

BOOK REVIEW

PERSPECTIVES OF RESPONSIBILITY IN LAW AND MORALITY

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I A BRIEF SUMMARY

Responsibility in Law and Morality is a challenging and valuable book. It aims to provide an account of responsibility that captures both non-legal moral responsibility and legal liability in criminal, civil and public law. At its heart is the rejection of the view that responsibility is something external to law, that

morality is in some sense prior to and independent of social practices in general, and of legal practices in particular. Whereas law is necessarily a social phenomenon, a matter of convention and practice, morality is ultimately non-conventional and critical, providing ultimate standards for the ethical assessment of law and other social practices.¹

While Cane accepts that the law departs from morality to some extent,² in stark opposition to the traditional view he argues that the law instantiates important and all too often overlooked conceptions of moral responsibility.

For Cane, law and morality exist in a 'symbiotic' relationship.³ By this, Cane advances the widely accepted claim that morality informs the appropriate shape of the law. However, Cane also embraces the more controversial and interesting

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¹ Peter Cane, *Responsibility in Law and Morality* (2002) 2 (citations omitted).

² Ibid 6–10, 19–20.

³ Ibid 13–16.

claim that the law can inform the content of morality.⁴ He argues that the common law is particularly informative in this respect. As common law judges must give reasons for their decisions, ‘the literature of the common law provides extremely valuable (and, perhaps, indispensable) material for developing a thorough understanding of complex concepts such as responsibility, both in their legal versions and more generally.’⁵ For instance, a good place to seek the answer to the question of when one is responsible for unintended harm, or at least a good place to find evidence as to how to answer this question, is the literature surrounding the law of negligence.

Cane devotes the first three chapters of the book to a development of his account of responsibility as outlined above. He then applies that account to a number of areas of law. The result is an elucidation of the sense of responsibility relevant in those areas, an elucidation that does much to illuminate contemporary legal practice. In the process, Cane explores issues such as causation, the responsibility of non-natural persons, responsibility for the actions of others, the settlement of claims in the civil law, the selective enforcement of the criminal law, the impact of insurance on civil liability and the role of responsibility in public law. This analysis is insightful and thought provoking, and lawyers of all stripes — not just legal theorists — have much to learn from it.

However, the following discussion explores Cane’s account of responsibility itself.

II CANE’S CRITIQUE OF MORAL PHILOSOPHY

Cane describes what he takes to be the ordinary view of philosophers (and many lawyers) as follows.⁶ Moral responsibility is dependent on culpability or blameworthiness, which is dependent in turn on the agent’s intentionality or the quality of the agent’s will.⁷ Hence, moral responsibility is determined by investigating the agent’s will. However, legal liability is frequently imposed in circumstances that cannot be justified by an appeal to the quality of the defendant’s will. Therefore, the law is, at the very least, frequently unconcerned with moral responsibility. Accordingly, while the imposition of legal liability may often be appropriate, it is not based on moral responsibility.

Cane rejects this view, arguing that it adopts an overly narrow conception of moral responsibility. With particular relevance to law, Cane accuses philosophers of obsessively focusing on individual agents, ignoring the interests of those affected by the agent.⁸ Hence, Cane argues for a ‘relational’ approach to responsibility that takes into account both the interests of the agent and the interests of other people with whom the agent comes into contact.⁹

While there is much to be learnt from this approach, there are two problems with the specific manner in which Cane describes it. The first is that Cane does

⁴ *Ibid* 14.

⁵ *Ibid* 9.

⁶ *Ibid* ch 3.

⁷ *Ibid* 96–7.

⁸ *Ibid* 4, 76.

⁹ *Ibid* 49–56.

not do justice to the views he rejects. Contrary to Cane's claim, the notion that moral responsibility turns on the quality of the agent's will does not necessarily imply that the attribution of moral responsibility focuses on the agent in isolation from the interests of others.

