I would like to thank Orlando Da Silva for his permission to reproduce his part of the brief.

François Lareau

Parties to an Offence

Orlando V. Da Silva

Accomplice liability, one of the oldest components of criminal law, is still one of the least evolved. Courts have pondered the common law doctrine for centuries; yet its principles, components and applicability still perplex judges, lawyers, law students and juries alike. Despite these frailties, the law has managed to serve its purpose with adequate effect and few injustices. But the opportunity for reform should not be passed over. The law of complicity is replete with contentious issues and inconsistent elements that could be effectively resolved after a prudent analysis of some of the forces that drive the uncertainty of the doctrine. The following discussion addresses these issues including, in particular, (a) the problem of causation, (b) the problem of *mens rea* , and (c) the purported necessity of distinctions between types of accessories. All of the above is addressed with a view toward developing a comprehensive yet simple law respecting accomplices.

The Current Law:

(i) Aiding and Abetting:

The *Criminal Code*, in Subsections 21(1)(b) and (c), provides that an accused who aids or abets the perpetration of an offence is liable as a party to that offence. If the offence is committed, the accused is guilty of the same offence as the actual perpetrator. Mere presence at the scene of the crime is insufficient to attract criminal liability; active encouragement or some positive act of assistance such as keeping watch, enticing the victim away, or preventing others from stopping the commission of the crime are necessary to attract criminal liability as an aider or abettor.[170]

(II) Common Intention:

S. 21(2) of the *Criminal Code* makes a person a party to an offence if he or she forms an intention in common with another person to pursue an unlawful purpose (and to assist each other therein) and the other, in fulfillment of that purpose, commits the offence. For crimes other than murder or attempted murder, the accused will be liable as a party if he or she knew or ought to have known that the offence was a probable consequence of carrying out the unlawful purpose. If the principal's offence is murder or attempted murder, the accused accomplice must have actual or subjective knowledge. [171]

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[170] *Supra*, note 18 at 121.
[171] *Ibid.* at 124.

(iii) Counselling:

The *Criminal Code* deals with counselling under sections 22 and 264. S. 22, defines 'counselling' as procuring, soliciting and inciting, and provides that everyone who counsels another to commit a crime is a party to and guilty of that crime if it is committed notwithstanding that it might be committed in a different way than that counselled. The accused is also a party to any crime that is different than the one committed if the person who counselled knew or ought to have known the different crime was likely to be committed in consequence of the counselling.

S. 464 provides that everyone who counsels another to commit a crime is criminally liable even if the crime counselled is not committed.[172] The counsellor is, however, subject only to such penalty as one who attempts to commit the counselled offence.

Shortcomings/Proposals/Recommendations:

Universally, reformers agree that complicity law must continue as a mandatory element of Canada's criminal law, although they disagree as to how it should be applied. According to Gillies, commentators and legal analysts consider that the complicity doctrine works reasonably well and performs adequate justice.[173] On further analysis, it becomes clear that the law does need some reform. Joshua Dressler, Professor of Law, Wayne State University Law School, advocates the imposition of a standard by which the accomplice's contribution to the crime may be measured for the purposes of imposing liability. He insists that there should be some threshold of assistance or influence, the surpassing of which, would justify the imposition of liability on the secondary party. If the threshold is not met, courts would be safe in ignoring the contribution as too slight to warrant criminal sanctions.[174] Peter Gillies, would reform the law such that the distinction between principles in the second degree and accessories before the fact (or, for that matter, aiders/abettors and counsellors/procurers/inciters) are eliminated. He would contract the ambit of liability imposed on secondary parties.[175] Glanville Williams would likely have *mens rea* carefully and specifically defined for all the elements of complicity doctrine.[176] But, the most comprehensive changes, though more to form than substance, are advocated by the Law Reform Commission of Canada. Understandably, the Commission proposes to modify ss. 21, 22, and 464, among other provisions, in light of their reform goals for a new General Part of the *Criminal Code* of Canada. Contending that: (a) the complicity provisions have not been sufficiently well organized to avoid repetition; (b) there is a lack of system and order in the various provisions which

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172 *Ibid.* at 127.

