CHAPTER 6: PARTIES TO CRIME AND VICARIOUS LIABILITY

INTRODUCTION

A person can be criminally liable for the acts of another if they are a party to the offense. For instance, the driver of the get-away car is guilty of the armed robbery of a store even though the driver never left the car, and the entire robbery itself was committed by others. Although the term "accomplice" is similar in meaning, the key statutes in the TPC treat this under the concept of a "party" to the crime. Like most jurisdictions, Texas has abolished the old common law distinctions between principles, accessories, etc. that are discussed at the beginning of ch. 6 in your text. Most of this law is covered in TPC ch. 7 "Criminal Responsibility for the Conduct of Another." This ch. is available at http://www.capitol.state.tx.us/statutes/docs/PE/content/word/pe.002.00.000007.00.doc

Vicarious liability also makes a person liable for the criminal acts of others. Unlike the liability of a party or accomplice, a person can be vicariously liable even though they had no involvement in the crime and committed no act and had no culpable mental states.. Vicarious liability is premised on the relationship between the actual offender and the defendant. The most common form of vicarious liability involves making the owner of a business responsible for the acts of employees.

A person can be involved in the crime of another because of their acts before, during or after the crime. The discussion below is organized in this fashion.

INVOLVEMENT BEFORE OR DURING THE CRIME

TPC sec. 7.01. "PARTIES TO OFFENSES" provides that "(a) A person is criminally responsible as a party to an offense if the offense is committed [1] by his own conduct, [2] by the conduct of another for which he is criminally responsible, or [3] by both." Thus, the person who commits the act is a party and anyone else whom the law defines as a party is criminally responsible for the act. Subsec. (b) provides that each " party to an offense may be charged with commission of the offense."

Sec. 7.02, describes three situations where a person is a "party," *i.e*., criminally responsible for the conduct of another. If the party does not commit the offense directly, to be liable, the party must want, intend or desire that the other person commit the offense. This is the *mens rea* requirement.

Causing or aiding an innocent or non-responsible person to commit the offense

First, under sec. 7.02 is the situation where the person acts with the *mens rea* of the offense and "he causes or aids an innocent or nonresponsible person to engage in conduct prohibited by the definition of the offense:" For example, if an adult wants a controlled substance delivered to a place and hires a young child to make the delivery, the adult is guilty of the crime even though the child could not be guilty. The *actus reus* is causing or aiding the innocent or nonresponsible person.

Aiding or Conspiring with Another to Commit an Offense

Second, a under sec. 7.02 (a)(2), a person is responsible for the acts of another if "acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense." This is the classic definition of an "accomplice" and also includes those who solicit others to commit crimes. (The crime of solicitation is discussed in ch. 7.) Thus is A asks (solicits) B to commit a crime, A intends that the crime be committed, and B commits the crime, A (along with B) are guilty of the crime committed by B. An example of accomplice liability would be if B tells A that he (B) would like to burglarize a home but lost his crowbar. If A provides B with the crowbar with the intent to aid in commission of the burglary, and B commits the burglary, A is also responsible for the burglary. The *actus reus* is satisfied if the defendant "solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense."

Merely being present at the scene of a crime is not enough to make one a party. (However, one can be a party even though one is not present at the crime scene). Failing to report a crime or failing to cooperate with the police alone cannot create liability as a party. Aiding the suspect only after the crime is completed cannot create liability as a party.

Salinas v. State, 163 S.W.3d 734 (Tex.Crim.App. 2005) is a recent example of accomplice liability, and is a case where even though the defendant did not pull the trigger, the law of parties resulted in a conviction for capital murder and the death penalty. The State's evidence showed that the appellant, Salinas,

