Accessory Liability, by PAUL S DAVIES.
Oxford: Hart Publishing, 2015, xxxiii + 285 + (index) 7pp (£58 hardback). ISBN: 978-1-84946-287-7.

Accessory liability is concerned with the liability of someone (the 'accessory') who has participated in a wrong committed by someone else (the 'primary wrongdoer'). The liability is parasitic on the primary wrong but nonetheless separate from that of the primary wrongdoer, with distinct requirements, defences and remedies. The concept is familiar in criminal law but less so in private law. This book, which considers accessory liability across the law of obligations, redresses that imbalance. It concludes with a simple contention – 'a defendant who knowingly assists a primary wrong risks accessory liability' – that belies the complexity and breadth of the author's analysis of issues of legal precedent and principle in the preceding pages.[43]

An action based on accessory liability must deal with three things: first, the wrong committed by the primary wrongdoer – that is, a tort or breach of contract or breach of equitable obligation; secondly, the conduct of the accessory; and, thirdly, the mental state of the accessory. In *Accessory Liability*, Paul Davies deals with all three, but his focus is primarily on the latter two elements. He argues that the conduct element requires participation that has a substantial causal link with the primary wrong. In particular, the accessory must have assisted, encouraged or procured the primary wrong.[44] The mental element requires subjective knowledge of – including deliberately turning a blind eye to – the primary wrong in question. The shape of accessory liability in private law proposed by Davies therefore comprises (i) a relatively wide *actus reus* and (ii) a restrictive *mens rea*. The latter means that 'claims against accessories should not readily succeed'.[45] This proposition is largely built on three doctrinal pillars: dishonest assistance, the tort of inducing breach of contract and joint tortfeasance. For the purposes of this review, each repays brief consideration.

The current law of dishonest assistance is not dissimilar to the model being proposed by Davies: a relatively wide conduct element limited by a restrictive mental element. Moreover, in terms of the conduct element, dishonest assistance provides Davies with ready support. There, subject to a *de minimis* exception, assistance of a breach of trust, fiduciary duty or other equitable obligation is considered sufficient participation in the primary wrong for accessory liability purposes.[46] However, the mental element for accessory liability in equity offers Davies less support, as, in *Royal Brunei Airlines v Tan*, Lord Nicholls decisively rejected knowledge as the mental element in favour

43. PS Davies *Accessory Liability* (Oxford: Hart Publishing, 2015) p 285.

44. The language of 'aid, abet, counsel or procure' from s 8 of the Accessories and Abettors Act 1861 may be more familiar to some readers. 'Assist, encourage or procure' is a more modern and accessible recasting of the same requirements: see Law Commission *Participating in Crime*, Law Com No 305 (2007).

45. Davies, above n 1, p 53. However, Davies suggests that the conduct requirement is still a 'real barrier': ibid, p 285.

46. *Baden v Société Générale pour Favouriser le Développement du Commerce et de l'Industrie en France SA* [1993] 1 WLR 509 (Ch) at [246] (Peter Gibson J).

dishonesty.[47] With some cogency, Davies endorses Lord Millett's dissenting view in *Twinsectra v Yardley* that dishonesty is 'an unnecessary distraction, and conducive to error' – a point vindicated by the tortuous state of the Privy Council, House of Lords and Court of Appeal authorities on the topic.[48] The better view is that dishonesty is a criminal law concept that is intended as a question to the jury and that is too uncertain and pejorative a label for commercial and other civil cases.[49] Moreover, despite the label of dishonesty, Davies persuasively argues that, in substance, the question of the mental state of the accessory remains knowledge because 'a defendant who genuinely and legitimately knows nothing regarding the primary wrong will not be considered to be dishonest'.[50]

Davies also finds some support for his proposition in the tort of inducing breach of contract (often known as the *Lumley v Gye* tort).[51] The *mens rea* for this tort is commonly supposed to be intention.[52] But, here too, Davies convincingly argues that underneath this label, the substance of the mental requirement is knowledge. As Lord Nicholls put it in the leading case on this tort, *OBG v Allan*, 'intentional interference presupposes knowledge of the contract' (to which knowledge that the conduct of the primary wrongdoer will constitute a breach of contract should also be added).[53] Davies is on a less firm footing with the conduct element of the *Lumley v Gye* tort – not only does the inclusion of 'inducement' in the name of the tort suggest something different to mere assistance, but when restating the requirements of the tort in *OBG*, the House of Lords chose to retain the language of 'inducement' and 'procurement' rather than move to 'assistance'.[54] Davies suggests that *OBG* can stand as authority for assistance liability on the basis that the House of Lords did not express any reservations about Mr De Winter, who had merely assisted a breach of contract in the *Mainstream Properties Ltd v Young* element of the *OBG* appeal, not having met the conduct requirements of the tort – but this perhaps over-reads the case.[55] More credibly, Davies is able to point to other (albeit first-instance) decisions that provide him with some basis for arguing that the law implicitly recognises assistance-based liability, and it should do so openly.[56]

