

# Is an ahistorical corrective justice theory useful in explaining modern private law?

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*2013 UK IVR Conference, QMW, 12-13 April*

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## Abstract

Modern corrective justice theory is something of a puzzle. Not, to be sure, when considered as a theory of justice: recent accounts of the theory stand in a long and rigorous tradition. Nor is it necessarily to the point that very different accounts of justice could be given. The puzzling matter is not, then, the account of justice that is given, but its relation to the legal system. Corrective justice is presented as the explanation of modern private law, and while it is not contended that the modern law in all respects conforms to a corrective justice model, nonetheless it is assumed that these deviances are relatively rare. Indeed, departure from a corrective justice model is taken to be a ground for legitimate criticism – so there is a double assumption being made, that the law is mostly based on corrective justice, and that it ought wholly to be so based.

The historical dimension is absent from this. Obviously enough, the extent to which the law conforms to a corrective justice model has not remained constant, and (given that the precise expectations we have of the legal system are also in constant flux) what we think that law ought to do is not static either. It might be tempting to assert that corrective justice is simply an outdated model for the law: that corrective justice is a good model for Western legal systems of (say) the 18th century, but of lesser use (though still some use) today. But current theories are not framed as explaining the law of any one period (or, indeed, of any one legal jurisdiction) and are hard to treat as such. And the problems they address are modern ones, not ancient ones. For example, the idea that “the law of tort” (as opposed to some individual rules within it) might require explanation as a unit is a distinctively modern one – certainly few scholars before the 1970s seem to have regarded the “explanation” of tort as something constituting a “problem” in need of a “solution”. And even now, that felt need is hardly universal – if corrective justice theorists are pre-eminent amongst those claiming to “explain” private law, they are also pre-eminent in seeing the need for such an explanation. Most legal scholars, indeed, happily work in the area without regarding the absence of agreed explanation as a problem in the first place.

A very different account of the modern system might be given. Corrective justice is essentially backward-looking: it waits until harm has occurred (an injury, a disappointed commercial expectation) and then seeks to resolve any dispute as to who should bear the costs arising from it. And indeed this was what the common law did for centuries. But as modern times arrived, in law as in many other contexts, it became possible to look forward as well as backwards: as we became more technically capable, we learned not merely to cure accidents quicker, but to prevent more of them in the first place. And so Law has many additional functions as well as merely adjudicating on accidents after they happen. Modern corrective justice theorists apply a subtle blinkering to their own vision, agreeing that Law serves many functions but that the function of private law remains what it always was, and as backward-looking as ever. The law does much (they would agree) to keep snails out of ginger beer bottles, but private law retains its distinctive function of clearing up the mess after one snail gets through. Yet if there is such a distinct area, the corrective justice theorists are inarticulate as to precisely where its boundaries are. And cases that seem to evidence the contrary (by evincing a forward-looking perspective in the court which decided them, in the course of resolving private law issues) are criticised for this. The corrective justice theorists hear the message of the modern law, but their response is to shoot the messenger.

At the core of the corrective justice approach is the concept of the responsible individual; contact is made with the modern law by asking what any one pair of individuals owes to each other, what the person who turned out to be the defendant owes to the person who turned out to be the plaintiff, and vice versa. But it is characteristic of the modern law that it casts responsibility so much broader, observing that (in a typical case) a number of people would have been able to prevent the accident. It is actually quite rare for the person directly responsible for the harm to pay damages, as corrective justice seems to demand: insurers, employers or state bodies step in to make good the award. One the main tenets of corrective justice theory – that one cannot complain in the abstract of injustice, but must identify the person primarily responsible for the injustice, who must then be made to pay – has been rejected by the modern law. This is (emphatically) not because the modern law lacks a notion of responsibility, but because modern notions of responsibility are radically different from those which corrective justice demands. If individual wrongdoing is of a predictable and regular sort, then the authorities are under a duty to predict it and regulate it. In short, corrective justice does not describe modern private law, and can only be made to appear to do so by a selectively blinkered vision: by emphasising the rules which fit in with a corrective justice approach, and ignoring others which do not. How much value there is in such an approach, is the subject of this paper.