> his brother Lorenzo, and Oscar Villa Sevilla were at appellant's house in Mission on the night of Saturday, July 28, 2001, smoking marijuana. Sevilla stated that he wanted to get a gun and steal a car. Appellant said, "Let's see if you have the balls; let's go." Appellant retrieved a shotgun that he had previously stolen and gave it to Sevilla. Appellant and Sevilla walked to a nearby intersection. Sevilla jumped out and pointed the shotgun at the first car to stop at the four-way stop. Geronimo Morales was driving the car, and his 21-month-old child, Leslie Ann Morales, was in her car seat in the back. Sevilla pounded on the window, and Morales opened the door. Sevilla got into the driver's seat and forced Morales over to the passenger's seat. Sevilla handed appellant the gun, and appellant pointed it at Morales. Morales cried and pleaded with them not to hurt the baby. Appellant got into the back seat of the car while still pointing the gun at Morales. Sevilla grabbed Morales by the hair and began hitting him. Sevilla asked Morales for his money, but Morales stated that he did not have any. This made Sevilla angry, and he beat Morales some more. Sevilla stopped the car, retrieved the gun from appellant, and dragged Morales into some orchards and shot him. He stole Morales' wallet, a gold ring, and a silver necklace with a skull on it.
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> Sevilla returned to the car, and appellant suggested that they return to his house and pick up his brother Lorenzo. When Lorenzo got into the car, he asked them what they were going to do with the baby. Lorenzo suggested that they leave her at a store or someplace where someone would find her, but Sevilla said they were going to dump her where no one would find her. They drove to an area south of town about a half a mile from the Rio Grande River, and close to La Lomita Mission. Appellant and Lorenzo took the baby out of the car, still in her car seat, and placed her in some tall grass. 163 S.W.3d at 737-38

Morales died of a gunshot wound to the head and the child died of dehydration. The CCA heard Salinas' case on direct appeal.

Salinas argued

> that the evidence is insufficient to support a finding that appellant assisted, promoted, or encouraged Sevilla in committing the murders. He further asserts that he could not have reasonably foreseen or anticipated Sevilla's actions in killing the victims. . . ..
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> "Evidence is sufficient to convict under the law of parties where the defendant is physically present at the commission of the offense and encourages its commission by words or other agreement." *Ransom v. State,* 920 S.W.2d 288, 302 (Tex.Crim.App.1994). Party participation may be shown by events occurring before, during, and after the commission of the offense, and may be demonstrated by actions showing an understanding and common design to do the prohibited act. *Id.*
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> According to appellant's own confession, when Sevilla stated that he wanted to commit a carjacking, appellant dared him to do it and provided him with a shotgun. Sevilla's intent to do more than steal the car was apparent. If Sevilla had intended only to steal the car, he could have ordered Morales and Leslie Ann out as soon as he stopped the car, and left them at the side of the road. Instead, Sevilla handed the shotgun to appellant, who pointed it at Morales as Sevilla got in and drove to a remote area. Appellant did nothing as he watched Sevilla drag Morales from the car and shoot him. Later, Sevilla stated his plan to leave Leslie Ann where she could not be found, rejecting Lorenzo's suggestion to leave her in a public place where she could be found. The evidence supports the inference that appellant and Lorenzo removed Leslie Ann from the car, still strapped in her car seat, and placed her in tall grass fifteen feet from a road and outside of town. The evidence is sufficient to support a finding that appellant encouraged and participated in, as a party, the murders of Morales and Leslie Ann. 163 S.W.3d at 739-40.

Although affirming Salinas' conviction on the law of parties, the CCA reduced his sentence to life. After the trial, but before the case got to the CCA the U.S. Supreme Court ruled in *Roper v. Simmons* (2005) that the Eighth Amendment precluded execution of someone under the age of 18 at the time of the crime. Salinas was under 18 at the time of the crime and could not be lawfully executed.

Conspiracies

Although sec. 7.02 (a) (2) does not specifically mention conspiracies, if A engages in a conspiracy to commit a crime, but another one of the conspirators (B) actually commits the crime, A is also guilty of the crime committed by B, because A is a party to a conspiracy, If one conspires with another to commit a crime this would fall under the language "acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense."

A legal difficulty can arise when someone in the conspiracy (A) goes beyond the crime planned by A, B, and C, and commits and additional crime or crimes. To what extent are B and C liable for the "extra" crime committed by A? For example, A, B and C conspire to commit an armed robbery of a bank. They

know that the bank has armed security guards. A is an experienced bank robber who has never committed any 'extra' crimes during the 3 years the gang has been robbing banks. During the robbery, A shoots and kills a security guard who attempts to intervene. Also during the robbery A sexually assaults one of the tellers. This situation is covered by sec. 7.02 (b):

> (b) If, in the attempt to carry out a conspiracy to commit one felony, another felony is committed by one of the conspirators, all conspirators are guilty of the felony actually committed, though having no intent to commit it, if the offense was committed in furtherance of the unlawful purpose and was one that should have been anticipated as a result of the carrying out of the conspiracy.

Applying this section, B and C are also guilty of the shooting of the guard because it was committed in furtherance of the armed robbery, and armed intervention by a security guard and the shooting of the guard should have been anticipated. B and C are not guilty of the rape because it was not part of the unlawful purpose and could not have been anticipated. Under Texas law, the rape would be termed an "independent impulse" by A (not related to the conspiracy and not foreseeable), and co-conspirators are not responsible for crimes committed by other conspirators on an independent impulse.

