

University of Cape Town  
**Seminar in honour of Professor Tony Honoré**

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*“Tony Honoré’s Contribution to Jurisprudence”*

by

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It is a pleasure and a privilege to be part of this seminar recognising and celebrating Tony Honoré’s work. Though my bond with Tony is more than intellectual, it started in the somewhat austere intellectual setting of the Gulbenkian law library building 31 years ago, where as an undergraduate in the spring of 1978 I attended his undergraduate lectures on the Lex Aquilia.

It soon emerged to our questing undergraduate consciousnesses that here was a thinker who had the knack of being profound without grandiosity; of stating intricate concepts lucidly; and of illuminating the heart of complexity.

It was only after I returned to Oxford for the BCL that I grew to know Tony personally, met his new wife Deborah, became a guest in their home, and profited from a long and loving and supportive friendship. I record my gratitude for also that today.<sup>1</sup>

Danie Visser with infinite gentleness informed me in a telephone call in January that I was to speak today on Tony’s “contribution to jurisprudence”. Not trusts, not the personal aspects, but his jurisprudence. Marius de Waal immediately sent me a message purporting to commiserate – but in fact gloating that he had been assigned “trusts”. For various reasons, that felt like a “curve ball”, but it has proved a welcome one.

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<sup>1</sup> While I was writing this introduction, my friend Sappho Dias, a London barrister who has met and greatly admires Tony Honoré, sent me this note:

“What a Great Man & how quickly overlooked because he did not Self Trumpet. I got to know a lot about his thinking via the Lacey biography on Hart as he worked very closely with Hart. But the MOST IMPORTANT thing about him is that he did not just stop at Legal Theory. He had a Moral Position which was actively pursued in his ordinary life through action. Thus the bullet in the hip from Al Alamein. Judgey-wudgiest, do not forget to say this. He needs to hear in a Public Forum that the Outside World perceive his Innate Morality & that it is Greatly Admired.”

In the introduction to *Responsibility and Fault*, Tony Honoré points to the difficulties of trying to address the concerns of lawyers and philosophers simultaneously.<sup>2</sup> Lawyers – perhaps especially judges – are sometimes dismissive of philosophy: how can it be practically relevant to legal concepts? On the other hand, some philosophers are equally dismissive of lawyers. Legal philosophy, Honoré says, thus faces scepticism on two fronts.

In this paper, I hope to show, from the perspective of my work as a judge over the last ten years, that Tony’s disclaimer should not be taken as dispositive. The impact of his work on various areas of South African law – leaving quite aside his overwhelming presence in the field of trust law – demonstrates what a legal philosopher can do for the practice of law.

I will not discuss or set out Honoré’s contributions to legal philosophy in the abstract. The breadth of his contribution makes that impractical. He has broken new and important ground in so many areas that one cannot do justice to all of his themes.

Instead, I will do something more modest but I hope more immediately engaging. I will discuss two cases in which Honoré’s work played a crucial role, focusing sharply on his work on responsibility and causation, and then try draw some general conclusions about the value and impact of his work.

### **Stolen goods and civic responsibility: *S v Manamela***

In 1955 the legislature introduced two provisions targeting possession of stolen goods. The first, s 36 of the General Law Amendment Act 62 of 1955,<sup>3</sup> required persons found in possession of goods reasonably suspected of being stolen to give a “satisfactory account” of why they had them. Not being able to do so was a criminal offence that attracted the penalties for theft. Early in the constitutional era, this provision was

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<sup>2</sup> Hart Publishing: 1999 p2.

<sup>3</sup> General Law Amendment Act 62 of 1955, s 36 (complementing and broadening the provisions of the Stock Theft Act 26 of 1923):

“Any person who is found in possession of any goods, other than stock or produce as defined in s 1 of the Stock Theft Act ..., in regard to which there is a reasonable suspicion that they have been stolen and is unable to give a satisfactory account of such possession, shall be guilty of an offence and liable on conviction to the penalties which may be imposed on a conviction of theft.”

attacked as an infringement of the newly constitutionalised right to silence and to be presumed innocent.

In an early test of its basic good sense, the Constitutional Court (CC) in 1998 dismissed the challenge to this provision.<sup>4</sup> It held that the provision does not compel an arrested or detained person to do anything; nor does it pressure the person into making a statement (para 11).

