is sometimes put in terms of constructive knowledge being insufficient.⁷⁰

The degree of knowledge must be considered separately from the content question, for it arises even in relation to straightforward cases where the content of knowledge can readily be delineated, for example, a representation by PW of simple facts that are false. Here, although the content is easy to identify (did A know the facts were false) there may be little evidence on point and thus a ‘degree of knowledge’ issue arises. If it is not possible to prove positively that a party knew a fact to be false, then an extension of knowledge to ‘wilful blindness’ allows the courts to fill evidentiary gaps, where it is impossible ever to prove that the ‘accessory’ subjectively knew the falseness of the representation. Essentially, ‘wilful blindness’ is a conclusion that A surely must have known certain facts.

3 Causation

The issue of causal connection between A’s conduct and PW’s wrongdoing has been discussed under ‘involvement’. The secondary issue is whether it is necessary to show a causal requirement between A’s conduct and P’s loss. Under the statutory provisions, it has also been held that no such causal connection need be shown. As was decided in *HHH*:

the text of s 82 indicates that the required causation element is that the claimant has suffered loss or damage *by the conduct of the principal contravener* ... [and] the text makes clear that it is no element of a claim against a person involved in a contravention that the actions of that person *has caused* the loss or damage which is sued upon ...⁷¹

B Equity

The focus will be on the liability of accessories for breach of trust or fiduciary duty. This does not mean that participatory or accessorial liability in other contexts in equity are not deserving of attention. Professor Austin has noted that the liability of accessories who benefit as a result of transactions procured by undue influence or unconscionable dealing, or obtain benefits from another’s

⁶⁸ *Zipside Pty Ltd v Anscor Pty Ltd* [2004] QSC 33 (2 March 2004) [42] (Helman J). It has been suggested that perhaps dishonest ignorance of the truth may also suffice. See, eg, the observations by Cole J in *Crocodile Marketing v Griffith Vintners* (1989) 28 NSWLR 539, 545–6. I am not sure how far this differs from wilful blindness; it may suggest some form of constructive knowledge.

⁶⁹ See, eg, *Inchcape Financial Services (Aust) Pty Ltd v Classic Automobiles Ltd* [1999] NSWSC 895 (10 September 1999) [98]–[118] (Foster AJ). See also *MBF* (2003) 135 FCR 1, 26 [71] (Stone J).

⁷⁰ See, eg, *Compaq Computer (Aust) Pty Ltd v Merry* (1998) 157 ALR 1, 5 (Finkelstein J), though the possibility of some form of constructive knowledge establishing liability was not conclusively ruled out in *Crocodile Marketing v Griffith Vintners* (1989) 28 NSWLR 539, 545–6 (Cole J).

⁷¹ [2007] NSWSC 633 (22 June 2007) [20] (Einstein J) (emphasis in original). See also at [25] (Einstein J).

breach of confidence or abuse of a mortgagee's power, are topics that are 'at least closely analogous' to accessorial liability for breaches of trust or fiduciary duty.⁷² For this reason, and others, one may concur with the views of Professor Finn advocating a general scheme of participatory liability in equity.⁷³ However, since this is not the current law and for reasons of space, only one aspect of accessorial liability in equity will be discussed in detail. Similarly, space does not permit a consideration of the liability of accessories in other areas of the general law.

Generally, the personal⁷⁴ liability of accessories for breach of trust or fiduciary duty is divided into at least two broad and potentially overlapping classes of cases: liability as a result of *assisting* in the breach of trust or fiduciary duty ('knowing assistance'), or as a result of the receipt of 'trust' property or other property the subject of a fiduciary relationship ('recipient liability' or 'knowing receipt').⁷⁵ The existence, however, of a separate 'knowing receipt' claim has come under attack from two quarters. Some have questioned whether the two classes of personal liability ought to be dealt with as distinct and separate heads of accessorial liability.⁷⁶ Others deny that receipt raises issues of involvement in another's wrong at all.⁷⁷ Hence, I will focus on knowing assistance, though in Australia at least, the distinction survives.

For knowing assistance, liability is dependent on whether the alleged accessory assisted in the requisite breach by the fiduciary or trustee and whether such conduct constitutes an equitable wrong. The High Court of Australia has held that the answer turns upon what the defendant knew or ought to have known of the breach of trust or fiduciary duty.⁷⁸ In England, the issue has been formulated in terms of whether, all things considered, the 'accessory' has been (objectively) 'dishonest'.⁷⁹ The label 'constructive trustee' is often attached to a person liable

⁷² See Austin, above n 51, 200. Another analogous topic discussed by Austin is that of the liability of persons acting as trustees (eg, a trustee *de son tort*) but this does not raise questions of accessorial liability.

⁷³ See Finn, above n 2.

⁷⁴ The possibility of a proprietary claim for the recovery of specific property received by a defendant, or its traceable proceeds, forms a significant backdrop to any personal liability but is not considered here.

⁷⁵ See *Farah* (2007) 230 CLR 89; *Barnes v Addy* (1874) 9 Ch App 244, 251–2 (Lord Selborne LC); *Consul Developments v DPC Estates Pty Ltd* (1975) 132 CLR 373, 398 (Gibbs J), 409–10 (Stephen J); See also *Australian Securities Commission v AS Nominees Ltd* (1995) 62 FCR 504, 523 (Finn J). 'Knowing assistance' is often labelled, particularly in England, as 'accessory liability'. See, eg, *Royal Brunei* [1995] 2 AC 378, 384–9, 392 (Lord Nicholls for Lords Goff, Ackner, Nicholls, Steyn and Sir John May). Such a label is unhelpful if a distinction continues to be maintained within wrong-based liability (in equity) between *assistance* in a breach and liability for the *receipt* of 'trust' property, given that the more general meaning of the word 'accessory' encompasses both types of claim.

⁷⁶ See generally Finn, above n 2, 209–17, who questions the need for two distinct wrong-based claims and advocates a general participatory liability regime.

⁷⁷ This issue, and 'knowing receipt' more generally, are discussed in detail in Dietrich and Ridge, above n 32.

⁷⁸ *Farah* (2007) 230 CLR 89, affirming *Consul Developments v DPC Estates Pty Ltd* (1975) 132 CLR 373.

