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IN MEMORY OF**

**ANTONY MAURICE HONORÉ**  
QC, BCL, DCL, LLD (Hon), FBA

**30 March 1921 – 26 February 2019**

Regius Professor of Civil Law and Fellow of All Souls College 1971-89  
Acting Warden 1987-89  
Emeritus Fellow 1989-2008  
Honorary Fellow from 2008

Saturday, 8 June 2019 at 2.30 p.m.

## **Professor John Gardner**

I first met my dear friend Tony Honoré – to shake hands with – in 1986 right here in All Souls when I was a candidate for the Prize Fellowship examination. Tony was that year the chairman of the assistant examiners for the College's Prize Fellowship competition. This was lucky for me. It was reassuring to have a chairman who shared so many of my interests.

I didn't really twig at the time but in a way I already knew Tony. He had been the first lecturer I went to hear in the Gulbenkian lecture theatre on my very first day as an undergraduate law student some three years before. He lectured on Roman law – lectures called Sources and Delicts. I warmed to him right away on that first morning because he was a very engaged lecturer although he was also very self-contained. And I think engaged, but self-contained, would be an accurate description of Tony's personality for the whole time that I knew him. In the time I knew him, however, his sense of humour and joie de vivre only became more conspicuous. We always had a great time preparing for class, and then playing out our ideas in the company of some of the world's cleverest graduate law and philosophy students. They were golden years.

As these remarks suggest, I was duly elected a Prize Fellow of All Souls and Tony and I went on to work together as teachers and collaborators. He was also my academic advisor in the college for some time. And we quickly became close friends. This continued for over 30 years, from Tony's official retirement as Regius Professor of Civil Law in 1987 until his death this year. During this time our principal collaboration was in the classroom. We offered seminars galore on various topics mostly to BCL students. In particular, we taught seminars on causation which was one of Tony's famous specialist subjects, arising out of work he'd done for many years with Herbert Hart. We also worked on the philosophical foundations of tort law. But perhaps most memorably for us and for our students we held our Friday evening seminars on problems of general legal and political philosophy. These classes were memorable, not just for the intellectual content, which was formidable, but also because of the atmosphere and style of the classes. In these more general seminars on Fridays we used to teach eight topics a year. We chose two and the students chose the other six. Between us and the students we would

concoct a syllabus. And we insisted that the students choose the readings. So that every year the course went off in a different direction: sometimes with tremendous success and sometimes with more difficulty.

It was during this period, officially post-retirement, that Tony did his most important work in the philosophy of law. I emphasise that this wasn't his only work in the philosophy of law. Far from it. He had been a major contributor to the subject for many, many years, dating at least to his 1959 book with H. L. A. Hart, *Causation in the Law*. In those days it was possible to be a generalist who turned his hand brilliantly, as Tony did, to many miscellaneous topics in the philosophy of law: the obligation to obey the law, the nature of and right to revolution, the criteria for the existence of a legal system, and so many others - not least causation. Yet it was mainly towards the end of Hart's life, in the late 1980s, that Tony really began to flourish in his own right as a philosopher of law. And that was because he finally chose to devote himself to topics that Hart had preferred to avoid, and now he wrote systematically about them. They added up to a short book published in 1999, *Responsibility and Fault*. In *Responsibility and Fault*, Tony decoupled responsibility from fault. He defended strict liability in the law and strict responsibility, within limits, in ethics. Our classes were often extensions and developments of these themes. I was often, but not always, persuaded by his arguments. I ended up writing some spinoffs of them myself. Strangely, however, we wrote together only once, last year, in a so-far unpublished paper revisiting, and mostly defending, unfashionable ideas from *Causation in the Law*. We always remained resolutely unfashionable.

