ACCESSORIES IN PRIVATE LAW

Accessory liability is an often neglected, but very important, topic across all areas of private law. By providing a principled analytical framework for the law of accessories and identifying common themes and problems that arise in the law, this book provides much-needed clarity. It explains the fundamental concepts that are used to impose liability on accessories, particularly the conduct and mental elements of liability: 'involvement' in the primary wrong and (generally) knowledge. It also sets out in detail the specific rules and principles of liability as these operate in different areas of common law, equity and statute. The authors undertake a comparative study across the common law and criminal law, and across a number of jurisdictions, including the United States, with a focus on Anglo-Australian law. The book sheds new light on what is and what is not accessory liability.

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ACCESSORIES IN PRIVATE LAW

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and
For David, Geraldine, Alice, Emily and Lucy

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FOREWORD

For some years now I have had the hope that Joachim Dietrich and Pauline Ridge, both former students of mine, would address together this greatly under-analysed, but practically very significant, subject. It has now come to pass. Their's is an important publication, and a much needed one. It obviously required mastery of major parts of the common law, equity and statute. It warranted – and received – considerable comparative treatment of the laws of other common law jurisdictions (beyond England and Australia), and especially of the United States. From these it is apparent they derived both helpful insights and, I venture, reassurance. As I anticipated, the authors have displayed an informed understanding of the methodology, the inspirations and the inevitable complexities of judge-made law. This saved their work from the allure of over-simplification, a common vice when one is seeking to bring cohesion and harmony to judicial utterances drawn from disparate bodies of law. I will return to this last theme below.

Beyond the criminal law of accessory liability (to which a chapter usefully is devoted), Anglo-Australian common law has displayed little by way of explicit acceptance, let alone development, of a jurisprudence focused on accessory liability for civil wrongs as such. There is not, for that reason, a readily available common language to which the authors could turn. Yet at the peripheries of quite some number of bodies of law – be they common law, equity-related or statutory – there has been the recognition that, at least in some circumstances, a third party's involvement in another's civil wrongdoing (be it a particular tort, a breach of contract, an equitable wrong, a misuse or misappropriation of property, or a breach of statutory duty) could result in that person being held liable to an injured plaintiff for, or on account of, that other's wrong. But as the authors acknowledge, accessory liability by no means provides the sole basis for imposing liability on a third party.

Necessarily they needed to give considerable explanation of what differentiates accessory liability from other species of third party-liability.

Much of this, I should add, required them to differentiate a variety of possible third-party liabilities which can arise particularly in tort law, and in equity. The tort of conspiracy and claims against third-party recipients of trust property, or of equitable interests in property, demonstrate why this is necessary. To complicate matters, as the authors accept, a possible difficulty here is that in some settings the same facts can give rise to several distinct possible liabilities (of which accessory liability can be one), for which there may be little by way of difference in the remedies that are available.

Over the last three decades or so, some number of judges and scholars have asserted with greater or lesser confidence that at least some of the disparate forms of third-party liability do, or else could be said to, display at least a general uniformity of legal themes, if not in fact far greater coherence than merely this. In short, they have heralded recognition of a body of accessory liability law having its own distinctive function. The important question, though, is this: to what extent will such a body of law continue to reflect the values, the compromises and characteristics of the separate and distinct bodies of law which have accepted in some degree an accessory-like form of liability?

It is in answering this question that the authors have revealed what I consider to be both a great virtue of this book and the breadth and perceptiveness of their own scholarship.

They have recognised what is immanent in the case law itself. While accessory liability in its various manifestations shares a deceptively simple analytical framework, there is in their view no single cause of action for this liability. As they put it, '[the] legal rules that determine accessory liability across private law are too complex and varied, even as to the form of the liability itself, for that to be the case'. This conclusion might disappoint those who wish for simplicity in all things. But it is intuitively correct. It does, incidentally, conform with my own experience with, at least, equity jurisprudence.

Nonetheless, the authors go on to suggest that the analytical framework of accessory liability depends upon three indispensable factors: the commission of a civil wrong by a primary wrongdoer; the accessory's involvement, through his or her own conduct, in that wrong; and the accessory's mental state at the time of such involvement.

The first of these – a primary wrongdoing by another – is a precondition. Without it, there can be no possibility of accessory liability. The other two factors – the accessory's own conduct and, to put it shortly, the mental state required at the time of the accessory's involvement – are

necessary to found liability. Nonetheless, the content required of each (and hence the reach of accessory liability itself in a given setting) is a function of the purposes, values and historical development of the primary wrong in question.

What may seem to complicate matters more is that the law takes two quite different approaches to how it formulates an accessory's liability. In some cases, it is formulated as being for the primary wrongdoer's wrong, that is, as a secondary liability for the same wrong. In other cases, accessories are held liable on the basis of an independent cause of action. The tort of inducing a breach of contract is an easy example of the latter. The authors, as one would expect, have discussed in detail with each species of accessory liability, the remedies and defences which are available. I will not enlarge on these.

