**‘Far from an Orthodoxy’: assignable responsibility and corrective justice in John Gardner’s account of tort law**

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The expression ‘far from an orthodoxy’ is John Gardner’s own.[[2]](#footnote-2) And it is true that Gardner’s contributions to tort theory set out positions which would not be embraced by the most popular brands of moral tort theory. To this writer, that lack of orthodoxy is a positive benefit, for reasons to be explained. This paper identifies and explores two important aspects of this lack of orthodoxy, which I suggest are linked (though they have not been directly linked by Gardner himself). These surround the notions of assignable responsibility; and of institutionalised corrective justice.

First, what are the key unorthodox features, more generally, of Gardner’s approach to tort law?[[3]](#footnote-3) Many have agreed that tort theory has become ‘polarized’.[[4]](#footnote-4) John Gardner’s interventions offer a moral account which resists this sort of polarization, and which presents some resources for breaking it down. Specifically, he urges the inclusion of a much wider set of questions within moral tort theory, challenging the formal boundaries between private law and other things, and thus the current barriers to discussion between different ‘camps’ of tort scholarship. His contributions resist any suggestion that there might be a single concept which can structure the answers to tort law’s problems – whether that notion is corrective justice, or rights, or economic efficiency, for example. It offers to dismantle some of the defensive armour plating which has been put in place within existing moral theories with the general intention of distinguishing questions of private law, from other questions. That armour plating has been chiefly aimed at separating private law from political and distributive questions, for example in order to defend the legitimacy of judicial choices, or (perhaps) to avoid the supremacy of economic efficiency.[[5]](#footnote-5) This is not the sort of formal barrier that Gardner would favour in relation to law or indeed any other aspect of life. In his most recent work on private law, Gardner argues particularly clearly that boundaries between different areas of morality are largely artificial. What private law should have us do, he argues, is best understood by reflecting on what we should do ‘apart from’ private law.[[6]](#footnote-6) Indeed, the thought that there can be no insulation of private law from the wider ‘human condition’ is identified as the main inspiration for the book.[[7]](#footnote-7) Gardner has made the same sort of point before about a different proposed boundary, between ordinary morality and political morality.[[8]](#footnote-8) This propensity to break down barriers, and to admit the conflict of reasons in all areas of life (including law) is a key part of the unorthodoxy of Gardner’s theory, and underlies the two important aspects of it considered here. It points towards a less closed and formal version of moral theory, which is more responsive to the range of issues which trouble tort scholars as a whole, and more permissive of the breadth of outcomes actually reached by private law. It incorporates legislative solutions within the realms of private law principle much more easily than more formal approaches.

The Gardner view is thus one which incorporates at least a degree of ‘monism’.[[9]](#footnote-9) Reasons, for Gardner, are capable of competing in all domains, and if a reason has weight in one domain, it is likely to have weight in another. This does not mean that the realm of private law has nothing distinctive about it, but it means that many rival considerations are relevant to deciding the obligations, rights, and remedies that private law should impose. A starting point which considers private law to be continuous with other areas of life is certainly promising. As an example, in Gardner’s account, the costs of tort law – a key question for politically engaged scholars of tort for many years now - are far from irrelevant to questions of justice; and it is perfectly acceptable, indeed correct, to see tort not only as ‘political’, but as serving public purposes. The question is what a morally informed approach to these issues should look like, and what it has to offer.

In this article, and from this starting point, I explore two key ‘unorthodox’ positions, outlined in some of Gardner’s more recent interventions into tort theory. While the article was substantially written before publication of *From Personal Life to Private Law*,[[10]](#footnote-10) I have drawn on this to illuminate matters further. I have made comparisons across more than one important piece of the jigsaw formed by Gardner’s contributions, focusing on two areas of his account, which appear to be closely comparable in certain respects, and where his approach seems to me to be particularly distinctive and important, but at the same time not without challenges. The key moves surround the relationships between a ‘basic’ form of responsibility, and a ‘raw’ form of corrective justice, and their respective counterparts in law. I will try to compare the moves made in relation to both responsibility, and corrective justice, and to understand the significance of any divergences, as well as addressing the underlying motivations.[[11]](#footnote-11) It is interesting that Gardner has not commented on the similarity of these moves, since they seem to illustrate a general relation between law, life, and moral reasons in Gardner’s theory.

1. **Basic responsibility, raw corrective justice, and their relationship to law**

In separate recent articles, Gardner makes what appear to be similar moves in relation to responsibility, and corrective justice, in private law (predominantly, the law of tort).[[12]](#footnote-12) I will try to sketch the basic moves, and their significance, as well as their potential appeal from the (welcoming) perspective explained in the introduction. Both draw on Gardner’s own work in different contexts – responsibility primarily in relation to criminal law,[[13]](#footnote-13) and justice in relation to general legal theory.[[14]](#footnote-14) But the concerns in relation to private law are, perhaps inevitably, a little different.

In relation to responsibility, Gardner refers to a ‘basic’ or ‘metaphysical’ variety. In relation to ‘justice’, he describes an ‘everyday’ or ‘raw’ variety. The links between ‘everyday’ or raw varieties, and legal varieties, of responsibility and corrective justice strike me as important in more than one way. On the one hand, the fact that ‘everyday’ and institutionalised variations are related, and that law’s categories of ‘justice’ for example are not exclusive to law, illustrates the lack of boundaries already referred to in Gardner’s theory, and underscores the challenge thereby mounted to formalist accounts which insulate the reasons used in private law from other reasons. Moral notions of responsibility and corrective justice are not unique to law – they are ideas already in use when law takes them up. At the same time, and on the other hand, the institutionalised nature of the legal varieties of responsibility and justice is equally important. In Gardner’s approach, it seems to me, responsibility and justice must respond to the purpose of the institutions by which they are shaped. The difference from formal accounts of private law in terms of corrective justice is that the nature of the institution does not operate to exclude otherwise good reasons. Corrective justice, being found elsewhere in life, is not an artificial or purely institutional construction; but it is inevitable that corrective justice cannot be the only value in play in private law, given its nature and purposes. Reasons and values continue to compete; and institutional choices must be made, and legitimately made. If private law imposes order on the chaos of values, it does so ‘artificially’.[[15]](#footnote-15) We might add, this order is selected, not ‘discovered’, notwithstanding the existence of raw moral responsibilities and duties.

In each case, the ‘basic’, ‘metaphysical’, ‘everyday’, or ‘raw’ variety (of responsibility, or corrective justice) exists with or without the law. Gardner argues however that both responsibility and corrective justice in private law though related to these ‘basic’ or ‘raw’ varieties raise questions of allocation and distribution, which do not and indeed cannot arise in relation to the basic or raw version. This is the distinctive difference between ‘everyday’, and institutional. Thus the distinctive nature of law’s uses of responsibility and corrective justice is, very importantly, connected to distributive issues. They are also connected to choice, by those with authority to choose. These key questions, of allocation and distribution, cannot arise in relation to ‘basic’ or ‘raw’ responsibility or justice because nothing is allocated or distributed in relation to those ‘basic’ or ‘raw’ varieties. In at least some sense, both basic responsibility and raw rights and duties just ‘are’. Tort law, by contrast, deals in ‘assignable’ responsibilities, and institutionalised duties of corrective justice, respectively. Below, I attempt to learn from a comparison between these two relationships, between the two different forms of responsibility, and of corrective justice, respectively.