Of all the subjects studied in the modern legal academy, Tort and Contract can probably claim to be the closest to their pre-20<sup>th</sup> century roots. Most legal subjects are much younger: Labour Law, Administrative Law, Social Security Law were all 20th-century creations, and it is not really to the point that the *courts* were concerned with those topics long before. Constitutional Law, Property, Family Law and Criminal Law have been in the academy longer, perhaps as long as Tort and Contract, but have changed utterly over that period – a trained 19<sup>th</sup>-century constitutionalist or family lawyer would be taken aback, perhaps even appalled, at what those subjects have become. Tort and Contract lawyers, not so much. A 19<sup>th</sup>-century tort lawyer might be startled at how much the law had expanded its range today, but the general coverage of issues would not be much of a shock; and a 19<sup>th</sup> century contract lawyer might be very pleasantly surprised at how little had changed, at how the basic approach is remarkably similar, and that statute had made so few inroads into basic common law principles.

Contract and tort, then, develop slowly when they develop at all, and this even though they are very active areas when it comes to litigation. One might wonder what there is left to discover about them, at least at the level of fundamental principle. This is why it is so surprising that in recent years there has been so much excitement around the theory of corrective justice that is now being proposed to explain them. It is not a new theory, to be sure – indeed, several of its proponents refer us back several centuries, to Immanuel Kant or even to Aristotle, to explain their approach. However, it is now being proposed as the proper explanation of basic private law institutions, in preference to what are seen as modern heresies such as that they serve the common good, or are economically efficient, or something of the sort. Indeed, the antiquity of the theory may even be seen as an advantage, allowing its proponents to hint that they are propounding not simply truths, but *timeless* truths.

## What is corrective justice?

There is no canonical version of corrective justice theory as applied to private law, and much of the literature is taken up with debating different versions of it<sup>2</sup>. Nonetheless, the main elements of the approach are clear enough.

Suppose A deliberately hits B, and B successfully sues A for compensation. What account can we give of why the law allows a remedy in such a case? One approach is to talk of the social purposes of the law, of how the law benefits us all in general. It is good that hitting people is discouraged – so it makes sense to allow a legal remedy that inconveniences A, and so perhaps deters A (and others) from hitting people so readily. B is perhaps injured and so deserves our sympathy and our help: an award of money might serve both purposes, providing recognition that B has suffered and covering some of the expenses incurred in consequence. So we *can* justify an award of damages – taking money from and giving it to B – by reference to general aims pursued by the legal system, and placing the matter in a broader social context.

But, say the corrective justice theorists, to do so is to miss the point. It is not a coincidence that we want to take money from A *and* we also want money to go to B: these things are related. And if we were really pursuing these abstract purposes, rather than something intrinsic to the relationship between A and B, they would not coincide in this neat way. What is the best way to deter A from random violence might be a serious question with an uncertain answer; simply imposing a monetary fine might not be the best way to do it. Equally, if we were really attentive to B's needs, this might not be the best way of fulfilling them. And it surely cannot be seen as a mere accident that the sum we wish to take from A is identical with the sum we wish to award to B. We are forced, therefore, by the law's own logic, to the conclusion that it is not a matter of A alone or B alone, but a matter of what is just as between the two of them, excluding wider considerations.

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<sup>2</sup> An important assertion of the theory is Ernest Weinrib, *The Idea of Private Law* (Cambridge: Harvard University Press, 1995) (hereafter "Weinrib, *Idea*"); see also the same author's *Corrective Justice* (Oxford: Oxford University Press, 2012). Weinrib's examples in *Idea* tend to be drawn from tort, though he also sketches out how they apply to contract (*Idea* 50-53 and 136-140). A similar theory is espoused by Beever (see especially "The law's function and the judicial function" (2003) 20 *New Zealand Universities Law Review* 299), who has applied it in detail to one particular area of tort (*Rediscovering the Law of Negligence* (Oxford: Hart Publishing, 2007) – hereafter "Beever, *Rediscovering Negligence*"). In principle the theory is applicable to all of the law of obligations (tort, contract, restitution) and property. For other relevant work strongly influenced by corrective justice see Stephen Smith, *Contract Theory* (Oxford: Oxford University Press, 2004), Robert Stevens, *Tort and Rights* (Oxford: Oxford University Press, 2007) (hereafter, "Stevens, *Tort and Rights*"), and Robert Chambers, Charles Mitchell and James Penner (eds) *Philosophical Foundations of the Law of Unjust Enrichment* (Oxford: Hart Publishing, 2009).