Of the many particular matters dealt with in this book, there are three I should emphasise. The first relates to wrongs involving companies and the possible accessory liability of the company (as an artificial legal person) and, distinctly, of directors as accessories. I simply note, because of its significance for Australian law, that the authors conclude that, as in the United Kingdom, the principles that determine the liability of ordinary persons as either primary wrongdoers or accessories apply equally to company directors and to companies themselves. They emphasise that there are no cogent reasons why directors deserve special immunity from liability for wrongs; nor why the principles of accessory liability, properly understood, should not provide just outcomes.

The second matter is that one chapter deals specifically with accessory liability and infringement of statutory intellectual property rights. The present challenges for the law come in part from technological innovations, particularly on the internet, which enable widespread and repeated infringements by numerous individual infringers. Here their use of comparative law is instructive.

The third matter is of particular importance to an Australian audience. This relates to those statutory schemes, such as the misnamed Australian Consumer Law (it is not limited to consumer transactions), which create obligations the contravention of which can give rise to a wide range of remedies against primary wrongdoers, but which also impose civil liability on accessories, that is, parties involved 'in the contravention' of a statutory obligation. Legislation of this variety has revolutionised the private law of obligations in Australia. Again, a separate chapter has been devoted to such legislative schemes, and to the obvious affinity

these have with the analytical framework which supports accessorial liability more generally.

In sum, Joachim Dietrich and Pauline Ridge have made a very considerable contribution to the law. They have created from previously opaque and much neglected case material a coherent body of civil law which can stand alongside other major areas of the law as providing sources of liability in its own right. Judges, practising lawyers and scholars alike have every reason to be grateful for the authors' endeavours. It is not often that we can witness the unearthing of a distinct and credible category of the law for what, after all, is a form of civil liability of such practical significance. I congratulate them on their achievement.

Paul Finn

PREFACE

This book owes its origins and inspiration to Paul Finn, former Justice of the Federal Court of Australia. Paul suggested, too many years ago, that accessory liability was one of the last great unexplored areas of private law and was worthy of deeper analysis. He was undoubtedly correct in his view. The size and complexity of the topic made us initially reluctant to take on the task, although we individually wrote and researched on various aspects of accessory liability. This convinced us even more of the merit of Paul's idea and we decided to take up his challenge. This book is our attempt to do so. Our many citations of Paul's judgments and academic scholarship throughout the book demonstrate his leadership in this area of law. We are honoured that he has agreed to write the Foreword.

We hope that this book does not disappoint in seeking to meet the challenge of exploring accessory liability (and its boundaries) in its many guises, but we are mindful that we have, perhaps, taken on a far larger task than we initially envisaged. Not only have we sought to explore accessory liability across a range of topics in private law, we have also considered accessory-related doctrines and criminal law; nor have we ignored statutory accessory liability. Further, the book ranges across a number of common law jurisdictions, although the focus is on English and Australian law. Although we took primary responsibility for some of the chapters, the book is the result of our joint efforts. Joachim took primary responsibility for Chapters 4–6 and 9–10. Pauline took primary responsibility for Chapters 7–8. Fortunately, despite robustly criticising each other's writing and methodology and arguing at length over our ideas, we have remained good friends.

This book could not have been achieved without the assistance of many people. We are grateful to those who have given up their time and been happy to share their wisdom. We apologise to anyone that we may have overlooked in the note of thanks here.

First, we would like to thank the friends and colleagues who have read parts of the draft manuscript and/or discussed our ideas with us. They are Malcolm Barrett, Rick Bigwood, Joel Butler, Peter Cane, John Farrer, Iain Field, the Honourable Paul Finn, the Honourable William Gummow AC (former Justice of the High Court of Australia), Harold Luntz, Tom Middleton, Jane Stapleton and Michael Tarlowski. We are also very grateful to the Obligations Group at Melbourne University Law School, especially Elise Bant, Michael Bryan, Matthew Harding and Katy Barnett, for their generous support and encouragement of private law scholars across Australia. They provided feedback on our work on at least three occasions. Pauline also thanks the Asian Law Institute, National University of Singapore, for providing a visiting fellowship for work related to this book.

Joachim would like to thank in particular Joel Butler, whose steadfast willingness to listen and to discuss ideas was always greatly appreciated. Only a friend could have put up with so much without complaint. Joachim would also like to thank Iain Field in particular for his thoughtful comments provided in short time frames. Pauline would like to thank her colleagues at the ANU, particularly Dennis Pearce for his support and friendship, and Michael Tarlowski.

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Most importantly, we would like to thank our families, to whom this book is dedicated. Joachim would like to thank Birgit, Melanie and Dominik for their love and support. Birgit had to live with and put up with Joachim's many mood swings, particularly during the emotionally difficult last few months of the project, and did so with love and understanding. When Melanie was told that the book was about 'accessories', she responded positively: 'Great, it's about handbags and jewellery.' Her assumption has been corrected – at least she will no longer have any unmet expectations on that front. Dominik always showed great concern for his dad's well-being. Pauline thanks her daughters, Alice, Emily and Lucy, for their patience and many kindnesses during this project. Most of all, she thanks David and her mother, Geraldine, for their unfailing support and unconditional love.

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