Authority, Vulnerability, and Strict Liability

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Christine Beuermann, Reconceptualising Strict Liability for the Tort of Another (2019).

In *Reconceptualising Strict Liability for the Tort of Another* Christine Beuermann—a Lecturer in Law at the University of Newcastle—shines new light on strict liability for the wrongdoing of others. In the United States, we generally classify these as vicarious liabilities and non-delegable duties, and we usually conceptualize them in terms of the liability of principals for the acts of their agents. Perhaps surprisingly, these liabilities are at once ancient, very active at present, and poorly understood. Professor Beuermann's book supplies a badly needed, original, and illuminating framework for thinking about these forms of liability. The book both offers an answer to longstanding theoretical puzzles, and guidance in deciding cases that presently vex the courts. It repays a reader's careful study by reorienting the reader's thinking.

Vicarious liability may well be the oldest form of tort liability extant in contemporary tort law. Legal historians often trace it back to Roman law, which held masters liable for the legal wrongs of their slaves, husbands liable for the wrongs of their wives, and fathers liable for the wrongs of their children. Blackstone distanced himself from Roman law's instantiations, but he saw in them the roots of a more modern and general liability of masters for the torts of their servants. Over time, that liability transformed into the liability of employers for the torts of their employees committed within the scope of their employment.[1] If the broad outlines of the history are clear, both the doctrine and the justification are not. Oliver Wendell Holmes thought that vicarious liability was wrong in principle, if too entrenched to uproot.[2] Modern corrective justice theorists also tend to see the doctrine as anomalous because it is not fault-based.[3] Other contemporary scholars have been more receptive to justifying the doctrine by reference to policies of accident prevention and loss-spreading, or by reference to "a deeply rooted sentiment that a business enterprise cannot justly disclaim responsibility for accidents which may fairly be said to be characteristic of its activities."[4] Whatever their virtues, these justifications have not been particularly helpful to courts struggling to decide the wave of sexual assault cases that have recently arisen. Why, exactly, is sexual assault a characteristic risk, say, of being a teacher but not of being a school janitor?

For its part, legal doctrine in this domain is an untidy morass of highly specific rules. The *Restatement (Second) of Agency*, for instance, once summarized the liability of "masters" (or principals) for the torts of the independent contractors that they employ by stating a general rule of non-liability and followed up that general rule with a list of specific exceptions.[5] The *Restatement (Second) of Torts* accepted the same general rule and followed its statement with twenty exceptions.[6] The sheer number of exceptions suggests a domain where the doctrine lacks overarching logical unity. Consequently, when new problems arise, it's hard for everyone—lawyers, scholars, and judges—to know how to reason even analogically from the preexisting materials of the law. And pressing problems do arise. On both sides of the Atlantic, we have just muddled our way through extremely disturbing scandals involving the sexual abuse of minors. Just how to conceptualize the problem of institutional liability for the wrongful acts of individual actors exploiting their positions as priests—or pastors, or teachers, or coaches, or school janitors—to commit such abuse has proven very difficult. The problems do not get any easier when the parties involved are adults, and the questions have to do with sexual batteries and sexual harassment.

Professor Beuermann's account speaks to both to Holmes's objection and to the difficulties that courts confront. Her framework puts relations among persons at its center and makes authority the master key to liability. The basic thesis that Professor Beuermann develops is simple: authority relations are the key to understanding strict liability for the wrongdoing of another. In the vicarious liability context, the relevant authority is the authority of the principal over the

agent. In the non-delegable duty context, the authority is the authority of that the principal has conferred on the agent over a third party. In the first circumstance, the relation between the principal and the agent is the critical relationship: the agent is under the thumb of the principal. In the second, the relation between the principal and the third party is critical: the principal puts the third party under the thumb of the agent. In both cases, strict liability is a check on the abuse of authority.

In the vicarious liability context, the authority of an employer over an employee may lead an employee to pay insufficient regard to their obligations not to wrong third persons in diverse ways. For example, a pizza company's authority over the drivers who deliver its pizzas puts the drivers in a position where they have reason to assign less weight than they should to their obligations to others, and more weight to delivering pizzas promptly.[7] It is this standing possibility that justifies strict liability. In the non-delegable duty context, the authority that a principal confers on an agent over a third party may be used to wrong the third party. Authority over someone can enable wrongs that the wrongdoer might otherwise lack the means to commit. When this framework is brought to bear on sexual assaults in school setting, it is illuminating in two ways. First, it shows that non-delegable duty is the right doctrine, not vicarious liability. That is, the connection between the institution and the wrong is the authority that the institution confers on the teacher over pupils, not the school's authority over the teacher. The school's authority over the teacher might tempt the teacher to disregard obligations to third persons in favor of pursuing the institutions' interests. Abusing students, though, isn't an institutional interest in the way that, say, delivering pizzas to customers within thirty minutes of the customer placing of the order is. The authority that teachers have over students creates special powers which might be used for sexual abuse. Second, it shows why we might sensibly distinguish between teachers and janitors.[8] Teachers have an authority over students which they may deploy to sexually assault a student. A teacher may usher a student into an empty classroom, or isolate a student in their office under pretext of educational purpose, and do so in order to commit an assault. Janitors do not have similar authority. The authority they have to clean the premises does not confer authority to direct the conduct of students in comparably extensive ways. The framework pours content into the concept of "characteristic risk".