⁷⁹ *Royal Brunei* [1995] 2 AC 378; *Twinsectra* [2002] 2 AC 164; *Barlow Clowes International Ltd (in liq) v Eurotrust International Ltd* [2006] 1 All ER 333.

under the ‘knowing assistance’ rule, but this label is unhelpful and potentially misleading.⁸⁰

1 *Involvement*

In the context of ‘knowing assistance’, the issue of the type of involvement, and whether it need be causally connected to PW’s commission of a wrong, has rarely been discussed.⁸¹ There is almost no discussion of the issue in texts or cases, though *Jacobs’ Law of Trusts in Australia* does exemplify assistance by reference to conduct that *causes* the breach by a fiduciary: ‘There is certainly assistance, if in the absence of steps being taken by the third party, the breach of duty by the fiduciary could not have occurred’.⁸² But this statement is clearly not intended to be definitive, and is merely by way of example. Judicial discussion is equally brief; for example, the statement by Peter Gibson J in *Baden v Société Générale pour Favoriser le Développement du Commerce et de l’Industrie en France SA* (‘*Baden*’):

As to the third element it seems to me to be a simple question of fact whether or not there has been assistance. The payment by a bank on the instructions of fraudulent directors of a company of moneys of the company to another person may be such assistance ... I accept that the assistance must be an act which *is part of* the fraudulent and dishonest design and *must not be of minimal importance* ...⁸³

The meaning of this is far from clear.

One can readily conceive of examples, however, where even absent any causal connection, liability may be justified. Professor Finn, in arguing for a general participatory liability scheme in equity, discusses the different types of involvement that may activate such liability. His fifth example is one where the ‘accessory’ simply takes advantage of a wrong to obtain benefits flowing from such wrong.⁸⁴ This seems to suggest that no causative link is necessary. Such a scenario also illustrates how an omission to act might suffice.

In equity, passive facilitation of a breach of fiduciary duty or trust, such as allowing one’s bank account to be used to launder misappropriated trust funds, probably also suffices as ‘knowing receipt’ or ‘knowing assistance’. Finn has suggested that a third party may be a participant (accessory) in another’s wrong ‘sometimes actively, sometimes passively’.⁸⁵ One example may be where an accessory ‘takes advantage of the breach for his or her benefit ... by receiving

⁸⁰ In part, this is because it suggests proprietary remedies; whereas the concern of the rule is principally with personal remedies.

⁸¹ But see Elliott and Mitchell, above n 18, and Ridge, above n 18, who discuss the requisite causal connection between A’s conduct and P’s loss. This is a related issue discussed below.

⁸² J D Heydon and M J Leeming, *Jacobs’ Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) 291 [1339].

⁸³ [1992] 4 All ER 161, 234 [246] (emphasis added). Peter Gibson J considered that it is not necessary to go further and prove causation of a specific loss as a result of the accessory’s ‘assistance’.

⁸⁴ Finn, above n 2, 213.

⁸⁵ *Ibid* 205.

the benefits which flow from it'.⁸⁶ Finn cites the Victorian Supreme Court case of *Ansell Rubber Co Pty Ltd v Allied Rubber Industries Pty Ltd*.⁸⁷ That case involved a breach of confidence by an employee of their ex-employer's trade secrets. The employee's new employer and its director were held liable as accessories. The director 'was party to [the employee] concealing his activities from the plaintiff, and saw no objection to them' and the defendant company 'took the property in the machines [developed in breach of confidence] with notice of the equity' and adopted the employee's conduct.⁸⁸ This seems to suggest that there was merely a passive omission to object to the breach by the employee, whilst reaping the rewards of such breach. Whilst this case does not relate to knowing assistance for breach of trust or fiduciary duty, one can readily accept that similar scenarios could arise in that context. In any case, if there were no liability for 'omissions', then this would raise difficult probative issues and necessitate that fine conceptual distinctions between 'active' and 'passive' be drawn.

2 Knowledge

In equity, the question of exactly what the defendant must know of has not received as much attention as the degree of the defendant's knowledge (for example, actual or constructive).⁸⁹ In relation to knowing assistance, the Privy Council has held that A does not need to know of, and recognise, the trust or fiduciary relationship. (Unless A is a lawyer, this could sometimes be a difficult exercise.) It is sufficient that A know or suspect that he or she is 'assisting in a misappropriation of money'.⁹⁰ The position in Australia is not as clear. It was suggested by the New South Wales Court of Appeal in *United States Surgical Corporation v Hospital Products International Pty Ltd* that the defendant must recognise the trust or fiduciary relationship, the facts constituting breach of duty, and 'that those facts did bear that character'.⁹¹ This states the requirement too onerously. Consistently with the position under the statutory scheme (and in criminal law), it should suffice that A knows broadly that some wrongdoing is occurring, without knowing the precise character of the unlawfulness.

Turning to the requisite *degree* of knowledge, in England A must be 'dishonest' in his or her assistance in order to incur liability (though a fiduciary or trustee may be in breach of duty even where his or her conduct is honest or well-

⁸⁶ Ibid 213.

⁸⁷ [1967] VR 37.

⁸⁸ Ibid 46 (Gowans J).

⁸⁹ For a useful discussion of this question in the context of accessorial liability in equity, see Austin, above n 51, 235–8.

⁹⁰ *Barlow Clowes International Ltd (in liq) v Eurotrust International Ltd* [2006] 1 All ER 333, 341 [28] (Lord Hoffmann), affirming *Twinsectra* [2002] 2 AC 164, 170 [19] (Lord Hoffman), 202 [135] (Lord Millett).

⁹¹ [1983] 2 NSWLR 157, 253 (Moffitt P, Hope and Samuels JJA). See generally the discussion in Austin, above n 51, 235–8. See also Charles Mitchell, 'Assistance' in Peter Birks and Arianna Pretto (eds), *Breach of Trust* (Hart Publishing, 2002) 139, 195–200, cited in Ridge, above n 18, 447.

intentioned).⁹² In Australia, the High Court has not endorsed the ‘dishonesty’ test, but the position is probably similar: accessory liability will only attach where the assisting party has knowledge of a breach in the nature of a *dishonest and fraudulent* design by PW.⁹³ Provided the level of knowledge is not set at too low a bar, this will probably broadly equate to dishonesty.

