

BOOK REVIEW**Responsibility in Law and Morality*

by PETER CANE

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The concept of responsibility underlies many legal rules and remedies. For the most part, criminal liability is incurred only in respect of acts for which the accused is considered responsible; and civil liability is incurred only in respect of loss or damage for which the defendant is considered responsible. However, it seems often to be suggested that questions of responsibility are matters for morality rather than law; that criminal and civil liability is determined by application of legal rules rather than by moral ideas of responsibility; and that the role played in relation to the law by ideas of responsibility lies in their contribution to the moral appraisal of the rules of law.

In this book, Peter Cane, Professor of Law at the Research School of Social Sciences at the Australian National University and recently a member of the Panel of Eminent Persons charged with reviewing the law of negligence for the Commonwealth Government, examines the legal role of ideas of responsibility, particularly as they operate in what he calls Anglian legal systems, that is, systems the conceptual structure of which is derived from that of English law. In doing so, he challenges suggestions such as those noted above, claiming that 'law and morality interact symbiotically', and that 'careful study of legal concepts of responsibility can add significantly to our understanding of responsibility more generally'.¹

Although Cane says that his book is about law and not a work of philosophy, I suspect its main readership may be among philosophically-inclined lawyers interested in advancing their understanding of how the concept of responsibility is used in the law, through an appreciation of the two-way relationship between this use and moral ideas of responsibility; and among philosophers interested in advancing their understanding of general notions of responsibility, through an appreciation of how the concept is used in the law. However, the book may also prove of use to practising lawyers in addressing actual legal problems concerning responsibility, just as Hart and Honore's *Causation in the Law* has been useful in addressing legal problems concerning causation.

It is true that, unlike causation, responsibility as such is rarely invoked by legal rules, so that analysis of the concept is not as directly relevant to problems

* David Hodgson. Judge of Appeal, Supreme Court of New South Wales.

1 Peter Cane, *Responsibility in Law and Morality* (2002) dust jacket.

facing practising lawyers as is analysis of the concept of causation. But the concept certainly underlies many legal rules, and can influence their interpretation, development and application. Cane distinguishes between *historic responsibility*, involving ideas such as accountability, answerability and liability, and looking backwards in time to conduct and events in the past; and *prospective responsibility*, involving ideas of roles and tasks, and looking forward to the future so as to establish obligations and duties. Ideas of historic responsibility may be involved in questions concerning a person's capacity to act, the exercise or non-exercise of that capacity, outcomes following that exercise or non-exercise, and causation of those outcomes: at each point, legal issues may be illuminated by asking whether the person in question was responsible, and if so to what extent, and what if any sanction or remedy there should be having regard to that responsibility. Ideas of prospective responsibility may be involved in questions concerning duties owed by the person, so that consideration of the person's responsibilities may influence the determination of whether legal duties exist and if so what is their content.

Cane begins his discussion in chapter 1 by considering some distinct features of the institutions of law and morality, pointing out that the law's need to provide definitive answers to difficult questions including questions about responsibility has led to the development of many detailed rules and practices in areas where morality can offer only vague and indecisive generalities. Chapter 2 lays further groundwork, dealing with the 'taxonomies' of responsibility ideas. It introduces the distinction between historic responsibility and prospective responsibility to which I have referred; and also that between three different paradigms of legal responsibility — the civil law paradigm, the criminal law paradigm, and the public law paradigm.

Chapter 3 deals with the relationship between responsibility and culpability, noting important differences here between the civil law and criminal law paradigms, particularly in that the latter focuses primarily on conduct and mental fault, while the former focuses more on outcomes and causation. Cane discusses the sensitivity of attributions of responsibility to the role of luck, and seeks to undermine the common view that the law is out of step with morality in its willingness in some circumstances to impose liability regardless of culpability, particularly by considering responsibility as not merely *agent-focused* but as *relational*, involving a three-way relationship between agents, victims and society. Chapter 4 discusses the relationship between responsibility and causation, and in particular how responsibility principles affect the link between conduct and outcome which is required if there is to be liability for that outcome.

Chapter 5 considers the relationship between personality and responsibility. Taking the paradigm case of responsibility as being that of an individual human being in respect of his or her own conduct, Cane looks at the principles according to which responsibility can be attributed to groups of persons, to 'legal persons' such as corporations, and to one person for the conduct of others. Chapter 6 moves to address issues of prospective responsibility: how ideas of responsibility affect the determination of what our duties are in various areas of law.

Chapter 7 explores ways in which ideas of responsibility operate in legal practice in the achievement of objectives otherwise than by straightforward application and enforcement of rules of law. In particular, it deals with settlement of civil claims and criminal prosecutions, selective enforcement of criminal law, and the impact of liability insurance. Chapter 8 deals with the public law paradigm of responsibility, exploring the relevance of concepts of responsibility to debates about the distinction between public and private morality. The concluding chapter 9 briefly restates the approach to thinking about responsibility adopted in the book, setting out seven recommendations for thinking about responsibility, including recommendations to the effect that responsibility be viewed in the light of its role in actual social and legal practices.

The book is well-written and stimulating. It is replete with insightful discussions of issues concerning responsibility in the law and related issues, and of the views of other writers on these matters. It is not possible in a short review to go into the details of these discussions, which will certainly reward careful study. I shall however comment on a few matters of particular concern to me.

Cane recognises the importance of predictability and stability in the legal domain, particularly as compared with the moral domain, but to my mind he still perhaps underrates these values.² He does not explicitly acknowledge the extreme importance of knowing in advance how to conduct oneself so as not to become subject to legal sanctions or otherwise bring about unsatisfactory legal outcomes. Further, he suggests that the principle of *stare decisis* leads courts to support judgments by second-best arguments (based on authority) instead of the best arguments (based on morality or policy), whereas I would argue that in Anglian systems, arguments soundly based on authority are generally very good arguments and not inferior to arguments that appeal directly to morality or policy.