Why is the distinctive account of the role of responsibility and corrective justice significant for an understanding of private law? These are central components of a theory of tort law because in Gardner’s account, decisions as to ‘assignable’ responsibility within the law determine the ingredients of different torts; while decisions over the institutionalisation of corrective justice determine which rights and duties will be enforceable through the law of tort. Both the content, and extensiveness, of tort liabilities are therefore explained via this approach.

The division also contributes to some of the key unorthodox attractions of Gardner’s approach. The assignment of responsibilities,[[16]](#footnote-16) and the institutionalisation of corrective justice, is clearly identified by Gardner as political in nature. This political element of the law of tort is closely linked with – not in opposition to – a satisfactory moral account of it. Tort law is also, in reaching decisions about institutionalisation, or allocation and assignment, quite properly responsive to a wide range of reasons, not all of which are best captured as questions about ‘justice’. In any case, justice is substantive, rather than formal, so that private law decision-making is relatively unconstrained by the corrective justice form. In all of these senses, Gardner’s approach is contrary to orthodox moral accounts of tort law, in recognising that the most appropriate allocation of legal rights, justice and responsibility in private law are primarily chosen[[17]](#footnote-17) rather than discovered; designed to further public policy as appropriate to the purposes of private law; inescapably distributive and political; and open to the full range of available reasons. In all the same senses, the approach breaks down artificial barriers to discussion between tort scholars of different sorts, illustrating how the unorthodoxy of the account is also part of its promise. What moves are being made on the way to delivering this promise; and do those moves raise any reason for doubt?

1. **Responsibility and Tort Standards**

In his discussion of the negligence standard, Gardner imports the notion of ‘basic responsibility’, developed chiefly in the realm of criminal law or general legal theory, to the realm of tort theory. As with corrective justice (considered in the following section), a contrast is set up, though the two contrasts are not identical. Tort law, he argues, is engaged with ‘assignable’ responsibilities (and presumably with their assignment). Basic responsibility by contrast is not ‘assigned’: it arises irrespective of any questions of law or other intervention.[[18]](#footnote-18) Legal responsibility however does not simply arise. It has a clear origin, in legal decisions. This includes non-judicial, for example legislative, decisions.

The metaphysical nature of basic responsibility runs deep. Gardner has made clear in earlier work in relation to criminal law that his notion of ‘basic’ responsibility requires no ‘relational’ elements. It need not be owed ‘to’ anybody. Immediately, it takes a different form from responsibility as it is applied in the law of tort, which inevitably is relational, in that it is unavoidably concerned with responsibility to another. It also does not imply any particular outcomes, sanctions or remedies. Nor does it imply any particular audience. Basic responsibility is ‘the ability and propensity to have and to give self-explanations in the currency of reasons’,[[19]](#footnote-19) or ‘the ability to respond’ or ‘to give an account of oneself’.[[20]](#footnote-20) While Gardner argues that there need not be anyone with a right to demand that one gives such an account, the notion of giving an account suggests that this is at least in some sense outward-facing, though Gardner argues that the reasons may be given to anyone who cares to listen (rather than, presumably, directed to someone who is either entitled to the reasons or in a position to make a judgment).[[21]](#footnote-21) There need not be any party with a right to the account or, perhaps, a right to require such an account to be given. Basic responsibility is inherent. It arises, therefore, irrespective of authority, judgment, or rights. It need not imply either fault or blame, and may be (perhaps typically is) something we experience, observe, or feel for ourselves.[[22]](#footnote-22) We feel responsible when our agency brings about certain effects; and will strive to offer reasons accordingly.

Is basic responsibility introduced into the discussion of negligence essentially to provide a contrast with assignable responsibility, or is there more to its role? There is, it seems, more to it. Basic responsibility is urged by Gardner to lie at the root of all responsibility. It is ‘basic’ in a foundational sense, to the extent that it is a *precondition* of assignable responsibility (and presumably, of all responsibility).[[23]](#footnote-23) Nevertheless, its role in contrasting with assignable responsibility also remains significant, as a means of understanding what is and is not at stake in the standards imposed by law.

Tort law, according to Gardner, deals with assignable responsibilities. It is clear that assignable responsibilities involve an element of ‘allocation’. I believe this means that they do not just arise, but are ‘assigned’. However, basic responsibility is a precondition of assignable responsibility. Gardner suggests that there must be at least a fiction of basic responsibility, for responsibility to be assigned. As Gardner puts it, there can be no *making* responsible, without *holding* responsible.[[24]](#footnote-24) *Making* responsible may be either a broad, or a narrow notion within Gardner’s account. One possibility is that all assignments of responsibility involve ‘making’ responsible. That is because there is a decision about where responsibility is to be assigned: this is the ‘broad’ notion. Another possibility is that in general, an assignment of responsibility does not ‘make’ someone responsible. On this interpretation, only if basic responsibility is fictional does an assignment involve ‘making’ responsible: this is the ‘narrow’ notion. There is reason to think that the core mode of assignable responsibility is ‘making’ responsible. Responsibility is said to be ‘given’;[[25]](#footnote-25) so that ‘making’ responsible is a broad notion.

Thus, private law is concerned with choices over whether or not responsibility should be assigned. Where then does ‘holding’ responsible fit in? ‘Holding’ responsible appears to reflect a decision that responsibility exists, rather than exercising a choice about which responsibilities to assign. It seems natural to think that holding responsible is something that is done to recognise the existence of basic responsibility. *Holding* responsible is not the normal mode of basic responsibility, but acts at one remove from it. Generally, I would suggest, basic responsibility as Gardner explains it is about *being* responsible: this sort of responsibility, which still awaits any consequences in the sense of blame, sanction, or even criticism, just ‘is’. Indeed, it is explained that holding responsible is something that may be done *in relation to* basic responsibility (though the ambiguity of the phrase is acknowledged).[[26]](#footnote-26)

To my mind, and allowing for other possible forms of responsibility, the question that arises is whether ‘basic responsibility’ is necessarily the best foil for ‘assignable responsibility’ – the allocative version that Gardner suggests that we encounter in the law of tort. Is the contrast that we really need the one between ‘making’ responsible, and ‘holding’ responsible, in the above senses? If not, then a focus on basic responsibility, and a direct contrast with assignable responsibility, will not be the best route to understanding the nature of tort’s responsibility.