The court further rejected the contention that the provision introduced a reverse onus. It held that it was the possessor's inability, and not failure or unwillingness, to give a satisfactory account of possession that constituted the offence. This the State had to prove beyond reasonable doubt, whether or not the accused testified. However, the accused "always runs the risk that, absent any rebuttal, the prosecution's case may be sufficient to prove the elements of the offence": "the fact that the accused has to make such an election is not a breach of the right to silence" (para 22).

The companion provision to this was s 37 of the General Law Amendment Act of 1955.<sup>5</sup> That provided that any person acquiring or receiving stolen goods, without having reasonable cause at the time of acquisition or receipt for believing that the goods were the property of the person from whom he received them (or that that person was duly authorised by the owner to dispose of them) was guilty of an offence, and liable to the penalties for the common law offence of receiving stolen property. The bite of the provision lay in its refinement of the common law. Under the common law offence, the prosecution had to prove beyond reasonable doubt that the recipient received the goods with a guilty state of mind – that is, either positively knowing that they were stolen, or not honestly believing that they were not.

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<sup>4</sup> *Osman v Attorney-General, Transvaal* 1998 (4) SA 1224 (CC).

<sup>5</sup> General Law Amendment Act 62 of 1955 s 37:

"Any person who in any manner, otherwise than at a public sale, acquires or receives into his possession from any other person stolen goods, other than stock or produce as defined in section one of the Stock Theft Act, 1959, without having reasonable cause, proof of which shall be on such first-mentioned person for believing at the time of such acquisition or receipt that such goods are the property of the person from whom he receives them or that such person has been duly authorized by the owner thereof to deal with or to dispose of them, shall be guilty of an offence and liable on conviction to the penalties which may be imposed on a conviction of receiving stolen property knowing it to have been stolen except in so far as the imposition of any such penalty may be compulsory."

The 1955 statute reversed this onus. It expressly stated that the burden of proving that there was reasonable cause when the goods were acquired lay on the accused. Any person found in possession of stolen goods therefore had to prove, on balance, that he had reasonable cause for believing that they were not stolen.

In *S v Manamela* 2000 (3) SA 1 (CC); 2000 (1) SACR 414 (CC), the reverse onus was subjected to constitutional attack.

The appellants were arrested in Johannesburg while carrying boxes containing stolen goods. They claimed that another person, known to them only as “Shorty”, had asked them to carry the boxes for him to a nearby taxi rank. They claimed that they had not stolen the goods, and did not know that the goods were stolen. The magistrate accepted that this evidence could reasonably possibly be true, and acquitted them of theft. But he invoked s 37, finding that even if the “Shorty” story was true, it offered the accused no reasonable basis for believing that he was the owner or had the owner’s authority.

On appeal, the High Court found the reverse onus provision unconstitutional and set aside the convictions.

By the time *Manamela* came before the CC, that court had given a slew of decisions voiding reverse onus provisions.<sup>6</sup> The stage therefore seemed set for another formulaic judgment disavowing this one.

That was not to be. The court unexpectedly split.

The court was unanimous that the section infringed right to silence, since it obliged the accused to produce evidence regarding reasonable cause<sup>7</sup> and that the presumption of innocence was also transgressed.<sup>8</sup> If, after hearing all the evidence a court was of two minds as to where the truth lay, the constitutional presumption of innocence was replaced by a statutory presumption of guilt.

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<sup>6</sup> *S v Zuma and Others* 1995 (1) SACR 568 (CC); 1995 (2) SA 642 (CC) struck down the reverse onus provision created by s 217(1)(b)(ii) of the Criminal Procedure Act; *S v Bhulwana* 1996 (1) SA 388 (CC) struck down the presumption contained in s21(1)(a)(i) of the Drugs and Drug Trafficking Act 140 of 1992; *S v Ntsele* 1997 (2) SACR 740 (CC) struck down s21(1)(b) of the Drugs and Drug Trafficking Act; *S v Mello* 1998 (3) SA 712 (CC) struck down s20 of the Drugs and Drug Trafficking Act; *S v Mbatha* 1996 (2) SA 464 (CC) held that s 40(1) of the Arms and Ammunition Act 75 of 1960 was unconstitutional.

<sup>7</sup> At para 24.

<sup>8</sup> At para 25.

But the court split as to whether these infringements were constitutionally justifiable. All members of the court considered that the right to silence limitation was justifiable. But the majority ruled further the limitation of the presumption of innocence could not be justified.