Joint tortfeasance presented Davies' proposition with the most doctrinal difficulty at the time of the book's publication. On the basis of the House of Lords' decisions in *CBS Songs v Amstrad* and *Credit Lynonnais v Export Credit Guarantee Department*,[57] the author was forced to acknowledge that it would be 'contrived' to argue accessory liability in tort was presently assistance-based.[58] This reviewer therefore feels more than a twinge of sympathy that, shortly after publication, the Supreme Court handed

47. [1995] 2 AC 378 (PC) at 387–391.
48. [2002] UKHL 12, [2002] 2 AC 164 at [134]. The authorities are usefully set out in L Tucker, N Le Poidevin QC and J Brightwell *Lewin on Trusts* (London: Sweet & Maxwell, 2015), [40-035]–[40-038].
49. Davies, above n 1, pp 119–121.
50. Ibid, p 121.
51. (1853) 2 E & B 216.
52. *OBG Ltd v Allan* UKHL 21, [2008] 1 AC 1 at [1] (Lord Hoffmann).
53. Ibid, at [192], [202].
54. Ibid, eg at [39] (Lord Hoffmann), [168]–[172] and [189] (Lord Nicholls).
55. Davies, above n 1, p 150.
56. Ibid, pp 150–153. See eg *British Motor Trade v Salvadori* [1949] Ch 566 and *Lictor Anstalt v Mir Steel UK Ltd* [2011] EWHC 3310 (Ch), [2012] 1 All ER (Comm) 592.
57. [1988] AC 1013 (HL) and [2000] 1 AC 486 (HL).
58. Ibid, p 196.

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down its decision in *Fish & Fish Ltd v Sea Shepherd UK*, in which the Justices recognised that, subject to a *de minimis* exception, 'the defendant will be liable as a joint tortfeasor if … he has assisted the commission of the tort by another person'.[59] This decision should be regarded, if anything, as a post-publication vindication of Davies' central thesis, namely that assistance is sufficient to ground a claim in accessory liability in private law. However, it should also be noted that the Supreme Court's decision in *Sea Shepherd* is relatively narrow in its scope and does not seek to 'restate' joint tortfeasance in the same manner as *Tan* and *OBG* did for accessory liability in equity and contract respectively. In particular, the Justices did not consider at length the requisite mental state of the accessory – though their reference to the need for a 'common design' suggests that intention, and therefore some level of knowledge, is required on the part of the accessory.[60] In this regard, *Sea Shepherd* is less of an immediate victory for Davies' position that subjective knowledge, not intention, should be the touchstone for accessory liability.[61] However, there are passages in the Supreme Court's decision that suggest that the law is moving in that direction. Lord Neuberger, for instance, considered that there was a common design on the facts of the appeal because the defendant had 'sufficient knowledge that tortious acts were contemplated'.[62]

As may be gathered from this review thus far, *Accessory Liability* has a predominately doctrinal flavour, to the palate of this reviewer at least. This is no cause for criticism. Indeed, the reason why this book should find its way on to the shelves of practitioners as well as of academics is because of the clarity with which it steers the reader through the mass of difficult case-law on the subject. But it would be misleading not also to acknowledge the author's engagement with the normative principles underpinning accessory liability. A range of possible principles is canvassed in the book, but weight is ultimately placed on three: protecting rights, responsibility and culpability.[63] There is a neat symmetry between these three principles and the doctrinal shape of Davies' proposition.

The first principle – protecting rights – goes to the need for the commission of a primary wrong. The law has already identified 'rights' or 'interests' worthy of legal protection and a civil wrong therefore arises where those rights or interests have been interfered with. Because of the importance already attributed to those rights, participation in a wrong should be considered a wrong in itself. It should be noted that Davies at a couple of points acknowledges that there might be a 'hierarchy of rights', with accessory liability less readily attaching to lesser rights such as pure economic loss.[64] Davies does not explore the potential repercussions of this point in the context of the requirements for accessory liability. This reviewer tentatively suggests that it could provide the normative basis for the defence of justification, where an accessory can escape liability because he was acting in order to protect a superior right to that enjoyed by the claimant.[65] It would be interesting to see the idea of a 'hierarchy of rights' in the accessory context dissected by Davies a little further in a subsequent edition of this book or elsewhere.

59. [2015] UKSC 10, [2015] 2 WLR 994 at [37] (Lord Sumption) see also eg at [41] (Lord Sumption) and at [55] and [57] (Lord Neuberger).
60. Lord Sumption, for instance, referred to the need for there to be 'common intent': ibid, at [41].
61. Davies, above n 1, pp 206–209.
62. [2015] UKSC 10, [2015] 2 WLR 994 at [67]. See also at [27] (Lord Toulson).
63. Davies, above n 1, pp 20–21.
64. Ibid, pp 15, 212.
65. Ibid, pp 230–234.