Hart was interested in *how* our causal contributions bear on our responsibility, moral and legal. Those were the main concerns of *Causation in the Law*. Yet Hart drew the line at investigating the question of *why* our causal contributions bear on our responsibility, moral and legal. This was the question, or these were the questions, to which Tony's post-retirement work turned. The work brought out two sides of his intellect and sensibility. First there was Tony the lawyer, concerned with fairness, institutional arrangements, social alternatives. These, he thought, could be otherwise. Strict liability in law was but an option

among others. On the other hand, there was Tony the humanist, always interested in the underlying human condition. For this Tony, our causal connections with the world, the traces we left behind, were unavoidably ours. They wove the story of our lives. He said that they gave us an identity, a character, a personality. Without them we were nothing.

Thus from strict responsibility, even when things went wrong, we had some things to lose but so much more to gain. Tony always thought that, as what he called a 'son of the Scottish Enlightenment', I also participated in some special way in these two ways of looking at the world. He said that this cemented the bond between us. It is true that Smith, Hume and other great Scots of the eighteenth century shared in them too, and took them out into the world. I tend to think, however, that every philosopher shares the same preoccupations. The relationship between what is unavoidably human and what is open to us to change is indeed the subject-matter of philosophy. Plato and Aristotle shared a preoccupation with it too. Who did the best work on it? Tony certainly did some of it. He was among the finest of all philosophers that I have had the good fortune to meet.

Tony taught me so much about the subject but not only about the subject. He taught me also about the life as a scholar, about how to teach, how to study and how to develop a topic. He was a man with a great deal of patience and tolerance, which was just as well in my case. He was happy to carry me through, even when I was a bit of a laggard or drag on his energy. Most importantly he was a man of tremendous humanity. A man of letters. A man of great depth and zest for living, right into his final months. A man with whom it was a great honour to work for such an extended period of my life, and his life. So thank you, Tony, for everything you did for us, and especially for me.

## **Professor Dr Detlef Liebs**

As a civilist, or as they say on the continent: 'Romanist', Tony Honoré studied with Fritz Pringsheim from Germany, who had taken refuge in Oxford. In this field – addressed for centuries in all European languages – he was especially interested in the personalities of the main players in ancient Roman law, the classical jurists, as he was convinced that 'even lawyers are partly human'. To detect the humanity of the Roman jurists is difficult, as there were no – and probably never had been – written biographies of a single Roman jurist. And on top of that, the writings of jurists then and now tend to avoid revealing facts about their background and personal history; if sometimes there are references to one's own experience, it usually was of vocational nature. Yet Tony was convinced that if someone has left behind a certain number of texts from his pen, you can find many rather inconspicuous indications of his personality.

Thus the subject of his first three publications on Roman law – they appeared when he was 41 years old, long after Pringsheim had returned to Freiburg – were two Roman jurists and a group thereof: Proculus, Gaius and the Severan lawyers. In his book on Gaius – its title was the shortest any book on Roman law had ever had – he discussed carefully the texts, made many new and detailed observations and brought them into sharper focus. His special interest in biographical details and intellectual influences led him to many possible conclusions from his observations, often enlightening, often keen. His novel ways of finding a fresh access to the Roman jurists' personalities were partly admired, but scepticism prevailed. Some of his conclusions from 1962 were never accepted later, whereas others – almost unanimously rejected in the 1960s – were ultimately revealed to have been substantially correct. At that time he spared his readers neither the consequences of a hypothesis, nor the consequence of a consequence. But he was the first who endeavoured to delineate the individuality of a given jurist far beyond his dates of birth and death, family status, teachers, pupils and offices, as prosopography has been practised since the late nineteenth century. He was skilled in ancient Greek and Latin. From the beginning he exploited those skills to learn more about the Roman legal authors by studying their language more closely. Till then,

Romanists had considered single terms and expressions, whereas his approach was from the very beginning as broad as possible. He noticed even the most trivial linguistic characteristics, and concluded from them characteristics of the author. He generously offered hypotheses to be criticised and thus expanded discussion of the Romanistic community to various new research fields.

