

CONTENTS

<i>Foreword by the Honourable Paul Finn</i>	page xvii
<i>Preface</i>	xxi
<i>Table of cases</i>	xxiii

PART I **General principles** 1

1. Introduction	3
1.1 An organising principle of accessory liability	3
1.2 The objectives of the book	4
1.3 The methodology and general approach of the book	5
1.4 An analytical framework, not a uniform test or rigid taxonomy	6
1.5 Terminology	6
1.6 The structure of the book	8
2. Identifying accessory liability in private law	10
2.1 Overview	10
2.2 Identifying accessory liability in private law	10
2.3 Accessory liability can be 'secondary' to the primary wrong or an independent wrong	12
2.3.1 'Secondary' or independent liability?	12
2.3.2 Liability as an accessory for the same wrong as that committed by PW	12
2.3.3 Liability as an accessory for an independent wrong	13
2.3.4 Doctrines that redress accessorial conduct without constituting accessory liability	14
2.4 Rationales for accessory liability	14
2.4.1 Possible rationales	14
2.4.2 The accessory's wrongful conduct that is linked to the primary wrong	15

2.4.3	Providing enhanced protection and further vindicating existing rights	16
2.4.4	Deterrence	17
2.4.5	Property protection	19
2.4.6	Countervailing policies that limit accessory liability	19
2.5	Distinguishing accessory liability from primary liability	20
2.5.1	It may be difficult to determine, factually, whether a person has committed a primary wrong	20
2.5.2	Categorising liability rules as accessory or primary: dual categorisation	22
2.6	Accessory liability is derivative, not duplicative	22
2.7	When is accessory liability needed?	25
2.8	Distinguishing accessory liability from related concepts	27
2.8.1	Vicarious liability	27
2.8.2	Property-based liabilities	27
2.8.3	Criminal accessory liability	28
3.	An analytical framework for accessory liability	29
3.1	Introduction to the framework and its operation	29
3.2	The primary wrong	33
3.2.1	A primary wrong must have been committed	33
3.2.2	The primary wrong determines the doctrinal content of the accessory liability rules	34
3.2.3	The meaning of primary wrong	34
3.3	A's involvement in the primary wrong: the conduct element	35
3.3.1	A's conduct	35
3.3.2	The terminology used to describe accessorial conduct	36
3.3.3	The causal relationship between A's conduct and the primary wrong	37
3.3.4	The timing of A's conduct	39
3.3.5	Procuring a wrong	40
3.3.6	Can A's inaction constitute sufficient involvement?	42
3.4	A's knowledge: the mental state	43
3.4.1	Overview	43
3.4.2	The content of A's knowledge	45
3.4.2.1	Overview	45
3.4.2.2	Identifying the facts of which A must know: the 'essential matters'	45

CONTENTS

ix

3.4.2.3	Must A ever know the legal significance of the essential matters?	47
3.4.2.4	Predictions as to future events	48
3.4.2.5	Knowledge of an alleged primary wrong	48
3.4.3	Degrees of knowledge	49
3.4.3.1	Overview	49
3.4.3.2	Intention	50
3.4.3.3	Actual knowledge	52
3.4.3.4	Recklessness	53
3.4.3.5	Objective knowledge	54
3.4.3.6	Mental states and procurement	56
3.4.3.7	The requisite mental state for strict liability primary wrongs	57
3.5	The operation of the analytical framework	60
3.5.1	The interplay of the three elements determines A's culpability	60
3.5.2	Should A's culpability be further defined: 'dishonesty' and other labels	60
3.5.3	Can the framework operate at the level of judicial determination of liability?	62
3.6	Defences	64
3.7	Remedies	65
4.	Accessories in criminal law	66
4.1	The relevance of criminal law to private law	66
4.2	Overview of criminal law accessories	70
4.3	Principal offender or accessory?	72
4.4	Elements of accessory liability	76
4.4.1	Conduct	76
4.4.2	Intention	78
4.4.3	Knowledge	80
4.5	The offences for which the accessory may be liable	84
4.5.1	Accessory's liability for a different offence to the principal offender	84
4.5.2	Extended joint enterprise liability	87