In corrective justice, then, the focus is on the *relationship between the parties* rather than on the parties as solitary individuals or as members of a wider community. We are interested in the wrongdoer only because he wronged the wrong-sufferer, and we are interested in the wrong-sufferer only because he was wronged by the wrongdoer. Hence, the reasons for holding the wrongdoer liable are the same reasons for finding that liability is owed to the wrong-sufferer. In corrective justice, the relationship between the parties forms a conceptual unity ...<sup>3</sup>

It is this focus on the relationship between the parties – private law’s *correlativity*, as it is termed – and its impatience with any broader social issues, that is the hallmark of corrective justice accounts. And when we look at the history of the law, this seems to point to something important – plaintiffs under the forms of action were always under a burden not simply to explain why they deserved compensation, but why they deserved it *from the defendant they were now suing*, which chimes well with corrective justice. So far, so good.

But even seen through that historical lens, any exclusive theory of corrective justice reeks of overstatement. *Of course* the law was from the earliest days concerned with the relationship between plaintiff and defendant, but *why* was it so concerned? After all, the quarrel between A and B would certainly resolve itself one way or another even without the law’s aid, perhaps going in favour of whoever had the larger cudgel, or the greater number of aggressive outraged relatives. While achieving justice between the parties was no doubt a consideration, the public interest was also served: providing a public forum for resolving grievances is one way of preventing other methods of dispute resolution, and so avoiding a threat to public order. Achieving corrective justice and maintaining public order are not opposed purposes, or at least not usually. So while it is legitimate to see corrective justice as playing a role in the law, it seems an error to conclude that this is *at the expense of* public purposes. Where corrective justice is part of the law, it is (at least in part) because it serves the public purpose that it should do so.

And (coming up to the present) it seems to sell modern *public* law short, to say that it is not really concerned with the relationship between A and B, or fairness in that relationship. On the contrary, the public law response seems equally closely tied to it, perhaps more so than the private law response. A and B’s relationship and previous dealings will be crucial in determining what defences are open to A, and how seriously the assault is viewed if there is no defence. An assault on a single occasion might demand a quite different response from an assault which was the culmination of a series of harassing actions. And, of course, any close relationship between A and B changes the picture entirely – hitting your boss, hitting your drinking companion, hitting your child, and hitting your spouse, are all serious matters, but serious matters likely to lead to quite different types of legal responses. It is nonsense, therefore, to say that public law is not concerned with the relationship between the parties. It is nonsense of a sort we are only likely to speak if we accept the false distinction that corrective justice theorists try to force on us, that we have to *choose* between following broad public purposes and doing private justice between the parties. The two go hand in hand.

This raises in acute form the question of why corrective justice is *now* an issue, when it has always been one factor of importance in the law but never the whole truth. Why, suddenly, around the turn of the millennium, did we see a sudden insistence that it is the key to the whole of private law, and that anyone who sees a significant role for public purposes within private law is making a mistake? This is very odd, especially since the overt role of the public within private law has been steadily growing for more than a century. We can speculate at various factors that might *now* make a corrective justice approach more attractive: the growth in status of public law, perhaps leading private lawyers to seek a similar status lest they simply be absorbed into public law; the growing sophistication of law-and-economics, which perhaps leads non-economists to feel they must develop a similarly sophisticated counter-theory<sup>4</sup>. But whatever the reason, the emergence of a vocal corrective justice theory is clear enough, as is its influence in a wide variety of writing on tort and contract. And its leading feature has been the insistence on the *exclusivity* of corrective justice explanations – corrective justice is presented not as *part* of the explanation of private law, but as a *complete* explanation.

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<sup>3</sup> Beever, *Rediscovering Negligence* 46 – emphasis in original, footnote omitted.

<sup>4</sup> Any serious account of relevant factors would have to distinguish, perhaps rather sharply, between different jurisdictions.

## Assumptions

There are two fairly persistent assumptions by writers of this type of work. Firstly, their assumption that their subject-matter is rigidly defined and requires some unitary explanation; and secondly, a reluctance to commit themselves to a particular place and time. So a typical corrective justice theory of tort is adamant that tort is a coherent intellectual unity, but would be vague as to which jurisdiction it was describing, or at what date this description was being applied. These two assumptions are not usually dwelled upon, rather they set the scene for the main theme, namely that corrective justice provides the best explanation for whatever subject-matter is in issue.

As to the first assumption, there is a standard way of proceeding in the corrective justice mode of argument, and that is to present corrective justice as the most convincing explanation of some legal topic. What that topic is, depends on the writer. Weinrib's topic is private law: private law is wholly to be explained by corrective justice, and this includes both contract and tort<sup>5</sup>. Beever by contrast focuses on negligence, which he explains as an instantiation of corrective justice – he appears to concede (if only for the sake of argument) that other areas of tort may be based on other considerations<sup>6</sup>. Whatever the topic, however, it is the primacy of corrective justice within it that is the point of the argument<sup>7</sup>.