The categories of knowledge (including constructive notice) were famously restated as five levels of a scale of ‘knowledge’ in *Baden*. These are:

- (i) actual knowledge;
- (ii) wilfully shutting one’s eyes to the obvious;
- (iii) wilfully and recklessly failing to make such inquiries as an honest and reasonable man would make;
- (iv) knowledge of circumstances which would indicate the facts to an honest and reasonable man;
- (v) knowledge of circumstances which would put an honest and reasonable man on inquiry.⁹⁴

There has been considerable controversy as to the utility of such an approach. In *Royal Brunei*, the Privy Council considered that it would be best to avoid the term ‘knowingly’ as a defining ingredient of the knowing assistance principle and that ‘in the context of this principle the [*Baden*] scale of knowledge is best forgotten.’⁹⁵ This approach has received support amongst commentators⁹⁶ and in the House of Lords.⁹⁷ It is fair to say, however, that assessing dishonesty without some reference to what A knew, and the degree to which he or she knew it, may be difficult. Hence, in the subsequent English Court of Appeal case of *Heinl v Jyske Bank (Gibraltar) Ltd*, it was considered that

the application of the principle to the facts of any particular case invariably depends, to a greater or lesser extent, on the state of knowledge of the person who is sought to be made liable. For this reason ... [the *Baden* classification] will sometimes continue to be helpful in identifying different states of knowledge which may or may not result in a finding of dishonesty.⁹⁸

⁹² *Royal Brunei* [1995] 2 AC 378, 392 (Lord Nicholls for Lords Goff, Ackner, Nicholls, Steyn and Sir John May).

⁹³ *Barnes v Addy* (1874) LR 9 Ch App 244, 251–2 (Lord Selborne LC), cited in *Farah* (2007) 230 CLR 89, 140 [111] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

⁹⁴ *Baden* [1992] 4 All ER 161, 235 (Peter Gibson J).

⁹⁵ [1995] 2 AC 378, 392 (Lord Nicholls for Lords Goff, Ackner, Nicholls, Steyn and Sir John May).

⁹⁶ See, eg, Heydon and Leeming, above n 82, 284 [1335], who describe the *Baden* scale as the ‘zenith of complexity’ and discuss *Royal Brunei*, seemingly with approval: at 287–8 [1336].

⁹⁷ *Twinsectra* [2002] 2 AC 164.

⁹⁸ [1999] Lloyd’s Rep 511, 523 (Nourse LJ), cited in *Grupo Torras SA v Al-Sabah [No 5]* [2001] Lloyd’s Rep 36, 58 [99] (Robert Walker and Tuckey LJJ and Sir Murray Stuart-Smith).

In Australia, the High Court has endorsed the use of such levels of knowledge and indicated that at a minimum level (iv) knowledge on the *Baden* scale is required to establish knowing assistance.⁹⁹

Are the English and Australian approaches significantly different? Certainly, level (iv) knowledge suggests something less opprobrious than dishonesty, although since the High Court held that the fiduciary's (PW's) conduct must amount to a dishonest and fraudulent design, and that A know of the circumstances that would suggest this to an 'honest' person, the difference may be, largely, inconsequential (though clearly, it could at least in rare cases extend beyond 'dishonest' conduct by A).

3 Causation

In relation to knowing assistance, the English Court of Appeal in *Casio Computer Co Ltd v Sayo [No 3]* has held that:

[The case of *Grupo Torras SA v Al-Sabah [No 5]*]¹⁰⁰ establishes that in a claim for dishonest assistance it is not necessary to show a precise causal link between the assistance and the loss. Loss caused by the breach of fiduciary duty is recoverable from the accessory. This is the relevant causal connection for this purpose. In the absence of such a connection the accessory would be under no liability.¹⁰¹

A further interesting question arises in relation to other remedies, such as an account of profits. Can A be held liable for PW's profits, where there is no corresponding loss to P?¹⁰² The answer is no. In *Ultraframe (UK) Ltd v Fielding* Lewison J considered the question, and stated:

it makes sense for a dishonest assistant to be jointly and severally liable for any loss which the beneficiary suffers as a result of a breach of trust. I can see also that it makes sense for a dishonest assistant to be liable to disgorge any profit which he *himself* has made as a result of assisting in the breach. However, I cannot take the next step to the conclusion that a dishonest assistant is also liable to pay to the beneficiary an amount equal to a profit which he did not make and which has produced no corresponding loss to the beneficiary.¹⁰³

C Criminal Law

In Australia, there is no uniformly applicable criminal law. The *Criminal Code Act 1995* (Cth) deals with some criminal offences, but most criminal law falls within state and territory jurisdiction, and there are a myriad of different legal regimes in place. The law in the majority of states and territories is codified (though not uniformly) but the criminal law in New South Wales, South Australia

⁹⁹ *Farah* (2007) 230 CLR 89, 163–4 [174]–[178] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

¹⁰⁰ [2001] Lloyd's Rep 36, 62 [123] (Robert Walker and Tuckey LJ and Sir Murray Stuart-Smith).

¹⁰¹ [2001] EWCA Civ 661 (11 April 2001) [15] (Tuckey LJ).

¹⁰² This question, as well as the question of whether P is able to obtain A's profits in the absence of any profit by the fiduciary (PW), is discussed in Elliott and Mitchell, above n 18, and Ridge, above n 18.

¹⁰³ [2005] EWHC 1638 (Ch) (27 July 2005) [1600] (emphasis in original).

lia and Victoria is based on the common law, with extensive additions contained in legislation. Hence, it is not practical, or necessary for current purposes, to set out the detailed statutory sections or common law rules from each jurisdiction dealing with the issue of the criminal liability of accessories. Instead, only a broad outline will be given of the essential principles upon which accessories are held criminally responsible.

An accessory in criminal law is someone who has not committed (all of) the acts that constitute an offence (or at least, it is not provable that A has committed such acts), but is deemed to be guilty of the offence because he or she encouraged or assisted the principal offender ('PO') or offenders. Alternatively, A may also be found liable for a criminal offence committed by another as part of a joint criminal enterprise or common criminal purpose. It is important that these two ways in which one can be implicated or involved in another's criminal act are kept distinct, as different degrees of knowledge apply to each (the issue will be discussed below). Liability for assistance is more restrictive than that for involvement in a common purpose and generally shares many similarities with the civil accessorial liability regime.

