ACCESSORY LIABILITY BY PAUL S. **DAVIES** [Oxford: Hart Publishing, 2015. xxxiii + 294 pp. Hardcover: £55.00]

Conduct amounting to a breach of duty often causes loss to the person to whom the duty is owed. But sometimes the duty-holder in breach, being insolvent, is a man of straw not worth suit. Other times, the prospect of suit is unattractive given the possibility of jeopardising existing relations with the duty-holder. To seek an adequate remedy, one is then tempted to expand one's search to the surrounding

circumstances leading up to the breach. So we peer up the chain of events. We search for persons—accessories—whose conduct contributed to the objectionable outcome. But the further up you go, the more diluted the contribution. And that presents a problem.

In criminal law, where the main concern is punishment, the accessory's upstream contribution alone to the ultimate harm (*actus reus*) may be thought too thin for a conviction to attach. This is especially so in a liberal democracy which values autonomy and freedom. The boundaries of criminalisation are at stake. *Nulla poena sine culpa*. The law therefore latches on, instead, to the state of mind (*mens rea*) with which the accessory's contribution is made. If grave enough, the combination of the two might perhaps just be enough to nudge him over the culpability threshold, warranting just application of the state's coercive force: visiting upon him a criminal conviction.

But does—or *should*—a similar structure present itself across other obligations in private law? What happens when, instead of a crime, there is a breach of trust, or a breach of fiduciary duty? What about a breach of contract? Or, maybe even, the commission of a tort? Davies answers with a resounding and provocative "yes". Building upon his prior journal articles tackling smaller aspects of this underexplored problem, Davies attempts to prove his case in an ambitious and impressively well-researched monograph spanning 285 pages.

In a grand unifying project, he argues that we should unify the law of accessory liability across seemingly disparate areas of crime, equity, contract, and tort. For too long has the structure of accessory liability been submerged beneath these traditional categorisations. Its excavation is "150 years overdue", says Phillip Sales LJ in the foreword. A standard, generalised approach should be applied across all obligations, *regardless* of the nature of the primary wrong (at p 283). The law of accessory liability should be unified and easy to state across all obligations across all areas (including criminal law): only a defendant who *knowingly assists* a primary wrong risks accessory liability (at p 285). And for all accessories, regardless of the nature of the primary wrong, a 'broad defence of justification' should be available to defray liability (at Chapter 7).

I. The Layout

Davies introduces the problem in the first chapter, and sets out his superstructure in the second. He then presents his central thesis and account of accessory liability. The next four chapters survey the leading cases in each area of law: crime (Chapter 3), equity (Chapter 4), contract (Chapter 5), and tort (Chapter 6), with each chapter seeking to show latent conformity, if not ripeness for reform, with the superstructure presented in Chapter 2. Chapter 7 proposes a 'broad defence of justification' for all forms of accessory liability, no matter the type of obligation breached. Before concluding in Chapter 9, Chapter 8 explores the possible remedies available against an accessory, which, conspicuously, tailors itself differentially according to the nature of the obligation and its originating area of law. Equally conspicuously, criminal law, being primarily concerned with punishment, is missing from this chapter.

Tellingly, this unifying project is not a complete one. In my view, this is a recognition borne of nuance and therefore a merit, but it highlights the central difficulty

facing such a unifying project cutting across such disparate areas of law. Each area of law protects different interests, upholds different values and practices, and responds to different social and economic concerns. Furthermore, one employs different forms of legal reasoning in each area, the emphasis depending on whether it is composed primarily of case law or statute, and how susceptible it is to the influences of international treaties (something which comes to the fore for intellectual property rights, an issue dealt with in the tort chapter). Any reformatory prescription must therefore take into account such differences.

II. The Strategy

A. *Establishing the Structure*

Davies starts by characterising breaches of all obligations by the duty-holder as 'primary wrongs' (at p 1)—thereby anchoring his analogy to primary offences in criminal law. For him, the structure of accessory liability should be indifferent to the type of underlying primary wrong (at pp 21, 284). It should not matter what type of obligation is breached—whether contractual, equitable, or tortious.

Next, he establishes a crucial feature of accessory liability: in order to qualify, as a conceptual matter, liability must be derivative (at p 2). Accessory liability is not inchoate. It is parasitic and dependent upon the commission of a primary wrong. But even though derivative in nature, an accessory commits a separate wrong, distinct in character from the underlying primary wrong. The wrong lies in his knowing participation in the primary wrong (at p 284). Using this helpful conceptual clarification, Davies clears up much existing doctrinal confusion by distinguishing accessory liability from its false cognates: free-standing duties of care, innocent agency, vicarious liability, corporate attribution, conspiracy, and joint enterprise (at p 54).