It should be clear – though it is not very often remarked upon – that the controversial proposition here is one which corrective justice theorists assume, rather than one that they state. To say that areas of private law are somewhat influenced, or even *heavily* influenced, by considerations of interpersonal fairness would not be controversial, indeed it would seem to state the obvious. The controversial assertion is that these considerations of interpersonal fairness *wholly explain* particular areas of law, a claim which of course requires a strong definition of what those areas are. Because it is obvious that many factors appear in legal argument, any claim for the exclusivity of one type of argument needs sharp fencing, to say which area is being so explained<sup>8</sup>.

The demonstration of the primacy of corrective justice usually takes the form of considering the merits of rival theories through this lens of the *complete explanation* – for example, the law-and-economics approach is dismissed by Weinrib because if we sought to explain *all* of private law in that way, we would miss important features of it<sup>9</sup>. It is difficult, however, to find rival theories that can clearly be said to be engaged here. Private law has no agreed borders, no exclusive subject-matter, and whether any given legal institution or rule is “private” usually depends on why we are asking the question. And there are no multiple contenders to “explain” the whole of private law: corrective justice theorists seem to be on their own here. (I am frequently assured that there are lawyer-economists with similar ambitions, but have yet to catch sight of one admitting to it. Arguments that one's preferred theory is very important, and aspersions cast on those of others, add up to a very different thing from an assertion that the preferred theory *completely explains* whatever subject-matter is in issue.) If we are convinced that “it takes a theory to beat a theory”, then we can propose a “pluralist” account of private law, which allows for many factors to influence it<sup>10</sup>. But such a theory is unlikely either to have a rigid view of what private law consists of, or to draw sharp contrasts between what private law does and what the rest of the law does. The fallacy is not that there is such a thing as corrective justice or that it is a major influence on the law, but that any one part of the legal system is truly distinct from any other part.

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<sup>5</sup> See especially Weinrib, *Idea* ch 1, where he defines his task as being “How are we to understand private law?” (1), which he takes to involve a choice between his own view and “[t]he usual view of legal scholars [...] that one understands law through its purposes” (3).

<sup>6</sup> Beever, *Rediscovering Negligence* 70-71. Beever's reluctance to pronounce on other areas of tort is of course more about defining the scope of his book than about any broader doubts as to the relevance of corrective justice: “... I should perhaps confess that it is my belief that at least almost all of the law of tort, and the private law more generally, is based on corrective justice” (71).

<sup>7</sup> So Beever contrasts his own view with a “generalist” approach to negligence, heavily reliant on policy (*Rediscovering Negligence* ch 1).

<sup>8</sup> As Dagan notes in the context of “corrective justice” accounts of property, “the integrity of private law does not require the neo-Kantians' more ambitious claims of an airtight distinction of private and public law and the exclusion of any collective or public value from our understanding of property. Quite the contrary ...”: Hanoch Dagan, “The Public Dimension of Private Property” (20 April 2012, [ssrn.com/abstract=2045487](https://ssrn.com/abstract=2045487)) 1.

<sup>9</sup> Weinrib, *Idea* 46-48.

<sup>10</sup> eg Hanoch Dagan, “Pluralism and Perfectionism in Private Law” (20 June 2011, [ssrn.com/abstract=1868198](https://ssrn.com/abstract=1868198)).

Where corrective justice theorists note this problem, they say it is a matter of coherence – if it were true that private law reflects a variety of concerns, perhaps mutually incompatible concerns, then it would be incoherent. Indeed, Weinrib seems to suggest that the law will be incoherent *whenever* it pursues several goals, because in some cases at least these goals will pull in different directions<sup>11</sup>. So, he says, it makes no sense to say that tort has the purpose *both* of compensating victims *and* of deterring wrongdoers: “If compensation is justified at all, it is justified even for injuries that cannot be deterred. Similarly, if deterrence is justified, it is justified regardless of whether injury occurs ... The two goals do not coalesce into a single integrated justification”<sup>12</sup>. But if this is what we mean by incoherence, then incoherence is a fact of life. We ask many things of our legal system, and while many of them are attainable, they are not *all completely* attainable because (as Weinrib notes) pushed to the absolute, they are not compatible with one another. The bar is being set too high – higher than corrective justice (or any other theory) can reach. As to this higher ideal of “coherence”, it is most unclear that it could ever be attained by any really-existing legal system; nor (given that it seems to require that we ignore most of the reasons why we want a legal system at all) is it obviously desirable. Humans are needy creatures, they want many things, and legal systems are one institution through which they get many of these things. Weinrib’s “coherence” seems more of a hindrance to this than a help; and a goal which is obviously unattainable needs careful justification.