173 Peter Gillies, The Law of Criminal Complicity (Sydney: The Law Book Company Limited, 1980).

174 Joshua Dressler, "Reassessing the Theoretical Underpinnings of Accomplice Liability: New Solutions to an Old Problem" (1985) 37 The Hastings Law Journal 91.

175 *Supra*, note 173.

176 Glanville Williams, "Complicity, Purpose and the Draft Code-2" [1990] Crim. L.R. 98.

make the sections somewhat unmanageable; and (c) there is confusion as to thrust, direction and basic principle, the Commission recommends semantic changes that would, purportedly, rectify these problems. [177] The English Draft Code[178] and the Model Penal Code[179] have also addressed some of the concerns raised above.

(I) The *Actus Reus* of Complicity Law

Joshua Dressler's maintains that one of the most pressing problems of the current complicity law involves the fact that the accessory may be liable no matter how minimal his actual contribution to the offence. "Why," he asks, "does the law treat all secondary parties alike, despite their varied levels of contribution to crime? Why does the criminal law potentially equate the villainy of an Iago with the loyalty of a spouse who furnishes a lunch to her perpetrator-husband?"[180]

The basis of Dressler's concerns lies in the way causation doctrine is applied to the law of complicity. For the perpetrator, the rule is straight forward and virtually immutable: the crown must prove beyond a reasonable doubt that *but for* the perpetrator's acts, the prohibited harm would not have happened when it did.[181] The accomplice, however, is on less secure footing: "[t]he assistance given...need not contribute to the criminal result in the sense that *but for* it the result would have ensued. It is quite sufficient if it facilitated a result that would have transpired without it." [182] For Dressler, the value of causation doctrine to complicity law is paramount. It is the instrument we employ to ensure those who are legally blameworthy are given their retributionally deserved punishment; it ties the degree of guilt of the accused accomplice to the degree of harm implicated.[183] Dressler argues that this paramountcy requires a more sophisticated and careful application to complicity law to ensure that justice is done.

Indeed, the immateriality of the degree of influence or contribution may cause substantial injustices. One would assume, for example, that a mastermind of a complicated robbery that ends in an innocent party's death would somehow be more culpable than an individual who, knowing of the scheme, purposely provides a mask; yet both would be liable to the same punishment under current law. A prudent analysis of accomplice law for the purposes of reform should at least address this issue. The Law Reform Commission does not.

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177 *Supra*, note 20 at 19.
178 *Supra* note 24.
179 *Supra*, note 23.
180 *Supra*, note174 at 92.
181 *Ibid.* at 99.
182 State v. Tally, (1894)15 So. 722.
183 *Supra*, note 174 at 103.

Curiously though, neither the English Draft Code provisions, the Model Penal Code provisions nor the Law Reform Commission provisions incorporate a causation test in their proposals. Perhaps they view an accomplice's immaterial or insignificant contribution to the crime as a matter to be considered in sentencing. Or perhaps they recognize that the common law doctrine of causation can be applied to accomplices only with great difficulty, not least of all because the commission of the crime is ultimately contingent upon the formation and/or maintenance of the will of the principal. This factor, the will of the principal, Peter Gillies writes,

> will usually be sufficient to rupture any such casual link as might otherwise have existed between the accessories act of incrimination and the commission of the crime. And the range of acts of incrimination required of accessories is not necessarily to be contracted by requiring that this act should have "substantially" or "materially" conduced to the perpetration of the crime. [184]

Such a limitation was once incorporated in the Model Penal Code: Tentative Draft but it was later abandoned by the American Law Institute in its Proposed Official Draft (1962) because it was presumably "too vague a test of liability to guide a jury verdict." [185] Even the Law Reform Commission in its Working Paper 45 recommended a "substantial act" test, but the recommendation did not materialize in any of the proposed provisions outlined in Report 31, Recodifying Criminal Law. [186]

There is also an entirely pragmatic reason for barring this causal contribution approach. Often, the only way to determine the extent the principal was influenced or helped by the accessory would be to cross examine him, which is not plausible for obvious reasons. Concerns about the unduly comprehensive ambit of accessorial liability must be addressed some other way, by, for example, imposing strict mens rea requirements. The actus reus requirements should not be changed for the foregoing reasons.