1 *Involvement*

For assistance liability, A's encouragement or assistance must be intentional. A variety of terms have been utilised to describe the nature of the assistance or involvement in the crime (the precise terminology depends on the jurisdiction). Recurring, however, are terms such as 'aid', 'abet', and 'counsel' or 'procure'.¹⁰⁴ Importantly, despite the different terminology, the courts often tend to generalise from the particular and state the issue in terms of whether the accessory is sufficiently 'linked in purpose with the person actually committing the crime', such that his or her 'words or conduct [do] something to bring about, or [render] more likely' the commission of the offence.¹⁰⁵ What is clear is that no causal connection needs to be shown between A's acts of assistance and PW's commission of the offence. Mere encouragement of a crime or assistance, even in circumstances where such offence may have occurred without such encouragement or assistance, can lead to a person being found guilty as an accessory.¹⁰⁶ In the *Code* states it is explicitly stated that acts done merely '*for the purpose of* enabling or aiding another person' suffice.¹⁰⁷ This is uncontroversial.

In the criminal law, liability for omissions is also accepted, albeit such liability will only arise where the alleged accessory is in a position of authority or control over PO, such that a duty arises to take reasonable steps to prevent the offence

¹⁰⁴ See, eg, *Criminal Code Act 1899* (Qld) s 7.

¹⁰⁵ *R v Russell* [1933] VLR 59, 67 (Cussan ACJ), approved by Gibbs CJ and Mason J in *Giorgianni* (1985) 156 CLR 473, 480 (Gibbs CJ), 493 (Mason J). *Giorgianni* is from New South Wales, a common law jurisdiction; however, the principles are similar under the Codes: see Shanahan, Smith and Ryan, above n 47, [7.45].

¹⁰⁶ See, eg, *Howell v Doyle* [1952] VLR 128, 134 (Herring CJ); *R v Tannous* (1987) 10 NSWLR 303.

¹⁰⁷ *Criminal Code 1899* (Qld) s 7(1)(b) (emphasis added); *Criminal Code Act 1924* (Tas) sch 1 s 3(1)(b) (emphasis added); *Criminal Code Act Compilation Act 1913* (WA) s 7(b) (emphasis added).

being committed. Thus, in *Randall v The Queen*,¹⁰⁸ a co-manager of a club was held liable as an accessory to a rape committed by the other co-manager, which took place in the club office whilst A was present (the same conclusion would not be reached in relation to other persons who were also present and merely witnessed the event). A duty to act can arise from pre-existing relationships between A and PO, for example, between parent and child.¹⁰⁹ Outside of such circumstances, a mere omission will not found criminal liability.

2 Knowledge

In the criminal law, the requirement is that A must have knowledge of the essential matters that make up the crime. A need not have knowledge of the particular crime intended (but only the type),¹¹⁰ or even that the conduct that constitutes the offence is illegal.¹¹¹ Although A need not know that PO is committing a criminal offence, nonetheless, A must have had knowledge of the essential facts and circumstances of the offence and intentionally provided the assistance or encouragement.¹¹² Essentially, determining what A must be proven to have known requires ‘close’ consideration of the essential matters going to the offence, but these essential matters ‘must not be characterised in too narrow a fashion’.¹¹³ Hence, it is only necessary that A have knowledge of all of the *essential facts* and not all of the details of the offence and information pertaining to it.¹¹⁴ This generally requires that A have knowledge of the intention of PO to commit an offence. Actual knowledge of the essential facts constituting an offence is required even where the offence itself may not require proof of such knowledge or intention. As Mason J stated in *Giorgianni*:

In general, the absence of intention as an element of the substantive offence has not been regarded as obviating the necessity for knowledge on the part of the secondary party of the essential facts constituting the offence. The ‘link in purpose’ between the secondary party and the principal offender is not established where a person does something to bring about, or render more likely, the commission of an offence by another in circumstances in which, through ignorance of the facts, it appears to him to be an innocent act.¹¹⁵

Similarly, Gibbs CJ noted in *Giorgianni* that a person cannot

aid, abet, counsel or procure the commission of an offence of strict liability without having an intention to do so formed in the light of knowledge of the

¹⁰⁸ (2004) 146 A Crim R 197.

¹⁰⁹ See, eg, *R v Russell* [1933] VLR 59.

¹¹⁰ See, eg, *R v Bainbridge* [1960] 1 QB 129, 134 (Lord Parker for Lord Parker, Byrne J and Winn CJ).

¹¹¹ *Giorgianni* (1985) 156 CLR 473, 500, 506 (Wilson, Deane and Dawson JJ).

¹¹² *Ibid* 494 (Mason J), citing a classic statement by Lord Goddard CJ in *Johnson v Youden* [1950] 1 KB 544, 546–7. Similarly, in relation to the *Code* jurisdictions, see, eg, *Wilson v Dobra* (1955) 57 WALR 95, 97 (Dwyer CJ).

¹¹³ *HIH* [2007] NSWSC 633 (22 June 2007) [49] (Einstein J), citing *Sweeney v Western Australia* [2006] WASCA 118 (27 June 2006). See also at [48]–[51] (Einstein J).

¹¹⁴ This was considered to apply equally under the statutory schemes: *HIH* [2007] NSWSC 633 (22 June 2007) [51] (Einstein J).

¹¹⁵ (1985) 156 CLR 473, 494.

facts. ... [A] particular state of mind is essential before a person can become liable as a secondary party for the commission of an offence, even if the offence is one of strict liability.¹¹⁶

There are, however, some decisions that are not easily reconcilable with a requirement of knowledge by A of the commission of an offence. One such case is *Tabé v The Queen* ('*Tabé*').¹¹⁷ To simplify somewhat, the case will be treated as if it concerned the possession of drugs (in fact, the drugs had been substituted and thus the PO was charged with attempted possession, the prosecution relying on 'attempt' provisions that are not of concern here). It was held by the majority that the relevant offence provision did not require the prosecution to prove that PO had knowledge that the substance possessed was in fact an illicit drug.¹¹⁸ Instead, the onus was on PO to show an honest and reasonable mistake as to the nature of the substance possessed.¹¹⁹ The majority went on to hold that, *therefore*, the prosecution did not have to prove knowledge by A that PO sought to possess a drug.¹²⁰ Accepting the majority's conclusion on the first point,¹²¹ nonetheless, the second conclusion seems wrong on two counts. First, one can argue that the principal offence is not akin to a strict liability offence — there is merely a reversal of onus — hence that knowledge of the existence of the drug is still an 'essential element' of the offence to which it is sought to make the accused an accessory. I would argue that the requisite content of A's knowledge includes that he or she is assisting PO to obtain a drug (even if the prosecution need not prove such knowledge against PO). The reversal of onus cannot apply against the accused, since assisting someone to obtain possession of a non-illicit substance, say, potatoes, is not an offence. Callinan and Heydon JJ concluded that the statutory provision, *as a matter of statutory construction*, did shift the burden of proof;¹²² but their reasoning is circular. They relied on the fact that s 7 of the *Criminal Code 1899* (Qld) deems an accessory to be a principal offender.¹²³ However, although this is correct, this does not mean that for all intents and purposes the alleged accessory must be treated on the same basis as a principal offender: he or she must first be *proved* to be an accessory. And, as has been consistently held previously, that requires A to know that an *offence* is being committed. Possession of non-illicit substances is not an offence.