One theme of the book is what Cane calls 'the inadequacy of the choice theory of responsibility',³ that is, the theory that responsibility as justification for remedies or sanctions is associated with moral fault related to the quality of the agent's will. Cane contends that there are many circumstances in which morality, like the law, recognises responsibility for harm or loss irrespective of fault of this kind. He makes out a good case for the view that attribution of responsibility often depends in part on judgments about how risks and losses should fairly be distributed. However, I think he perhaps underestimates the role of mental fault in various areas and respects, inter alia by not sufficiently recognising that judgments about how risks and losses should be distributed may themselves affect mental fault.

For example, Cane argues that the obligation of a person, who without fault has received a benefit at someone else's expense, to give up that benefit, as in the case of a payment made under a mistake, is a matter of liability irrespective of mental fault. He does not appear to acknowledge that, where a person receives

² Ibid 20–1.

³ Ibid 99.

a gratuitous benefit, knows that this is at someone else's expense, and knows that retention of the benefit would unfairly involve loss to that person, the failure to restore that benefit may itself be a matter of choice involving mental fault: a stark example of this is the crime of larceny by finding.⁴

Cane asserts that mental states play no role at all in liability for breach of contract, except to the extent that there is choice as to whether to enter into the contract in the first place. However, the likelihood of mental fault in such cases is quite high: one would expect a commitment not to be made without care first being taken to be satisfied that it could be fulfilled, and one would expect care then to be taken in seeking to fulfil it; and I would argue that failure to take care can properly be considered as involving mental fault, indeed as a kind of choice. Further, non-performance is generally excused if unforeseeable circumstances make performance impossible. This still leaves an area where there can be liability for breach of contract without mental fault prior to the breach; but even here, there may be mental fault in not redressing loss caused, even without fault, to someone who has relied on one's commitment.

Cane argues that liability for negligence arises from failure to meet the standards of reasonable persons, and thus does not involve a mental element. However, the standards in question are standards of both care and skill, and very often failure to meet the standards is due to an actual failure to take care. As regards other reasons for failure to meet the standards, such as deficiency of skill, in many cases the defendant has chosen to assume a role in such a way as to make a commitment to exercise appropriate skill (driving a car, employing other persons, and so on), giving rise to considerations similar to those applying to contracts.

Even in relation to criminal offences apart from offences of strict liability, Cane to some extent downplays actual mental fault. He argues that judgments of mental states such as intentions are not in any event propositions about an agent's subjective mental state, but rather interpretations derived from the way people normally behave.⁵ I agree that such judgments involve interpretation, but would contend that, except to the extent that our language may be inadequate to describe mental states accurately, it is a matter of fact whether or not a person has a subjective mental state such as an intention, and that a judgment that a person has or had a particular intention is indeed a proposition about the person's actual subjective mental state, albeit one based on fallible inferences depending in part on assumptions about normal behaviour.⁶

As appears from my description of the book, two important themes concern what we can learn about responsibility generally by analysing legal responsibility in particular, and the relationship between law and morality. In chapter 1, Cane identifies what he calls a third underlying strand of the analysis in the book, and I will conclude with some comments on this. Cane tells us that

4 See, eg, *R v MacDonald* [1983] 1 NSWLR 729.

5 Cane, above n 1, 47–8.

6 Cane's position could be considered a philosophical version of a view suggested in *DPP v Smith* [1961] AC 290, now regarded as a legal heresy: *R v Hyam* [1975] AC 55, *Frankland v The Queen* [1987] 1 AC 576.

his concern is with responsibility *practices*, and the ideas of responsibility on which they are based.⁷ He contends that such practices have developed and thrived independently of whether there is any 'natural truth' about responsibility, and of whatever is the truth about human agency and free will. He later suggests that 'even if it were proved that the universe is deterministic, a psychological need to feel a certain degree of control over our surroundings and our lives would probably preserve our responsibility practices more or less intact'.⁸

This is a sensible approach for him to take in this book, and Cane is in good company here.⁹ However, I think he and others may be too sanguine about the possible effects on our responsibility ideas and practices of current trends in the sciences. My own opinion is that responsibility ideas and practices underpin important aspects of human rights, and that they have thrived partly because of widespread acceptance of the view that normal adult human beings have free will and are therefore truly responsible for their conscious voluntary actions. Accordingly, responsibility practices and thus human rights could be endangered if there came to be thoroughgoing acceptance of the view that human behaviour is the mechanistic working out of the operation of laws of nature on initial conditions.¹⁰ I think it is important both to recognise that this mechanistic view, although taken for granted by many scientists, is far from being established¹¹ and, unless and until such a view should come to be established, also to challenge it so that damage to responsibility practices and to human rights does not occur by default.

These comments notwithstanding, the book is a significant contribution to the understanding of the role of ideas of responsibility in law and morality. I thoroughly recommend it to the readership identified earlier in this review.

7 Cane, above n 1, 4.

8 Ibid 24.

9 See, eg, Peter Strawson, 'Freedom and Resentment' (1962) 48 *Proceedings of the British Academy* 187–211.

10 This view is elaborated in Justice David Hodgson, 'Guilty Mind or Guilty Brain: Criminal Responsibility in the Age of Neuroscience' (2000) 74 *Australian Law Journal* 661.

11 My reasons for saying this are stated briefly in my article on 'Free Will' in the forthcoming Macmillan *Encyclopedia of Cognitive Science* (forthcoming, November 2002), see <<http://www.cognitivescience.net>> at 28 October 2002.