The nub of the difference between the majority and the dissentients therefore lay in their approach to the constitutional justifiability of the infringement of the presumption of innocence.

This the majority ruled could not be justified. It found the impugned provision overbroad – for example, if the goods in question were confined to motor cars or expensive equipment, where people could be expected to document ownership, provenance and transfer, it might be justified. However, many of the persons caught in the net were poor, unskilled and illiterate. The risk of such vulnerable people being erroneously convicted, subjected to social stigma, and unjustly sent to jail was unacceptably high.<sup>9</sup>

The reverse onus provision was therefore struck down.

O'Regan J and Cameron AJ dissented. They held that it is constitutionally permissible for the legislature to require the accused to persuade the court that he had reasonable cause for believing that the goods he acquired were not stolen.<sup>10</sup>

The minority argued that the extensive market in stolen goods and the violent pattern of theft and robbery feeding that market justified society in imposing an obligation on citizens to prove they have reason to believe the goods they purchase are not stolen.<sup>11</sup> The infringement of the right to be presumed innocent was thus justifiable.

To the majority's stated concerns about the effect on poor people, the minority countered that these should not be overstated: first, because what is reasonable for the accused to believe is construed in the particular circumstances;<sup>12</sup> and second, because the seriousness of the offence created by s 37 should not be overstated. The courts had already developed a doctrine of negligent contravention – the section could be carelessly

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<sup>9</sup> At para 44.

<sup>10</sup> At para 60.

<sup>11</sup> At para 61.

<sup>12</sup> At para 76.

as well as deliberately contravened. The basis on which the accused was convicted determined the length of sentence. In this case, the accused got long jail terms because of their long criminal records.

In effect, the minority cautioned against patronising those at risk of being found guilty by assuming that they were weak and vulnerable in the face of the law.

To the dissenting judges, the importance of discouraging people from acquiring goods without first establishing that they were not stolen was central. The presumption required members of the public to take care when acquiring goods to establish that they had reasonable cause for believe the goods were not stolen.

The section “requires us all not to turn a blind eye to the dubious origin of goods proffered for sale.”<sup>13</sup>

The minority further argued that “[s]uch an exhortation recognises that the protection of individual rights depends not only on the actions of the State, but on the actions of fellow citizens. The conduct of each individual can and will contribute to a climate in which the rights of others are respected.”<sup>14</sup>

Pivotal to the reasoning of the minority was an extract from Honoré in which he argued that social institutions and arrangements should treat people as responsible agents:

“[W]e do well, indeed we are impelled...to treat ourselves and others as responsible agents. But the argument for welcoming this conclusion is not that our behaviour is uncaused – something that we cannot know and which, if true, would be a surprise – but that to treat people as responsible promotes individual and social well-being. It does this in two ways. It helps to preserve social order by encouraging good and discouraging bad behaviour. At the same time it makes possible a sense of personal character and identity that is valuable for its own sake.”

### **Causation and responsibility: *S v Tembani***

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<sup>13</sup> At para 89.

<sup>14</sup> At para 100.

The same theme – that the law should enhance responsibility through the ways in which it imposes criminal liability – was at the forefront of the SCA’s reasoning when it invoked Honoré’s philosophy in *S v Tembani* 2007 (2) SA 291 (SCA).

There the accused shot his girlfriend, Thandi Lamani, in the Ivory Park informal settlement near Kempton Park. One bullet penetrated her chest, right lung, diaphragm and abdomen. The other entered her calf. Thandi’s sisters gave chilling evidence against Tembani. One of them saw the shooting. The other arrived on the scene to find him still armed and “muttering murderous imprecations against the injured woman.”<sup>15</sup>

That he intended to kill could not be doubted.

Thandi was admitted to Tembisa hospital on the night of the shooting. It is a public hospital serving overwhelmingly people who are poor and black.

The staff cleaned her wound, inserted a drain and gave her antibiotics. The next day, even though she was vomiting and complained of stomach pains, they left her in the ward, unattended. Only four days later did surgeons properly track the gunshot wound in a laparotomy, and suture it.

By this time an infection of the abdominal lining had set in. Thandi was belatedly transferred to intensive care. But it was too little, too late. She died in acute pain – fourteen days after the shooting. The cause of death was septicaemia as a result of her chest wound. The evidence conclusively showed that this resulted from the inadequate and negligent medical care she received.