In the 1960s and '70s, Justinian's Digest became a main subject of Tony's research, as he focused it on the man who was the principal manager of Justinian's legislation, Tribonian. A hundred years before Justinian, the emperor had failed to achieve the then obvious task of legislation: to fix the law by selecting and adapting those texts of the classical law literature that remained important for current law practice; Roman legislation until then had settled the law only sporadically. Tribonian managed that task within three years. He and his collaborators collected, arranged and updated all still-available texts from the classical Roman law literature which might still be of practical use, reducing more than three million standard lines to almost 150,000, less than 5% thereof. How that was possible to do fascinated scholars for centuries. Tony, occasionally together with Alan Rodger, published a series of articles on that subject, and their work culminated in his book on Tribonian. Here again he took into account not only some linguistic peculiarities as had been done before, but as many as possible. Obvious changes in vocabulary and style in the chronological order of Justinian's constitutions could be stated exactly at the same time, when ancient historians referred to the fact that Tribonian entered upon the office of imperial quaestor, or left it; that quaestor was the one who was normally responsible for drafting the wording in imperial legislation. It was Tony who detected that there was no uniform Roman imperial chancellery style, but that the style of imperial constitutions depended on the personality of the individual responsible for drafting the imperial texts, and that those changed. He developed criteria to identify when there was a change in language use in the chronological order of the laws.

Justinian's constitutions have come down to us in large numbers, at full length, and precisely dated. Less numerous and well-preserved are the constitutions of the third-century emperors. Many imperial rescripts on questions from private people from that period have

survived. Literary sources tell us that the emperors employed classical jurists to assist them in managing this task of imperial service to the public. Tony now tried to apply his means of differentiating individual authors of imperial constitutions to that material, beginning by reading the datable rescripts in their chronological order. Here, too, he detected obvious changes in style. Moreover, he detected identical 'marks of style' in a sequence of rescripts and the writings of contemporary jurists such as Papinian, Ulpian, and Hermogenian, later adding Arcadius Charisius. And he extended this research, trying to identify more classical jurists as rescript authors, proposing Modestin and Arrius Menander. Those studies resulted in his book *Emperors and Lawyers*, vehemently discussed in the scientific community. Tony took notice of all serious objections, and 15 years later he presented a second, revised edition with a palimpsest of all third-century rescripts on a diskette, corroborating his former results and assumptions, or qualifying them. He thus supplemented the classical jurists' writings, adding other legal writers who remain anonymous until now.

He cooperated with the team of Marianne Meinhart and Josef Menner in Linz, who had begun to digitise Roman law texts. That work resulted in the *Concordance to the Digest Jurists*, published together with Josef Menner and consisting mainly of 84 microfiches, a useful help for all those interested in the individual language of a certain Roman jurist. He employed it himself to introduce a study on another Roman jurist, Ulpian. There he proposed solutions to intensely-discussed problems. He could clearly distinguish Ulpian's authentic works from those that are not, being pseudo-epigraphs or written by another Ulpian. His results are convincing, if sometimes surprising. The other challenging task with Ulpian was to realise that almost all the indications for dating his works, about 400,000 standard lines, imply Caracalla's short reign. Could Ulpian really have written all of that within five years? How, and especially why, such haste? According to Tony, it was both possible, and there were good reasons for doing so. At the beginning of his reign, Caracalla extended Roman citizenship to nearly all the free inhabitants of the empire. More than half of the population had been lacking it till then, and henceforth they also lived according to Roman law. To be applicable for them as well, the entirety of Roman law had to undergo a new interpretation, which is just what Ulpian did. Tony

proposed a five-year plan; he offered a solution for the problem. This book too had a second, completely revised edition 20 years later.

He was one of the first Romanists in law to take advantage of the computer for his research. This he extended to the Codex Theodosianus too, later novels inclusive. Again he ordered the datable fourth- and fifth-century laws chronologically. In so doing, he detected a change in style in a certain rhythm, scrutinising the style of each writer who had drafted these laws, and he began to characterise them. His book: *Law in the Crisis of Empire* was the result of those investigations, a colourful depiction of legislation and codification at that time.

