Twitter Thread by Nuggehalli Nigam

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My dear law students, I know that the events in Brisbane are at the top of your minds, so I will jump on the bandwagon and talk about one aspect of this wonderful test series that appealed to me. Right through the series, we have seen the role of fortune in a player's success.

Rishabh Pant escaped a stumping before he went on to win the game for India in Brisbane. In Melbourne, Ajinkya Rahane was dropped before he went on to make a hundred. But is it not the case that we give these players credit for their achievements despite their fortune?

We also hold these players responsible even if what happened was their misfortune. India's 36 in Adelaide was a collective failure no doubt but it was also a perfect cocktail of bad luck-pitch, conditions, and all the Australian bowlers managing to get their line & length right.

That's test cricket, but we might say that's life in general. Luck, good and bad, plays an important role in how the world judges us. We might go further and say that the law reflects life in this respect.

When I look at the way the law apportions responsibility, I am amazed that there is widespread acceptance of the system. Take the law of negligence that all of you study in the first year. The law of negligence establishes an objective standard of care.

The standard of care is that which is required of a hypothetical reasonable person in the circumstances of the alleged offender. So, if a person is actually ignorant, clumsy, lazy etc, he will still be subject to the objective standard of care expected of a reasonable person.

In a remarkable set of articles, Oxford's Tony Honoré has analysed the moral issues that arise from the application of the standard of care in negligence law. I will try to summarise his ideas in this thread and also raise some questions.

Honoré begins by noticing the following point: People generally believe that a person who is negligent is someone who is at fault.

Traditionally, fault is ascribed to a person only when a person could have controlled the situation in which he found himself, and had the opportunity to act otherwise, but didn't.

Applying this test to the law of negligence, a person would be guilty of negligence only if he could have met the applicable standard of care. This means an incompetent, clumsy, impatient or lazy person ought not to be held guilty of negligence.

However, this is clearly not true because of the application of the hypothetical model person test in the law of negligence. How do we then justify the law of negligence? Honoré has argued that we live in a system in which we allocate responsibility...

according to the outcomes of our actions, not moral qualities or circumstances. Is outcome responsibility fair? Honore provides two different justifications for outcome responsibility, neither of which is uncontroversial.

Honore argues that since we take credit for favourable outcomes (like the examples I gave in the beginning), we must accept responsibility for unfavourable outcomes as well. He believes that generally people benefit from a system that is essentially based on luck.

Ask yourselves if you are convinced by this argument. Some people appear to have more luck than others. If luck allocation among the population is not uniform, then why must we accept a system where the unluckier ones are punished more often?

Honore has another, more abstract justification for outcome responsibility. He believes that outcome responsibility is crucial to our identity as persons.

To quote Honoré, if actions and outcomes were not ascribed to us on the basis of our 'bodily movements and their mental accompaniments', we would have no 'continuing history or character'.

Outcome responsibility makes us have an identity-we are what we are because we are responsible for our outcomes, good and bad.

How do you respond to Honoré? Is the idea of responsibility or accountability vital to our identities? Is the connection between identity and responsibility intuitively obvious?

I agree with Honore that it is a myth that, in law, fault is essential to responsibility. Fault can enhance the punishment for one's actions, but legal responsibility depends on the outcomes of one's actions, not one's mental make up.

When you review Donoghue v Stevenson, go past the negligence issue and neighbourhood principle and ask yourself this question: what if the snail got into the bottle because the manufacturer's employee was a clumsy sort?

Would it have made any difference to the finding on negligence? If not, negligence liability is as beset by bad luck as some of our unfortunate cricketers.

Ask yourself whether you are ready to accept a legal system that apportions responsibilities on the basis of outcomes, even if these outcomes are just plain bad luck.

Search for the philosophical foundations of the cases you study, even the ones that you think have bee n done to death. You might be surprised at what you find.