Given Tembani’s intent to kill, the only question was whether he was legally responsible for Thandi’s death – or whether the negligent medical care she received at Tembisa, which was the immediate cause of her death, exculpated him.

The evidence on causation was this. If Thandi had received no medical treatment, she would have died from the gunshot wounds. Her injuries at Tembani’s hands were an indispensable precondition, or *sine qua non*, of her death.

However, had she received adequate medical care in good time, the wound would not have been fatal. The failure to perform the appropriate surgery was a contributing cause to her death, since with proper care the septicaemia could have been avoided.

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<sup>15</sup> At para 2.

In our law, determining whether a preceding act entails criminal responsibility for a subsequent condition entails a two-stage process.

The first question is whether as a matter of fact the perpetrator caused the victim's death.

The second question is whether the act is sufficiently closely linked to the death for criminal liability to ensue as a matter of legal policy.

The first was obvious. Without Tembani's attack, the victim would not have died. The wound inflicted was thus intrinsically fatal.<sup>16</sup>

The more difficult question was whether, as a matter of legal policy, the subsequent treatment the hospital staff administered exculpated Tembani from liability for Thandi's death.

On one view, in general an event will interrupt causation if it is abnormal, or unlikely, in the light of human experience, to follow an act.<sup>17</sup> The distinguished criminal law authority, JR Milton, thus argued that "in modern times medical proficiency is normal and that negligent, improper procedures are abnormal."<sup>18</sup> On this basis, he contends that negligent medical treatment amounts to an intervening (and thus exculpating) cause (or *novus actus*).

On this view, Tembani should have been acquitted, since Thandi's medical treatment was negligent, and probably grossly negligent.

In addressing the problem, the Supreme Court of Appeal<sup>19</sup> invoked Hart and Honoré's seminal work, *Causation and the Law*.<sup>20</sup> Hart and Honoré summarised the United States and English cases as follows:

"Where, as in England, the distinction between mortal wounds and others is not insisted on, subsequent negligent treatment if lacking in 'common knowledge or skill' may relieve the accused of further liability even if it is not of a character sufficient without the wound to

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<sup>16</sup> At para 11.

<sup>17</sup> At para 18.

<sup>18</sup> At para 18, reference in fn27.

<sup>19</sup> At para 22.

<sup>20</sup> 2<sup>nd</sup> ed, OUP:1985, p357.

cause death and a fortiori if it is. Where the distinction is drawn, if the original wound is mortal no subsequent negligence relieves accused of responsibility for homicide. If it is not mortal though ‘dangerous’ some authorities allow subsequent negligence to relieve only if it is of a character sufficient to have killed the victim independently of the wound.”

Following Hart and Honoré, the SCA endorsed the general principle that the deliberate infliction of an intrinsically dangerous wound, from which the victim is likely to die without medical intervention, leads to liability for an ensuing death, whether or not the wound is readily treatable, and even if the medical treatment later given is sub-standard or negligent. (An exception was where the victim so recovers that at the time of the negligent treatment the original injury no longer poses a danger to life.)<sup>21</sup>

The court cited two interconnecting considerations of policy to justify this principle. First, an assailant who harms his victim is morally culpable. That culpability is not diminished by the fact that others do not intervene to save the injured person. Even where others culpably fail to intervene, in breach of a duty they independently owe to the victim (like the medical staff at a public hospital), the moral culpability of the assailant for inflicting a mortal wound is not diminished.

The SCA ruled that “[i]t would offend justice to allow such an assailant to escape the consequences of his conduct because of the subsequent failings of others, who owe no duty to him, whose interventions he has no right to demand, and on whose proficiency he has no entitlement to rely.”<sup>22</sup>

This is because an assailant who deliberately inflicts a fatal wound thereby embraces the risk that death may ensue.

Secondly, Hart and Honoré note that “improper medical treatment is unfortunately entirely too frequent in human experience for it to be considered abnormal in the sense of extraordinary.”<sup>23</sup> This observation proved pivotal to the SCA’s approach to upholding the murder conviction.

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<sup>21</sup> At para 25.

<sup>22</sup> At para 26.

<sup>23</sup> *Causation in the law* p355-6.

In particular, the SCA took the view that in a country where medical resources are scarce and grievously maldistributed as in South Africa, legal liability cannot be imputed on the assumption that a victim will receive efficient and reliable medical attention. The absence of such care, the court said, should not exculpate an assailant from responsibility for death.

