PART I

General principles

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Introduction

1.1 An organising principle of accessory liability

When a person commits a civil wrong, other persons may in some circumstances also be held legally liable for some or all of the consequences of that wrong despite not having personally satisfied all its elements. Legal concepts that explain such liability include vicarious liability as an employer or a principal; attribution to a principal of the acts of agents or alter egos; breach of non-delegable duties; receipt of benefits or property as a consequence of the wrong; and accessory liability. This book considers the last of these concepts.

Specifically, this book concerns whether there is an organising principle of accessory liability discernible throughout private law. We argue that there is indeed such a principle and seek to explain its elements and operation. Our claim is not novel. Many judges and commentators have suggested that this might be so, although there is no consensus regarding how such a principle might operate or what its contents might be.[1]

At its core, the notion of an accessory is intuitively simple: an accessory is someone who is wrongfully involved in another's wrong. As with many concepts, however, legally defining 'accessory liability' and drawing the precise boundaries between it and other, perhaps related, concepts is not easy. We argue that there are three key elements of accessory liability in its various manifestations throughout private law, namely:

(1) a primary wrong committed by another;
(2) involvement, through conduct by the accessory, in that wrong; and

[1] See, e.g., R. P. Austin, 'Constructive Trusts' in P. D. Finn (ed.), *Essays in Equity* (Sydney, Law Book Company, 1985) 196, 200 n. 22; Philip Sales, 'The Tort of Conspiracy and Civil Secondary Liability' (1990) 49 *Cambridge Law Journal* 491; Peter Birks, 'Civil Wrongs: A New World' in *The Butterworth Lectures 1990–91* (London, Butterworths, 1992) 101; Paul S. Davies, *Accessory Liability* (Oxford, Hart, 2015). We were not able to read Paul Davies' book before submitting our own manuscript for publication.

(3) a requisite mental state on the part of the accessory, generally knowledge of the other's wrong.

The contents of each element of the organising principle are fleshed out by specific doctrines within the common law, equity and statute. Ultimately, the question of liability is a normative one of whether a person is sufficiently involved in the primary wrong with sufficient knowledge such that it is appropriate to hold him or her liable for the primary wrong of the primary wrongdoer. The answer depends on the primary wrong that has been committed, particularly in light of the purposes and values promoted by the law proscribing that wrong, and the factual context in which that wrong came about. In simple terms, accessory liability is justified by the accessory's own wrongful conduct that contributes to the commission of the primary wrong. These matters form the subject matter of our book.

1.2 The objectives of the book

This book explores the variety of forms in which accessory liability manifests itself throughout private law; we do not ignore statute in that exercise. This book also explores the question of whether liability rules can be characterised as accessorial or not. Our objectives are threefold:

(i) to explain why we consider that there is an organising principle of accessory liability operating across private law;
(ii) to provide a principled analytical framework for accessory liability in private law according to which common themes and problems can be identified and coherent solutions to those problems suggested; and
(iii) to set out in detail the specific rules and principles of accessory liability as they currently operate in private law.

Objectives (i) and (ii) form the basis of Part I of this book. Objective (iii) forms the basis of Part II. We intend Part II to be a useful resource for those seeking information on the substantive law. This book not only focuses upon Anglo-Australian law, but also refers to other common law jurisdictions. We use US law as a useful point of comparison and insight in relation to some areas of accessory liability, but we do not claim to provide a comprehensive or authoritative treatment of that country's various jurisdictions.

Describing accessory liability in isolation from the contexts in which it operates would be to present a distorted, inaccurate picture of the law. Furthermore, in order to understand what accessory liability *is*, it is crucial to understand what accessory liability *is not*. Hence, Part II includes discussion of some related rules that also impose liability on third parties to a primary wrong and which have considerable affinity with accessory liability. We have taken this approach, for example, in relation to equity by including discussion of persisting property claims and recipient liability; and in intellectual property law by including 'indirect' liability rules. These bases of liability must be disentangled from what we consider to be, conceptually, accessory liability. We also do not wish to disrupt settled groupings of liabilities that make sense on other grounds. For example, equitable accessory liability and recipient liability form part of a broader 'participatory' liability in equity; it would be misleading to imply that the courts treat equitable accessory liability in isolation.

1.3 The methodology and general approach of the book

Extracting a concept of accessory liability from case law and legislation has the potential to be a circular process, given that such a task presupposes a prior understanding of the concept. Chapter 2 identifies what 'accessory' could mean in a legal sense and demonstrates that our understanding of the concept is consistent with actual usages of the term 'accessory' in private and criminal law. We then explain that, regardless of the terminology, the same concept exists in different guises across private law. Chapter 2 also explains the rationales for accessory liability and distinguishes it from other concepts. In Chapter 3, we present a conceptual framework of accessory liability that is based upon our conclusions in Chapter 2 and that draws upon the substantive law discussed in Part II.