As to the second assumption – the omnipresence and timelessness of corrective justice – it is often interesting to see how far you have to read a piece inspired by corrective justice concerns before you get any clue as to when or where it was written. Law differs from jurisdiction to jurisdiction; law changes from time to time. But corrective justice is (apparently) timeless and omnipresent. Aristotle and Kant are cited on the assumption that they have something to tell us about “the law”<sup>13</sup> – which, at least without further explanation, should be a deeply problematical claim for 21<sup>st</sup>-century common lawyers. There is no sense of movement, of development, in these writings – legal change is barely acknowledged, and the only development deemed worthy of comment is over how explicitly the law commits itself to corrective justice. The whole panorama of legal development is before their eyes, but they do not see it<sup>14</sup>.

Are the changes in the law over the centuries really so trivial, so respectful of the fundamentals, differing only in how deeply the courts understood what they were doing? Again, it is important not to attack straw men here. When corrective justice theorists attack modern case law developments by pointing out that they are departures from classic principles enunciated in famous old cases such as *Donoghue v. Stevenson*, it is tempting to accuse the corrective theorists of living in the past – much has happened over the last century that Lord Atkin could not have anticipated. Perhaps his vision for the law is in need of revision for a new century? But true or not, this misses the deeper point. We should not be agreeing with the corrective justice theorists that tort law was once coherent, but then saying that we no longer have a need for coherence. The truth is that tort law *never was* coherent, at least not in the sense that the corrective justice theorists use the word. Indeed, it is hard to point to any area of law that ever was, if “coherence” is of the monomaniacal sort that corrective justice theorists demand.

The pretence that the law is “coherent” in any one place or at any one time can only be carried off by ignoring the context in which law operates. And it is by ignoring context that corrective justice flourishes, trying to argue from first principles about why private law is a good thing and what form it should take, while making no assumptions about what other institutions and resources are available to deal with the problems society has. The modern world has many features unknown to Aristotle and Kant and perhaps only dimly guessed at by Lord Atkin, such as a massive governmental apparatus which consumes a large proportion of GDP and from which, accordingly, a great deal is expected by the public, an all-pervasive health-and-safety culture, and an economy dominated not by individual traders but by huge multi-national corporations. *Of course* this affects how we view contract and tort principles. And if it is argued that the law’s purposes have not really changed, the answer is that it is *people* who have purposes, and the context in which people are placed and decide what purposes are reasonable ones has changed a good deal. We

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<sup>11</sup> “Understood from the standpoint of mutually independent goals, private law is a congeries [sic] of unharmonized and competing purposes” (Weinrib, *Idea* 5)

<sup>12</sup> Weinrib, *Idea* 38.

<sup>13</sup> See eg Weinrib, *Idea* ch 4.

<sup>14</sup> Beever (*Rediscovering Negligence* 28-29) explicitly bases his understanding of negligence law on five “great cases”), which in historical order are *Palsgraf v. Long Island Railroad Co* (162 NE 99 (NY CA 1928)), *Donoghue v. Stevenson* [1932] AC 562, *Bolton v. Stone* [1951] AC 850, *The Wagon Mound (No 1)* [1961] AC 388 and *The Wagon Mound (No 2)* [1967] 1 AC 617. Beever is not much impressed by arguments stressing the historical context of decisions, even decisions well outside the four decades his “great cases” span – see for example his discussion (at 117) of *Winterbottom v. Wright* (1842) 10 M&W 546, 152 ER 588.

cannot hope to explain the modern law of obligations if we leave out the two most important things about it, namely that it is part of the legal system and that it is modern.