Secondly, even if we view the principal offence as a strict liability offence (possession of a drug even without knowledge), this does not mean that knowledge by A of the fact that the substance is a drug is irrelevant. The position is

¹¹⁶ *Ibid* 479.

¹¹⁷ (2005) 225 CLR 418. Thanks to Malcolm Barrett for drawing my attention to this case, and for our fruitful discussions in relation to it. See also *Lenzi v Miller* [1965] SASR 1.

¹¹⁸ *Tabé* (2005) 225 CLR 418, 429 [24] (Gleeson CJ), 465 [155] (Callinan and Heydon JJ).

¹¹⁹ *Ibid* 429 [22] (Gleeson CJ), 459 [145] (Callinan and Heydon JJ).

¹²⁰ *Ibid* 430 [25] (Gleeson CJ), 461 [148] (Callinan and Heydon JJ).

¹²¹ The dissenting judges held that the principal offence did require knowledge as an element and hence, did not deal with the points I am raising: *ibid* 436 [57] (McHugh J), 446–7 [102]–[105] (Hayne J).

¹²² *Ibid* 461 [148].

¹²³ *Ibid* 464 [153].

comparable to breach of s 52 of the *TPA*, for which primary liability is strict; nonetheless, a party is only an accessory where they know that the conduct is in fact misleading. Since the alleged accessory has not himself or herself done the unlawful *act* (that is, made the statement or, as in *Tabé*, possessed the drug) we cannot hold him or her liable as an accessory absent such knowledge, since if PW had made a true statement, or PO had possessed potatoes, no offence would have been committed. And surely, I am perfectly entitled to assist someone to make true statements or obtain possession of potatoes.

The requisite *degree* of knowledge is actual knowledge of the essential elements of the crime (though wilful blindness may allow the inference to be drawn that such actual knowledge exists).¹²⁴ This will generally be the case even where the principal offence itself requires a lesser degree of moral culpability; for example, liability without knowledge. (However, as *Tabé* demonstrates, wrongly in my view, the *content* of what A must actually know in some cases does not include knowledge that conduct that amounts to an offence is to be committed.)

However, where accessorial liability for parties engaged in a joint criminal enterprise or common purpose is at issue, a lesser degree of knowledge will give rise to liability. The knowledge requirement is also far less onerously applied: a party to a joint criminal enterprise or common purpose may be held liable for the subjectively *foreseen* consequences of the carrying out of that purpose, even where the conduct of the principal is outside of that purpose.¹²⁵ This is so at common law; at least, in the *Code* states, liability is both narrower and broader: it only arises for the *probable* consequences of such a common purpose, but it is determined by an objective test.¹²⁶ Such an approach does mean that, unusually, the state of mind of the accessory may be less than that needed to prove the liability of a person charged with the commission of the offence itself. As Kirby J pointed out in *Clayton v The Queen*:

If a *principal* offender were to kill the victim, foreseeing only the possibility (rather than the probability) that his or her actions would cause death or grievous bodily harm, that person would not be guilty of murder. Yet a *secondary* offender with a common purpose could, on the current law, be found guilty of murder of the same victim on the basis of extended common purpose liability if the jury were convinced that he or she had foreseen the possibility that one of the group of offenders might, with intent, cause grievous bodily harm and if, in the result, one of the group does indeed kill the victim with the intention to cause such grievous bodily harm.¹²⁷

¹²⁴ Cf *Halsbury's Laws of Australia*, above n 41, [130-7260] n 9, which suggests that the High Court in *Giorgianni* (1985) 156 CLR 473 was divided as to whether wilful blindness is sufficient to satisfy the knowledge element. In my view, all judgments are consistent with the proposition that evidence of wilful blindness may allow a court to draw an inference that actual knowledge exists.

¹²⁵ *McAuliffe* (1995) 183 CLR 108, 117 (Brennan CJ, Deane, Dawson, Toohey and Gummow JJ); *Gillard* (2003) 219 CLR 1, 36 [112] (Hayne J); *Clayton v The Queen* (2006) 231 ALR 500, 504–5 [17] (Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ). See also Gray, above n 23, 205.

¹²⁶ *Criminal Code Act 1899* (Qld) s 8; *R v Barlow* (1997) 188 CLR 1, 20 (McHugh J).

¹²⁷ (2006) 231 ALR 500, 524–5 [100] (citations omitted) (emphasis in original). The anomaly does not really arise as starkly as suggested by Kirby J in those Australian jurisdictions that impose

Such a position is unusual. Liability in such cases is broader than accessory liability for *assistance* in a crime,¹²⁸ and broader than civil liability generally, where actual knowledge of the commission of the wrong or an intention that it be committed, rather than mere foresight of a possibility, is required.¹²⁹ In *Clayton v The Queen*, Kirby J noted the ‘anomaly and lack of symmetry’ created by the fact that in cases

of an accused charged as an aider, abetter, counsellor or procurer of the offence in question, [the requirements are stated] in terms firmly anchored in a requirement of proof of ‘... intentional participation’ ... Adherence to the present requirements of liability for an extended common purpose is difficult, or impossible, to reconcile with this approach to criminal liability.¹³⁰

The policy reasons for this appear to be based on the nature of joint criminal enterprises and the need to curb antisocial involvement in such enterprises, especially since they have a tendency to get out of hand.¹³¹ It should be added, however, that such a position has been trenchantly criticised by some¹³² and does seemingly lead to the anomalies noted above.