In formulating our understanding of civil accessory liability, we draw upon the well-developed (albeit complex and uncertain) criminal law jurisprudence. There are obvious parallels between accessory liability in private and criminal law, but equally there are dangers in too readily analogising between the two legal systems. Chapter 4 provides an overview of accessory liability in criminal law and explains how it may help us understand civil accessory liability.

1.4 An analytical framework, not a uniform test or rigid taxonomy

As accessory liability describes rules that are evident throughout private law, does this mean that there is a single coherent test for, or determinative standard of, liability that uniformly applies across different areas of law? It would be surprising if this was so and that is the conclusion that this book has reached. The elements that we set out in Chapter 3 are formulated too generally to operate as uniform tests of liability; these elements merely provide a starting point for analysis. It is necessary to consider the specific legal principles and rules as set out in Part II in order to gain an accurate understanding of how accessory liability operates in its respective contexts.

This book does not advocate a rigid taxonomy of accessory liability. Exceptional or borderline cases of liability exist that may share some, but not all, of the characteristics of accessory liability. We are mindful of the dangers of a categorisation that is too rigid. As Thomas has stated,

> Instead of analysing the law as it actually exists, as a product of piece-meal (often haphazard) historical development, with all its uncertainties and inconsistencies, there seems to be a passion for re-ordering and re-classifying it as commentators would wish it to be. . . . Many areas of law might, perhaps, be better arranged and rendered more logical if one were starting with a blank canvas.[2]

Overzealously promoting one classificatory scheme may distract attention from equally important, yet inconsistent, commonalities. To do so may also distort the law through oversimplification. Similarly, we do not intend to reject alternative classificatory frameworks that encompass all or some of the principles that we include in our accessorial scheme. We do not see how any classificatory scheme can claim to be the sole and exclusive means of organising the law. With such qualifications in mind, however, the analytical framework set out in Chapter 3 is nonetheless intended to illuminate and clarify the current law.

1.5 Terminology

We refer to the claimant, or C, as the party to whom liability, accessorial or otherwise, is owed, and we refer to the party who has personally committed the wrongful conduct to which accessory liability attaches as the 'primary wrongdoer' (PW or, if a company, PW Co). In the context

[2] Geraint Thomas, *Thomas on Powers*, 2nd edn (Oxford University Press, 2012) *x*.

of criminal law, that party is referred to as the 'principal offender' or PO. When the liability is indisputably accessorial and no confusion arises, we refer to the accessory as A; otherwise, we generally refer to third parties involved in the wrongful conduct without having personally committed it as the 'defendant' or D. Purely for reasons of style and convenience, A is assumed to be male and PW is assumed to be female.

Accessory liability is described by a proliferation of terms in specific legal contexts, but there are few terms that adequately describe accessory liability as a generic concept. 'Accessory liability' itself is often associated with criminal liability. Conversely, in the United States (US), 'aiding and abetting' liability is widely used, even outside of its core operation in criminal and tort law, but does not naturally encompass all forms of accessorial conduct such as procurement. In Anglo-Australian law, one widely used generic term is 'secondary liability'. To the extent that 'secondary' means derivative or 'ancillary'[3] liability, that is dependent on, or subsidiary to, the commission of a wrong by another person, that label is useful. Nonetheless, we prefer the generic label 'accessory' to 'secondary' or, for that matter, 'ancillary' and consider that 'secondary liability' is best avoided for the following reasons.

The term 'secondary liability' is sometimes used to refer to non-accessory liabilities, such as vicarious liability, and is therefore too wide for our purposes.[4] It is also used by some commentators to mean that the accessory must be liable for the same wrong as that committed by PW and that the same remedies must therefore apply against the accessory as those available against PW.[5] This issue goes to the heart of our understanding of accessory liability and is explored fully in Chapter 2. Here, it suffices to note that 'secondary' in this sense is inaccurate where A is liable for what is a different wrong, as is the case in equity [Chapter 8], and the tort of inducing breach of contract [Chapter 6], for example. Necessarily, that party is subject to potentially different remedies.[6] Furthermore, accessory

[3] See *Williams* v. *Central Bank of Nigeria* [2014] UKSC 10; [2014] 2 WLR 355 [9] (Lord Sumption); *Hasler* v. *Singtel Optus Pty Ltd* [2014] NSWCA 266; (2014) 101 ACSR 167 [72] (Leeming JA).

[4] See, e.g., Sales, 'The Tort of Conspiracy', 502–503.

[5] See in the context of liability for assistance in a breach of trust or fiduciary duty, Steven Elliott and Charles Mitchell, 'Remedies for Dishonest Assistance' (2004) 67 *Modern Law Review* 16.