As we have seen, ‘basic responsibility’ is at root an ability to answer to reasons. It is presented as arising independently of anyone’s judgment, or anyone’s interest in asking, or anyone’s standing to ask. Many have interpreted legal and philosophical notions of responsibility very differently from this. In essence, it has been argued that the essential form of responsibility encountered in law and indeed in life in general depends on being *held* responsible. We saw above that Gardner allows for the notion of ‘holding’ responsible, as a process of recognising basic responsibility (even where this is fictional). This was contrasted with *making* responsible. I take it that nobody can be *made* basically responsible, because they are or are not. But they may intelligibly be *held* basically responsible. It seems to me that where basic responsibility is chiefly about *being* responsible, something different, which we may call ‘attributed’ responsibility, is chiefly about *holding* responsible. If that is the case, it may be the latter concept that we really need to consider in order to highlight the significance of assignable responsibility, with which tort law is argued to deal.

If there is a notion of responsibility which lies between assignable responsibility, and basic responsibility, this could be particularly useful in highlighting the meaning of the former. To what extent is there a notion of attributed responsibility that is importantly different from both basic responsibility, and assignable responsibility? This notion would argue that responsibility itself depends in practice upon being *held* responsible. This would, it seems to me, necessarily be to draw attention to the context in which responsibility questions arise. Typically, we are interested in responsibility where someone has an interest in asking or a reason to assess the answers. Indeed Antony Duff has argued, ‘to *be* responsible is to be *held* responsible by somebody within some practice’.[[27]](#footnote-27) This approach may lead to denial that basic responsibility is identifiable or useful – ‘holding’, in practice, takes the place of ‘being’, and indeed is the main sense in which ‘being’ responsible can arise at all. As Kutz puts it, ‘attributions of responsibility’ are ‘fundamentally relational’, and depend upon ‘the character of the moral, legal, and social relations among the actor, the victim, and the evaluator’.[[28]](#footnote-28) This sort of ‘attributed’ responsibility contains a number of features that basic responsibility does not, and it strikes me that these features bring it closer to responsibility in the law of tort. If we want to learn more about tort law, could this typical process of contextual attribution provide the closer and trickier contrast with assignable responsibility, which is said to be distinctive of the law of tort?

When Gardner argues there is no *making* responsible ‘without *holding* responsible’, he could be taken to be implicitly drawing attention to three stages, consistently with Duff’s aphorism above. We may *be* (basically) responsible, but this is little use where there is (pretty much by definition) no process to determine it. We may be *held* responsible for the purpose of a particular context (attribution), and this appears to me to respond to the events that have occurred within their context and particularly depending upon the relationships in play. And we may be *made* responsible through the allocation of particular duties (assignment). Gardner’s point is firstly, that the law of tort typically deals with the last of these – the allocation of particular duties, and therefore the attribution of responsibility. Secondly, that there is a more basic form of responsibility than attributed responsibility. But it strikes me that if we want to demonstrate the political, allocative nature of tort standards, as Gardner sets out to do, it is the contrast between attribution and assignment, rather than the contrast between basic responsibility and assignable responsibility, which would be the more typically engaged distinction, as well as the more difficult to explain. Indeed this contrast raises the very live question of whether all tort duties are concerned with assignable, as opposed to attributed, responsibility. Are tort duties concerned chiefly with the roles that we play, rather than purely responding to the harm that we do?

Is there, then, a middle piece missing from the argument about the nature of the negligence standard, and other tort standards? Gardner makes a very general distinction between metaphysical, and political responsibility, in which basic responsibility is metaphysical, and tort liability rests on responsibilities that are assignable and political. I wonder whether this fills the ground. Is there nothing in between? In particular, is attributed responsibility still metaphysical? As I have very briefly sketched it, it is not abstract, but purposive, and contextual, and dependent on an act of judgment. Perhaps then it is not metaphysical. But is it political? It appears that it is not allocative in the sense of assignable responsibility. It does not depend on an assignment of roles. But it does incorporate a human intervention which might result in the distribution of blame and other outcomes. Could it be neither political, nor metaphysical? A further question is whether assignable responsibility that exists outside the law, or assignable responsibility which turns upon the voluntary taking on of a responsibility, is still political?

An example of appearing to gloss over such questions, implying that basic responsibility is the only non-political alternative to assignable responsibility, can be found in the suggestion that the reasons for choosing the negligence standard over strict liability are not to do with basic responsibility, because basic responsibility is essentially strict. Here, Gardner explains that there ‘is no metaphysical limit in the immediate neighbourhood. If there is a limit, it is a political one’.[[29]](#footnote-29) This seems to state an either-or: metaphysical, or political. That basic responsibility does not require a negligence standard is an important conclusion. To conclude without more that the negligence standard can therefore only be a political choice suggests the glossing of possibilities. Are attributions of responsibility – which are responsive to events in the context of relationships and the circumstances of the attribution – regarded as political, for they may respond to the same events as basic responsibility, but lead to the allocation of blame and other responses? Or not?

At this point, we should look more closely at what Gardner proposes to be the core tort law form of responsibility, namely assignable responsibility. The attribution of responsibility, we saw above, is effectively a judgment about the right response to the agent’s actions and situation. Attribution of responsibility appears to me to involve a response to events. Assignment of responsibilities however is related to the distribution of roles. Responsibilities, in this sense, may be accepted, given or imposed. As Gardner puts it, ‘[s]ometimes I *take* responsibility for something. Responsibility is here assigned to me by my own consent or undertaking. In other cases I am *given* responsibility or, in a different idiom, *made* responsible. Here the responsibility is assigned to me by an exercise of another’s authority.’[[30]](#footnote-30) It seems to me that this makes clear that the idiom of assignable responsibility is *making* responsible. Indeed, it is natural to speak of the ‘assignment of responsibilities’, rather than of ‘responsibility’. To my mind, this notion of assignable responsibilities is a very valuable one in relation to the law of tort. Responsibilities in this sense help to answer the ‘why me?’ question that is sometimes asked in relation to tort duties.[[31]](#footnote-31) And it appears to me to be correct that tort law does indeed assign responsibilities in this sense. The role of the defendant, in relation to the claimant, is typically considered in a manner which shows that it is not entirely made up of the circumstances which led to harm being done, but includes prior features of the relationship, even if identified retrospectively. What was it between defendant and claimant which meant that a duty arose?

The relationship then is typically not solely that of the ‘doer and sufferer of harm’. Indeed, as Gardner has recently argued in a slightly different context, even the Atkinian approach set out in *Donoghue v Stevenson*[[32]](#footnote-32)implies that tort law’s duties are concerned with ‘neighbourhood’ (a prospective idea), rather than merely turning on the fact that the defendant was the agent of damage to the claimant.[[33]](#footnote-33) In other contexts, tort law may well seek to impose duties retrospectively, or to recognise assignments of responsibility that have already occurred. There could be much fruitful discussion of the types of assignment of responsibility that occur in the law of tort, and whether the reasons for them are sufficiently compelling, enabled by Gardner’s analysis. But equally, a different account may be offered. It may be argued that what tort law typically does is to respond to the actions of the defendant, and their impact on the claimant, within the context of the relationship between them. This is similar to attributed responsibility: it involves the exercise of a judgment, rather than the placing of distinct role-based responsibilities. To me, whether tort is primarily of the first, or the second, character is a genuinely live question. Is it primarily concerned with placing of responsibilities in relation to role; or with judgment based on actions and consequences? To answer this even in relation to the tort of negligence is no simple matter. But it seems to me that moral theories of negligence generally have neglected the first of these possibilities. It also seems to me that the existence of assignable responsibilities in tort law is undeniable.