PART II	Accessory liability in private law	91
5.	Torts	93
5.1	Introduction	93
5.1.1	Overview of chapter	93
5.1.2	Accessory liability is often subsumed under ‘joint tortfeasors’ label	96
5.1.3	Arguments against accessory liability in tort law	98
5.2	When is accessory liability needed in tort law?	101
5.2.1	Limited use and relevance of accessory liability concepts	101
5.2.2	Torts in which there is wide-ranging primary liability	102
5.2.3	Torts in which accessory liability is significant	105
5.3	Accessory liability compared to other tort concepts	105
5.3.1	Accessory liability and vicarious liability	105
5.3.1.1	Employer-employee relationship	105
5.3.1.2	‘Agents’	107
5.3.1.3	Non-delegable duties	110
5.3.2	Accessory liability and the tort of conspiracy	110
5.4	Establishing accessory liability	113
5.4.1	Judicial tests for liability	113
5.4.1.1	Introduction	113
5.4.1.2	Procuring or inducing tortious acts or wrongs	115
5.4.1.3	Common design	116
5.4.1.4	‘Aiding and abetting’ in United States law	118
5.4.2	Conduct	120
5.4.2.1	Is there a need for a causal link between A’s involvement and PW’s wrongdoing?	120
5.4.2.2	The type of conduct that constitutes involvement	122
5.4.2.3	Assistance does not suffice for liability?	125
5.4.3	Mental element: A’s knowledge	127
5.4.3.1	Overview	127
5.4.3.2	Content of knowledge	128
5.4.3.3	Degrees of knowledge	130
5.4.4	The relationship between the conduct and mental elements	131

CONTENTS

xi

5.4.5	Extent of liability	132
5.5	The application of accessory principles to specific torts	134
5.5.1	Trespass	134
5.5.2	Intellectual property torts	141
5.5.2.1	General principles	141
5.5.2.2	Procurement of specific torts	142
5.5.2.3	Common design: a close link between infringing acts and a defendant's conduct	144
5.5.2.4	Patent infringements	146
5.5.3	Nuisance	147
5.5.4	Defamation cases	153
5.5.4.1	Publication as the essence of the tort	153
5.5.4.2	Knowledge of the content	154
5.5.5	Negligence	158
5.5.6	Conclusion: no single test of accessory liability	161
5.6	Defences to accessory liability	161
5.6.1	Possible defences	161
5.6.2	Release by claimant of one joint tortfeasor	163
5.7	Remedies against accessories	163
5.7.1	Damages	163
5.7.2	Injunctions	166
5.7.3	Other remedies	168
6.	Breach of contract	169
6.1	Overview	169
6.2	Liability as accessory liability	173
6.2.1	Liability in tort, not contract	173
6.2.2	The accessory rationale for liability	175
6.3	The elements of the tort	179
6.3.1	Elements in general	179
6.3.2	The primary wrong: breach of contract	180
6.3.3	Conduct: induce or procure	181
6.3.4	Mental element: knowledge/intention	186
6.3.4.1	The relationship between knowledge and intention	186
6.3.4.2	Degrees of knowledge	191
6.3.5	Damage	195

6.4 Defences	195
6.5 Remedies	197
6.6 Conclusion	198
7. Infringement of equitable property rights	199
7.1 Introduction	199
7.2 Trustee de son tort	200
7.3 Dealing inconsistently with trust property	202
7.4 The <i>Diplock</i> claim	204
7.5 The persisting property claim	205
7.6 Recipient liability	208
7.6.1 The dual character of recipient liability	208
7.6.2 The relationship of recipient liability and accessory liability	209
7.6.3 Recipient liability as a primary custodial liability	212
7.6.4 Recipient liability and unjust enrichment liability	213
7.7 Conclusion	216
8. Breach of equitable duties	217
8.1 Introduction	217
8.1.1 Overview	217
8.1.2 The primary wrong: equitable wrongs and 'wrongfulness'	220
8.1.3 The rationales for accessory liability and participatory liability	221
8.1.4 Current frameworks for participatory liability, including accessory liability	223
8.1.4.1 The traditional framework	223
8.1.4.2 The reformed framework	226
8.1.5 Equitable accessory liability is a secondary ('derivative') and independent liability	228
8.1.6 An equitable tort?	229
8.1.7 The terminology of constructive trusts	230
8.2 The scope of accessory liability	231
8.3 Accessory and recipient liability for breach of trust and fiduciary duties	234
8.3.1 The primary wrong	234

CONTENTS

xiii

8.3.1.1	Breach of trust	234
8.3.1.2	Breach of fiduciary duty	235
8.3.1.3	Must there be a misapplication of trust property?	238
8.3.1.4	Must there be a dishonest and fraudulent design?	239
8.3.2	The accessorial involvement or the receipt	240
8.3.2.1	Procurement and inducement	240
8.3.2.2	Assistance	242
8.3.2.3	Beneficial receipt of trust property	244
8.3.3	The causal or other link between A's conduct and the primary wrong	250
8.3.4	The mental state of the accessory or recipient	252
8.3.4.1	Overview	252
8.3.4.2	The content of A's knowledge	253
8.3.4.3	The necessary mental state under the traditional framework	257
8.3.4.4	The necessary mental state under the reformed framework	260
8.3.5	Shortcomings of the two frameworks and a preferred approach	266
8.4	Accessory liability for breach of confidence	269
8.4.1	When does accessory liability arise?	269
8.4.1.1	Scenario 1: A, knowing of a breach of confidence by PW, receives the confidential information	269
8.4.1.2	Scenario 2: A innocently receives confidential information from PW	271
8.4.1.3	Scenario 3: A does not receive the confidential information at all	273
8.4.2	The elements of accessory liability for breach of confidence	273
8.5	Undue influence and related doctrines	275
8.5.1	Introduction	275
8.5.2	Undue influence	276
8.5.3	Scenario 1: D is party to the transaction tainted by X's undue influence	277
8.5.4	Scenario 2: D is not a party to the transaction tainted by X's undue influence	279
8.6	Defences	280