(ii) The *Mens Rea* of Complicity Law:

Perhaps the most important unresolved question involving the law of complicity is what the mens rea requirements should be. The problems associated with the actus reus of complicity should inform the approach to mens rea. More specifically, because "but for" causation is required to convict the principle, yet the accessory's act of complicity need not be of the slightest causal significance, mens rea should be the mechanism by which secondary liability is

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184 *Supra*, note 173 at 301.
185 *Ibid.*
186 *Supra*, note 20.

constrained. The fact that the crown must usually prove both causation and purposive intent to convict the principle[187] reinforces the claim that it should at least have to prove purpose to convict his accomplice. S. 21(1) of the Code, constrains accomplice liability sufficiently by requiring proof of this highest level of *mens rea*. And by requiring such, the Code more closely harmonizes the *mens rea* required of the accessory with that required of the principle and, consequently, narrows the broad scope of accessorial liability resulting from the failure of causation doctrine. These are not the only reasons for requiring purpose.

If the law required knowledge alone, rather than purposive intent, what would otherwise be completely lawful activity, activity the accused has a right to engage in, would become unlawful. When a gun seller, intending only to make a living, sells someone a gun knowing that he thereby helped his customer to kill, or when a the novelist writes about a "perfect" crime knowing that, statistically speaking, someone will attempt that very crime, they act with indifference towards the ultimate offence; they have no interest in it. In so far as their intention differs from the principal 's in this respect, they are less blameworthy. They may not be totally innocent of wrong doing, but they are, at least, less culpable than the principal and should not, therefore, be subject to the same punishment.

Requiring purpose to aid or influence in order to convict the accomplice on the same terms as the primary offender, may cause its own injustices where, for example, an accomplice, although not as culpable as the perpetrator is nevertheless highly culpable.[188] Consider for instance a case where the accomplice provides a gun to the principal at the scene of the crime knowing full well that the principal plans to kill the victim. The accomplice's purpose may not coincide with the principal's but his state of mind is still highly reprehensible.

To solve this dilemma without dissolving the purposive intent requirement, Peter Gillies suggests an offence of assisting crime analogous to an "accessory after the fact" offence with a corresponding penalty less than the maximum offence.[189] The jury would have to consider, then, whether the accused had the requisite intent to be convicted as an accessory or assistant in crime. In either case, the accused would still need to posses the mens rea appropriate for the crime. [190] A new Code provision should incorporate this notion.

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[187] The principal is required to act with the highest degree of culpability. If he does not specifically desire the crimes occurrence, he must still act with the foresight that the offence is virtual certainty to flow from his behavior.

[188] *Supra*, note 173 at 304.

[189] This proposal, incidentally, is supported by Grace E. Mueller in her article entitled: "The Mens Rea of Accomplice Liability" (1988) 61 Southern Cal. L. Rev. 2169 at 2186.

[190] *Supra.*, note 173 at 305.