I have argued the contrast between basic responsibility, and assignable responsibility, may not be sufficient, since basic responsibility is in any event so different from the needs of the law of tort. If we choose to work a contrast with something like attributed responsibility, rather than basic responsibility, we will need to consider (amongst other things) whether an ‘attribution’ (a holding responsible) can or cannot give rise to distributive unfairness. Is this notion of responsibility (implicitly recognised by Gardner in his discussion of ‘holding responsible’) sufficiently different from assignable responsibilities for the contrast between metaphysical and political responsibility to stand up? Is it sufficiently clear that tort chiefly, or universally, concerns itself with one rather than the other? I think it is undeniable that it includes responsibilities that are ‘assigned’. But could it also include responsibilities that are simply attributed? Gardner may well argue that tort law typically depends upon assignments of responsibility, and on allocation to parties in particular relations to one another; and that these choices are always political. Attributions of responsibility which do not take this form may be debated in terms of whether or not they are ‘allocative’ (and perhaps political), without destroying this essential point. But it is quite possible that tort law contains a mixture of these two.

*What is (and is not) ‘political’?*

I have, to this point, attempted to fill in something that appears to me to be not fully explained, and that is the mark of the ‘political’. Assignable responsibility is argued to be ‘political’, but in ‘the broadest sense’. Equally, the legal standard of negligence (and presumably also other legal standards), is said to be political: it is part of the ‘pliable politics of assignable responsibility’.[[34]](#footnote-34) So far, I have taken it that all assignments of responsibility are therefore political (this seems to follow from the expression just quoted); and, further, that this is because they involve allocations, and are in this sense distributive. It is also mentioned, albeit only in passing, that assignable responsibility also exists outside the law. Is it also political there? This is not answered, and it is not explained where we will find assignable responsibility outside law. Who else, other than actors in the law, might have authority to assign responsibility? Certainly, I seem to have such authority for myself, since assignable responsibilities may be accepted or self-imposed. Perhaps, the same authority falls to anyone who can assign a role. This may be done within a team, a club, or a family for example. In each case, there is an allocation and thus, a distribution is effected. With basic responsibility, as we saw, there is no such distribution, since responsibility is not imposed but just arises. I would be eager to know under what circumstances law starts with these assignments, or not. Should they have legal effect? Is there a distinction between responsibilities that ‘descend’ on parents for example,[[35]](#footnote-35) and those which are placed on the person who is given responsibility for keeping the junior football squad diary? Equally, does law, in attaching legal consequences to the responsibilities that descend on parents, ‘allocate’ responsibility without an assignment (the responsibilities are only *assignable*), or simply attach consequences to it?

Equally, ‘political’ is not defined. Does it apply to assignable responsibility generally, perhaps because this effects a distribution? Or does it apply to law, because it involves action of the state? If the former, then assignments of responsibility in all kinds of settings would deserve the description ‘political’; but mere attributions of responsibility may not. If the latter, this would be hard to square with Gardner’s general monism, already noted, or with his rejection of John Rawls’ meaning of the political, with which his piece on ‘The Negligence Standard’ begins.[[36]](#footnote-36) Indeed, if this were the meaning of ‘political’, why would we need to think in terms of assignability, for any legal standard to deserve the title? It would be an automatic consequence of being legal, and it would not take a philosopher to tell us that all law was therefore political. Perhaps, the implication is that only if certain types of outcome follow from the assignment of responsibility – for example, the kinds the state can impose – will assignable responsibility belong to the ‘political’.

Perhaps we can conclude these reflections by asking, what is the most significant point being made through the distinction between ‘basic’ and ‘assignable’ responsibility (and association of tort with the latter)? I think it is that there is no point seeking answers to tort law’s questions about responsibility by looking for a metaphysical limit on responsibility, other than the very broad limits associated with basic responsibility. All the rest, it seems to be argued, is political. Fairness, efficiency, and reasonableness, are all pertinent considerations. As ever, formal arguments won’t get us very far or avoid the need to consider competing reasons. All this has intuitive appeal. My enquiry has suggested that to fully convince of this, we also need to contrast assignable responsibility with attribution of responsibility, and to indicate where the boundaries of the political lie, other than through a contrast with the very different case of basic responsibility. To define tort law’s standards as ‘political not metaphysical’ leaves me with questions about whether there is a distinction between assignment and attribution, how far tort law is engaged in both, whether there are judgments of responsibility which are neither political nor metaphysical, and whether all assignments of responsibility, or only some of them, are political. But I also think that there is scope for much fruitful discussion about the degree to which tort duties are indeed essentially concerned with *assignable* responsibility, rather than with attribution of responsibility, with which much debate about responsibility in criminal law has been concerned. If there is such a difference, what justifies it? Gardner sets his face against explanations of private law in terms of ‘risk distributive justice’ (though in *From Personal Life to Private Law* he also elaborates, convincingly, the neglected significance of security, which I would suggest is closely related to risk[[37]](#footnote-37)). Perhaps the key is that private law is indeed concerned with the distribution of responsibility for security (ie, in a different terminology, with risk-bearing); and this may very well be a function of roles, and relationships. Assignable responsibility is a useful and suggestive notion, but it deserves further scrutiny.

1. **Corrective justice: the raw and the cooked**

A very similar dichotomy is also the jumping off point for Gardner’s account of the place of corrective justice. Gardner proposes that questions of ‘corrective justice’ are not only legal: they also arise irrespective of law, in respect of ‘everyday’ interaction. Thus, there are ‘everyday’ or ‘raw moral’ rights and duties of corrective justice.[[38]](#footnote-38) ‘Everyday’ strikes me as a slightly suspect expression, since arguably legal relationships are no less ‘everyday’ than others,[[39]](#footnote-39) and there may be complexities attaching to any context. This recalls the argument above that whenever we encounter responsibility in practice, it is typically attributed, in a particular context. The key example of ‘everyday’ corrective justice used, borrowed from Neil McCormick, crosses the contexts of family and employment, for example.[[40]](#footnote-40) I think that generally, Gardner recognises these issues. In *From Personal Life to Private Law*, Gardner expresses his own mistrust of very abstract examples and scenarios, recognising the significance of ‘back story’. The point of the book is that the boundaries between personal life, and law, are porous, so that one may learn from the other. Out of preference however, given this doubt about a contrast between law and the ‘everyday’, I will refer to ‘raw’ moral duties, rather than ‘everyday’ duties. This notion of rawness performs a similar strategic role to the one played by ‘basic responsibility’ in relation to the negligence standard, but I note that it is different. On the one hand, as with responsibility, it contrasts with the distributive, and thus (I think) political, role of the legal allocation of rights and duties of corrective justice. It also shows that the legal version depends upon an allocation (with an assertion that the non-legal variant does not). On the other hand, this must be a distinctly different notion from basic responsibility in at least some senses. In particular, a notion of corrective justice cannot be anything other than relational, and it also necessarily contains a duty to take action, and thus some relatively specific consequences. In this respect, it is rather more adventurous to claim that a raw moral duty of corrective justice exists. Nevertheless, I will take the existence of raw moral corrective justice as read.