8.6.1	Introduction	280
8.6.2	Is it a defence that PW is not liable?	281
8.6.3	Statutory limitation periods	284
8.6.4	Statutory indefeasibility of title	286
8.7	Remedies	288
8.7.1	Introduction	288
8.7.2	Loss-based remedies	289
8.7.3	Gain-based remedies	292
8.7.3.1	Introduction	292
8.7.3.2	Account of profits	293
8.7.3.3	Gain-based proprietary remedies	295
8.7.4	Other remedies	298
8.8	Apportioning liability	299
8.8.1	Joint and several liability for losses	299
8.8.2	Joint and several liability for gains	300
8.8.3	Contribution	301
9.	Infringement of statutory intellectual property rights	304
9.1	Introduction	304
9.1.1	Overview	304
9.1.2	Competing policies in IP accessory law	305
9.1.3	Statutory accessory liability compared to similar concepts	309
9.2	Authorisation of infringements	310
9.2.1	Statutory sources of liability	310
9.2.2	Is authorisation accessory liability? The need for a primary wrong	311
9.2.3	Definitions of 'authorise'	314
9.2.4	Conduct that amounts to authorisation	318
9.2.5	Mental element: the role of knowledge	319
9.2.6	Cases of authorisation	320
9.2.6.1	Express request or direction	320
9.2.6.2	Providing mechanical means of copying	322
9.2.6.3	Live performance on premises	324
9.2.6.4	Internet cases	326
9.2.7	The interaction between A's conduct and mental state	329

CONTENTS

xv

9.3	Other accessory liability provisions	335
9.3.1	Introduction	335
9.3.2	Permit premises to be used for performance	335
9.3.3	Trademarks	337
9.4	Non-accessorial 'indirect' infringements	338
9.4.1	Introduction	338
9.4.2	'Contributory' infringement of patents	339
9.4.3	Copyright	344
9.4.3.1	'Secondary' or 'indirect' infringement liability	344
9.4.3.2	'Constructive' knowledge: objective knowledge	346
9.5	Remedies	349
9.5.1	Injunctions	349
9.5.2	Damages	351
10.	Other statutory wrongs	352
10.1	Introduction	352
10.2	Legislative frameworks	354
10.2.1	United Kingdom	354
10.2.2	Australia	356
10.3	The meaning of 'knowingly concerned' in the UK	359
10.4	The meaning of involved in a contravention in Australia	360
10.4.1	Liability as primary wrongdoer or accessory?	360
10.4.2	Intentional wrongdoing	363
10.4.3	Involvement	365
10.4.4	Knowledge	367
10.4.4.1	Content of knowledge	367
10.4.4.2	Degrees of knowledge	370
10.4.5	Conclusion on Australian statutory accessory liability	372
11.	Wrongs involving companies	373
11.1	Introduction	373
11.1.1	Overview	373
11.1.2	The general law tools of attribution and vicarious liability	374
11.2	Company liability	376

11.2.1	Distinguishing accessory from primary liability	376
11.2.2	Companies as accessories	378
11.2.2.1	Attribution of conduct and mental states for the purposes of accessory liability	378
11.2.2.2	General rules of attribution	378
11.2.2.3	The company's directing mind and will	379
11.2.2.4	The 'fraud' exception to attribution	380
11.2.2.5	Aggregation of conduct and mental states for the purposes of attribution	382
11.3	Directors as accessories	383
11.3.1	Distinguishing accessory liability from primary liability	383
11.3.2	General principles of accessory liability	387
11.3.3	D's liability for PW Co's torts and statutory IP infringements	387
11.3.3.1	Overview	387
11.3.3.2	Direct or procure	391
11.3.3.3	'Makes the wrong his own' test	393
11.3.4	Liability for strict liability common law wrongs	394
11.3.5	Liability of D for PW Co's breach of contract	398
11.3.6	Liability of directors acting in their constitutional role	399
11.3.7	Accessory liability of directors of company trustees	401
11.4	Conclusion	403
	PART III	405
12.	Conclusion	407
	<i>Index</i>	409