Tony's contribution to the science of Roman law was 'frisch, interessant und geistvoll', as Franz Wieacker summarised it. He approached to old problems of the old subject 'Roman law' in his very own manner, finding new subjects of research in this field. He was reluctant to follow the paths his predecessors had taken, and he enjoyed overstepping the boundaries of the different fields of science. His argumentation always kept close to the pertinent sources, and he mastered a veritable plethora thereof. His imagination and diligence were infinitely admirable.

## Professor Niki Lacey

I had the great good fortune to meet Tony Honoré in 1981. I had just arrived as a young lecturer at UCL. In those days legal academics were expected to be generalists, and I had been assigned to teaching, *inter alia*, Roman law. Tony Thomas, then professor of Roman law at UCL, convened a Roman law research group, which I gratefully joined in an effort to upgrade my rather meagre qualifications in the field. The other members were luminaries; but the brightest star of all was Tony Honoré. I regarded the prospect of meeting him with a mixture of awe and trepidation. What I encountered was a man of great warmth, who treated me as an equal; whose enthusiasm for ideas, and for life more generally, inspired and engaged me; who showed an interest in me as a person as well as a new recruit to the academy; and who became one of the most important mentors of my career.

It was a particular privilege to be able to spend time with Tony when I was working on Herbert Hart's biography, to which his contribution was as generous as it was large. My memory of those years is filled with images of lively and often very intense conversations around Tony's and Deb's kitchen table, with Tony bringing post-war Oxford and its intellectual and personal dramas alive through his formidable memory, his acute powers of observation, and his fascination with peculiarities of human life – and with Deb often adding her own marvellous *aperçus*. All those of you who know them personally will understand what a deep pleasure it was to spend time with them, amid the warm embrace of their supremely happy home.

John and Detlef have already spoken about Tony's intellectual contributions. These were radical, rich and often quietly subversive. For Tony was not only distinctive in the range of his intellectual interests and achievements – jurisprudence, Roman law, the South African law of trusts – but also in his boldness and methodological originality. The fresh approach of his studies of the great Roman jurists was groundbreaking. He wrote one of the very first monographs on law's treatment of sex. And his career as a legal philosopher spanned an extraordinary period; one on which Herbert Hart and a few likeminded colleagues brought, in R. V. Heuston's famous words, a town planning scheme to

the intellectual slum of English jurisprudence. Tony was a leading light in this programme of improvement – indeed his seminar with Tony Woolley predated Hart's entry into the project; and he held a very distinctive place in it. Who else could have been elected to one, taken up a second, and been eminently qualified for a third chair in the Oxford law faculty, and the subject of three festschrifts? Perhaps this took someone who had – narrowly – cheated death at the battle of El Alamein, and who rose cheerfully above his injuries for the rest of his life so as to live intensely in every moment.

Town planning schemes – and particularly those of the early post-war years – are notorious for subjecting urban life to rigid systems driven by ideological precepts. Jurisprudential planning schemes are vulnerable to similar problems. The best town plans are informed by a close attention to the varied texture of urban life: tempered by a humane vision, by sympathetic imagination, by common sense and by what we might call wisdom. Luckily, Tony and one or two others were around to provide the jurisprudential equivalent of planning attention to detail, imagination, common sense and wisdom. Tony's sensitivity to the texture of different forms of law, and of law in different systems, allowed him to identify issues which escaped the notice of Hart's philosophical system, as their book on causation testifies. For while Hart in effect used law for philosophical ends, in Tony's scholarship, law and philosophy are equal partners.

Tony had an unerring capacity to go right to the core of issues which had escaped scholars more firmly embedded in one of the established jurisprudential approaches. This is reflected in the titles of essays such as 'Groups, Laws and Obedience'. I first read this essay as an undergraduate, and I can still remember the excitement I felt. Why was it so exciting? Because it identified a key question which had been entirely neglected in the standard debates: how does the fact that we live in groups affect the normative structure of law and its capacity to secure obedience? I have re-read this essay every few years through my career, and if I am ever invited onto the jurisprudential equivalent of *Desert Island Discs*, it will be among my choices!