liability for ‘constructive murder’ committed by principals in pursuit of a serious criminal act: *Crimes Act 1900* (NSW) s 18(1)(a) (where the killing is ‘done in an attempt to commit, or during or immediately after the commission, by the accused, or some accomplice with him or her, of a crime punishable by imprisonment for life or for 25 years’); *Criminal Code 1899* (Qld) s 302(1)(b); *Criminal Law Consolidation Act 1935* (SA) s 12A (killing must be an ‘intentional act of violence’ while committing a 10 plus year offence (except abortion)); *Criminal Code Act 1924* (Tas) s 157(1)(c); *Crimes Act 1958* (Vic) s 3A(1) (includes an explicit requirement that the offence be one involving an element of violence); *Criminal Code Act Compilation Act 1913* (WA) s 279(1)(c). See generally David Lanham et al, *Criminal Laws in Australia* (Federation Press, 2006) 187–94. Gray, above n 23, 216, suggests that it is plausible that an accessory could be convicted of a crime that was not even committed and rightly categorically rejects such a possibility as unjust and absurd. I would suggest that this possibility does not really arise even on the broadly stated test, which implicitly requires that the actus reus and offence actually committed must set the limits of any possible accessory liability (though it is plausible that PW may not be convicted of such an offence if they have a valid defence that A does not).

¹²⁸ See Simester, above n 16, 593–5, distinguishing between the two types of complicity liability and why different mental elements are justified for each. His views have been endorsed by the High Court in *Clayton v The Queen* (2006) 231 ALR 500, 505 [20] (Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ).

¹²⁹ See, however, the discussion below in relation to equity.

¹³⁰ (2006) 231 ALR 500, 525 [102]–[103], citing *Giorgianni* (1985) 156 CLR 473, 506 (Wilson, Deane and Dawson JJ).

¹³¹ Gray, above n 23, 208, citing the House of Lords decision in *R v Powell* [1999] 1 AC 1, 14, where Lord Steyn referred to the risk that ‘joint criminal enterprises only too readily escalate into the commission of greater offences.’ See also Simester, above n 16, 598–9. While the majority’s joint judgment in *Clayton v The Queen* (2006) 231 ALR 500, 505 [18], [20] (Gleeson CJ, Gummow, Hayne, Callinan, Heydon and Crennan JJ) referred to both the case of *Powell* and Simester’s article, there is no discussion of the risks of escalating joint criminal enterprises. Kirby J quoted Lord Steyn’s argument and stated that ‘this argument represents the strongest policy justification for the exceptional ambit of the present Australian common law rule of extended common purpose liability’: at 519 [79]–[80]. However, Kirby J considered the argument ‘ultimately unpersuasive’ as extended common purpose liability removes ‘the normal requirement of the modern criminal law that the prosecution prove a requisite intention on the part of the secondary offender’: at 526 [107].

¹³² See Odgers, above n 22. Odgers was counsel for the losing appellants in *McAuliffe*, the case that broadened liability using the common purpose doctrine. See also Kirby J’s dissenting opinions in *Clayton v The Queen* (2006) 231 ALR 500, 517–32 [70]–[126] and *Gillard* (2003) 219 CLR 1,

V COMPARATIVE OBSERVATIONS IN RELATION TO EACH OF THE COMMON QUESTIONS

It is now proposed to make a number of general observations that attempt to draw together the discussion of the accessory liability regimes. These will be related back to the four questions proposed above.

A *The Nature of the Principal Wrong*

The first point to note is that irrespective of the principal wrong that has been committed, the rules of civil accessory liability have tended towards requiring a fairly stringent degree of responsibility before liability is imposed. There appears to be no real correlation between the requisite culpability of PW and the requisite culpability of A: the latter must generally be intentionally and knowingly concerned in the wrong even where PW did not knowingly commit such a wrong. In part, this is perhaps because accessory liability rules must operate in relation to specific wrongs that can be committed by a variety of conduct. For example, a party engaging in misleading conduct in trade or commerce may engage in such conduct deliberately and knowingly, or innocently; a fiduciary in breach of duty may be malicious, dishonest, reckless, or simply well-intentioned but ignorant of his or her obligation.¹³³ But the law has taken the position that, although a party may mislead another innocently, and although the fiduciary may be in breach though well-intentioned, one cannot be an innocent or well-intentioned accessory to these two wrongs.

I would suggest that one reason why the courts take a restrictive approach to imposing accessory liability is because of the consequences of such liability. At common law and in equity, A is *jointly liable* (with PW) for the full extent of the damage suffered by P, justifiably so if, for example, A is the instigator of the wrongdoing. But this will be so even where A's involvement in the wrong is fairly minor. Given such potentially harsh consequences, it is not surprising that the law has been cautious in imposing such liability. The adoption of proportionate liability in parts of the statutory schemes (such as for misleading or deceptive

16. For criticism of the English legal position, see Beatrice Krebs, 'Joint Criminal Enterprise' (2010) 73 *Modern Law Review* 578.

¹³³ The last possibility has led some commentators to describe breach of fiduciary duty as imposing strict liability: see, eg, Robert Flannigan, 'The Strict Character of Fiduciary Liability' [2006] *New Zealand Law Review* 209. But this is a misleading use of the label. A fiduciary in breach has breached an objective standard of acceptable conduct and this is a wrong no less than that committed by a tortfeasor who is negligent but well-intentioned. As *Nocton v Ashburton* [1914] AC 932, 954 (Viscount Haldane) makes clear:

A man may misconceive the extent of the obligation which a Court of Equity imposes on him. His fault is that he has violated, however innocently because of his ignorance, an obligation which he must be taken by the Court to have known, and his conduct has in that sense always been called fraudulent ...

Such conduct is wrongful because it involves intentional conduct that breaches such a standard (even if no harm or wrong was intended). The label of strict liability should be reserved for liability imposed on parties who have not engaged in any intentional or negligent conduct that breaches required standards, such as an employer held vicariously liable for a tortfeasor's negligence.

conduct under the *TPA*)¹³⁴ could be used to argue for the imposition of a broader accessorial liability.

However, by way of contrast, such concerns are not relevant in the criminal law. Perhaps this is why, even though the criminal law forms the basis of the statutory liability regimes and requires similar levels of knowledge and intention in the context of assistance, it nonetheless, and perhaps surprisingly, imposes broader liability in cases involving joint illegal enterprises. The rules of liability in this context, extending to foreseen consequences, are the most far-reaching of any of the accessorial liability rules here considered. A party may be held to be an accessory to the most serious crime of murder merely because he or she foresaw the possibility that one of the parties to the common purpose might kill with a requisite intention (to kill or cause grievous bodily harm). This suggests the need for caution when comparing the criminal law with civil liability: either criminal law analogues are not helpful; or the criminal law has extended joint liability too far (as some critics suggest); or, thirdly, perhaps one can find justification for such an approach and see if there are, indeed, civil law parallels. The third possibility will be supported below, under the heading of knowledge.