(iii) *Mens Rea* of the Common Intender

Both the English Draft Code and the Law Reform Commission indicate a general desire to preserve the common intender doctrine embodied in s. 21(2). Understandably, this fact represents the view that society should feel justified in imposing liability on the participants for the collateral but probable harms that arise from their unlawful designs. The normal purpose requirements are not imposed because of the pre-existing blameworthy mental state of the accused accomplice; this culpable intent is properly transferred to every *probable* consequence of the illegal design on which he or she embarked. Society should create incentives to arrest the onslaught of harm falling within the scope of common unlawful purposes by increasing the potential liability of an accessory for all the probable crimes of his cohorts. This approach does not suffer from the over-criminalization that arises from using mental states less than purpose (or knowledge for that matter) because the accomplice is not otherwise innocent. The only condition on liability that should be added to prevent over-criminalization would be to require not only that the collateral criminal act be probable but to insist that the accomplice know, subjectively, that the act would result. Using this approach, the new Code would follow the trend set by R. v.Vaillancourt [191] and "ought to have known" in s. 21(2) would be struck out in respect of all crimes, not just murder and attempted murder. The Law Reform Commission adopted this approach in section 4 (6) but the English Draft Code failed utterly in this regard.

The Law Reform Commission Proposals

The Law Reform Commission developed its draft sections with a view to improving their arrangement, clarity and consistency and to increasing their generality, subjectivism, and comprehensiveness. To some extent they have accomplished these goals but they did so at the expense of coherency and doctrinal accuracy.[192]

The "furthering" provisions have eliminated the distinctions between counselling and procuring on the one hand and aiding and abetting on the other. By and large, all the ways in which one could assist or influence a crime are captured by the verbs: "helps, advises, encourages, urges, incites or uses." By incorporating them in one section, the LRCC proposals ensure that the crime of furthering would no longer be derivative in nature. It would not, in other words, require a completed offence on the part of the principal as a precondition to imposing liability on the accomplice. "Furthering" would be treated as counselling has always been treated; an aider or abettor would be liable for attempted furthering even if the principal does not commit the crime aided or abetted. In so far as aiders and abettors can be said to have engaged in equally reprehensible conduct with equally culpable intentions, then the result of the LRCC's proposals are both rational and just.

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[191] (1987), 39 C.C.C (3d) 118.

[192] Law Reform Commission of Canada, Secondary Liability - Participation in Crime and Inchoate Offences (Working Paper 45) (Ottawa: Law Reform Commission of Canada, 1985).

The Commissions proposals would also ensure that the same *mens rea* will apply to all acts of furtherance, thereby eliminating the uncertainty the courts experienced with respect to counselling. But to gain the added certainty, the LRCC proposal sacrificed a common sense approach to *mens rea* which necessarily distinguishes counselling from aiding and abetting. *Mens rea* requirements for aiding and abetting dictate that the accomplice know the principal's criminal intention but the same is not true for counselling. To group helping with counseling in the face of this different *mens rea* application would effectively prevent the conviction of one who counsels another to commit an offence where the individual counselled has no prior criminal intention.

The deficiencies of the LRCC proposal revolve around the fact that it does not properly deal with accessory *mens rea*. The difficulties in applying mens rea using the current provisions would prevail notwithstanding the LRCC's changes. Except for the residual clause in s. 2(4)(d) of *Report 31* which would have mens rea default at "purpose", the Commission's proposals do not provide guidance on what the requisite mental element should be for accomplices. The LRCC's notion of purpose, embodied in s. 2(4)(a)(i), does not address secondary parties although it was no doubt so intended. Consequently, whether an accomplice needs to exhibit purpose, knowledge, or recklessness with respect to the act of assistance, the principal's intention, the circumstances constituting the offence or the results of the conduct is still unclear. Assuming that the default provision in s. 2(4)(d) applies to accessories, the accomplice would have to act purposely with respect to his of her conduct, purposely as to the consequences of that conduct, and knowingly or recklessly as to the circumstances. The conduct, consequences and circumstances must be specified by the definition of the crime, but crimes are typically defined in relation to the conduct and culpability of the principal and not the conduct and culpability of the accomplice standing alone or in relation to his or her principal.