Central to his unificatory project across private law is the need for substantial borrowing from the criminal law. Even though criminal law is "tangential to the core" of his project, Davies references its concepts heavily, since accessory liability is an issue worked on most extensively by philosophers of criminal law (at p 10). Consequently, each substantive chapter dealing with contract, equity, and tort is split up according to the 'conduct element' (*actus reus*) and the 'mental element' (*mens rea*), following which Davies undertakes an extensive and systematic survey of the leading cases in the area to demonstrate fit with the overarching structure.

Drawing from s 8 of the *Accessories and Abettors Act*, the 'conduct element' for accessory liability is set at causal participation of a third party in a wrong committed by a primary wrongdoer (at p 21). 'Assistance' takes centre stage. It is recognised that this is potentially very wide, given the many ways in which one might assist, so the buck is passed on to the 'mental element' to control liability. A relatively strict requirement of 'knowledge' of the essential facts which constitute the primary wrong is preferred so as to achieve a "narrow but coherent law of accessory liability" (at p 285). Wilful blindness as a proximate also qualifies. *Knowing assistance* becomes the uniform rule for accessory liability, cutting across all areas of law.

B. Fitting Equity, Contract, and Tort into the Structure

But not every target area is easily amenable to this prescription. To fit the law into this new unified structure, Davies advocates a reversion from dishonest assistance to 'knowing assistance'—the position prior to the landmark case of *Royal Brunei Airlines Sdn Bhd v Tan* [1995] 2 AC 378 (PC) [*Royal Brunei v Tan*]. Much reliance is placed on analysis of the old *Baden* scales of knowledge ([1993] 1 WLR 509 (Ch)) (at Chapter 4). Similarly, for the tort of inducing a breach of contract introduced by *Lumley v Gye* (1853) 118 ER 749 (QB), he advocates a switch from intending to cause a breach, to knowledge that such acts will constitute a breach (at Chapter 5) More radically, in tort, he tries to establish that accessory liability has an independent existence apart from joint tortfeasance, heavily relying on cases involving intellectual property rights (at Chapter 6).

Even though he cautions of the "varying import of the principles and policies underpinning the two areas" (at p 87), at times, parts of the book read very much like a valiant attempt to rehabilitate private law by reference to its more sophisticated cousin, criminal law. Of the poor cousins, tort is the poorest. With even the existence of a distinct law of accessory liability in doubt, given the tendency for joint tortfeasance to do the same work since *The Koursk* [1924] P 140 (CA), tort is given a dismal bill of health. Unhappily for Davies, the UK Supreme Court in *Fish & Fish Ltd v Sea Shepherd UK* [2015] 2 WLR 694 (SC) has just recently rejected his proposal to carve out a distinct law of accessory liability for torts, citing one of his prior works in the process (Paul Davies, "Accessory Liability for Assisting Torts" (2011) 70 CLJ 353).

At some parts, the project feels like a superimposition of a structure that does not quite fit with the target area. Cracks appear from some degree of force-fitting, and the strain on the conceptual apparatus is evident. At times one is aware of the danger that, with hammer in hand, everything starts looking like a nail. As an example, much effort is spent convincing the reader that 'dishonesty' in *Royal Brunei v Tan*, which requires an assessment of the assistor's conduct in light of his knowledge of the circumstances, is really a 'mental element' rather than a 'conduct element' (at pp 116-122). Similarly, infringement of intellectual property rights does not fit all that cosily into the analogue of 'primary wrongs'. The interests protected by intellectual property rights are quite different from the interests protected by most torts. Intellectual property rights are concerned primarily with generating incentives to innovate. By temporarily excluding others and charging for their use, rights-holders can recoup their investment, thereby internalising the positive externalities created by their intellectual property. The extent to which intellectual property is or should be protected is intimately linked to industrial organisation and competition, international trade, and foreign direct investment (see *eg* Kenneth Arrow, "Economic Welfare and the Allocation of Resources for Invention" in Harold M Groves, *The Rate and Direction of Inventive Activity: Economic and Social Factors* (Princeton: Princeton University Press, 1962) 609 at 609-626). With the advent of patent trolls, a real concern today is the excessive protection of intellectual property rights creating monopolies, stifling innovation and entry by second-comers and inhibiting access to products, especially for software and business processes. Statutory provision has already been made for secondary infringement of copyright and any case-law

driven reformatory project has to work within its constraints (*Copyright, Designs and Patents Act 1988* (UK), ss 22-26). Moreover, the nature of the harm is not that immediately apparent in the case of intellectual property rights infringements, unlike for example, the 'primary wrong' in most crimes or the torts protecting bodily integrity.

C. Uncovering Underlying Principles

The most important and significant contribution Davies makes is his attempt to provide what he calls "principles underpinning accessory liability", essentially a long list of "rationales" or "major factors" justifying accessory liability across all areas of law (at p 12). Each of these rationales is then used in the subsequent substantive chapters on equity, contract, and tort to demonstrate fit with the overarching unifying project. The task is undertaken in every substantive chapter, each of which has repeated sections entitled "Explaining Accessory Liability" and "What Shape Should Accessory Liability Take".