The progenitor of the theory Cane attacks is, of course, Immanuel Kant. According to the most well-known, though flawed,¹⁰ reading of Kant's moral theory, Kant maintains that it is permissible for an agent to perform an action if the agent can consistently will a universalised version of a maxim based on that action. To take the most famous example, if an agent is thinking of making a false promise in order to realise a gain, they must ask whether they can consistently will that everyone make false promises in order to realise gains. Kant's claim is that they cannot. This is because if everyone made false promises to realise gains, it would be impossible to make promises at all.¹¹

On its face, Kant's approach appears to be entirely focused on the agent. It may even appear solipsistic. However, such an interpretation is not correct. In Kant's view, the 'universalisability' test shows that it is immoral for an agent to make a false promise for gain because the inability of the agent to will consistently the relevant maxim demonstrates that, in making such a promise, he or she would be acting in a way that he or she cannot accept others acting. The moral agent, then, is not self-obsessed. Rather, the agent is concerned to ensure that he or she is acting in accordance with principles that apply to all and that can be accepted by all. In other words, the moral agent is concerned with fairness. Accordingly, it does not follow from the fact that some philosophers determine responsibility by focusing on the quality of the agent's will that those philosophers ignore the interests of persons other than the agent.¹²

The second problem with Cane's critique of moral philosophy is that, on Cane's account, the philosopher accepts that legal liability may be justified.¹³ The philosopher insists only that legal liability cannot be justified by morality. For instance, imagine a negligence case in which the defendant fell below the standard of care and injured the plaintiff, but was not culpable for doing so.¹⁴ On Cane's analysis, the philosopher may accept that the defendant *should* pay damages to the plaintiff, though that 'should' is not to be cashed out in terms of moral responsibility. Conversely, Cane contends that the defendant was morally responsible for the plaintiff's injury. The danger is that Cane generates this disagreement with the philosopher because he means something by 'moral responsibility' that the philosopher does not. It may be that the philosopher will agree with all the reasons Cane gives for finding the defendant liable in the example above, while insisting that those reasons do not show that the defendant was morally responsible in the sense in which that term is used by philosophers.

¹⁰ See, eg, Allen Wood, *Kant's Ethical Thought* (1999) ch 3.

¹¹ Immanuel Kant, 'Groundwork of the Metaphysics of Morals' in Mary Gregor (ed), *Practical Philosophy* (1996) 37, 57–8.

¹² This also demonstrates that Cane is wrong to insist that theories that focus on the agent's will cannot provide an account of moral obligation: Cane, above n 1, 97.

¹³ *Ibid* 65.

¹⁴ One such case is *Vaughan v Menlove* (1837) 3 Hodges 51; 132 ER 490. This case is explored in below Part V.

This problem is most apparent in Cane's discussion of strict liability. Cane argues that it is appropriate to protect property rights via strict liability in the law of trespass because 'maintaining the integrity of property rights is a major function of tort law.'¹⁵ However, it is surely open to the philosopher to accept that argument while denying that it has anything to do with moral responsibility in the sense in which philosophers use that term. Instead, the philosopher may insist, strict liability is imposed regardless of moral responsibility in order to protect something regarded as valuable: the institution of property. Cane cannot deny the validity of this reply, as he accepts that some legal liability — liability in restitution — is not based on responsibility.¹⁶

A different strategy employed by Cane is to argue that, even as philosophers use the term, persons are widely regarded as being morally responsible when they are not to blame. For instance, Cane maintains that victims harmed by agents often respond emotionally in a way that indicates negative moral judgment, even when the victim recognises that the agent was not to blame for causing the harm. Cane argues that if I innocently knock down someone in the street, then I should help that person up; and that if I do not, 'the person knocked over ... could be thought justified in feeling a reactive emotion, such as [moral] indignation, toward me'.¹⁷

However, it is questionable that this conclusion shows what Cane believes it to show. To what is the victim's indignation directed? Is it directed towards the fact that I knocked him or her down or to the fact that I knocked him or her over but did not help? Cane's own presentation suggests the latter. But that begs the question: why is the feeling of moral indignation not rightly directed to the knocking over? The natural answer seems to be that I was not to blame for that event. Moreover, imagine that I did not know that I had knocked the victim down. Is the feeling of moral indignation for not helping justified in such circumstances? Many would answer this question in the negative and would expect the victim to forgive my failure to help when my lack of knowledge is explained. If this is right, then the victim's rightful indignation in the actual example Cane presents is directed not to the fact that I knocked him or her down, nor to the fact that I knocked him or her over but did not help, but to the fact that I *knew* that I knocked him or her over but did not help. On this view, my failure to help is blameworthy.