The SCA concluded that improper medical treatment is neither abnormal nor extraordinary, and that when the wound originally inflicted is intrinsically fatal the supervention of negligent treatment does not amount to an intervening cause exculpating the assailant.<sup>24</sup>

It therefore confirmed Tembani's conviction of murder.

This reasoning illuminated the intersection between Honoré's views on causation and responsibility. On Honoré's view it is fair to hold people in Tembani's position responsible for the deaths of their victims. This is partly because of the primitive (in the sense of primal, or basic) intuition that omissions to cure are not causes of death in the same way that the original causing of injury was. But it is also fair, in part, because it is fair to hold people responsible for the outcomes of their actions.

Honoré says: "It is clear that the idea that one who deliberately wounds another takes on himself the risk of death from that wound, whatever the reason for the failure to treat it properly, has an attraction which may be only partly penal in origin. It seems to draw, in addition, on the primitive idea that an omission to treat or cure, like the failure to turn off a tap, cannot be called a cause of death or flooding in the same sense as the infliction of the wound or the original turning on of the tap."<sup>25</sup>

## **Themes from the cases**

### **(a) Outcome responsibility**

One of Honoré's primary themes is that holding agents responsible for the outcomes of their actions is fair. Honoré shows that, in law and ordinary life, we hold

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<sup>24</sup> At para 28.

<sup>25</sup> *Causation in the law* p362.

people responsible for the results of their actions. The community allocates responsibility according to outcomes. Honoré aims to demonstrate that this practice is justified.

In particular cases, it may seem as if holding people responsible in this way is unfair. For example, if Tembani and Thandi had been middle-class South Africans, with access to private health care, Thandi would have been taken to a private clinic where the gunshot wound would have been tracked, cleaned and sutured immediately. She would not have died from her wounds, and Tembani would have been jailed only for attempted murder and not murder.

Tembani is obviously not to blame for the fact that the health care Thandi received was so bad. From his point of view, that was a matter of bad luck – or, from the point of view of social structure, a negative consequence of their class position as a poor working class people, rather than affluent middle-class people with access to private health care.

There is thus at least a surface unfairness in holding him responsible for the outcome of his attack on Thandi, when assailants who carry out similar attacks on persons with access to better medical facilities would escape liability for murder.

Despite that fact that in particular cases<sup>26</sup> it seems unfair to hold people liable for the outcomes of their actions, Honoré argues that the system of liability is in general fair. To show this, he draws an analogy with betting. Every time we choose a course of conduct, we are betting on the outcome:

“To choose and execute a course of conduct is to bet on your skill and judgment of the probabilities. Choosing is inescapably betting.”<sup>27</sup>

When things turn out well, the social system allocates the credit of our course of action to us; but when they turn out badly, the adverse consequences are also allocated to us. Each agent bears the risk of her own actions.

Honoré argues that, given three conditions, this system of outcome allocation can be defended as fair: “the system must in its operation be impartial, reciprocal and over a period beneficial.”<sup>28</sup> His strategy is to show that “a system of liability that holds people

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<sup>26</sup> Perhaps especially cases of strict liability.

<sup>27</sup> *Responsibility and Fault* p26.

<sup>28</sup> *Responsibility and Fault*, p26.

responsible in these ways is fair overall, so that its application in any particular case is not unfair. Thus the two equally careless drivers may be treated differently on some occasions, but across time the system as a whole will be fair to both of them, so that neither may complain of unfairness.”<sup>29</sup>

Honoré says that –

“Despite the uncertainties, over a span of time more outcomes are likely to redound to our credit than to our debit, so that we are not permanently saddled with a losing ticket. Risk and benefit go hand in hand.”<sup>30</sup> People “do not have the option of claiming responsibility when things turn out well and disclaiming it when they turn out badly. The principle involved is that of taking the rough with the smooth.”<sup>31</sup>

There are several objections that might be made to Honoré’s view.

First, we might press the claim that the decision in *Tembani* perpetrates an invidious type of unfairness. Not everyone is equally capable of betting and choosing wisely. Our ability to make winning choices comes down to factors such as our genetic makeup, upbringing, education, position in the class structure and innate abilities – none of which are chosen or deserved. They are the result either of what John Rawls calls the “natural lottery”,<sup>32</sup> or what other social theorists would regard as structural factors determining class position.

