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Relating to Responsibility: Essays for Tony Honore on his Eightieth Birthday

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***L.Q.R. 476** THE wide sweep of authority of Professor A. M. Honoré, phenomenon amongst academic lawyers, was celebrated by *The Legal Mind*, on his ostensible retirement in 1985. Fifteen years on, we have not another *Festschrift*, but a collection of essays commenting on Honoré's work in the narrower field of responsibility, as collected in his *Responsibility and Fault* (1999). The papers in *Relating to Responsibility* are by no means overly deferential; and they are met by an afterword from the protagonist, remarkable in its range and clarity for anyone, and doubly so for a man in his sixth decade as a law teacher.

Honoré's interest in this field dates back at least to the first edition of *Causation in the Law* (with H. L. A. Hart) in 1959. One of the main features of that work, for lawyers at least, was its vigorous attack on the risk theory as the basis of what was then called remoteness of damage in negligence. That debate was interrupted, some would say concluded, by the decision of the Privy Council in *The Wagon Mound* [1961] A.C. 388. The general theory enunciated in that case was characterised as immoral by Honoré in a memorable case note ((1961) 39 Can.B.R. at p. 270) and the case itself said 25 years later, in the rightly venerated (*Relating to Responsibility*, p.v.) preface to the second edition of *Causation*, to have made only a limited impact on the decided law. In truth, however, Lord Simonds has convinced not only posterity, but also the mainstream of writers on the law of tort. Nor is that merely by the dead hand of *stare decisis*. The risk theory is now seen as a flexible and unifying doctrine that brings together all aspects of the law of negligence, as most recently expounded in Lord Hobhouse's speech in *Platform Home Loans Ltd v. Oyston Shipways Ltd* [2000] 2 A.C. 190. There is little or no acknowledgement of that, even by way of criticism, in *Relating to Responsibility*. Legal philosophy should speak to lawyers (p. 238), particularly when, as in *Relating to Responsibility*, it addresses issues that take as their starting-point the proper mode of deciding legal disputes. *Relating to Responsibility* engages hardly at all with how lawyers have, rightly or wrongly, gone about that task. That may be because the rest of the contributors agree with Professor Lucy (p. 203), quoting Roberto Unger, that it would be strange if the results of a coherent, richly developed normative theory were to coincide with a major portion of any extended branch of law. Perhaps so; and there is of course greatly more to jurisprudence than analysis of the decided law. But to turn one's back on the cases deprives the legal theorist of proper exposure to an important part of the raw material of his trade.

Enough has already been said to indicate that a judge may not be the best person to understand, let alone to review, a work such as *Relating to Responsibility*. I will do the best that competence permits, while confessing now that I have not felt able to address in detail the papers of Professors Gardner or Lucy. The constraints of a review require some familiarity with the broad lines of Honoré's scheme to be assumed; new readers, as it were, should however start with Professor Cane's lucid exposition (pp. 82-102). The scheme's central notion is that of outcome responsibility as the key to just distribution of risk in tort law, outcome responsibility being the idea that certain outcomes of our conduct, settled according to causal criteria, are ours, even when unforeseen or unintended (Honoré in *Relating to Responsibility* at p. 223). So, what causal criteria should we use? Professor Stapleton accessibly reviews the many criticisms that have been advanced of the claim inherent in *Causation* that the causal criteria there expounded are issues of fact: and therefore value-free and, it would seem, unavoidable. Those doubts seem to be shared by Professor Perry, who suggests (p. 70) that the theory of *Causation* is not an account of pure causation but rather an account of responsibility. Stapleton's solution appears to be to go back to something like the realist causal minimalism to the refutation of which some 300 pages of *Causation* were devoted. The difficulties in this area are, however, demonstrated by the fact that Honoré criticises Stapleton's approach on the same ground that she criticises his: that it runs together factual and normative issues

(p. 233). If we are to understand outcome responsibility, we need to know what count as the “causal” criteria by which outcomes are determined; and the answer is not rendered any easier by Honoré’s claim (p. 235) that Stapleton accepts the idea of outcome responsibility, even though she would not appear to accept the causal theory on which that idea is based.