The problems of *mens rea* application created by the LRCC's proposal's are not insurmountable. A competent court could make sense of the provisions irrespective of the difficulties, but if this situation were allowed to occur, an important opportunity to clarify a perplexing area of the law will have been missed. A new law of complicity should carefully and precisely define the accomplice's mens rea in relation to his or her own conduct, the conduct of the perpetrator and the circumstances and consequences of each.

Furthermore, and most notably, the LRCC's definition of purpose in s. 2(4)(a)(ii) of *Report 31* incorporates "knowledge" and "recklessness" as to circumstances into what consequently becomes an overly broad definition. The scope of accomplice liability moves far beyond the current legislation in so far as "knowledge or recklessness" as to circumstances includes

knowledge or recklessness as to whether the principal in fact intends to commit a crime. All the problems argued above regarding the overly broad ambit of accessorial liability, come to the fore under the LRCC's proposal's. An accomplice should not be convicted subject to the full penalty for the offence committed by the principal unless he or she acted purposely (i.e. acted for the purpose of assisting the principal perform an act that the accomplice knows is an offence and knows the principal intends to commit).

Proposed Legislation

1. (1) Furthering. A person is liable for furthering the crime of another person and is subject to the penalty for it if:

(a) with the purpose of promoting or facilitating the commission of the offence,[193]

Commentary

The useful language adopted by the Law Reform Commission of Canada with respect to the use of the word "furthering" is applied her to connote the highest level of culpability of an accessory to crime. As is evident by clause 1(1)(a), an individual guilty of furthering a crime must have acted with purpose rather than merely knowledge or recklessness.

(i) he or she counsels another person to commit the crime (or to do acts that in law will amount to the crime in the circumstances that exist, or if a specified result follows), and the other person commits the crime or does the act; or

Commentary

Clause 1(1)(a)(i) adopts the necessary bifurcation between counseling and aiding and abetting. The words surrounded by brackets enables the provision to cover complicity in offences of recklessness or negligence.[194]

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[193] The wording in this subclause was adopted from the s. 2.06 (3)(a), Model Penal Code, *supra*, note 23.

[194] The words used in this subclause were adopted from Prof. Glanville Williams language delineating the proper *mens rea* for accomplice liability in his article cited *supra*, note 176 at 102.

(ii) he or she, having a legal duty to prevent the commission of the offence, fails to make proper effort so to do;[195] **or**

Commentary

This subclause makes witnesses, who have a legal duty to prevent the crime, accomplices subject to the full penalty for the completed offence. The section is intended to account for scenarios parallel to the fact situation in Dunlop and Sylvester v. R. [196] where two motorcycle gang members delivered beer to a dump site where other gang members were gang raping a woman. The two accused watched the sexual activity for a few minutes and then left. Dickson J. for the majority of the Supreme Court of Canada, held that the accused gang members were not parties to the rape because mere presence is not sufficient to ground culpability under s. 21(1) of the *Criminal Code* unless it is coupled with active encouragement or prior knowledge that the offence would occur. Under the clause proposed above, the gang members would become parties to the rape if reforms to the *Criminal Code* include omissions of a type encompassing the behaviour of the two gang members. It would be inconsistent to hold the gang members liable for the rape merely because they failed to prevent it unless the Code specifically labels this failure reprehensible and deserving of criminal sanction.

As an exception to this principle, if the gang members arrived at the scene of the crime, witnessed the rape and stayed for the purpose of encouraging the rape or knowing that the rape was being encouraged by their presence they may be liable under clauses 1(1)(b) or (2) below.

(b) he or she

(i) knows that a another person intends to commit the crime or intends to do acts that in law will amount to a crime in the circumstances that exist, or if a specified result follows; and

(ii) knows that his or her act is or will be a help to the offender in the commission of the crime;[197] **and**

(iii) acts for the purpose of assisting the offender carry out his or her criminal intention.

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[195] The wording in this subclause was adopted from the American Law Institute's Model Penal Code s. 2.06 (3)(a)(iii), *supra.*, note 23.

[196] [1979] 2 SCR 880 at 891.