The same is true of 'Real Laws'. In this strikingly original paper, which bears its considerable philosophical learning very lightly, but which shows that he had absorbed the ideas of European thinkers like Kelsen far more thoroughly than had most of his Oxford peers, Tony ponders what difference it would make if we were to think of law in terms of a very small group of 'real laws' – 'do not commit crimes', 'do not breach contracts' and so on. This is another piece to which I return on a regular basis. I will forbear from discussing my personal favourite, 'Responsibility and Luck', because John has already done so: it is one of the most important articles in legal theory over the last half century.

Last but not least, I want to mention Tony's post-retirement career, and in particular to pay tribute to his and John Gardner's seminar, which was a true heir not only to Tony's pathbreaking early seminars with Tony Woosley but also to the legal philosophy discussion group initiated by Herbert Hart, which later met in Tony's beautiful All Souls rooms, now so fittingly occupied by John. John has described his first meeting with Tony: shortly before that, a stone's throw away in New College, I received a phone call from Tony to share the good news of John's election and to thank me for encouraging his application. Little did I know at the time that this was the start of a most significant, indeed precious, intellectual and personal friendship as well as a key moment for the future of Oxford jurisprudence. Tony would have wanted that to be celebrated here today.

My time is up, and I have hardly spoken of Tony's brilliance, of the depth of his scholarship, of the warmth and humour which animate his work. All these are fundamental to his stature. But if I were to be asked to draw out just one theme which marks his work out from that of all his contemporaries, it would be his unerring ability to identify and tackle issues which have escaped the view of those approaching the jurisprudential terrain from the prism of a particular town planning scheme. Tony Honoré stands as one of the giants of post-war jurisprudence: Informed by but not dictated to by the relevant town planning ideologies, his contributions have enriched and humanised the whole field.

## Judge Edwin Cameron

In the autumn of 1996 Tony Honoré and I went for a long walk in Princes Street Gardens, Edinburgh. We had been invited to a seminar on constructive trusts organized by the law school of Edinburgh and the Scottish Law Commission – I on Tony's coattails, since four years before he had taken me in as co-author of the fourth edition of his monumental work on the South African law of trusts.

In the already-chill air of the Scottish October, we sat down on a bench looking down on the city and up to the Edinburgh castle. It was then that I told Tony that more than decade before I had become infected with HIV and that I feared that I might already be falling ill with AIDS.

At that very time, just months before, radical news had emerged that new combination therapies were proving to be the first effective means against the virus, whose grim death toll across North America, Western Europe, Australasia and, increasingly devastatingly, across central and Southern Africa, had thus far proved impossible to staunch.

But the new therapies still seemed uncertain of outcome and were in any event at that time unattainably expensive. Even for me, on the salary of a judge, the position to which, just two years before, I had been appointed in South Africa, the new hope was of doubtful access.

So, although Tony was a treasured friend in whom I reposed, like his spouse, Deborah, immense trust and confidence, I felt impelled to tell him for business, not personal reasons. It seemed unlikely that I would be able to be much help to him in ensuring the succession *in perpetuum* of his book on trusts.

Tony was then 75. I was 43. He had brought me in six years before, to take over the treatise – yet my courage had failed me in telling him then of my mortal condition, even though I of course also ardently hoped that, unlike almost everyone else infected with HIV, I would never fall ill.

Now, as my body started failing, I had to confront my own mortality and share it with my mentor.

Tony listened quietly. He asked a few questions. I was not yet severely ill and might stave off debility until the new medications came within my reach.

And so, there on the park bench in the cold air of Edinburgh, Tony and I did a deal. We would see. In the face of our imminent mortality, we would make only modest plans. We would meet, every year, for so long as we both remained alive; and, at each meeting, we would plan for the next.

And that is what happened. Every year between 1997 and 2018 Tony and I met, always with Deborah, and always in Oxford, to celebrate the improbable fact that we were both still living.