Gardner suggests that law must determine *which* rights and duties of corrective justice will be institutionalised, and thereby necessarily performs an allocation. To give effect to all moral duties of corrective justice would be undesirable, and excessively demanding. Thus, just as law deals in ‘assignable’ responsibilities, effecting a distribution, so law must ‘institutionalise’ only some rights and duties, involving a selection between them. Corrective justice itself is, therefore, distributed by private law, falsifying Weinrib’s assertion that distributive and corrective justice cannot be mixed in private law.[[41]](#footnote-41)

Does it make this move for a different reason from the reasons why tort law engages assignable responsibility? The selection between different potential claims of corrective justice appears to be motivated at least partly by scarcity: there are not enough resources for all claims to be permitted: ‘Even among those who have been wronged, the question is always live of who should be the privileged ones who will qualify…’.[[42]](#footnote-42) But in addition, to institutionalise all duties of corrective justice would have adverse effects (both economic, and non-economic). Here, the language of ‘institutionalisation’ is used, where the discussion of responsibility was premised on ‘assignability’. The language of ‘institutionalisation’ tends to imply that it is the same thing (corrective justice with the same meaning) that is being given effect. That was not quite the case in relation to responsibility, where different notions of responsibility, with different purposes, were engaged. But still, in relation to responsibility, there was a question of the kinds of responsibility that it is reasonable to *demand*. As with corrective justice, it would not be reasonable to require agents to respond to all reasons at once.

 The discussion in relation to justice, and the language of ‘institutionalisation’, suggests a particular process: a claim of corrective justice which exists outside the law, is either given effect, or not given effect, within the law. While basic responsibility was very different from assignable responsibility (both within and outside the law), it seems that raw moral duties of corrective justice are pretty much in the same form as legal duties of corrective justice. Further, it would appear that the law is ‘recognising’ some of these duties, rather than creating them – while the assignment of responsibilities (unlike their attribution, perhaps) seems to be an act of creation. That act of creation may depend upon basic responsibility, unless such responsibility can be deemed to apply, but it is not the same form of responsibility that is being assigned by the law. For example, strict duties may be imposed at law irrespective of whether or not a strict moral duty might be thought to exist in the same circumstances, and irrespective of any diverging views on this point. Responsibility in law, on this account, does not require or reflect moral responsibility of the same form. At the same time, legal duties of corrective justice help to constitute raw moral duties of corrective justice, by their recognition. So these notions seem much more similar than basic responsibility, and assignable responsibility. Perhaps this reflects the fact that the notion of corrective justice already looks at both sides of a relationship, and perhaps prefigures some sort of consequences – captured in terms of the ‘continuity thesis’ (there is a duty to take some sort of action to reflect the initial failure to fulfil a duty, on which corrective justice depends). That is a strikingly complex idea given its attachment to something that just ‘is’.

Raw moral rights and duties of corrective justice are said to give rise to no questions of distribution, because nothing relevant has been distributed. This mirrors the non-allocation of basic (as opposed to assignable) responsibility. The fairness of raw moral duties, like the fairness of basic responsibility, cannot be complained of, because (it is argued) nobody has made a distribution – even if the underlying pattern of resources is unequal. Gardner agrees here with Weinrib’s observation that ‘corrective justice operates on entitlements without addressing the justice of the underlying distribution’. [[43]](#footnote-43) I’m not sure about this, or at least of its implications. I wonder if something as complex as a moral duty of corrective justice might be susceptible to underlying patterns, even if those underlying patterns are not perceived in terms of ‘justice’. For example, it seems to me that the implications of the broken promise to take the children to the beach might be read subject to the question of the pattern of leisure time enjoyed by parent and children respectively, even in ‘raw morality’ (understood here to mean, outside the law). The underlying pattern might not affect the primary duty to keep your promise, yet could still make a difference to what duty of corrective justice, if at all, is thought to arise from its being broken even in ‘raw morality’. More recently, Gardner has argued that the law may coherently and fairly protect interests that people already have, even where this creates opportunity costs, because of the inherent, and underestimated, value of security.[[44]](#footnote-44) This, it seems to me, is a better explanation for the defensibility of corrective justice, than the notion that distributive concerns are simply irrelevant in the ‘raw moral’ world: arguably, there is no part of the moral world which is immune to questions of distribution; but the form of corrective justice may still retain its significance. This, it seems to me, is more consistent with Gardner’s general world view, in which reasons which operate within the law are also likely to operate in other areas of life. The notion of basic responsibility was justified by an understanding of human agency, assisting its claim to be ‘basic’. Basic responsibility was ‘basic’ in more than one possible sense. It is the entry level of responsibility, and the common denominator of all responsibility, as well as not requiring any intervention to fix or allocate it. The notion of corrective justice, even outside the law, would struggle to attain such a basic status and it strikes me that the reasons for corrective justice must compete with other reasons outside the law, just as inside it. The special value of security may help explain its existence, for example; but even outside the law, or perhaps especially so, it must surely compete with other values and considerations.

Setting these doubts aside, it seems that on Gardner’s account these raw moral duties of corrective justice, like the duties breached, just ‘are’. That makes the contribution of law to the ‘fixing’ of raw moral duties of corrective justice a little complicated. Does the law in this instance simply make more apparent what existed, in any event? Alternatively, what the law does first is to reach a *judgment*, to the extent that it interprets duties of corrective justice; it is an *allocation* only to the extent that it decides which are actionable. As with responsibility, this introduces a potentially difficult contrast between what is *judged* to be the case (more akin to attributed than to basic responsibility?), and what is *decided* to be the case (allocated; given effect).

Following Gardner’s logic, the question facing the law of tort appears to be, whether to give effect to the raw moral duty of corrective justice. Will this duty be ‘institutionalised’, with all the legal implications of that, including not only remedies, but the power and resources associated with conferring a legal claim? This looks different from the notion of assignment – or assignability – contained in the discussion of responsibility. Assignable responsibility is not the ‘same’ responsibility as basic responsibility. It at least appears that it is the ‘same’ duty of corrective justice that is institutionalised. To what extent is this merely an implication of the language used (‘institutionalisation’)? Because law has a special role in fixing or making more determinate moral duties of corrective justice, I think the truth is complex. At the very least, it strikes me that no ‘pre-existing’ recognition needs to exist, for the law to find a duty of corrective justice. Perhaps the implication is that each claim for a remedy in tort contains at least an *implicit* argument that there is a raw moral duty, to which law ought to give effect – in the same way that the law must (at least fictionally) ‘hold that’ someone is basically responsible, in order to find them legally responsible. The judgment about what ‘is’, and the decision about what to do about it, are to be reached within the same legal judgment.