As *Tembani*’s case illustrates, people who are already disadvantaged are more likely to place losing bets, or to have losing results supervene on their bets by no fault of their own. A system of betting is not fair unless all the bettors are similarly able to make good choices.

Stephen Perry points out that “the claim that the system is beneficial to all seems to be, empirically, simply false. We all know people, or know of people, who apparently possess whatever minimum capacity is required to get by in the world and be properly

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<sup>29</sup> Ripstein, p39.

<sup>30</sup> *Responsibility and Fault* p25.

<sup>31</sup> *Responsibility and Fault* p134.

<sup>32</sup> *A Theory of Justice*, 1999 p65.

regarded as a person, who nonetheless seem to be (and destined from the outset to be) life's perennial losers."<sup>33</sup>

This is not the place to mount a comprehensive defence of Honoré's position (though I should say I think Perry's point is misconceived; the point of systemic functioning is not that everyone must have a good life, but that, overall, life must be better for all because of the system of responsibility-attribution; and unless Perry claims that *that system* produces no benefits even for perennial losers, by making them better off on the whole than otherwise, he seems to me to be wrong).

But some general observations should be made.

First, one of Honoré's most important contributions to the understanding of the system of outcome responsibility is the acknowledgment of the central place of luck [or social positioning] in attributions of responsibility.<sup>34</sup> Being responsible and legally liable are on his account partly a matter of luck. Attributions of outcome responsibility require the agent to bear the risk of her own bad luck (and, potentially, to benefit from her good luck). This is not often explicitly acknowledged.

But recognising the role of luck has an important consequence. It means it may be appropriate to soften our attitudes towards those who are legally liable. Honoré says: "Society has to punish, because that is the only way of keeping deviance within manageable bounds. But in some ways those who are tried and convicted are like military conscripts chosen by ballot. The lot falls on them but it could have fallen on others who committed similar offences but were not caught, or who were caught but had the intelligence and resource to conduct a sophisticated defence. Once we are alerted to the role of chance in the criminal process, it seems proper to take account of the fact that some of those prosecuted, though responsible for what they did, are handicapped by

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<sup>33</sup> Perry, S.R., "Honoré on Responsibility for Outcomes", in *Relating to Responsibility*, Gardener, J., and Cane, P., (eds), Hart Publishing: 2001 p67.

<sup>34</sup> See the accounts of moral luck in B Williams, *Moral Luck*, CUP: 1981 and T Nagel, *Mortal Questions*, Cambridge University Press: 1991. On my understanding, the definition of moral luck is, roughly, that one can be treated as an object of moral judgment and held responsible for something despite the fact that a substantial part of what one is judged and held responsible for depends on factors beyond one's control. It follows that, as long as we agree that socially determined class positioning is largely beyond the control of individuals, and contributes to outcomes for which we hold persons responsible, it qualifies as a form of moral luck.

incapacity or social deprivation, and can easily be set on a downward spiral from which recovery is unlikely.”<sup>35</sup>

Second, every assailant (or negligent wrongdoer) bears the risk that his attack might have bad consequences. Whenever you harm someone in the way Tembani did, you take on the risk that they might die. Contextual factors increase or decrease the risk in each case; so if I punch a burly and pugnacious rugby player like Victor Matfield, there is less risk that I will be convicted of murder than if I punch someone with a flimsy frame and a weak constitution.

But in every case, by carrying out the attack, I take on the risk. Those who attack persons with access to good medical care are indeed less likely to be convicted of murder. This is a matter of luck, and of unchosen social position.

It is of course to be regretted that the bad luck that poor public medical care imposes on attackers in this country falls disproportionately on those who are already burdened by poverty and otherwise marginalised; but this regret need not be seen as regret at an *injustice*. It is in general just that one should bear the risk that one’s attacks might lead to the death of the victim. It would be unjust to absolve particular attackers of that risk on the basis that their victims do not have access to adequate treatment.

This same principle I think emerges illuminatingly in the law of delict, which requires one causing negligent injury to take victim as he finds her:

“‘Egg-skull cases’ arise where the plaintiff, because of one or other physical, psychological or financial weakness, suffers more serious injury or loss as a result of the wrongdoer’s conduct than would have been the case if the plaintiff did not suffer from such a weakness. Most jurists agree that in such a case the wrongdoer should also be liable for the harm which may be ascribed to the existence of the weakness concerned – this principle is reflected in the maxim ‘you must take your victim as you find him’ ...”<sup>36</sup>

It is true that the analogy equates the victim’s physiology with her access to social resources; but it illuminates the factors common to the situations, namely that the added burden of liability is the direct result of factors peculiar to the victim (rather than any

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<sup>35</sup> *Responsibility and Fault* p142.