Similarly, with respect to negligence, Cane maintains that a victim of a negligently speeding driver may be justified in feeling indignation towards the driver.¹⁸ It seems right to say that the indignation can be justified, at least in the usual case, though it is not clear that this shows that the indignation is merited if the driver was not to blame. Cane's argument at this point is that unless the driver self-consciously chose to speed, the philosopher must conclude that the driver was not responsible.¹⁹ This clearly asserts too strong a connection

¹⁵ Cane, above n 1, 87.

¹⁶ *Ibid* 1, 109.

¹⁷ *Ibid* 106–7.

¹⁸ *Ibid* 98.

¹⁹ *Ibid* 56, 97–8.

between explicit choice and intentionality. Cane appears to be attacking a straw position.²⁰ Conversely, if the driver was speeding because he suffered from a condition that made him unable to prevent the accident, then I predict that many would feel that indignation would be inappropriate. This is so even if, due to the operation of an objective test, that driver would be found liable in tort.

Another argument latent in Cane's position is that legal liability is justified in terms of justice. In Cane's view, such justification is ultimately a matter of distributive justice.²¹ According to this position, the reply to the philosopher is that legal liability is connected to moral responsibility because it is based on justice. But again, if distributive justice involves the attribution of a kind of responsibility to agents who are not culpable, then it seems open to philosophers to reply that distributive justice is not based on moral responsibility as they understand that term. In consequence, the claim that moral philosophers focus inappropriately on individual culpability may amount only to the notion that there are areas of normative significance that *moral* philosophers have ignored. But this seems to come to very little, as philosophers are concerned with broader normative issues, such as distributive justice, though they do not see them as connected to moral responsibility.

The problem is accentuated by a distinction Cane makes between theoretical responsibility and practical responsibility.²² Theoretical responsibility refers to moral responsibility as it really is — that is, the truth about moral responsibility. On the other hand, practical responsibility is concerned with the imposition of responsibility in the real world. One area in which the distinction becomes important is that of evidence and proof. Cane maintains that, while evidential issues are irrelevant to the issue of whether someone is in fact responsible for an event, they are central to deciding whether someone should in practice be held responsible for that event. Cane points out that philosophers are inclined to regard practical responsibility as parasitic on theoretical responsibility in the sense that practical responsibility is seen as the necessarily flawed application of theoretical responsibility to real world situations.²³ However, Cane responds that

the difference between the two concepts of responsibility lies not in their relative genuineness, but in the fact that one (theoretical responsibility) belongs to the world of normative concepts while the other (practical responsibility) is a normative component of a social practice of holding people responsible. Judgments of responsibility that result from the application of techniques to deal with epistemological uncertainty are just as 'real', and just as central a part of our legal and moral lives, as the concepts and definitions of responsibility on which they are based.²⁴

²⁰ Cane claims to derive this view from R Jay Wallace, *Responsibility and the Moral Sentiments* (1994). This seems inaccurate but, in any event, the argument fails to describe the position of most philosophers. Cf Cane, above n 1, 65, where Cane acknowledges that some accounts of culpability capture negligence.

²¹ Cane, above n 1, 68, 74–80, 191–224.

²² *Ibid* 48–9.

²³ *Ibid* 49.

²⁴ *Ibid*.

Of course, Cane is right in arguing that we have to deal with epistemological uncertainty in the real world and hence practical responsibility is ‘real’ — no one would deny that. The real question is whether practical responsibility is to be seen as a best working application of theoretical responsibility or whether it is to some degree conceptually independent of theoretical responsibility. In some places, Cane appears to take the latter view. For instance, Cane maintains that his is not a work of philosophy and is not concerned with the truth about responsibility. Instead, Cane describes his interest as lying in ‘responsibility practices [that] have developed ... independently of “the truth” about human freedom’ and responsibility.²⁵ Cane accepts that these practices may not cohere with, or even be based on, moral responsibility in fact. At this point, it seems clear that Cane and the moral philosophers he attacks are talking about different things.