Tony's longevity and my astounding rescue from death in an epidemic in which many tens of millions have died meant that with humble tentativeness in the face of our mortal frailty we could continue to rejoice in our living.

I speak these words today heavy with knowing how unequally and undoubtedly arbitrarily life and vigour are distributed to those of us who are here.

My continued health meant that Tony could relinquish responsibility for his book on trusts. With Marius de Waal and others, I took into a thoroughly revised fifth edition and, late last year, into a refreshed sixth edition.

One of the most touching photographs of Tony and Deborah together, which he asked to be specially sent to me, was of him cradling the sixth edition on its arrival in Oxford just two weeks before the mortality which had so long eluded him, and for which he eventually yearned, overtook him.

It is a pleasing paradox about Tony's prolific output as a lawyer and philosopher that most of those who, across the Anglophone and civil law jurisdictions of the world, revere his name, barely know about his work on the South African law of trusts; while most South African lawyers who rightly treat his treatise as determinative on trusts know barely anything about his work as a philosopher and a Romanist.

The book on trusts has justly earned the epithet 'monumental'. Its publication in 1966 formed the basis, I believe, for this University's award to Tony of the DCL.

When Tony started work on it, he came upon a scene of scattered, fragmented and somewhat incoherent writing and judicial decisions on trusts.

As the historical survey Tony undertook illuminatingly showed, the trust was imported into South Africa after the English conquest of the Cape in 1806. English wealth and English practitioners settled in the colony; the trust proved an indispensable mechanism for their wealth accumulations and their property dispositions.

Tony's achievement was not merely to collate the sources of trust law – which he did with meticulous and even grinding efficiency, every single decided case and piece of writing, professional, academic or informal – it was also to synthesize this body of material into a novel and coherent exposition.

*Honoré's South African Law of Trusts* was responsible for two sustaining innovations.

First, it propounded the redeeming notion that the trust, in its South African form, was distinct from the English trust, but also distinct from the Romanist legal constructions into which early judicial decisions had tried to squeeze it. Instead, it comprised a blend of Roman, Roman-Dutch and English law – what Tony called *ius tripartitum*. Tony noted that it was precisely this distinctive indigenous mix that rendered it so useful to family, business and property transactions.

Second, Tony propounded a heresy. This was that the Dutch *bewind*, in which an administrator is appointed to manage property belonging to another, was in fact one manifestation of the distinctively evolved South African trust.

This proposition excited furious denunciation by a Leiden-educated senior practitioner, C. P. Joubert SC, who in two lengthy scholarly disquisitions excoriated the notion that an institution distinctive to Roman-Dutch law could by sleight of hand be assimilated to the alien English institution of the trust.

Joubert's indignation was tremulous, his language scathing. Even his title – 'opvattings' (strange notions); and '*ons trustreg*' – implied that Honoré was violating a national heritage that should be immune from foreign intrusion.

Timing was of course everything. The first edition appeared in the year the architect of grand apartheid, Dr H. F. Verwoerd, was assassinated. His separatist, race-pure political ideology was at that very time being given resonance in a swathe of Appellate Division decisions under the Chief Justiceship of the formidable L. C. Steyn.

Steyn considered that the doctrinal purity of Roman-Dutch law should be preserved from contamination by English law in just the way Verwoerd believed that whites would be preserved from contamination from by racial impurity. C. P. Joubert's vilification of *Honoré* stood in close ideological solidarity with this.

Joubert was appointed a judge in the 1970's and to the Appellate Division in 1977, where he sat forbiddingly for eighteen years. In the 1980s he became part of a bleak apartheid-enforcing panels Chief Justices Rumpff and Rabie specially constituted in crucial cases to render reliable pro-government decisions when executive action or proclamations were challenged.

But the quixotic attempt to retain the ideological purity of Roman Dutch Law in South Africa was as ill-fated as the attempt to maintain the white racial domination that spawned it.