These rationales appear to be distilled from a considered survey of the main concerns underlying each disparate area, and it is a thought-provoking list indeed. The list is too long to enumerate or examine one by one. One main gripe a reader may have is the lack of clarity in the relations between each of these rationales in this long, amalgamated list. It is said that they are "major factors", which may not be of "equal weight", and that a "careful balancing of relevant factors" is necessary (at p 12). There is a real risk, in making this distinctively non-analytic move, that the coherence of the justifications is as a whole compromised. Robert Stevens reminds us in a discussion on vicarious liability that "[j]ustifications for legal rules are not like the ingredients of vegetable soup. We cannot simply add together a number of disparate ingredients and expect to get a satisfactory result." (Robert Stevens, *Torts and Rights* (Oxford: Oxford University Press, 2007) at 259). But this is an understandable move by Davies. The interests protected and values upheld vary across areas of law, and in a unifying project of this kind such a move is necessary to maintain commonality of relevance while allowing some room for the identified rationales to operate with different 'weights' relative to each area.

A brief examination of how some identified rationales might operate quite differently relative to each area will illustrate the point. As an example, the need for 'culpability' before punishment is obvious in criminal law. But perhaps not so in commercial transactions. After all, most contractual duties are results-oriented and notoriously strict, and breach thereof strictly treated. So too the tort of conversion, with its potentially wide-ranging reach to banks, carriers, and agents across all types of commercial transactions. It is inappropriate to equate the function of the 'mental element' of 'knowledge' to establishing 'culpability' alone, especially in these other areas where the law's concern is more about compensation and less about punishment. The better analogue would be with the separate function of *mens rea* in ensuring fair warning, putting persons on guard that with their contemplated conduct they are treading on thin ice. The more appropriate analogy would be with the ability of the businessman to calculate the risks of his investments *ex ante*, planning his transactions and navigating the demands of commerce accordingly so as not to run afoul of the law. He might want to, for example, insure himself against liability

in the tort of conversion (both primary and accessory, should accessory liability for torts exist), a widespread practice by banks and carriers. This would facilitate the identified rationale of 'freedom of action' without fear of liability, although the type of action and its value thereof would differ drastically depending on the area of law. The freedom of a bank to readily process payment transactions and the freedom of a business to sell sound recorders or knives present quite different risks, and accordingly, attract different concerns. Such fair warning might then be properly thought of as a precondition to effective 'deterrence' of the accessory's contemplated assistance in a primary wrongdoing, thereby reducing the likelihood of such wrongdoings occurring and 'protecting the rights' of the correlative claim-right holder. In fact, one might even quibble with this analysis by arguing that a tailored negligence standard (rather than knowledge) may be sufficient to meet the concerns of culpability and fair warning, although that is a contested point on which I shall not further delve.

III. The Methodology

This leads one to comment on the methodological ambiguity one detects upon reading the book. What kind of a project is this? Is it analytic—a clarification of latent concepts hidden in the ordinary usage of lawyers' language? Is it explanatory—a primarily descriptive task seeking to provide reasons why accessory liability exists, without evaluating whether this state of affairs is good or bad? Or is it justificatory or prescriptive—seeking to take an evaluative stance on whether accessory liability *should* exist, what its contents *should* be, and therefore advocate reform? The language slips effortlessly between the descriptive and the normative throughout the whole book. As an example, despite earlier recognition that to fit tort and equity within a structure of 'knowing assistance' would require changing their existing required 'mental elements', Davies asserts in his conclusion that "knowledge already appears to be the basis of accessory liability across the private law, and overt recognition of the content of this mental element would have beneficial effects in making the law more transparent and easier to understand." (at p 283) There is a subtle and easy transition from reformatory, prescriptive language, to language suggesting engagement in a merely non-evaluative analytic exercise. These shifts in gear may at times disorientate the reader, leaving him wondering at the project's aim.

IV. Conclusion

But it is far too easy to sit back and cavil, and much more difficult to construct. Davies is to be congratulated for achieving a task of immense proportions. This monograph's delay in being "150 years too late" may perhaps be attributed to its being a Herculean and forbidding task not to be undertaken by anyone faint of heart. Davies has done this in a courageously argued and painstakingly researched 285 pages. It is a tremendous feat. Being the first of its kind, this is a book which demands engagement from any subsequent work on accessory liability. Even if one disagrees with his unificatory thesis, Davies is to be heartily commended for bringing

to the fore the previously unexplored connections across disparate areas of law, if only to expose them to further long overdue analysis by the legal community.

TIMOTHY **LIAU**
Sheridan Fellow
Faculty of Law, National University of Singapore