Moreover, this approach robs Cane’s project of much of its interest. Recall that Cane’s task is to show that legal liability is based on, rather than being separate from, moral responsibility. However, if ‘moral responsibility’ for Cane refers simply to our practices of holding others responsible, then the conclusion seems almost tautologous. On this reading, it is not clear what the difference is between the claim that the law holds persons responsible and the claim that the law imposes liability on persons. Moreover, unless Cane’s project is based on an unstated and unargued appeal towards meta-ethical cultural relativism, then ‘responsibility’ in the sense in which Cane appears to apply it cannot be used to *justify* legal liability. Hence, while Cane’s discussion may inform us as to the content of what he stipulates as our ‘responsibility practices’, it cannot justify them.²⁶

An important example of this difficulty can be seen in Cane’s discussion of luck. Cane maintains that because people often take credit for producing good outcomes, even when those outcomes occurred through good luck, as a matter of fairness they should also be prepared to accept discredit when they produce bad outcomes due to bad luck.²⁷ However, the appropriate response may be to simply argue that taking credit for good luck is unjustified.

In reply, Cane endorses Honoré’s view that some insensitivity to luck is justified because, overall, it benefits the vast majority of people.²⁸ This is because, in

²⁵ Ibid 4.

²⁶ Ibid 17–18. Cane suggests that his approach is analogous to the philosopher’s use of ‘reflective equilibrium’ in moral argument. However, the philosopher attempts an equilibrium between moral *intuition* and moral theory, not between certain social *practices* and moral theory. This difference is important because moral intuitions are feelings about what is right — they are directed at the *truth* in a way that our social practices need not be. Hence, if Cane’s project is linked to reflective equilibrium, then he should see it as connected to the discovery of truths about responsibility. See John Rawls, ‘Outline of a Decision Procedure for Ethics’ in Samuel Freeman (ed), *John Rawls: Collected Papers* (1999) 1. Cf Cane, above n 1, 18.

²⁷ Cane’s discussion of luck is derived from Tony Honoré, *Responsibility and Fault* (1999). In fact, there is a sleight of hand in this argument. Imagine that my choices and luck are equally important in producing a certain outcome. Cane and Honoré appear to assume that either I am responsible for the outcome or I am not. Hence, given that I will sometimes want to say that I am responsible, I am forced to concede that responsibility is to some extent insensitive to luck. But this does not necessarily follow — responsibility need not be all or nothing. Neither Cane nor Honoré explain why I cannot say that I am 50 per cent responsible for the outcome and hence maintain that responsibility is sensitive to luck.

²⁸ Cane, above n 1, 76.

the course of a lifetime, the majority of people will produce more good outcomes that rely on luck than bad outcomes that rely on luck. Hence, some insensitivity to luck is better for most than no sensitivity to luck. As Cane identifies, this is an attempt to justify insensitivity to luck in terms of distributive justice.²⁹ This fits rather neatly with Cane's view that responsibility practices are to be justified in terms of their function.³⁰ On this understanding, responsibility practices are to be evaluated in terms of certain goals, the most important for law being distributive justice.³¹

Note that on this view Cane *is* offering an account of the truth of moral responsibility — an account that I will now explore.

III RESPONSIBILITY AND CULPABILITY

As indicated above, Cane believes that legal liability serves the functions of practical moral responsibility. Imagine the following two cases. First, I take and eat your lunch in the reasonable belief that it is my lunch. Second, I take and eat your lunch, knowing that it is yours, because I am very hungry. Let us suppose that in neither case am I to blame for taking your lunch. In the first case, I am not to blame because the fact that the lunch was yours did not affect the quality of my will. In the second case, I am not to blame because my need is such that it overrides any *prima facie* wrongdoing. Conversely, in both cases — assuming that I am not so hungry that the defence of necessity applies — I am guilty of the tort of conversion.

Cane argues that the imposition of tortious liability is justified because the civil law is concerned not only with the agent (the defendant, me) but also with the agent's victim (the plaintiff, you) and with wider society in accordance with distributive justice.³² Specifically, Cane insists that tort law is right to demand compensation because it is required in order to '[maintain] the integrity of property rights'.³³

A distinct position from that taken in ethics and tort law is found in the criminal law. While criminal law is not uninterested in the victim or in wider society, its primary focus is on the agent.³⁴ In consequence, then, the criminal law imposes liability in the second case only. Crucially, Cane does not argue that the content of responsibility depends on the perspective taken on the incident. It is

²⁹ Ibid 68, 190. This argument is also questionable, even if the possibility that some may not benefit overall is ignored (see Stephen Perry, 'Honoré on Responsibility for Outcomes' in Peter Cane and John Gardner (eds), *Relating to Responsibility: Essays for Tony Honoré on His Eightieth Birthday* (2001) 61, 67). As a matter of distributive justice, the issue is not whether all benefit, but whether all benefit in accordance with distributive justice. On this view, those who have done best in the 'natural lottery' — that is, the most well endowed — are likely to do much better than the rest of us. To many, this result will be distributively unjust.