The assumption that private law forms a unit, not in the trivial sense that it can be discussed on its own, but in the fuller sense that we can explain it without looking to other areas of law and society, is naturally a hard one to sustain in argument. Contrary evidence is always showing up. In practice, corrective justice theorists usually seek to do it by narrowing the field of vision: leaving the explanation of something awkward to later researchers, or simply denying that the identified oddity is part of private law at all. Weinrib, whose *Idea of Private Law* concentrates on tort, identified four “problematic doctrines” which seem to contradict his theory of corrective justice: liability under *respondeat superior*, abnormally dangerous activities, nuisance, and the *Vincent v. Lake Erie* rule on preservation of property<sup>15</sup>. Other writers have identified exemplary damages as problematical<sup>16</sup>, or any explicit resort to public policy in private law reasoning<sup>17</sup>; indeed, some corrective justice theorists decline to treat remedies in a corrective justice spirit at all, confining it to explaining what private law treats as wrongful without looking at what remedy a court might give in consequence of that wrong<sup>18</sup>. Corrective justice expositions of contract are similarly selective. Accounts of “agreement” tend to focus on the case of those who meet face-to-face to hammer out terms, with barely a reference to standard terms or to implied terms<sup>19</sup>.

Of course, each of these attempts to explain away matters inconvenient for corrective justice must be taken on their merits – and if I had found them largely convincing, I would perhaps not have written this paper. But it is the big picture that I am looking at here, and (as before) it is the gaps in the big picture that are interesting. On encountering inconvenient evidence – where a judge considered a private law issue but employed an intellectual technique incompatible with corrective justice, such as asking about the implications for society generally – corrective justice theorists seem only to have three responses. One is to say that the judge was right for the wrong reason – that the judge’s reasons can be recast as corrective justice reasons. The second is to say that the case is wrongly reasoned<sup>20</sup>. And the third is to say that the case is not really about private law at all, as evidenced by the “public” nature of the reasons the judge employed to solve it<sup>21</sup>. They do not usually consider an obvious fourth possibility, namely that the case is evidence that the courts do not *always* resolve private disputes exclusively by reference to fairness between the parties, but sometimes ask whether what they are doing serves the common good.

Clearly, some of these techniques are more pernicious than others. The first is not necessarily bad at all – it is valuable to know if an apparent appeal to the public good can be restated as an argument from individual fairness (though of course one must give weight to what was actually said by the court, along with what it could easily have said). The second is perhaps more dubious – certainly if the only ground for saying that a case is wrong is that it neglects corrective justice, then surely the case stands as authority against the corrective justice view. And it certainly involves its proponents in odd assertions. Why, for example, is it the case that if you negligently damage my stash of heroin, street value £100,000, I cannot recover anything from you through action in tort? A typical lawyerly response would be that allowing recovery for its value would conflict with important principles of public policy to do with the suppression of prohibited drugs. But Beever cannot countenance such a gross intrusion of public law principles into tort, so he explains it in a different way: rather, he says, because possession of heroin is illegal, in the eye of the law my goods were worth £0, and so while in principle I can recover their value, the law’s view of its value is zero<sup>22</sup>. Of course, if it were really true that the law thought illegal drugs were worthless, sentencing practice would be very different – judges handling such cases are very well aware of the monetary value of drugs seized, and act

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<sup>15</sup> Weinrib, *Idea* 184-196.

<sup>16</sup> Allan Beever, “The Structure of Aggravated and Exemplary Damages” (2012) 23 *Oxford Journal of Legal Studies* 87.

<sup>17</sup> Beever, *Rediscovering Negligence* ch 1, and see the same author’s “Policy in private law: An admission of failure” (2006) 25 *University of Queensland Law Journal* 287.

<sup>18</sup> Gregory Keating, “Is tort a remedial institution?” (1 July, 2010, [ssrn.com/abstract=1633687](https://ssrn.com/abstract=1633687)).

<sup>19</sup> Interestingly, Smith includes a discussion of “standardized terms” (Stephen Smith, *Contract Theory* (Oxford: Oxford University Press, 2004) 307-314), but take this to refer to terms standardised by statute, barely referring to the (much more pervasive, and on any view important) phenomenon of standard terms introduced by parties to the contract.

<sup>20</sup> Examples of both the first and second can be found in Beever, *Rediscovering Negligence* 357-364, discussing negligence liability in a context where insurance was clearly very much to the forefront of both the parties’ and the judges minds.

<sup>21</sup> This argument pervades Beever’s objections to exemplary damages, in Allan Beever, “The Structure of Aggravated and Exemplary Damages” (2012) 23 *Oxford Journal of Legal Studies* 87, esp 102-104.

<sup>22</sup> Beever, *Rediscovering Negligence* 382.

accordingly. The law does *not* treat illegal drugs as worthless, and indeed its treatment of drug trafficking would be nonsensical if it did<sup>23</sup>. The fact that corrective justice theorists are driven to such desperate fictions is evidence of how unwilling they are to recognise public policy considerations even when they are glaring.