[6] It should be added that debates about which remedies are available against an accessory and whether such remedies are duplicative of those available against PW, ought not to turn on whether we label such liability as 'secondary' or as a discrete wrong.

liability need not necessarily duplicate the remedies available against PW (though it usually does) even where A's liability is for the same wrong as PW [2.6]. Finally, the term 'secondary liability' might be confused with the term 'secondary rights', which is used to denote remedial rights arising from the breach of legal duties and which differ from the 'primary' rights that have been infringed.[7] For these reasons, 'accessory liability', rather than 'secondary liability', is used in this book as a generic label. Both 'accessory' and 'accessorial' can be used as an adjective; we have chosen for convenience the term 'accessory liability', and in all other adjectival contexts we use 'accessorial'.

Finally, by 'private law' we mean the case law and statutes that regulate the interactions of private actors, and we use 'wrong' in the conventional sense of breach of a legal duty that leads to remedial outcomes. In private law, a wrong encompasses breach of common law duties (torts and breach of contract), breach of equitable duties (including breach of trust, fiduciary duty and confidence) and breach of privately actionable statutory duties (for example, concerning misleading conduct by persons engaged in trade or commerce). Equity has a broader understanding of wrongful conduct, the various permutations of which are encapsulated in the general concept of unconscionability or unconscientous conduct, and which we also consider in this book.

1.6 The structure of the book

Part I of this book is concerned with identifying and explaining the organising principle of accessory liability that operates in private law. Chapter 2 identifies and describes the general features of the principle, explains its rationales and distinguishes it from other forms of liability. Chapter 3 explores the analytical framework of accessory liability with reference to the substantive law detailed in Part II. Chapter 4 concludes Part I with an overview of criminal accessory liability that explains its relevance to accessory liability in private law.

Chapters 5–10 of Part II of this book are ordered according to the respective jurisdictions of private law: common law, equity and statute. The very particular questions that arise across private law in determining accessory liability in the context of wrongs involving companies are discussed separately in Chapter 11. The chapter headings in Part II

[7] See, e.g., Robert Stevens, *Torts and Rights* (Oxford University Press, 2007), particularly 285 onwards, which explains the distinction between primary and secondary rights.

generally refer to the primary wrong that has been committed by PW, but the content of these chapters (with the exception of Chapter 7) focuses on the accessory liability rules that apply to determine who are accessories to those wrongs. This focus generally matches the chapter headings, but it does lead to some unavoidable overlap in coverage. Specifically, intellectual property infringements are statutory torts and, consequently, the courts have applied both general accessory rules, from tort law, as well as specific statutory accessory rules to intellectual property infringements. Consequently, the primary wrongs of intellectual property infringements are considered both in the chapter dealing generally with torts [Chapter 5] and the chapter dealing specifically with infringement of statutory intellectual property rights [Chapter 9]. The subject matter of Chapter 7, which deals with infringement of equitable property rights, is unusual in that it concerns non-accessory liabilities that are closely related to equitable accessory liability and that need to be clearly distinguished from it. It forms a necessary prelude to the discussion of equitable participatory liability (including both accessory and recipient liability) in Chapter 8. Chapter 12 contains our brief concluding observations.

2

Identifying accessory liability in private law

2.1 Overview

This chapter identifies – by drawing upon first principles, the substantive principles of private law and, to a lesser extent, the criminal law – a form of liability that is appropriately characterised as accessory liability and that arises across private law. The chapter explains when a liability can be appropriately characterised as accessorial, regardless of whether it is formulated as an independent wrong or as a 'secondary' liability to the primary wrong of the primary wrongdoer (PW), and irrespective of the actual terminology used to describe that concept. The chapter explores the rationales of accessory liability and when it is needed in the law: that is, why it serves an important function in some areas of law and not in others. It explains why accessory liability is derivative upon another person committing a primary wrong, but need not duplicate, or replicate, PW's liability. Finally, this chapter distinguishes other forms of liability and explains why it is necessary to consider some non-accessorial, but related, liabilities in more depth, specifically ones concerning the protection of equitable property rights, recipient liability and the protection of statutory intellectual property (IP) rights.

2.2 Identifying accessory liability in private law

In simple, non-legal terms, 'accessory' means something that is additional to, or contributes to, something else. The core legal understanding of accessory accords with this meaning: an accessory is someone who is linked to another's wrongdoing in such a way as to be made responsible for its consequences. Such a generic statement, however, hides a range of more specific possible meanings. At its broadest, 'accessory' could encompass all situations in which the commission of a primary wrong is a prerequisite to another's liability and could, for example, therefore include vicarious liability [2.8.1], [5.3.1]. But such a meaning would be