³⁰ Cane, above n 1, 3, 56–60.

³¹ Ibid 191–224. Cane maintains that much of the civil law is unconcerned with distributive justice. Nevertheless, '[t]he distinctions between the various grounds of legal responsibility ... rest ultimately on arguments of distributive justice. The same is true of the bounds of responsibility': at 224.

³² Ibid 68.

³³ Ibid 87.

³⁴ Ibid 77.

not Cane's view that I was responsible in the first case from the perspective of tort law but not from the perspective of criminal law. Rather, Cane insists that in the first case, I was responsible full stop. The reason I should not be found criminally liable is not because I was not responsible but because, though I was responsible, it would be inappropriate to punish me in such circumstances. That is because criminal law imposes punishments and, as a general (but not universal) rule, punishment is justified only if the agent was blameworthy.³⁵

It appears that this argument must also apply to 'moral responsibility' in the sense used by philosophers. That is, Cane must argue that philosophers restrict the attribution of responsibility to the culpable because they are concerned primarily with blame. However, on Cane's view, this argument must be erroneous, as responsibility is not coextensive with culpability.

What develops is an account of responsibility based on functions that take into account the interests of all. However, I now argue that Cane's conception of responsibility does not provide the most plausible analysis of what ought to be his paradigm case. That case is the attribution of responsibility in circumstances where culpability is least important — the civil law.

IV DISTRIBUTIVE JUSTICE AND THE CIVIL LAW

Cane maintains that, although much of the civil law implements corrective justice, the rights protected by the law are ultimately based on distributive justice.³⁶ For instance, he maintains that because the decision of the House of Lords in *Donoghue v Stevenson*³⁷ 'gave consumers a legal and financial resource that they previously lacked'³⁸ it must be understood as implementing, inter alia, distributive justice. Moreover, Cane insists that:

The function of the concepts of 'foreseeability' and 'unreasonableness' is to provide a normative criterion for the distribution of risks within society. In other words, they are principles of distributive justice. They strike a balance between the interests in freedom of action and freedom from adverse consequences that we all share.³⁹

I take it that few would disagree that tort law must balance freedom of action with security of the person and property. However, Cane simply assumes that the only way of balancing these concerns is in terms of distributive justice. But that assumption is unwarranted. The relevant questions here are the following: when one balances freedom of action against security, does one do it by balancing the interest in freedom of action of all in society with the interest in security of all in society, or by balancing the freedom of action of the defendant with the security of the plaintiff? Does one balance freedom of action with security to produce the best social consequences according to some scheme of distributive justice, or to

³⁵ Ibid 110.

³⁶ Ibid 191–224.

³⁷ [1932] AC 562.

³⁸ Cane, above n 1, 68.

³⁹ Ibid 79. See also the comments regarding the standard of care at 187.

do justice between the parties? The former are examples of distributive justice, but the latter examples embody corrective justice.

Of course, whether the common law of tort embodies corrective justice or not is a famous and ongoing debate. But Cane is mistaken to insist that responsibility in these areas *must* be seen in terms of distributive justice. Cane is wrong here because he believes that a form of responsibility must be about distributive justice if it distributes. For instance:

Donoghue v Stevenson ... decided for the first time in England that a manufacturer could be held liable to a consumer who suffers injury as a result of a defect in a product caused by the negligence of the manufacturer. At one level, the case concerned the responsibility of a particular manufacturer to a particular consumer. At another level, it dealt with much larger social questions about the relationship between manufacturers and consumers generally. In other words, the case was not only about the responsibility of one individual to another, but also about the distribution of rights and obligations in society generally. For this reason, in deciding how to resolve the case, the judges considered not only the issue of 'fairness' as between the plaintiff and the defendant, but also the wider social and economic impact of a decision one way or another ...⁴⁰

It is true that the dissenting judges were inclined to find for the defendant, *inter alia*, because of the fear of what we would call indeterminate liability.⁴¹ However, the sole references to 'wider social and economic impact' by the majority were Lord Macmillan's aside that it was a good thing that English and Scottish law adopted the same approach with respect to the duty of care⁴² and Lord Atkin's opening observation that the issue in the case was of importance to public health.⁴³ Neither of these concerns played any role in either of their Lordships' formulation of the duty of care.