<sup>36</sup> Neethling et al: p191

distinguishing feature of the assailant or the attack itself); the assailant does not control and is therefore not responsible for these factors; but that nonetheless, it is just that the assailant bear the increased risk.

In short, the wrongdoer in each takes a chance, whether by behaving deliberately or carelessly – and should therefore take the consequence.

### **(b) Personal identity**

In addition to constituting a fair system of risk allocation, Honoré argues that the practice of holding people responsible for the outcomes of their actions is a necessary condition of recognising their personal identity.

This is a separate reason for endorsing the system of outcome responsibility. Indeed, this argument makes outcome responsibility even more fundamental, since we could not dispense with it without losing an important component of personal and moral identity.

The idea is that our sense of self depends in large part on being held responsible for the outcomes of our actions. If we were not held to be in some way identified by what we bring about in the world we would lose our distinctive identity. Perry says that “it is outcomes that make us what (and who) we are. It is the outcomes of actions that give us a history as persons, and our history as persons contributes in very large measure to our identity as individuals.”<sup>37</sup>

Seeing others as appropriately responsible for the outcomes of their own behaviour is essential to recognising them for who they are. As Honoré argues:

“That we should think of ourselves as responsible agents, as taking on responsibility for other people and things, and as having it thrust on us, is what makes possible a shared sense of one’s identity and character and that of others. It makes possible a life in common in which people relate to one another as individuals, each with distinctive traits, virtues and shortcomings, and with a history that is largely made up of what they have done, of their achievements and failures.”<sup>38</sup>

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<sup>37</sup> “Honoré on Responsibility for Outcomes”, p71.

<sup>38</sup> *Responsibility and Fault* p127.

This line of thought embodies an important and practical idea. It coheres strongly with two strands of reasoning that have manifested in our case law recently.

First, it is a corollary of HLA Hart's illuminating notion, engagingly expressed in *The Concept of Law*, that a legal system is not merely a coercive structure for imposing obligations on legal subjects, but an emancipating framework that endows each legal subject with attributes of moral agency and autonomy, entitling them to "legislate privately" for themselves, by concluding contracts, writing wills, making dispositions of their property and binding themselves to others to fulfil certain commitments.

That idea, which Hart may have derived from or evolved jointly with Honoré,<sup>39</sup> was central to the notion of contractual autonomy the SCA endorsed in *Napier NO v Barkhuizen* 2006 (4) SA 1 (SCA) (and which the CC blessedly affirmed in *Barkhuizen v Napier* 2007 (5) SA 323 (CC)).<sup>40</sup>

In its manifestation in the post-Constitution law of contract in South Africa, this idea rejects the notion that the Constitution and its value system confer on judges a general jurisdiction (beyond fraud and constitutionally-determined public policy) to declare contracts invalid because they perceive them as unjust, or power to decide that contractual terms cannot be enforced on the basis of imprecise notions of good faith.

The courts in those cases held that the constitutional values of dignity, equality and the advancement of human rights and freedoms provide no general all-embracing touchstone for invalidating a contract; and that the fact that a term is unfair or may operate harshly cannot, by itself, mean that it offends against constitutional principle.

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<sup>39</sup> See Lacey, N., *A Life of H.L.A. Hart*, OUP: 2004, p164-5.

<sup>40</sup> The passage from HLA Hart's *Concept of Law* (1961), which was quoted in my separate concurring judgment in *Brisley v Drotosky* 2002 (4) SA 1 (SCA) at para 94, later endorsed in *Afrox Healthcare Ltd v Strydom* 2002 (6) SA 21 (SCA), and developed as part of the central ratio in *Barkhuizen*, is this:

'If we look at the law simply from the point of view of the persons on whom its duties are imposed, and reduce all other aspects of it to the status of more or less elaborate conditions in which duties fall on them, we treat as something merely subordinate, elements which are at least as characteristic of law and as valuable to society as duty. Rules conferring private powers must, if they are to be understood, be looked at from the point of view of those who exercise them. They appear then as an additional element introduced by the law into social life over and above that of coercive control. This is so because possession of these legal powers makes of the private citizen, who, if there were no such rules, would be a mere duty-bearer, a private legislator. He is made competent to determine the course of the law within the sphere of his contracts, trusts, wills, and other structures of rights and duties which he is enabled to build.' (pages 40-41)

This approach, though by no means uncontroversial,<sup>41</sup> asserts the individual moral agency and correlative responsibility of private citizens over the notion that the Constitution should blanket them from the adverse consequences of their own choices.