If that is right, then tort judgments include both moral and political elements. For lawyers, the live question is how these work. Success in the tort claim would fix or make more apparent the existence of a raw moral duty (would it now be a cooked moral duty?) of corrective justice; but failure in the claim need not amount to denial that such a raw moral duty exists. There is a potential gap between legal duties of corrective justice, and moral ones, in the sense that the law may decide not to give effect to a morally good claim for corrective justice. This, it seems to me, is a sound observation, and it reflects Gardner’s arguments, in relation to the negligence standard, that nobody can attend to all reasons at once; and that the law must make reasonable demands. Both responsibility, and justice, are potentially more extensive than law could reasonably recognise – and if it did, it would have unfortunate effects. To reflect all of them should not even be an aspiration. But, how likely is it that the law will enter the business of stating that a raw moral duty *of corrective justice* exists, but not the remedy? It is much more likely that there would be maximum effort to package the answer as consistent with corrective justice, for example, as an argument that the primary wrong in a particular context nevertheless did not import a duty of corrective justice.[[45]](#footnote-45)

To my mind, there is also a potential contextual doubt about ‘raw’ moral duties which somewhat mirrors the questions about basic responsibility asked above. Here, I return to the deferred question, of the extent to which the ‘everyday’ sphere is realistic. All relationships are experienced in some sort of institutional setting (possibly apart from freakish ones such as those with one dimensional characters dangling over a vat of hot liquid). Arguably, the family setting is no more nor less ‘everyday’ than employment or acting as consumer, or consulting a doctor or accountant. It seems quite possible to me that questions of allocation/ distribution arise within the family setting, in the same way that assignable responsibilities are accepted to arise outside the law. I don’t think this destroys the point that is being made about the distributive character of law’s decisions about corrective justice. But, putting these two observations together, I suspect that the notion of ‘raw moral’ duties of corrective justice is largely conceptual rather than empirical.

The need for those involved in the law to ‘distribute’ corrective justice is fundamental, because it means that institutionalisation of corrective justice raises questions of distributive justice, contrary to the ‘purist’ notion that corrective and distributive justice cannot be mixed. That is only one of the routes Gardner takes to questioning the purity of corrective justice. Another route –appearing as a teaser in ‘Part 1’ where the institutionalisation of corrective justice did not – was the doing of ‘localised’ distributive justice between parties. This may occur, for example, in relation to contributory (proportionate) negligence.[[46]](#footnote-46) But how far does the overall dual activity – of making a raw moral judgment, and a more practical but still moral legal (distributive, and therefore political) judgment - gain its reflection in the law? If the claim really only crystallises through processes of law (or, let us remember, legal reform[[47]](#footnote-47)), then legal decision-makers are unlikely to gain much support from the existence of an observable raw moral duty of corrective justice.

*Legal decision-making and raw moral duties*

Gardner argues that in making their choices about which raw moral duties to institutionalise, legal decision makers might very well prioritise some other factors, over justice. Asking whether institutionalisation has been done well includes asking whether it has been done “prudently, humanely, efficiently, honestly, and so forth, sometimes at the expense of its justice”.[[48]](#footnote-48) Apart from the fact that this list includes the old foe, efficiency,[[49]](#footnote-49) it is notable that ‘justice’ is not the sole consideration, and not always the dominant consideration. ‘Justice’ in this sense will not be done without consideration of other factors and consequences. But we can take it that the justice of an institutionalisation is not *corrective* justice. What we are asking is whether or not to institutionalise the relevant duty of corrective justice.

*Moral considerations, political considerations, and institutionalisation*

Earlier, we noted that tort decision-making according to the logic of Gardner’s account is both moral and political, and that there was scope to ask how this might operate. We could think about this through some high level tort cases, which either create new torts, or new areas of liability, or don’t. In the English Court of Appeal’s decision in *X v Bedfordshire*,[[50]](#footnote-50) Lord Bingham (then Bingham LJ) said that the policy with first call on the law is that wrongs should be righted. For a dictum delivered in a dissenting judgment in the Court of Appeal, where the majority was vindicated in the House of Lords, this dictum has been strikingly often repeated. But it is only ever a starting point – admittedly it is usually brought out by judges who want to expand liability, but even so sometimes it wins the day, sometimes it doesn’t. In the two recent cases of *Crawford Adjusters* and *Willers v Joyce*,[[51]](#footnote-51) it enjoyed more success than in *X v Bedfordshire* itself – possibly unprecedented success, as it was used in the process of creating a new tort (in English law) of malicious civil prosecution, after direct weighing of justice against other pressing considerations. Rarely does the argument that a novel claim is ‘just’ provide sufficient argument in its favour, but these two decisions, where policy was tested against a ‘starting point’ of (in)justice, perhaps come the closest. In an area of law much closer to *X v Bedfordshire*  - the tort duties owed to police to prevent and investigate crime – the Supreme Court has recently preferred to fold policy questions into the notion of corrective justice, arguing that there simply is no duty in such cases to *act positively*, consistent with the rest of the tort of negligence.[[52]](#footnote-52) This could be an argument that there is no ‘raw moral’ duty to do so – or an ‘in between’ appeal to a legal position about corrective justice generally, without recourse to additional sorts of reasons (or indeed, underlying ones).

To stay with the notion of ‘wrongs being righted’, it has been suggested that if we think of wrongs as ‘legal’ wrongs, Lord Bingham’s dictum is rather circular. An action isn’t a wrong unless there was a duty to breach. But from a perspective informed by Gardner’s analysis, this might not hit the point. Perhaps the point is that the law gets to choose whether or not to right wrongs after all. It identifies ‘raw moral’ rights and duties of corrective justice, and determines whether to give effect to justice, in that sense, in the particular case. There is a difference of view about which way the balance goes – a presumption that justice comes first, or not. There are energetic arguments to the effect that reasons of policy, for example, are unnecessary, and that corrective justice, perhaps through a more nuanced theory of rights, can do all the work. On Gardner’s approach, a whole lot of reasons that might be dismissed as ‘policy’ are in fact part of political morality and the fact that they are not reasons of ‘justice’ doesn’t mean that they are irrelevant, or even *external* to private law. They are an essential aspect of ‘institutionalisation’. And this, while contrary to orthodoxy, strikes me as both attractive, and helpful.