B *Nature of Involvement: Causative Connection with PW's Wrong*

As has been seen, both in the criminal law and under the statutory scheme, the varying ways in which A may be involved in PW's wrong is described by numerous different terms, but these illustrate a general approach that inquires whether there is a sufficient link with PW's wrongdoing. In equity, the issue has received almost no consideration. Should the same position be adopted in equity? Further, should this mean that no causal connection is necessary between A's acts and PW's commission of the equitable wrong?

There are countervailing arguments either way. On the one hand, it could be argued that being found guilty of a criminal offence has potentially far more serious consequences than mere civil liability. Hence, civil liability ought to arise, potentially at least, in the same circumstances. On the other hand, it can be argued that the consequences of being liable to the full extent of P's losses (where, for example, PW is insolvent) can be devastating and, absent a causal nexus between A's conduct and the commission of the wrong, is unwarranted. Further, the criminal law punishes persons because of a breach of social norms; thus, encouraging a serious assault is contrary to acceptable social conduct irrespective of whether the assault would or would not have occurred but for such encouragement. The purposes and goals of civil liability are very different, and also differ according to the particular wrong in question. Thus, if the principal wrong is primarily concerned with compensation for loss (as in tort), then arguably such a causal connection between A's conduct and PW's tort ought to be necessary. (However, where the purpose of the primary wrong is otherwise, such as the prophylactic purpose of fiduciary law, then such a causal connection may not be necessary.)

¹³⁴ *TPA* pt VIA.

This argument is strengthened by the fact that accessorial liability in civil law is generally joint liability. This means that A may be liable for the full extent of the harm suffered by P.¹³⁵ Even where there is a causal connection between A's conduct and PW's wrong, this may have harsh consequences. A's conduct may have been only a minor factor in PW's wrongdoing. And yet, A may be held fully liable for the resultant losses (A's right to contribution against PW notwithstanding; this may, of course, be practically worthless in some circumstances). Such consequences appear even harsher where A's conduct is *not* a cause-in-fact of PW's commission of the wrong.

These arguments would suggest that the criminal and statutory approach is not justifiable under the general law and that a causal connection between A's assistance and PW's commission of the wrong ought to be required. However, one argument *against* requiring a causal connection is that a 'but for' enquiry poses a question that, in theory, may have logical appeal but, in practice, is one incapable of being answered. Answering the hypothetical question as to what influence A's conduct actually had on PW's decision to commit a wrong may be simply impossible, especially where we are dealing with PW's motivations and circumstances leading up to the commission of the wrong. Were it required to be answered, courts may simply assume such connection, make questionable findings of fact, or otherwise 'fudge' the issue. This final argument is surely decisive. To require a causal connection would be to set up an element of liability that is unrealistic: the evidence will rarely allow one to reach a clear conclusion. Hence, the position in equity ought to be the same as in the criminal law and under the statutory scheme.

Essentially, the statutory formulation in the *TPA* sums up the best approach, by requiring merely that a party be in some way 'knowingly *concerned in*' the contraventions.¹³⁶ Indeed, I would argue that the requisite degree of concern in a matter, or 'involvement', raises a normative issue and not a purely logical, causative one. Causation may be one factor in assessing the broader question of whether A's involvement is such that A ought to be held liable for PW's wrong, but it should not be determinative. (As is now widely accepted, even in circumstances where factual causation is established, a further enquiry as to the scope of the defendant's liability raises normative issues that cannot be resolved by logic or 'common sense'.)¹³⁷

One sub-issue that arises if a causal connection is *not* required is whether one can go even further and argue that involvement encompasses within it something that occurs *after* the 'contravention has already been committed and is complete, even if what is later done is to conceal, ratify or knowingly derive benefit from the contravention.'¹³⁸ In other words, can conduct after the commission of a wrong ever be a sufficient involvement to justify accessorial liability? The

¹³⁵ My thanks go to Kylie Fletcher for alerting me to this point.

¹³⁶ See, eg, *TPA* ss 75B, 76, 78–9, 80 (emphasis added).

¹³⁷ See, eg, Jane Stapleton, 'Cause in Fact and the Scope of Liability for Consequences' (2003) 119 *Law Quarterly Review* 388.

¹³⁸ *Australian Investors Forum* (2005) 53 ACSR 305, 327 [118] (Palmer J).

answer given to this question under the statutory schemes appears to be ‘no’, (and this is said to follow as a matter of statutory construction).¹³⁹ This seems to me to be correct (despite the fact that the criminal law has a concept of ‘accessory after the fact’). In relation to some wrongs, however, it may be difficult to draw a discrete boundary around the conduct that constitutes the wrong, such as where there is ongoing disloyal conduct by a trustee (for example, not only is misappropriation of trust property a breach of trust, but any further dealings with the misappropriated property would also be).¹⁴⁰ This complication suggests that one should not be too categorical in defining the acts that constitute the wrong. Nonetheless, the conclusion reached under the statutory scheme seems fundamentally sound.

C Knowledge and the Mental Element

As is evident from the discussion above, the *content* of knowledge question is in many cases the most critical, and ultimately determinative, one on the facts of a given case (irrespective of the area of law). Since it is, however, essentially a ‘jury’ question, that is, a question of fact, it often raises little in the way of conceptually interesting legal questions (the discussion of *Tabé* above being an obvious exception). Only once we identify what it is that A needed to know, does the question of what the available evidence establishes about A’s degree of knowledge of those facts become a live issue.

As to the *degree* of knowledge, to generalise, it appears that the courts have tended to require a high degree of knowledge — actual knowledge, or wilful blindness to such actual knowledge — to establish conduct that is culpable conduct on the part of A. Given the requirement of such actual knowledge of the essential elements of the wrong, the label ‘dishonesty’ is a reasonable generalisation of the requisite conduct of A (or, perhaps less onerously, unconscionable conduct).¹⁴¹ In some contexts, a lesser degree of knowledge may be justified to fortify the sanctions against the principal wrong, and the PWs themselves. Where less than actual knowledge may activate liability (as perhaps in ‘knowing assistance’ in Australia), is it worthwhile articulating the issue in the form of the *Baden* scale? The differing views expressed on this issue suggest no clear way forward, and I have no firm views.