Second, it coheres with the minority reasoning in *Manamela*. While the majority were concerned not to burden the poorest and most vulnerable people in the country with the onus of proving that their beliefs about the origin of stolen goods was reasonable, the minority argued that we should not flinch from recognising the responsibilities that flow from moral agency.

There are good reasons to insist on recognising the responsibility of even the poorest and most vulnerable in our society. Honoré says:

“It is important not to succumb to the temptation of treating the restricted freedom of the socially and morally deprived as relieving them of responsibility. For they, like the rest of us, benefit from the system of responsibility that gives others an incentive to treat them well and to abstain from harming them.”<sup>42</sup>

If respecting the independent moral agency of others requires holding people responsible for the outcomes of their actions, the majority judgment in *Manamela*, and the dissenting judgment in *Barkhuizen*, may have been inappropriately patronising. Ironically, their reasoning may stifle the very moral agency and identity of the poor, unskilled and illiterate individuals they aimed to protect.

However well-intentioned, measures that fail to properly attribute responsibility for outcomes to individuals undermine efforts to treat such people with equal respect. Honoré says:

“Individuals come to understand themselves as distinct persons, to whatever extent they do, and to acquire a sense of self-respect largely by reflection on those changes in the world about them which their actions are sufficient to bring about without the intervention of others and which are therefore attributable to them separately. This sense of respect for ourselves and others as distinct persons

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<sup>41</sup> See D E Moseneke, “Transformative Constitutionalism: its Implications for the Law of Contract”, delivered at the University of Stellenbosch 22 October 2008; and D Bhana, “The law of contract and the Constitution: *Napier v Barkhuizen* (SCA): notes”, SALJ 2007 Vol.124 No. 2, pp 269-279.

<sup>42</sup> *Responsibility and Fault* p142.

would be much weakened, if not dissolved, if we could not think of ourselves as separate authors of the changes we make in the world.”<sup>43</sup>

The minority judgment in *Manamela* is therefore misunderstood if it is seen simply as imposing a strict or harsh approach to liability. Its foundation lies in the more nuanced notion of recognising the responsibilities – and therefore the equal moral status – of all citizens: and the legitimate role of the law in securing and enhancing this status.

These cases offer two insights about Honoré’s work.

The first is methodological. Because Honoré is concerned with the analysis of the way that ordinary people and lawyers use language, and because he undertakes the task with a painstaking rigour and remarkable clarity of thought, his arguments are highly relevant for the practice of law.

They make explicit the assumptions that underlie our ordinary usages, exposing them to scrutiny and evaluation, and laying bare the hidden structure of legal reasoning even where it seems counterintuitive. Consider here the centrality of luck in attributions of responsibility.

The second insight is substantive. In addition to analysing the meaning of legal terms as used by lawyers and ordinary people, Honoré provides original and compelling defences of important elements of practice that have not often been defended before.

Consider, for example, his defence of the system of outcome responsibility, which found dramatic practical expression in the result in *Tembani*, which held an assailant liable for murder even though the hospital treated his victim shockingly.

The result is that Honoré’s legal philosophical contribution is practically relevant and illuminating for practising lawyers; but that it also provides a deeper justification for various aspects of practice, of the kind sought by philosophers. This duality means that, far from Honoré’s self-deprecating claim about facing scepticism on two fronts, his own work has been welcomed, debated and acclaimed by lawyers and philosophers and has had an invigorating effect on both disciplines.

Most importantly, in an era in which truth-speaking, accountability and the practical virtues of delivery are under severe strain, Honoré’s ideas seem likely to

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<sup>43</sup> *Causation and the law* p lxx.

continue to influence and inform our understanding of the values of autonomy, dignity and human worth that underlie our Constitution.

The result is a profound philosophy that has had a significant practical legal impact, and promises more of the same.

There is no greater tribute to his intellectual legacy than that.