Outcome responsibility is said also to depend on determining whether the agent had the “capacity” to reach a rational decision about his conduct, which Honoré (quoted at p. 1) sees as an essential prerequisite to holding the agent “responsible”: an idea that Perry (pp. 78-80) characterises as one of Honoré’s great contributions to tort theory. Professor Smith develops an analysis of capacity based on the crucial distinction between synchronic and diachronic exercises of self-control (p. 18); but his essay, and that of Professor Pettit, are difficult to fit into the theory of outcome responsibility, and thus into *Relating to Responsibility* as a coherent analysis, since (as Professor Ripstein points out, pp. 41-42) the law of tort, or at least the law of negligence, as opposed to the criminal law, does not regard the defendant’s lack of capacity as excusatory.

Perhaps passing over these preliminary awkwardnesses, what does *Relating to Responsibility* say of outcome responsibility itself? Central is exploration of the relationship of outcome responsibility to the other of the twin pillars of Honoré’s scheme, the theory of risk-distributive justice: we bear the burden of being held liable for the bad consequences of our acts in return for freedom from the bad consequences of the acts of others, which arrangement assures freedom from (uncompensated) injury (p. 224). Perry suggests (p. 66) that one can support this theory of risk distribution without going anywhere near outcome responsibility in the sense defined ***L.Q.R. 478** above, and Honoré (p. 227) would seem to agree; but in at least apparent contrast Ripstein (p. 50) sees outcome responsibility as essential to corrective justice, because its role is to undo interruptions of the appropriate distribution of risk. This is one of the most testing areas of the Honoré thesis. Before we had the benefit of *Relating to Responsibility*, risk-distribution was seen at least by some to have not a logical but a forensic relationship to outcome responsibility: as a means of justifying or at least of rationalising the imposition of strict liability that outcome responsibility appeared to accept and indeed to require. The latter difficulty, as in moral terms it was thought to be, is underlined by Cane (p. 102), who understands Honoré to see strict liability like outcome responsibility as a form of responsibility for bad luck, justified by the (distributive) principle of taking the rough with the smooth. Honoré, however, will have none of this. He says that outcome responsibility does justify strict liability; though not of itself, but only if there are pragmatic reasons for its imposition (p. 227). This raises a host of questions, not merely in relation to risk distribution, but also as to the function of outcome responsibility as a precondition to, rather than a ground of, legal liability: questions in relation to which one reader at least found it difficult to extract answers from *Relating to Responsibility*.

More widely, Honoré is the inspiration of a group of academics, equally centred in Oxford, who like the authors of *Relating to Responsibility* in relation to the civil law challenge mainstream thinking in the criminal law, and the courts’ acceptance of that thinking, the latter being most recently demonstrated by the House of Lords in *B (A Minor) v. D.P.P.* [2000] 2 A.C. 428 and *R. v. K*: for the writings of this school, and their expression of indebtedness to Honoré, see for instance *Action and Value in Criminal Law* (1993) edited, like *Relating to Responsibility*, by Professor John Gardner. Honoré has always been cautious about the application of his theories of responsibility to crime, and rightly so, since as Perry says (p. 73) outcome responsibility seems to be more at home with compensatory damages rather than with criminal punishment. Nevertheless, references to crime make a sufficient appearance in *Relating to Responsibility* to suggest that that forum could well serve as a further context in which to test Honoré’s approach; and Honoré himself (p. 237) indeed draws an analogy between causal issues in tort and the application of causal theory to participation in crime, citing the work of Professor Sandford Kadish: that being an area of conspicuous difficulty, as demonstrated by the Law Commission in *Assisting and Encouraging Crime* (Consultation Paper No. 131, 1993), at paragraphs 2.15-2.22. The scene would therefore seem to be set for a fuller exploration of these issues, ideally at the level of rigour and detail that characterises *Relating to Responsibility*.

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