The approaches of both the civil law and the criminal law in relation to assistance liability require a high degree of moral culpability and responsibility in the form of intention or knowledge that PW commits, or is going to commit, a wrong, and that A’s conduct will aid, assist or encourage such wrongdoing. By way of exception to this general position and seemingly inconsistent with it, is the broad common purpose liability in criminal law. There are, however,

¹³⁹ Ibid 327 [114]–[118].

¹⁴⁰ Similarly, if ‘damage’ is not an *element* of a wrong, then the accessory’s involvement may occur after PW’s conduct that constitutes the wrong (and that ultimately leads to damage being suffered), but before any such damage is incurred.

¹⁴¹ Cf Finn, above n 2, 213–15; *Royal Brunei* [1995] 2 AC 378, 392 (Lord Nicholls for Lords Goff, Ackner, Nicholls, Steyn and Sir John May) (the ‘term is better avoided’).

arguably parallels that can be drawn here. One argument that has been made in the context of equity's participatory liability rules is that they ought to reflect the degree of A's involvement in PW's wrong. Finn has argued that the greater the participation by A — for example, where A actively induces or procures certain outcomes — the lower the requisite degree and content of knowledge needs to be.¹⁴² To require knowledge of the fact that such an outcome will be achieved by PW breaching a fiduciary duty states the requirement too highly. In Finn's view:

The procurer of a fiduciary's breach may exploit the conditions which make the commission of that wrong a distinct possibility and may be aware of, or else indifferent to, that possibility. Yet that person may have no knowledge at all of whether a breach has in fact occurred when the fiduciary brings about the end result — say a dealing with the beneficiary — that is wanted by the third party. ... Here, while ignorant of any actual wrong of the fiduciary — and no wrong may in fact be done in any event — the procurer should be taken as having assumed the risk should the wrong occur. By his or her own actions (by the role taken in the matter) the third party can properly be said to have 'reason to know' of the substantial chance of its possible occurrence.¹⁴³

Although Finn uses the language of 'reason to know' this is akin to liability for the foreseeable commission of a wrong by PW. Is this far removed from making co-conspirators liable for the foreseen consequences of their criminal enterprise, even ones that were outside of the scope of that agreement? I would argue not. This suggests a flexible interaction between the degree and extent of A's involvement in the wrong, and the content and degree of A's knowledge and intention. The more active is A's participation in the commission of the wrong, and the more direct or causally relevant it is, perhaps the less needs to be proven about A's mental state.

VI CONCLUSION

It remains to summarise the conclusions reached in this article:

- 1 The precise scope of accessory liability will vary according to the nature of the specific wrong that the accessory liability regime supports. Nonetheless, the *broad* questions that need to be addressed in all cases are essentially similar.
- 2 We need to identify the specific character of the wrong and its elements in order to identify both the applicable accessory liability regime, as well as the key information that is relevant in assessing the alleged accessory's culpability.
- 3 A will be sufficiently involved in the principal wrong where his or her conduct links A with PW's commission of the wrong such that, normatively, it is justified to make A liable for PW's wrong (all other elements of liability being satisfied). It is not necessary that such involvement be active (as opposed to passive) and A's conduct need not have caused PW's wrong.

¹⁴² Finn, above n 2, 215.

¹⁴³ *Ibid.*

Even encouragement or facilitation of PW's wrong may suffice for liability, so long as A in some way associates himself or herself with PW's venture.

- 4 A must know the essential elements of the conduct that constitutes the wrongdoing by PW or, putting it another way, must know the facts that need to be proved against PW to show the wrong has been committed.¹⁴⁴ A need not know that such conduct is illegal, nor need A know all the information pertaining to the wrong. Generally, A must have actual knowledge of such wrongdoing (or be wilfully blind to it, which is the same thing) such that A's conduct is culpable. Such high degrees of knowledge and culpable conduct are required even where the principal wrong committed by PW is constituted by less culpable conduct.
- 5 In some contexts, slightly lower degrees of knowledge may suffice to impose accessorial liability. This suggests that the degree of A's involvement in the reasons for and manner in which PW committed the wrong may give us reasons to relax the general requirement that there be dishonesty or assistance with *actual* knowledge. The more active A is in inducing or co-planning the wrong, the lesser may be the required degrees of knowledge.
- 6 A's conduct does not need to cause P's loss: it is the link between A's conduct and PW's wrong (that caused P's loss) which justifies making A liable. This means that the fourth question of causation is largely redundant. (The important issue of the causal connection between A's conduct and PW's wrong is better dealt with under the inquiry as to A's involvement in PW's wrong.) It has been argued that A's conduct need not have caused PW's wrong, let alone P's loss. Although this conclusion is in my view correct, it should give pause to reflect. It is an unusual conclusion, one that is outside the normal pattern of common law rules that generally impose liability only for losses *caused* by a defendant's torts, breach of contract, breach of equitable duty, and so on. Causation is a standard part of most legal analysis. Unusually, however, where the liability of a defendant is based on being an accessory in another's wrong, no further causal connection (other than that required by the causation rules applying to establish that PW's wrong caused P's loss) is required.

The conclusions reached here are largely consistent with the statutory scheme, which itself derives from the criminal law. Given that the statutory scheme has been broadly adopted in a range of Commonwealth statutes, in the contexts within which those statutory schemes operate, a sufficiently uniform and largely coherent approach to accessorial liability exists. By way of contrast, the same coherence in approach is not evident in equity, as has been demonstrated above, nor, perhaps, at common law generally (though this issue has not been considered here). Given the many shortcomings in equity's approach to the liability of

¹⁴⁴ Cf *Giorgianni* (1985) 156 CLR 473, 494 (Mason J).

accessories, perhaps it is time to consider the analogical development of the common law (including equity) by reference to the statutory scheme.¹⁴⁵ But that is an issue for another day.

¹⁴⁵ My thanks go to Paul Finn for this suggestion, which in part also formed the initial impetus for this article. On the analogical development of the common law on the basis of legislation, see *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49, 61–3 [23]–[25] (Gleeson CJ, Gaudron and Gummow JJ).