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## FOREWORD

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‘Vicarious’ liability, from the Latin *vicarius*, suggests a liability of one that deputises for a liability of another. But as soon as the surface is scratched the doctrine becomes very difficult to understand. This outstanding book spans a range of jurisdictions which have developed vicarious liability by reference to each other but with a result that no two jurisdictions have taken precisely the same approach: Canada, England and Wales, Australia, Ireland, Singapore, Hong Kong, New Zealand, and Scotland.

This book is bristling with insights concerning the history of vicarious liability, the relationships which should count for the purposes of vicarious liability, the torts to which vicarious liability should apply, and the degree of connection required between the tortious action and the defendant for the purposes of vicarious liability. But, perhaps most importantly, every chapter assesses these questions in the context of justifications for vicarious liability.

Part of the enormous value of this book is that it provides great insight for the future of an area of law that, despite the best efforts from the judiciary and the academic and practising branches of the profession, remains a mess. As Giliker observes in a masterful opening chapter (p 18), none of the legal systems has found a ‘magic solution that renders vicarious liability straightforward and easy to apply’. This book shows the problems that have arisen, how they have arisen, and provides powerful insights into how to solve them. One deep insight may be that one reason for the confusion surrounding ‘vicarious liability’ is that it is attempting to do the work of up to three discrete doctrines.

First, some vicarious liability cases seem comfortably to be based upon agency reasoning: acts of an agent are attributed to a principal who is responsible for them. As Glofcheski observes in relation to the law in Hong Kong, it has been taken as implicit that a person should be liable if they employ another to perform tasks for the person’s benefit (pp 147–48). But the use of vicarious liability to describe the imposition of responsibility based upon a relationship of agency is, as Giliker says, controversial (p 4).

Secondly, other vicarious liability cases seem to be based on reasoning more comfortably associated with non-delegable duties, which, as Todd observes, arise where one person has assumed responsibility for the safety of another (p 191). Non-delegable duties are duties to protect against a risk by ensuring that care is taken, rather than duties merely to take reasonable care not to act as to foreseeably cause injury. Fleming described non-delegable duties as a disguised form of vicarious liability (Giliker, p 58). And vicarious liability may sometimes be a disguise for

non-delegable duties. Indeed, the breadth of vicarious liability in Canadian law may be partly due to the narrowness of the Canadian approach to non-delegable duties (Neyers and Kiss, p 34). And in her review of the position in Australia, Beuermann astutely observes that in instances of institutional liability for child sexual abuse the concept of a non-delegable duty of care might be more appropriate than that of vicarious liability (p 98; see also Ryan, pp 117–18; Glofcheski, pp 167–69).

Thirdly, cases which perhaps most accurately fit the description of vicarious liability are those in which the liability of a defendant is based upon an attribution to the defendant of the liability of another. In this sense, as Campbell and Lindsay observe, ‘one cannot be vicariously liable if no delict [wrong] has been committed’ (p 197). Whether or not ‘enterprise liability’, which is carefully explained in many of the chapters should be accepted as the basis for vicarious liability, one of the many significant insights that might be drawn from this book is that the ‘labyrinthine’ (Tan, p 144) doctrine of vicarious liability will be far easier to understand if it is disentangled from other doctrines. The outworking of vicarious liability by reference to its rationale will be guided by the clear and cogent comparative learning contained in this superb book.

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