Moreover, while Lords Atkin and Macmillan referred (in passing) to the claim of Mathew LJ in *Earl v Lubbock* that liability should be denied if its imposition would make it 'difficult to see how ... trade could be carried on',⁴⁴ it is not clear that even this would support Cane's view. Mathew LJ's point could have been that liability should not be imposed as it would make trade difficult and either that this would be bad for society or would be unfair as between the parties. The latter seems to have been Mathew LJ's view in fact. Further, their Lordships in *Donoghue v Stevenson* imposed liability on the defendant despite that making trade in ginger beer more difficult.

Similarly, though the majority of their Lordships in *Donoghue v Stevenson* were clearly of the view that negligent manufacturers of ginger beer should, as a general rule, owe a duty of care to consumers — not merely that *this* manufacturer should owe a duty of care to *this* consumer — this does not imply a concern for distributive justice. According to the majority, the reason why all negligent ginger beer manufacturers in relevantly similar circumstances should owe a duty

⁴⁰ *Ibid* 53 (citations omitted).

⁴¹ *Donoghue v Stevenson* [1932] AC 562, 568, 577–8 (Lord Buckmaster), 599–600 (Lord Tomlin).

⁴² *Ibid* 621.

⁴³ *Ibid* 579.

⁴⁴ [1905] 1 KB 253, 259, quoted in *Donoghue v Stevenson* [1932] AC 562, 592 (Lord Atkin), 615 (Lord Macmillan).

of care to all consumers was because all such manufacturers could foresee injury to their consumers. Hence, the decision is concerned with fairness between potential parties rather than with distributing risks and responsibilities in order to realise social goals (other than the ‘goal’ of corrective justice, of course).

Likewise, though Lord Atkin spoke of the public sentiment,⁴⁵ the ordinary needs of civilised society⁴⁶ and common sense,⁴⁷ these phrases could equally apply to corrective as to distributive justice. Although Lord Atkin does (once) mention the defendant’s *social* wrongdoing,⁴⁸ this is surely insufficient evidence to justify the conclusion that Lord Atkin was intending to implement distributive justice.

On their face at least, the majority judgments in *Donoghue v Stevenson* do seem to have been concerned purely with corrective justice. According to Lord Atkin, a defendant owes a plaintiff a duty of care if he or she can reasonably foresee that his or her actions would place the plaintiff at a risk of injury. This is concerned with the relationship between the parties (corrective justice) rather than with society as a whole (distributive justice). Hence, despite Cane’s claim to the contrary, the concept of foreseeability as applied in tort law seems to have little to do with ‘the distribution of risks within society’.⁴⁹ Rather, it is concerned with justice between the plaintiff and the defendant. Hence, in *The Wagon Mound [No 1]*,⁵⁰ Viscount Simonds said:

if it is asked why a man should be responsible for the natural or necessary or probable consequences of his act ... the answer is that it is not because they are natural or necessary or probable, but because, since they have this quality, it is judged by the standard of the reasonable man that he ought to have foreseen them.⁵¹

Again, this is focused on whether the defendant could foresee the plaintiff’s injury rather than on whether something would be socially advantageous.⁵²

In fact, Cane himself presents a reason to hold that tort law is interested purely in corrective justice. Recall his claim that the law balances freedom of action with security of the person and property. But these concerns, typically raised in tort cases, are by no means the only ones relevant to distributive justice. Why, then, does Cane single them out as the predominant concerns lying behind tort liability? The answer is provided by corrective justice: freedom of action and security are of paramount importance in tort because there is always a conflict between the defendant’s freedom of action and the plaintiff’s security.

⁴⁵ *Donoghue v Stevenson* [1932] AC 562, 580.

⁴⁶ *Ibid* 583.

⁴⁷ *Ibid* 599.

⁴⁸ *Ibid* 583.

⁴⁹ Cane, above n 1, 79.

⁵⁰ *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd* [1961] AC 388 (*‘The Wagon Mound [No 1]’*).

⁵¹ *Ibid* 423.

⁵² Compare also Cane’s account of unreasonableness (Cane, above n 1, 79) with Ernest Weinrib, ‘Toward a Moral Theory of Negligence Law’ (1983) 2 *Law and Philosophy* 37, 51, who argues that unreasonableness is to be elucidated in terms of corrective justice. These views are almost identical, barring Cane’s redundant appeal to distributive justice.

