Agent-Responsibility and Vicarious Liability

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For the academic tort lawyer, *Responsibility in Law and Morality*[1] offers significant insights into everyday thought and practice. This comment considers aspects of the book in the light of the civil law paradigm, and in particular, in relation to one aspect of negligence law which raises difficult questions about responsibility — the area of law which holds an employer responsible for his or her employee's wrongs.

Cane argues, rightly in my view, that law has something to offer moral philosophy because courts must grapple with issues of responsibility and actually make final decisions. Those decisions typically carry significant consequences for the people concerned. The law thus carries with it the experience of the consequences of making certain decisions about levels of responsibility in different contexts and this offers a rich resource for moral and legal theorists alike.

One of the great advantages the common law has over legislation is that, in rendering their decisions, judges are obliged to give reasons, reasons which may parallel the thinking processes of the judge to some extent. The relationship between the decision and the judge's views of moral responsibility may thus be more clearly discerned.[2] I would like to use this advantage of the common law in considering Cane's analysis of law's account of responsibility in relation to negligence law and, in particular, to vicarious liability.

Vicarious liability is a strict liability matter in the sense that it means liability regardless of fault. But negligence law generally is deeply fault-based. It reflects our deep-seated psychological and moral convictions that responsibility should be attributed to someone on the basis of fault and that other forms of responsibility have less validity. The issue of vicarious liability, then, is a difficult one in a fault-based system. What we see in the cases on vicarious liability is courts struggling to justify the imposition of liability on a person who has not done anything wrong. The courts find it

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1 Peter Cane, *Responsibility in Law and Morality* (2003) ('*RLM*').

2 See eg, Prue Vines, 'Fault, Responsibility and Negligence in the High Court of Australia' (2000) 8 *Tort Law Review* 130.

extraordinarily difficult to mediate the tensions which such cases raise, and are often led strongly into policy analysis — 'deep pockets', the employer's creation of the situation leading to the risk etc — which also seem flawed or unsatisfactory.

One of Cane's themes is that agent-focused accounts of responsibility are not sufficient to deal with law, nor with richer accounts of morality. In tort theory, however, agent-focused accounts of responsibility, focusing on autonomous free will, are dominant. We are only responsible for what we choose to do. For example, reasonable foreseeability in negligence is profoundly important because foresight allows us to choose whether or not to avoid a risk. Cane notes various problems of agent-focused responsibility — it has trouble with the concepts of causal determinism, randomness and group responsibility. The problem to be emphasised here, however, is that the concept of responsibility without fault is deeply suspect on agency-focused accounts. Cane prefers to deal with concepts of responsibility by looking at social practices in context. This blunts the edge of agent-responsibility and allows other relationships and factors to come into the account.

That agent-focused accounts of responsibility have been the major accounts used in relation to negligence law is, perhaps, natural as the question courts ask is: Did *this* defendant's action cause *this* plaintiff's harm? The individualistic nature of the question directs us to a consideration of responsibility through the focus of the individual. Cane is right, however, to say that consideration of the choices facing defendants or plaintiffs is not sufficient. In the first place it is clear that many other people are involved, insurers being one important group. Negligence law generally pretends insurance doesn't exist. Other relationships are clearly also important — the nervous shock cases recognise the presence of the family, rescue cases like *Chapman v Hearse*[3] recognise the existence of other people with a sense of responsibility and so on. Civil law responsibility is essentially relational, despite the common practice of distinguishing tort law from contract on the basis that one is based on a prior existing relationship and the other is not. There is no difficulty at all in saying that contract is relational; but there is also no difficulty in observing that the basis of negligence law lies in weighing up the relationships between the parties and others around them.

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3 (1961) 106 CLR 112. In that case, one car driven by A hit another car driven by B. B was thrown out onto the road, and later Dr Chapman attempted to assist B, but was killed by another car driving along the road which failed to see him kneeling on the road. The High Court held that it was not necessary to foresee the specific chain of events, but was sufficient to foresee in a general way that if the defendant (A) failed to drive carefully, a person might be injured and therefore need rescuing.