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The second principle – responsibility – explains the conduct element for accessory liability. The law usually answers the question of responsibility by reference to causation. This provides the normative basis for Davies' proposition that there must be assistance on the part of the accessory that has a substantial causal link with the primary wrong. As Davies puts it, 'if there is no such link, then there is no reason why the accessory should bear any responsibility for the primary wrong and the claimant's loss'.[66] One of the most thought-provoking sections of *Accessory Liability* is where the author considers what approach to causation might be applicable for accessory liability – a diluted 'but for' test, a material contribution requirement, or NESS (Necessary Element of a Set of conditions jointly Sufficient for the result) – and explains why it is appropriate to look beyond the *novus actus interveniens* of the primary wrongdoer committing the wrong in the accessory context.[67]

Either of these first two principles might also underpin the mental element of accessory liability. For instance, private law treats intentional or knowing conduct as posing a greater threat to protected interests or rights – that is one reason why in tort law, for instance, non-intentional, negligence-based torts offer less protection for pure economic interests than intentional torts. Equally, the principle of responsibility might also underpin Davies' requirement that an accessory must act knowingly to risk liability: a knowing assistant should be regarded as more responsible for the occurrence of a wrong than an unwitting one. Davies, however, instead chooses to rely on a third principle – culpability. This reviewer must confess to being less convinced about the utility of this principle in private law. Culpability is a concept most often associated with criminal law and is less helpful in the civil law context – as is evident from the difficulties that have arisen following the adoption of dishonesty as the fault requirement for accessory liability in equity.

Putting this reservation to one side, however, Davies' combination of doctrinal rigour and normative reasoning is a powerful one. It results in one particular theme being drawn out in the book, which is that there should be a coherent law of accessory liability across the legal landscape: 'An insistence upon examining the private law by reference to discrete subjects – such as equity, contract and tort – may fail to illuminate the key principles underpinning liability.'[68] This investment repays particular dividends when Davies challenges the state of the law on joint tortfeasance as it was at the time of publication. It 'smacks of inconsistency' that assistance is sufficient for accessory liability in criminal law, contract law and equity but not in tort:[69] 'There is no reason for tort law to be stranded from the principles of accessory liability which undermine private law generally'.[70] It appears from *Sea Shepherd* that the Supreme Court agrees.

Policy issues associated with accessory liability are less comprehensively covered by Davies. There is a page towards the front of the book that identifies three 'pragmatic factors' that would encourage the use of claims against accessories: (i) the insolvency or financial state of the primary wrongdoer, (ii) preserving a pre-existing relationship with the primary wrongdoer and (iii) convenience.[71] From a practitioner's perspective, a slightly lengthier and more detailed discussion of these factors would have been

66. Ibid, p 31.
67. Ibid, pp 33–37.
68. Ibid, p 9.
29. Ibid, p 216.
70. Ibid, p 220.
71. Ibid, p 3.

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informative, particularly as regards the 'convenience' factor. For instance, the claim in accessory liability against the English company in the recent *Sea Shepherd* litigation appears in large part to have been motivated to allow the claimant to serve out of the jurisdiction on the second and third defendants.[72] The interplay between accessory liability and claimants seeking to bring claims in the English courts would have been interesting to explore – though perhaps that is for a different project. Likewise, this reviewer would have liked to see a little more discussion of the wider repercussions arising from Davies' proposed model for accessory liability – for instance, the impact that an expanded law of accessory liability would have on the personal liability of directors and controlling shareholders for the primary wrongs committed by their company.[73]

Overall, *Accessory Liability* is well-written, comprehensive, compelling and thought-provoking. In fewer than 300 pages, it weaves together a staggering range of subjects – from intellectual property torts to criminal accessory liability, from efficient breach theories to philosophies of moral culpability and responsibility – and all with a consistent rigour of analysis. This reviewer cannot but agree with both the foreword by Lord Justice Sales that 'This is a work of formidable scholarship' and the decision to award it second prizewinner status in the 2015 Society of Legal Scholars Peter Birks Book Prize for Outstanding Legal Scholarship.[74] This book deserves to become a significant point of reference for private law scholars and practitioners alike.

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Book reviews: *Žižek and Law*, edited by LAURENT DE SUTTER.
Abingdon: Routledge, 2015, xi + 254pp (£80 hardback). ISBN: 9781138801844.

Laurent de Sutter's edited volume[75] is the first book dedicated to Slovenian philosopher, psychoanalyst and cultural critic Slavoj Žižek's treatment of law. It brings together widely acknowledged Žižek scholars and legal theorists to offer a varied and original analysis of the place of law and its many interpretations and meanings in Žižek's work. Further, the book offers an approach to law that is inflected by a consideration of the role it could play in radical politics, and includes a chapter with Žižek himself directly grappling with the topic of law. The book is composed of 11 rich, substantive chapters plus a postscript by Slavoj Žižek. Rather than go through every chapter, this review will focus on a number of chapters that have particularly struck this reviewer in order to provide an impression of the substance of the book as a whole and its impact in the field of critical legal studies generally as well as beyond.

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72. [2013] EWCA Civ 544, [2013] 1 WLR 3700 at [2] (Beatson LJ).

73. See eg W Day 'Skirting around the issue: the corporate veil after *Prest v Petrodel*' [2014] Lloyd's Mar & Com L Q 269 at 288–296.

74. Davies, above n 1, p v.

75. L de Sutter (ed) *Žižek and Law* (Abingdon: Routledge, 2015).

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