To put the conclusion simply: it does not follow from the fact that a case distributed resources that the case was about distributive justice. Distributive justice is concerned with such a case, but it does not follow that the case was concerned with distributive justice. In order to embody distributive justice, tort law must do more than merely distribute. It must distribute *in order* to realise distributive justice. Though there are some (mostly modern) cases that appear to do this,⁵³ it is far from clear that this is an accurate description of tort law as a whole.

My contention is not that tort law definitely does not distribute in order to realise distributive justice, but that the contrary claim needs to be argued. Cane simply assumes its truth. On its face, given that tort law allows the perpetuation of the most serious distributive injustices, much needs to be done for Cane to establish the soundness of his view.⁵⁴

V MORAL PERSPECTIVES

The fundamental problem with Cane's analysis of moral responsibility is his insistence that the term be analysed via a determinate set of functions, including that of distributive justice. Recall that Cane rejects the notion that a defendant who takes another's property in the reasonable belief that the property is his own is not responsible from the perspective of the criminal law. Rather, Cane insists that although the defendant was morally responsible, the defendant should not be found criminally liable because he is not deserving of punishment. What prevents us from saying that the defendant was responsible from the perspective of tort law, but not responsible from the perspective of criminal law? Similarly, if the defendant's story in *Vaughan v Menlove* was true — he really was too stupid to know that his actions could injure the plaintiff — why could we not say that a 'corrective justice' approach would hold him responsible, though he was not criminally or ethically responsible? Despite Cane's insistence that responsibility takes into account the interests of those other than the agent, and despite my agreement with his view that there is more to responsibility than blame, I remain adamant that there are *senses* in which the defendant in *Vaughan v Menlove* was *not* responsible. Moreover, the senses in which that is so are as important and as true as the sense in which it is not.

In effect, I am suggesting an Aristotelian conception of the constellation of morality. For Aristotle, ethics, and hence ethical responsibility, is agent-focused

⁵³ See, eg, *McFarlane v Tayside Health Board* [2000] 2 AC 59; *White v Chief Constable of South Yorkshire Police* [1999] 2 AC 455.

⁵⁴ Unless, that is, Cane has in mind a very 'conservative' account of distributive justice. The origin of Cane's error seems to be his belief that corrective justice is concerned only with correcting wrongs. Hence, corrective justice cannot define the wrongs themselves. Instead, Cane concludes, wrongs must be defined in terms of distributive justice: see Peter Cane, 'Distributive Justice and Tort Law' [2001] *New Zealand Law Review* 401, 409; Cane, above n 1, 187. This view is incorrect. In its broad sense, corrective justice provides an account both of responses to injustices and of the nature of justice itself. See, eg, Ernest Weinrib, *The Idea of Private Law* (1995) ch 4. Cane's claim is the equivalent of insisting that distributive justice is concerned only with distributing benefits and burdens, and not with what constitutes a benefit or a burden. Cf John Rawls, *A Theory of Justice* (2nd ed, 1999) 78–81.

in the sense that the fundamental aim of ethics is to produce happy agents.⁵⁵ However, Aristotle also identifies the two forms of justice — corrective justice and distributive justice⁵⁶ — and maintains that these involve concerns external to ethics.⁵⁷ On this view there are at least three perspectives from which to analyse responsibility, none of which is reducible to any other.⁵⁸ I do not believe that Cane gives any reason to doubt this division.

VI CONCLUSION

Although I have criticised Cane's account of responsibility in this review, I do not wish to leave the reader with the impression that his book is anything but valuable and rewarding. Despite possible defects, it is an illuminating study of responsibility in law. It is my view that many modern lawyers have a great deal to learn from its approach. Accordingly, apart from being essential reading for all those interested in legal theory, the book has much to teach any lawyer with even the smallest interest in the justifications of legal liability.

⁵⁵ Aristotle, *Nicomachean Ethics* (Terence Irwin trans, 2nd ed, 1999) 1–2. Note that it is not a consequence of Aristotle's focus on the agent that his theory ignores the interests of others.

⁵⁶ *Ibid* 71–4.

⁵⁷ *Ibid* 73.

⁵⁸ See, eg, the important discussion in *ibid* 79–80. Cf Cane, above n 1, 96.