As apartheid lurched dangerously to its end, the legislature, acting on the sound advice of the South African Law Commission – which at that very time produced also an innovative report advising against any attempt to constitutionalise protection of group as opposed to individual rights in South Africa – enacted the Trust Property Control Act of 1988.

This defined ‘trust’ in terms that ringingly vindicated Honoré’s conception that a trustee’s ownership of the trust assets was not definitive of the institution, but that ownership could be located, indifferently, in either the beneficiary or the trustee, so long as enjoyment and control were properly separated.

Honoré, in liberating the trust on the one hand from its strict English heritage and on the other envisioning it as an indigenous South African legal creature, may well have helped open up the field for the proliferation of the trust beyond elite property accumulations into business, estates and much smaller property transactions.

Indeed, after 1985, when emergency legislation by the apartheid government explicitly menaced independent civil society and non-governmental organisations, we lavishly invoked the trust form to secure their assets against government seizure.

But this very proliferation of trusts also led to debasement. It necessitated what is no doubt the major decision on trusts by the post-democracy Supreme Court of Appeal, *Land and Agricultural Bank of SA v Parker*.

There the court for practical rather than doctrinal reasons embraced Honoré’s conception that the embodiment of the trust was the separation of control (in contradistinction to ownership) from enjoyment. This led it to denounce the evolution of duplicitous family trusts in which unscrupulous family and other debtors could sequester their assets from attachment for debts they had willingly undertaken as trustees while invoking technical formalities of the trust form to resist recovery.

When Tony died on 26 February 2019, with the impress of the sixth edition late in his hands, he could know that the main doctrines of his work and its unexampled coalition of sources and authorities had placed him indisputably at the pinnacle of authority within the field.

But, though I said earlier that Honoré's South African reputation was dominated overwhelmingly by this work, had it not existed, he would nonetheless, for entirely independent reasons, have been a name distinguished in South African jurisprudence.

For *Hart and Honoré on causation*, first published in 1959, has left a deep impress on judicial thinking about causative responsibility in South African law, as it has in other Anglophone jurisdictions.

This started in 1965 in *Wells v Shield Insurance*, a first-instance decision on causation in a motor vehicle collision, and then, at appellate level, in 1968, in *S v Masilela*. There the Appellate Division expressly invoked authority from the book to decide a case where robbers strangled the deceased, and, thinking him already dead, set fire to his house so that he died by asphyxiation. The argument was that, since they admittedly intended to kill by strangulation, but did not intend to cause death by fire or asphyxiation, which did cause death, they could be guilty only of attempted murder.

The majority of the Court eluded this difficult question by differentiating the case from those cited in the textbooks, finding that that the two acts of strangulation and arson constituted subsidiary but integral parts of a single overall design that constituted a single course of conduct in which the deceased was murdered, and in which the strangulation was a directly contributory cause of the death by asphyxiation.

Hart and Honoré's influence reached its apogee in the Supreme Court of Appeal in 2007. The case concerned the internationally vexed question whether one may be guilty of murder who with murderous intention inflicts a fatal wound where the victim dies because efficient health care interventions that would have saved her life were not administered.

The facts in *S v Tembani* were pitiful. The deceased's jealous lover shot her twice. Though her lung and abdomen were perforated, efficient surgical intervention at the Tembisa hospital, where she was taken on the night of her shooting, would have saved her from death. Instead, because of the hospital's inadequate and negligent care, septicaemia intervened and she died an agonizing death fourteen days later.

Mr Tembani contended that the promise in South Africa's Bill of Rights of access to health care entitled his victim to reasonable, efficient and safe medical intervention. Since a determinative cause other than his gunshots had supervened, he could not be guilty of murder.

But Hart and Honoré, in an allusive and somewhat cryptic discussion of the problem, noted that 'improper medical treatment is unfortunately too frequent in human experience for it to be considered abnormal in the sense of extraordinary'.

To this they added, intriguingly, that 'the idea one that who deliberately wounds another takes on himself the risk of death from that wound', despite failure to treat it properly, 'has an attraction which may be only partly penal in origin'. It draws, the authors said, on what they called a 'primitive' idea. This was 'that an omission to treat or to 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'.