The relational nature of tort law is vividly illustrated in the recent case of *Lepore,*[4] where the High Court had to decide issues of non-delegable duty and vicarious liability in three cases where a teacher had sexually assaulted children at school during school hours. The question was whether the school authority could be held responsible either non-delegably or vicariously.

Non-delegable duties traditionally arose in the context of an employer's duty to create a safe system of work so that when an employee was injured at work the employer was liable even if he or she had reasonably delegated the supervision or arrangements to another person. In 1982 such duties were extended to children at school in the case of *Introvigne.*[5] In *Lepore* the High Court held that whilst a non-delegable duty was not available in the circumstances, whether a school could be vicariously liable for a teacher's sexual assault depended on whether a close enough connection between the act and the employment could be established. It was common ground amongst the parties that the school authorities were not at fault — they did not know of the sexual assaults and they happened during the ordinary school day. So this case squarely raised the question of whether, within the civil paradigm, responsibility without fault can be meaningful.

Is it, then, possible for a school authority to be held vicariously liable for the sexual assault of a pupil by a teacher at school? Three judges seemed to consider that it might be possible — Gleeson CJ, Gaudron and Kirby JJ. Three judges seemed to think it was not possible — Callinan, Gummow and Hayne JJ. However, Gummow and Hayne JJ left the matter open by stating the limits of vicarious liability as being those of the *Deatons Pty Ltd v Flew*[6] test (that is, vicarious liability can lie where the conduct was done in intended pursuit of the employer's interest or the employment or where it was done with ostensible authority). It is clear that any intentional act which would meet the *Deaton's* test would be covered, but only a minority of the court was willing to go beyond that. For them, what was critical was the close connection which could be established between the act at issue and the employment situation. In this they were taking a similar position to the House of Lords in *Lister v Hesley Hall Ltd,*[7] rather than the more overt policy decision of the Supreme Court of Canada in *Bazley v Curry.*[8] Both these cases involved similar facts to those in *Lepore.* In *Bazley v Curry* the court held that where there was a significant increase in risk as a

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4 *State of New South Wales v Lepore; State of Queensland v Rich and Samin* (2003) 212 CLR 511 ('*Lepore*').

5 *Commonwealth v Introvigne* (1982) 150 CLR 258.

6 (1949) 79 CLR 370.

7 [2002] 1 AC 215.

8 [1999] 2 SCR 534.

consequence of the employer's enterprise, vicarious liability could lie, even for intentional or criminal acts which were antithetical to that enterprise. They did this on the basis of a frank discussion of the policy underlying vicarious liability. In *Lister* the House of Lords emphasised the question of the closeness of the connection between the wrongful act and the employment in determining liability.

Cane defines vicarious liability as 'holding one person liable for another person's breach of the law'.[9] It is different from the doctrine of agency because responsibility is shared in vicarious liability (ie if B is vicariously liable for A, then A remains liable as well, unless protected by statute) whereas when A is the agent for B, A does not carry the liability personally as well, that is, agency responsibility is not shared. This is interesting in the context of *Lepore* because the cases which suggest that vicarious liability can arise based upon a deliberate act are cases which can be explained as agency rather than employer cases. For example, in *Lloyd v Grace Smith & Co*[10] an employer solicitor was held liable for the fraud of his managing clerk who had tricked a client into signing documents giving the property to him. The solicitor was regarded as having allowed the appearance of authority to the managing clerk enabling him to commit the fraud.

Cane says 'the causal basis of vicarious liability is the provision or creation by the employer of the opportunity for a breach of the law to occur'.[11] This does not fit with the traditional view that vicarious liability is a strict liability matter. Why is a *causal* connection needed at all? Isn't all that we need to establish a relationship between employer and employee and then a relationship between the employment relationship and the wrong? In my view the reason that argument is attractive is that it does resonate with the policy bases which are said to underlie vicarious liability.

Undoubtedly vicarious liability is shared responsibility as Cane observes[12] — but when lawyers say that vicarious liability is not responsibility based they are confusing responsibility with fault. Cane says this is congenial to agent-focused accounts of responsibility under which vicarious liability is problematic, but he gives an account of vicarious liability as a form of relational activity-based responsibility. He rejects the argument that vicarious liability is an example of the gap between legal and moral responsibility. 'The basic idea of vicarious liability is found in the moral domain as well as in the legal. Indeed, the scope of the moral

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9 Cane, above n 1, 153.