Failing to Prevent the Offense

Third, a person is a party to the crime under sec. 7.02 (a)(3) if "having a legal duty to prevent commission of the offense and acting with intent to promote or assist its commission, he fails to make a reasonable effort to prevent commission of the offense." For example, parents have a legal duty to protect their children from harm under V.T.C.A., Family Code sec. 151.001:

> Rights and Duties of Parent
> a) A parent of a child has the following rights and duties:
> (1) . . . .
> (2) the duty of care, control, protection, and reasonable discipline of the child;
> (3) the duty to support the child, including providing the child with clothing, food, shelter, medical and dental care, and education;

If a parent wants their child to be raped, and fails to make a reasonable effort to prevent the rape, the parent is also guilty of the rape of the child. The specific intent or culpability is intent to promote or assist the commission of the offense. The *actus reus* is failing to make a reasonable effort to prevent the offense.

FAILING TO REPORT OR STOP A CRIME

Merely being present at the scene of a crime, even if the person knows a crime is being committed does not make one party to that crime. Failure to intervene does not make one a party to the crime except as provided by sec. 7.02 (a)(3). Further, failure to report a crime does not make one a party to it. However, under a few limited circumstances, failure to report a crime can be a crime itself. Examples are TPC sec. 38.17 (Failure to Stop or Report Aggravated Sexual Assault of a Child) and sec. 38.171 (Failure to Report Felony). These crimes of omission are discussed in ch. 4 *infra*.

INVOLVEMENT AFTER THE CRIME

At common law, accessories after the fact were those who knew a felony had been committed and aided the perpetrator only after the crime had been completed. Accessories after the fact were guilty of a felony which usually resulted in the death penalty. Today, in Texas and most states, aiding the offender only after the crime has been completed is not a felony and does not make the person providing aid a party to the offense.

TPC sec. 38.04 covers this type of activity:

> HINDERING APPREHENSION OR PROSECUTION. (a) A person commits an offense if, with [1] intent to hinder the arrest, prosecution, conviction, or punishment of another for an offense or, [2] with intent to hinder the arrest, detention, adjudication, or disposition of a child for engaging in delinquent conduct that violates a penal law of the state, or [3] with intent to hinder the arrest of another under the authority of a warrant or capias, he:
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> (1) harbors or conceals the other;
> (2) provides or aids in providing the other with any means of avoiding arrest or effecting escape; or
> (3) warns the other of impending discovery or apprehension.
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> (b) It is a defense to prosecution under Subsection (a)(3) that the warning was given in connection with an effort to bring another into compliance with the law.

Note that there are three alternative *mens rea* elements, [1] and [2] and [3], and three alternative *actus reus* elements—(a) (1), (2), and (3). This offense is usually a class A misdemeanor which is punishable by confinement in a jail for a maximum of one year and/or a maximum fine of $4,000.

It is also a crime to engage in (or assist someone in engaging in) "Resisting Arrest, Search, or Transportation" (TPC sec. 38.03). It is also a crime for an employee of a correctional facility to permit or facilitate the escape of an inmate (TPC sec. 38.07).

VICARIOUS LIABILITY

Both accomplice or party liability and vicarious liability make one liable for the criminal acts of another. However, the accomplice must have some intent that the crime be committed and engage in some acts that aid or attempt to aid the perpetrator. In vicarious liability, the State does not have to prove any acts or mens rea by the person found vicariously liable. The liability flows from the relationship of the offender to the persons held vicariously liable. The two most frequent examples are parent-child and employer-employee.

An example of vicarious liability is the liability of parents to make restitution to the victims for crimes committed by their children. One Court of Appeals, *In Re D.M.*, 191 S.W.3d 381) (Tex. App. Austin, 2006), dealt with this issue after a juvenile student started a fire in a public school. Total damage was over $100,000. The juvenile was placed on probation and the parents were ordered to make restitution to

the school in the amount of $25,000. They appealed. The Court of Appeals upheld the award of restitution. The court explained this law as follows:

> The juvenile justice code, located in the family code, was enacted for several reasons including the desire "to promote the concept of punishment for criminal acts" and "to protect the welfare of the community and to control the commission of unlawful acts by children." Tex. Fam.Code Ann. § 51.01(2)(A), (4) (West 2002). The code emphasizes that both the parents and the child are responsible for the conduct of the child. Section 51.01(2)(C) states that one of the goals of the juvenile justice code is to provide "rehabilitation that emphasizes accountability and responsibility of both the parent and the child for the child's conduct." *Id.* § 51.01(2)(C) (West 2002). Further, the code was enacted "to provide a simple judicial procedure through which the provisions of this title are executed and enforced and in which the parties are assured a fair hearing and their constitutional and other legal rights recognized and enforced." *Id.* § 51.01(6) (West 2002).
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> Juvenile delinquency proceedings, although considered civil proceedings, are quasi-criminal in nature. *In re M.S.*, 985 S.W.2d 278, 280 (Tex.App.-Corpus Christi 1999, no pet.); *In re J.R.*, 907 S.W.2d 107, 109 (Tex.App.-Austin 1995, no pet.). Portions of juvenile proceedings are governed by the rules of criminal proceedings including the State's burden of proof, the right to trial by jury, the privilege against self-incrimination, the right to trial and confrontation of witnesses, and confessions. *In re J.R.*, 907 S.W.2d at 109.
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> As part of a delinquency determination, the court is allowed to consider what amount of restitution, if any, should be paid to the victim of the crime committed by the juvenile. Tex. Fam.Code Ann. § 54.041 (West 2002 & Supp.2005). The code allows restitution to be *issued against* the juvenile or *the parents* of the juvenile. *Id.* § 54.041(b). However, the maximum amount of restitution that parents may be required to pay as a result of their child's willful and malicious conduct is $25,000. *Id.* § 41.002 (West 2002). Further, the restitution ordered must promote the rehabilitation of the child. *Id.* § 54.04(b) (West 2002 & Supp.2005). If the court finds that the parents have made "reasonable good faith efforts" to prevent their child from engaging in delinquent behavior, the court shall waive any requirement that the parents pay restitution. *Id.* § 54.041(g). 199 S.W.3d at 383-84

With regard to the burden of proof on the “good faith” is the court concluded “that the family code places the burden on parents of a delinquent child to prove that their child engaged in the delinquent behavior in question despite their good faith efforts.” 199 S.W.3d at 388

Other examples can be found in the Alcoholic Beverage Code. There, the holder of the license (owner or employer) is liable for violations committed by employees. An example is sec. 104.01, “Lewd, immoral, indecent conduct.” The liability is based on the employer-employee relationship and the responsibilities of the holder of a liquor license.

REVIEW QUESTIONS

Review Questions (Answers are found at the end of this chapter)

1. Which of the following relationships can create vicarious criminal liability?
   a. principal-accessory
   b. principal-accomplice
   c. party-accessory
   d. employer-employee
   e. employer-accomplice

2. According to Texas Penal Code ch. 7, everyone who is criminally responsible for a criminal act is specifically termed a/n
   a. accomplice
   b. accessory
   c. party
   d. co-conspirator
   e. principal

3. One who aids, abets, or encourages another to commit a crime is commonly referred to as a/n
   a. accomplice.
   b. accessory after the fact.
   c. accessory before the fact.
   d. principal in the first degree.
   e. miscreant

4. Under the independent impulse doctrine, coconspirators are
   a. not liable for the unforeseeable act of other conspirators.
   b. liable only for their own acts.
   c. liable only for the acts they personally conspired to commit.
   d. liable for any and all acts committed by other conspirators.
   e. not liable for any acts done in furtherance of the conspiracy.

5. Under a vicarious liability theory, a person (A) is liable for the criminal acts of another (B),
   a. only if A want B to commit the crime.
   b. only if A fails to stop B from committing the crime.
   c. only if A fails to report B's crime to authorities.
   d. only if A is related to B by blood or marriage.
   e. only if the legally required relationship exists between A and B.

6. Which of the following alone can legally create accomplice liability.
   a. being present at the scene of the crime.
   b. failing to report the crime to the police.
   c. failing to cooperate with the police investigation.
   d. being present at the scene and enjoying witnessing the crime.
   e. assisting the offender in committing the crime.

REFERENCES AND RESOURCES

Belbow, B. A. (2005). *Guide to Criminal Law for Texas*,. 3rd ed. Belmont, CA: Thomson-Wadsworth, ch. 5.

Teague, M.O. & Helft, B. P. (2006). *Texas Criminal Practice Guide*. San Francisco: Matthew Bender. ch. 121

Texas Jurisprudence 3rd (2006). *Criminal Law* Law, sec. 151-55.

ANSWER KEY, CH. 6, PARTIES TO CRIME AND VICARIOUS LIABILITY

1. d
2. c
3. a
4. a
5. e
6. e