The book left these Delphic pronouncements hanging, somewhat inconclusively. But they provided the spur for the court's decision, which rejected the assailant's arguments. Appalling wounds had been inflicted with the deliberate intention of causing death in a country where the assailant knew all too well that medical resources are not only sparse but grievously mal-distributed.

The court said that it would be 'quite wrong to impute legal liability on the supposition that efficient and reliable medical treatment will be accessible to a victim or to hold that its absence should exculpate a fatal assailant from responsibility for death'.

During the course of preparing this judgment, I had the opportunity to discuss the problem with Tony who read the draft. Engaging with him on this was a rich, challenging and inspiring experience.

But Honoré's influence on South African law went far beyond causation. In the development of the class action, the Supreme Court of Appeal invoked his definition of a 'secondary group' to rebut government's contention that the class of impoverished pensioners – to whom it had scandalously failed to pay pensions – was insufficiently defined.

Honoré's powerful thinking on groups was pivotal yet a second time, recently in the Constitutional Court, when the Salem land dispute between the descendants of the 1820 settlers and a group of land claimants descended from the indigenous people whom the settlers had displaced was adjudicated.

The evidence established that black people had been living on the disputed land for many decades, but it was contested whether, they constituted a 'community' as the statute required. Invoking Honoré's analysis, the Court noted that, where people live in proximity to one another, conventions develop that would otherwise not have existed. It is the existence of these, rather than the extent of interaction or the time it lasts, that constitutes the defining characteristic of a group.

This proved pivotal in the conclusion that the social and functional arrangements of the particular group of black people living on the claimed land included common rules as to how they accessed and utilized the land. They were thus a community.

Honoré likewise left deep tracks in the development of constitutionalized forms of legal duty. His analysis of responsibility and fault was cited in *Olitzi* and again in *Telematrix*. But perhaps the most interesting instance was his citation in a dissent in the Constitutional Court which nearly fifteen years was later embraced by the Court as a whole.

In *S v Manamela*, the question was whether in a country where criminal syndicates massively recycle stolen goods, it was constitutionally

permissible for the legislature to require those in possession of stolen goods, acquired otherwise than in public sale, to prove that belief when acquiring the goods that they were not stolen was reasonably based. The Court split 8-2 with Justice O'Regan and myself in dissent. In *Responsibility and Fault* Honoré propounded that to treat people as responsible agents promotes both individual and social well-being. It does this in two ways: by helping to preserve social order through encouraging good and discouraging bad conduct, while, at the same time, it makes 'possible a sense of personal character and identity that is valuable for its own sake'.

This redeeming assertion of individual moral agency and the responsibilities that flow from it was cited in the dissent, and later unanimously endorsed in *Masingili*.

Tony's vision of human agency was liberal and humane, one much in threat at this time, not only in my own country but in yours, in Europe, South Asia and in America.

Though steeped in the Oxford tradition of thought and argument, he brought to it a practical simplicity of expression and humane connection with ordinary problems that made him an inspiring source of authority for judicial decision-making.

Once, when I acknowledged an insufficiency in my own academic output, he consolingly said: 'Oxford is the place for thinking; South Africa is the place for doing'.

But, like all consolations, though humane in its intent it was slightly disingenuous. For South Africa's 'doing' drew heavily on Honoré's Oxford 'thinking', and this was a source of profound gratification to Tony, for he never relinquished his sense of intense involvement with South Africa its issues and its people.

His profoundly reflective contributions have continued to resonate through what is done in South Africa as we struggle – as do you here – to sustain the virtues Tony best represented:

rationality, gentle though rigorous humanity, humane wisdom, a sometimes childlike animation in argument, an utter lack of vainglory and pride, together with an abiding disavowal of the grand rhetorical gesture, an abundance of gentle enjoyments and – most important of all – an abiding belief in the power of thought to influence action.