10 [1912] AC 716 (House of Lords).

11 Cane, above n 1, 153.

12 Ibid 175.

analogue of vicarious liability seems wider than its legal counterpart.'[13] So, for example, where the parent of a 15 year old child pays for the broken window after the neighbourhood cricket game there is no question that the parent should have supervised the child or is at fault. The parent pays purely because of the relationship.

Vicarious liability is a strict liability matter in the sense that it means liability regardless of fault. But as noted above, tort law generally is deeply fault-based. The idea of fault in negligence is based on a failure to reach the standard of behaviour which an ordinary person in the same situation would reach. It encompasses some very bad behaviour and some not-so-bad behaviour. But any person who does not reach that standard is regarded as 'at fault'.

Much of the law discussing vicarious liability is incoherent. For example, if vicarious liability is liability regardless of fault, why should it matter whether an employer increased the risk of an accident happening as seemed to be important in *Bazley v Curry*? There is a deep-seated angst about attributing responsibility without fault so that sometimes fault is created to get around the problem.

In *Bazley v Curry*, the Court was, of course, using the theory that liability arises when there is a close connection between the employer and the employee's conduct such that the employer increased the risk of the wrongful behaviour of the employee, because it implicitly puts the vicariously liable party at fault and relieves the sense that moral and legal responsibility are at odds in the area of vicarious liability. However to do this the judges use an argument that implicitly makes the employer liable for creation of risk, something which tort law generally avoids, preferring to found liability on outcomes. As Cane says '[t]his reflects the focus in that [civil law] paradigm on repair as opposed to prevention.'[14] In *Lepore* Gaudron J pointed to the agency basis of some of the cases on vicarious liability as being profoundly different from the employer/employee cases.[15] The difference between these, as discussed earlier,[16] is that where an employer is responsible for an employee's wrong, there is no attribution of the wrong to the employer, but in the situation of principal and agent, the agent stands in the shoes of the principal and so the agent 'is' the principal at that moment and responsibility is attributed to the principal. Thus, as soon as a situation of possible vicarious liability moves out of a clear 'fit' with the course of employment, it becomes problematic. A clear fit implicitly makes the employer and wrongdoer the same person and the

13 Ibid 176.
14 Ibid 207.
15 *Lepore* (2003) 212 CLR 511, 560–1.
16 Cane, above n 1, 154–5.

attribution of liability or responsibility to the employer is far less problematic. However, where there seems to be a clear separation between the employer and employee, as when a person does something that seems entirely contrary to the employment, it offends our naive sense of attribution of responsibility. Indeed it clashes with the ideas of agency responsibility which have been dominant in tort theory. It then becomes far more important to justify the outcome with policy matters, one of which is the desire to ensure that a person who has been an innocent victim is compensated. This explains the split between the judges who wish to remain with the traditional course of employment rule (and are strongly connected to notions of personal autonomy and responsibility generally)[17] and who reject the possibility of vicarious liability for a teacher's sexual assault of pupils, and those who are prepared to contemplate the possibility.

However, if we consider vicarious liability as a form of responsibility which takes into account not only agent-focused responsibility but also relational matters and distributive matters it no longer appears anomalous. It could be argued that this is the position the Canadian court finds itself in, whereas the Australian and English courts remain agent-focused and find themselves unable to resolve the issues because of that. Thus the cases on vicarious responsibility do seem to bear out the correctness of Cane's view that agency-focused views of responsibility are inadequate. They also indicate how thinking about the law in this area can add richness to legal and moral philosophy.

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17 See judgments of Gummow, Hayne and Callinan JJ in *Sullivan v Moody* (2001) 183 ALR 404; *Jones v Bartlett* (2000) 205 CLR 166; *Agar v Hyde* (2000) 201 CLR 552; *Modbury Triangle Shopping Centre v Anzil* (2001) 205 CLR 254 and Vines, above n 2.