[197] The words used in cl. 1(1)(b)(ii) and (iii) were adopted from Prof. Glanville Williams language delineating the proper *mens rea* for accomplice liability in his article cited *supra*, note 176 at 103.

Commentary

These subclauses delineate the mens rea requirements for an accomplice who furthers crime other than by counselling another. It, again, maintains the important distinction between counselling and actively helping. The mental element is outlined in detail with regard to the accomplice as an accomplice standing alone and in relation to the conduct and culpability of the principle. Moreover, it, like clause (1)(a)(i) above includes liability for complicity in offences of recklessness or negligence.

1. (2) Assisting. A person is liable for assisting the crime of another person and is subject to half the penalty for it if he or she, acting without purposive intent, but, nevertheless, satisfying the conditions in ss. 1(1)(a) or (b) (as the case may be), knowingly helps, counsels, encourages or otherwise influences the offender to commit the crime.

Commentary

This provision fills in the gap between those accomplices who are as morally culpable as the perpetrator because they acted with purposive intent (and, therefore deserve full punishment) and those acting with knowledge of their assistance but for some other purpose (and, therefore, are still morally culpable but not as culpable as the perpetrator). "Purpose" is used to contract the overly broad ambit of accomplice liability; the "knowing assistance" clause recognizes that some individuals who act with knowledge but without purpose have still engaged in conduct that is highly reprehensible. By making this recognition and imposing a reduced sentence, the provision strikes a compromise between the two concerns.

(3) Different Crime Committed from that Furthered or Assisted.

(a) General Rule. No one is liable for furthering or assisting any crime which is different from the crime he or she meant to further or believed he or she was assisting.

(b) Exception. Clause 1(3) (a) does not apply where the crime differs only as to the victim's identity or the degree of harm or damage involved.

(c) Qualification. A person who agrees with another to commit a crime and who also otherwise furthers it, is liable not only for the crime he or she agrees to commit and intends to further, but also for any crime which he or she knows is a probable consequence of such agreement of furthering.[198]

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[198] Clauses 1(3)(a)(b) and (c) are adopted from the Law Reform Commission of Canada's recommendations clauses 4 (6)(a)(b) and (c), *supra.*, note 20 at 47.

Commentary

Subclause (b), although worded as an exception, largely codifies the common law requirements as to the appropriate specificity of the intended crime vis a vis the actual crime committed. It must be the same *type* of crime as the one anticipated differing only as to the victim's identity or the *degree* of harm caused. Subclause (c) embodies the common intender provision in s. 21(2) of the *Criminal Code*, but restricts liability to those crimes the accomplice is subjectively aware are probable consequences of the joint illegal enterprise.

(4) If an individual does not completely perform the conduct specified by the crime's definition, the person who furthered or assisted its attempted commission is subject to half the penalty he or she would be subject to had the criminal conduct been completely performed. [199]

Commentary

This provision maintains liability for an individual who helps or counsels another to commit an offence even if that person does not commit the offence helped or counselled. It fills the gap in the current law which fails to accord criminal liability to those who aid and abet an offence that, for one reason or another, is never completed by the principal.

Clause 1(4), which is substantially based on the LRCC's "Attempted Furthering" provision does not use the same label in order to distinguish situations where the accomplice's act fails to assist or the accomplice fails to counsel from situations where the principal chooses, of his or her own volition, not to commit the crime. The former situation is more properly labeled an attempt, but it fails to justify the imposition of liability because of the utter lack of both actus reus and resulting harm. In other words, an act that fails to help or to counsel, fails to reach the mind of the perpetrator (if there is any), and does not ultimately result in any crime (or harm for that matter) is wholly insufficient to ground criminal liability. To punish on these grounds would be tantamount to punishing for mere bad thoughts.

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[199] Clause 1(4) is adopted from the Law Reform Commission of Canada's recommendations clauses 4 (4) "Attempted Furthering", *ibid.* at 46.