The framework that Beuermann's book develops responds to Holmes' objection. The principles of responsibility that govern wrongs committed by others differ from the principles that govern wrongs that people commit personally, because liability for the wrongdoing of others responds to a phenomenon—namely, authority over either the wrongdoer or the victim—that is simply absent when personal wrongs are at issue. Moreover, because this account is relational, it does not suffer from the defect that afflicts policies of loss-spreading and accident-prevention. Those policies identify states of the world in which a desirable end is realized; it remains unclear exactly why a particular person or institution can be singled out by the law of torts to promote that desirable end. Beuermann puts her finger on grounds of responsibility which arise from forms of authority that some people either assume over others, or confer on others. Beuermann's framework holds people responsible for what they have done—for authority relations they have created.

To be sure, there are questions. For one thing, Beuermann's book addresses the law in Commonwealth countries. American law appears to be somewhat different. In the United States, it is common to call the inherent, peculiar, and abnormally dangerous risk exceptions to the non-liability of principals for the torts of independent contractors "non-delegable duties".[9] For another, the features of relations between employers, employees, other kinds of agents, and victims of tortious wrongs that attract forms of responsibility for the wrongs of others may go beyond "authority" as Beuermann conceives it. Sometimes, as in the *Bushey* case, the justification for liability appears to be the fact that the institution at issue (i.e., the Coast Guard) imposes on people a distinctive kind of risk for which the institution is more responsible than the individual wrongdoer. American courts appear to care more about whether the risk is created by the institution than Commonwealth courts do. The may be doing something different, and for good reason. For another, one might think that there are forms of vulnerability to institutional power and position which should be checked by strict liability even if the relations are not relations of authority. Ultrasound technicians may not have authority that enables them to commit sexual batteries on patients, but their institutional role may put them in a position where victims have little power to protect themselves against such assaults.[10] Yet, even if this book is does not really address American incarnations of the doctrines it discusses, that silence is a limit not a fault. The book's chief and considerable virtue remains intact: its account does more to illuminate non-delegable duty than any other account that I have read. It finds

unity of principle where the weight of American authority has seen only ad hoc judgment or a delicate balance of competing considerations of "policy". Better yet, *Strict Liability for the Tort of Another* teases that unity out of the cases. These are impressive achievements.

1. Beuermann summarizes these developments at page 25 of her book.
2. "I assume that common-sense is opposed to making one man pay for another man's wrong, unless he actually has brought the wrong to pass according to the ordinary canons of legal responsibility." O.W. Holmes, *Agency*, 4 **Harv. L. Rev.** 345 (1890-91); 5 **Harv. L. Rev.** 1, 14 (1891-92).
3. *See*, *e.g.*, Ernest Weinrib, **The Idea of Private Law** 185-87 (Rev. ed., 2012). Weinrib explains away all strict liabilities as arising from principles which are not part of tort law. He explains vicarious liability as rooted in agency conceptions.
4. Ira S. Bushey & Sons, Inc. v. United States, 398 F.2d 167, 171 (1968). The Bushey opinion remains the best American judicial discussion of the possible bases of vicarious liability.
5. Restatement (Second) Agency § 220. See also, Restatement (Third) Torts: Liability for Physical and Emotional Harm § 57.
6. Restatement (Second) of Torts (1965) § 209. The exceptions are stated in §§ 410-29.
7. *See*, *e.g.*, Parker v. Domino's Pizza, 629 So.2d 1026 (Fla.Dist.Ct.App.1993).
8. As Commonwealth courts have done. See Beuermann, at 68, 73.
9. *See*, *e.g.*, Dobbs et al., 2 **Law of Torts** § 432 (2010).
10. As in Lisa M v Henry Mayo Newhall Memorial Hospital, 12 Cal. 4th 291 (1995). Compare Mary M. v. City of Los Angeles 54 Cal. 3d 202 (1991). The cases are discussed in Beuermann, at pp. 99 & 95 respectively.

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