The reasoning structure proposed by Gardner can be observed at work in private law. Some reasons are recognisably reasons of justice, while others are not, yet retain both relevance and, subject to rule of law considerations, legitimacy. But the point about a ‘wrong’ being a legal notion which can’t lead the definition of what is a legal wrong is sound in another respect. While not everything can be a reason of corrective justice (there are constraints), the content of corrective justice in a given case might surely be uncertain. The *boundary* between considerations of corrective justice, and other considerations which will help to determine how rights and duties of corrective justice will be distributed, is highly uncertain. For example, Gardner suggests that when courts consider claims to corrective justice, they think analogically to determine whether it would be distributively fair to benefit someone in the claimant’s class, relative to others who have had claims allowed, or rejected. These are distributive considerations. It strikes me that when reasoning by analogy in precisely this way, courts may very well be seeking guidance on what corrective justice properly demands. Reasoning by analogy is not always distributive reasoning, and the boundary between these two purposes might be hard to identify, certainly in the minds of the judges.

The important point however is that both reasons of corrective justice, and reasons associated with distribution, are properly and unavoidably part of the law of tort. Accepting this, tort scholars can disagree about where the boundary lies – some more work might be done by a notion of rights in relation to economic losses, and some less work might be done by ‘public policy considerations’, but at the same time, corrective justice cannot specify the full range of tort outcomes, nor can tort law dispense with corrective justice. I don’t think it will often be the case that a ‘raw moral’ duty will simultaneously be recognised, and left unfulfilled. Rather, it strikes me that raw moral duties of corrective justice are typically only crystallised in a legal claim.

**Conclusions**

In relation to both responsibility, and corrective justice, Gardner’s analysis adopts an intriguingly similar structure, in order to achieve a similar goal: to demonstrate the political and distributive aspects of the law of tort; and to demonstrate that there is no need for a moral account to avoid this. However, the breadth and significance of the notion that tort law is political are not fully explained. For reasons I have suggested, a contrast with the ‘metaphysical’ may not take us very far. What then seem to be the unavoidable political elements of the law of tort? These elements appear to lie in the fact that tort law’s decision-makers will allocate and distribute both corrective justice, and responsibility; and that they will make parties responsible, rather than simply finding them to be responsible. In respect of responsibility, the notion of assignable responsibilities is both significant, and a good fit with tort reasoning. Much might be learned about the law of tort by pursuing this notion of assignable responsibilities. But the boundary with attribution of responsibility, and the possibility that tort law deals in this too, remains to be explored. This exploration could be revelatory.

In respect of corrective justice, it strikes me that law more often constitutes or fixes corrective justice, rather than giving effect to (or cooking) observable ‘everyday’ (or ‘raw’) varieties, and that questions couched in terms of corrective justice will typically crystallise through legal claims.[[53]](#footnote-53) There are so many questions surrounding the demands of corrective justice in any given situation that the raw variety may simply not exist – some baking is always required, even within a family setting. It may also be expected that courts will not newly recognise moral duties of corrective justice simply in order to go on and deny claims, so that the boundary between corrective and distributive elements of the decision will tend to be hard to identify. Above all however, Gardner’s contributions seem to me to pursue some important and attractive unorthodoxies: that private law decisions are very often distributive in nature; that they are properly seen as ‘political’; and that they are properly subject to a wide range of substantive reasons, relatively untrammelled by formal constraints.

1. \* Professor of Law, University of York. I would like to thank all the participants at the Symposium for John Gardner at Wadham College on 15-16 March 2018 for their contributions and discussion, and John Gardner in particular for his reflections. Particular thanks also to colleagues Matt Matravers, Richard Nolan, Charlotte Ellis, Ben Fitzpatrick, and Isra Black for their comments and support. [↑](#footnote-ref-1)
2. J. Gardner, *Tort Law and Its Theory*, in J TASIOULAS (ed)*,* THE CAMBRIDGE COMPANION TO THE PHILOSOPHY OF LAW (Cambridge University Press, 2018). [↑](#footnote-ref-2)
3. Though this article, and the contributions it considers, are chiefly concerned with tort law, some of Gardner’s work is broader, contemplating ‘private law’ and particularly the law of contract also: JOHN GARDNER, FROM PERSONAL LIFE TO PRIVATE LAW(Oxford University Press, 2018). [↑](#footnote-ref-3)
4. For example, moral theories may stand in contrast to economic theories; ‘internal’ accounts may be contrasted with ‘external’ accounts; and ‘rights-based’ accounts may be contrasted with ‘policy-based’ approaches. On internal and external accounts, see for example Steve Hedley, *Looking Outward or Looking Inward? Obligations Scholarship in the Early Twenty-First Century*, in ANDREW ROBERTSON & HANG WU TANG (eds.), THE GOALS OF PRIVATE LAW (Hart Publishing, 2009), 193-214. Hedley concludes that ‘It is the internalists who have retreated to their bunkers, and have recently dug in deeper. They need to rediscover that, like it or not, they are part of a wider political system’ (214). Gardner’s approach beckons moral theory out of its bunker. [↑](#footnote-ref-4)
5. Approaches based on economic efficiency have been much less influential in UK tort law, than in North America. Rather, the enemy outside the bunker tends to be policy-aware scholarship more generally. [↑](#footnote-ref-5)
6. Note 2, Chapter 1. [↑](#footnote-ref-6)
7. Ibid., 11. [↑](#footnote-ref-7)
8. J. Gardner, *The Negligence Standard: Political Not Metaphysical* (2017) 80 M.L.R. 1-21 (‘The Negligence Standard’), 2: ‘Governmental agents answer to all valid reasons for action, just like you and me”. [↑](#footnote-ref-8)
9. Note 2, 10-14. [↑](#footnote-ref-9)
10. Note 2. [↑](#footnote-ref-10)
11. The discussion of responsibility and justice in relation to private law does of course draw on existing debates between Gardner and others of criminal responsibility, and justice more generally. I focus here on the issues in relation to tort, with anxious regard for these prior debates. [↑](#footnote-ref-11)
12. On responsibility, see ‘The Negligence Standard’; on corrective justice and its institutionalisation, see primarily John Gardner, *What is Tort Law For? Part 2: The Place of Distributive Justice*, in JOHN OBERDIEK (ed), PHILOSOPHICAL FOUNDATIONS OF TORT LAW (Oxford University Press, 2014) (‘WTLF 2’). This of course develops the ideas in John Gardner, *What is Tort Law For? Part 1: The Place of Corrective Justice* (2011) 30 LAW AND PHILOSOPHY1 (‘WTLF 1’). [↑](#footnote-ref-12)
13. Among others, *The Mark of Responsibility*, in J. GARDNER, OFFENCES AND DEFENCES: SELECTED ESSAYS IN THE PHILOSOPHY OF LAW(Oxford University Press, 2007). No hard and fast line between criminal and civil law contexts is generally drawn in the literature to which these pieces contribute. But the work I address here is specifically focused on some key aspects of the law of tort, and this marks a change. [↑](#footnote-ref-13)
14. *The Virtue of Justice and the Character of Law*, in JOHN GARDNER, LAW AS A LEAP OF FAITH: ESSAYS ON LAW IN GENERAL(Oxford University Press, 2012). [↑](#footnote-ref-14)
15. Note 2, 15. [↑](#footnote-ref-15)
16. The plural is most appropriate here, for reasons explored below. [↑](#footnote-ref-16)
17. Gardner argues that this is in fact too narrow a reading, and that some allocations arise inadvertently (WTLF 2, 7, differing to this extent from Guido Calabresi and Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, HARVARD LAW REVIEW85 (1972) 1089). But choice or decision strike me as the primary means by which rights and duties are institutionalised, and in any event, the allocation is evidently the result of legal decision-making whether advertently or not. [↑](#footnote-ref-17)
18. Any verb associated with this causes me some anxiety. I have said it ‘arises’. At one point, responsibility of parents is said to ‘descend’: The Negligence Standard, 6, ‘Parental responsibility … descends upon parents without the exercise, by themselves or by others, of any normative powers’. This is arguably, however, an assignable duty, relating to a particular role (parenthood). [↑](#footnote-ref-18)
19. The Negligence Standard, 7. [↑](#footnote-ref-19)
20. J. Gardner, *Relations of Responsibility*, in ROWAN CRUFT, MATTHEW H. KRAMER, AND MARK R. REIFF (eds), CRIME, PUNISHMENT, AND RESPONSIBILITY: THE JURISPRUDENCE OF ANTONY DUFF (Oxford University Press, 2011), 87. [↑](#footnote-ref-20)
21. Ibid., 88. [↑](#footnote-ref-21)
22. See Gardner’s reference to the ‘complex psychology of blameless but responsible agency’ (The Negligence Standard, 18). [↑](#footnote-ref-22)
23. The Negligence Standard, 10: basic responsibility is ‘normally’ a condition of legal responsibility; 12, referring to ‘the basic responsibility condition’. [↑](#footnote-ref-23)
24. Ibid. As just implied, Gardner allows that the ‘holding responsible’ could be fictional. [↑](#footnote-ref-24)
25. The Negligence Standard, 6: ‘I am given responsibility or, in a different idiom, made responsible’. [↑](#footnote-ref-25)
26. The Negligence Standard, 9. [↑](#footnote-ref-26)
27. R.A. Duff, *Who is Responsible for What, to Whom?*, OHIO STATE JOURNAL OF CRIMINAL LAW 2, 42; MATT MATRAVERS, RESPONSIBILITY AND JUSTICE(Polity Press, 2007), xx. [↑](#footnote-ref-27)
28. C Kutz, *Responsibility*, in JULES COLEMAN AND SCOTT SHAPIRO (eds), THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW (Oxford University Press), 550; MATT MATRAVERS, note 26, xxx. Duff also argues that working notions of responsibility are inherently relational: R.A. DUFF, ANSWERING FOR CRIME: RESPONSIBILITY AND LIABILITY IN THE CRIMINAL LAW(Hart Publishing, 2007). [↑](#footnote-ref-28)
29. The Negligence Standard, 16. [↑](#footnote-ref-29)
30. The Negligence Standard, 6. [↑](#footnote-ref-30)
31. Used in particular by Lord Hoffmann in relation to positive duties, in *Stovin v Wise* [1996] AC 923. [↑](#footnote-ref-31)
32. [1932] AC 562. [↑](#footnote-ref-32)
33. Note 2, Chapter 5. [↑](#footnote-ref-33)
34. The Negligence Standard, 1. [↑](#footnote-ref-34)
35. Note 17. [↑](#footnote-ref-35)
36. The Negligence Standard, 1-3: “Institutional Actions, Ordinary Reasons”. [↑](#footnote-ref-36)
37. Note 2, Chapter 5. For the link between security and risk in tort law, see J. Steele, *Risk Revolutions in Private Law*, in ANDREW ROBERTSON, GRAHAM VIRGO AND SARAH WORTHINGTON**,** (eds.), REVOLUTION AND EVOLUTION IN PRIVATE LAW (Hart Publishing, 2018). [↑](#footnote-ref-37)
38. WTLF 1; WTLF 2. [↑](#footnote-ref-38)
39. Consider road traffic, which could not be more everyday. [↑](#footnote-ref-39)
40. This is the example of a parent’s broken promise to take the children to the beach, where a student is in trouble and the promise has to be broken because of other considerations (and duties). Gardner argues that a raw duty of corrective justice arises to provide a ‘next best’ solution. [↑](#footnote-ref-40)
41. E. WEINRIB, THE IDEA OF PRIVATE LAW(Harvard University Press, 1996). As Gardner explains, this is connected to Weinrib’s embrace of formal coherence in private law, so that if corrective justice underlies one norm of private law, it must underlie the rest: J. Gardner, *The Purity and Priority of Private Law* (1996) 46 THE UNIVERSITY OF TORONTO LAW JOURNAL459-493, 470-471. Gardner himself does not (and could not, given his embrace of conflict of values and reasons) embrace ‘coherence’ in this sense as a goal or essential value of private law. [↑](#footnote-ref-41)
42. WTLF 2, 10. [↑](#footnote-ref-42)
43. Gardner, WTLF 2, p.7, citing Weinrib, *The Idea of Private Law*, 80. [↑](#footnote-ref-43)
44. Note 2, Chapter 5; see also discussion in text to n.36. [↑](#footnote-ref-44)
45. Famously within the English law of tort, the ‘two stage’ approach in *Anns v Merton* [1978] AC 728 resembled this sort of position: in principle the claimant succeeds, but as a matter of policy, they may nevertheless be denied a remedy. This is partly why this was replaced in *Caparo v Dickman* [1990] 2 AC 605 with an approach which did not have ‘stages’, only criteria or ‘prongs’. [↑](#footnote-ref-45)
46. WTLF 1, 13. [↑](#footnote-ref-46)
47. It strikes me as a further attraction of Gardner’s contributions in relation to tort that decision-making is equally apt to include contributions by legislators and those involved in law reform, not solely judges. [↑](#footnote-ref-47)
48. WLTF Part 2, p.8 [↑](#footnote-ref-48)
49. Thus considerations that are dismissed as not sufficient values – such as efficiency – are nevertheless recognised as relevant. But it may be that this is simply a different notion of efficiency – not dependent on ‘values’ but on effectiveness at limited cost. [↑](#footnote-ref-49)
50. [1994] 2 WLR 554. [↑](#footnote-ref-50)
51. [2013] UKPC 17; [2016] UKSC 43. [↑](#footnote-ref-51)
52. *Michael v Chief Constable of South Wales* [2015] UKSC 2. Lord Bingham himself – without success – preferred in this category of case to try to define some limited duties: *Smith v Chief Constable of Sussex* [2008] UKHL 50. [↑](#footnote-ref-52)
53. If so, this would recall the arguments of Tony Honoré, *The Dependence of Morality on Law* (1993) 13 O.J.L.S. 1-17. [↑](#footnote-ref-53)