Most worrying is the third argument, that if a case cannot be reconciled with corrective justice then – right or wrong – it cannot be part of private law. This *is* pernicious, because it reduces corrective justice theory to an uninteresting tautology: that private law is based on corrective justice because any cases not based on corrective justice are not part of private law, and torts are based on corrective justice because if we see something that clearly is not so based, it cannot be a tort. What, then, do we do with elements of tort that do not fit with this vision? We eject them from the tort books and say that, right or wrong, these cases do not involve torts and should not be discussed when tort lawyers gather.

But why should we do this? What is the point of such a rigid definition of corrective justice, which is at best only an approximation to what was assumed in earlier centuries and is very far indeed from modern assumptions? One question worth asking is whether the theory is meant to be descriptive or normative. Yet neither hat really fits. It is not normative, because no reason is ever given why a corrective approach is a good one. On the contrary, corrective justice theorists tend to express (rhetorically, no doubt) complete indifference to the continued existence of tort and complete openness to arguments that is undesirable, insisting that their argument is merely descriptive. Beever compares himself with an architect explaining the structure of the Eiffel tower – such an account should not be taken as an endorsement of the tower or even as a denial that it should be knocked down<sup>24</sup>. But is the corrective approach descriptive, either? Certainly it has no very adequate account of the many cases where the courts manifestly have not internalised a corrective justice approach. Some might say that corrective theorists want it both ways – when people point to normative defects in their argument they retreat into descriptivism (so if someone says the law should not be that way, their answer is that it is, in fact, that way), but then they deal with descriptive errors by retreating into normativity (so if a case is clearly incompatible with corrective justice, they say that it is wrong).

Some argue that corrective justice occupies a middle ground, an “interpretive” ground, which might seem to have elements of description and prescription, but is in fact a distinct enterprise. I have argued elsewhere that this “interpretivism” makes no coherent sense, at least not when used in the way corrective justice theorists use it. Interpretivism itself is respectable enough – there is clearly a case for saying that what tribunals do in divining the law *in individual cases* can be seen as seeking the best interpretation of the applicable law, though that is certainly not the only thing there is to say about it. But there are difficulties in scaling this process up, in looking not for the best legal explanation of *one case* to the best legal explanation of a *whole area of law*. Most of the “interpretivism” currently on offer seems merely an attempt to smuggle in the very thing in issue (that we should be looking for a single explanation) as a methodological precept rather than as something that has to be demonstrated<sup>25</sup>.

## Pedagogy is not philosophy

So where does this assumption, that private law (or tort, or contract, or whatever) forms a coherent unity, come from? Not from any recognised body of theory. Obviously, it came from teaching practice. Legal culture is accepting of the idea that contract and tort form unities, because those who learn law systematically will have been taught this view early on and will very probably have internalised it – they will have difficulty thinking of law any other way. And of course those who teach those subjects have been through the same process – indeed, it may be precisely because they find that way of thinking congenial that they end up spending large parts of their lives as contract or tort teachers. The result is a pervasive assumption that those subjects form coherent entities *even though* there is no point at which that unity was rationally demonstrated.

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<sup>23</sup> Indeed, the attention paid in modern drug control law to the value of any drugs involved in the case is a major factor in the erosion of the line between civil and criminal law in the area. See generally Kenneth Mann, “Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law” (1992) 101 Yale Law Journal 1795; Andrew Ashworth, “Is the Criminal Law a Lost Cause?” (2000) 116 Law Quarterly Review 225.

<sup>24</sup> Beever, *Rediscovering Negligence* 515.

<sup>25</sup> See my “The Shock of the Old: Interpretivism in Obligations” in Charles Rickett and Ros Grantham (eds), *Structure and Justification in Private Law* (Oxford: Hart Publishing, 2008) 205.

Many of the features which ground the corrective justice standpoint are simply the choices forced on generations of law teachers, who must somehow make their subject make sense to undergraduates relatively ignorant of the wider legal system. So for example:

- Issues of responsibility are obscured. Tort teachers cannot also talk about corporate form, insurance, or other means of social and legal control: the students do not have that kind of knowledge yet. So they talk as if we were all atomised individuals, corporate form has no relevance here, and the rest of the legal system does not exist. A good teaching choice, and those other gaps in the students' knowledge will be filled soon enough.
- The origin of contract terms is obscured. Contract teachers cannot talk of collective agreements and collective disagreements, government control of terms (whether "soft" or "hard" controls), or the constantly shifting line society draws between what is hard-nosed bargaining and what is illegitimate bullying. Students do not have that kind of legal understanding yet. So the teachers talk as if potential contract terms just appear almost magically, as if the legal enforceability of terms was the only important issue around them, and the rest of the legal system does not exist. A good teaching choice, and those other gaps in the students' knowledge will be filled soon enough.
- The operation of private *as a system* is obscured. Law teachers talk as if the task were to examine each case individually and minutely, as if every case comes to court or even to the Supreme Court, where it can be anatomised and dissected. Indeed, judges who find neat solutions that do not involve complicated legal analysis tend to be criticised as slackers, and it is rarely that the mechanics of settlement are discussed. A good teaching choice, and those other gaps in the students' knowledge will be filled soon enough.

It is, I hope, clear that this paper is not a critique of teaching practice. For current purposes I am neither for nor against the way in which tort and contract are taught in law schools. My point is that the compromises necessary to get through a term of teaching – the various simplifying assumptions we introduce so that tort and contract are teachable in the real world to real students – do not add up to a defensible philosophy of either subject. I am quite happy to teach elementary tort principles to 18-year-olds as if there were no such thing as liability insurance, not least because I know that others from amongst my colleagues *will* teach them about it when the time is right. But when I see some of those colleagues claiming that a rigorous explanation or justification of modern tort principles should omit reference to insurance, I can see that something has gone wrong somewhere. It is like seeing discussions of childcare written as if babies are brought into the world by storks. No proper explanation or justification of tort can leave out how the law encourages or discourages such claims, how it provides a framework for tort disputes, or how it arranges for payment of awards.

The modern theory of corrective justice theory, then, has its origins in classroom practice, and indeed many of those who comment on it have noticed its origins in classroom disputes, particularly over whether particular cases or particular rules should be determined by what is fair between the parties affected, or whether the result should be the one that is best for society at a whole. And we have all been party to these arguments of fairness vs. the common good (or, if the disputants are sophisticated enough to reach the higher levels of theory corrective justice vs. economic efficiency). These are good arguments to be having in the classroom – they emphasise that law matters, and that whatever the law does, it should do for a good reason. But the point should not be to produce an overall winner. Individualised fairness, on the one hand, and the collective good, on the other, can both put up a good fight, because the law gives a great deal of weight to both of them. One will win some rounds and the other will win others, but neither can deliver a knock-out blow to the other. And an individual scholar can, of course, focus on one rather than the other, but if they do so they are likely to omit features which all agree to be important.

The inward-looking focus of corrective justice, then, reflects the inward-looking focus of law teaching: we seek to explain particular concepts and institutions, and necessarily focus closely on them as we do so. But any overall justification worth a damn must look more broadly. An obvious question about the development of corrective justice theory is whether its proponents have a serious interest in defending their values before a wider audience. For corrective justice in its purest form, the matter seems hopeless. It is several centuries too late to ask states to step back from defining their own laws, or from doing their best to define them in the way that suits the public interest.

There will always be a few people that are horrified that law is instrumental – that it has a purpose, in other words<sup>26</sup> – but most people would be considerably more horrified if it *lacked* a purpose. The question is, whether the corrective justice theorists have a useful contribution to make, perhaps by indicating ways and means by which more attention to individualised justice would lead to better laws – or whether their work will simply degenerate into a litany of complaint against the reality of early C21<sup>st</sup> legal systems, a continual wail that they would have preferred to have been born in a different century.

So far, the signs are not good. The predominating voices from corrective justice theorists are not those urging compromise, but on the contrary those suggesting that a law of obligations not based on corrective justice is not really a law at all. Weinrib insists that an instrumental approach is politics rather than law<sup>27</sup>, and seems to think that one can no more be a little bit political than one can be a little bit pregnant. Beever similarly talks of the open recognition of policy as representing the “disintegration” of law, and calls for a return to principles of “justice”, by which he means interpersonal justice<sup>28</sup>. (At one point, Beever seems to concede that morality and justice take many forms, of which the interpersonal is only one<sup>29</sup>; from which it seems to follow that much of what he rejects as “instrumentalism” and “policy” may in fact simply be a different sort of justice. But this insight is quickly abandoned.) The constant message is that a legal system which appeals to collective concerns is not really a legal system at all.

All of this makes dialogue about the state of the law, and whether it can be improved, rather difficult. Nonetheless, I think there is a great deal of value in the corrective justice approach, once it is seen as a significant strand within modern thinking about obligations rather than as a purported “explanation” of the whole. In what follows, I will seek to sketch out how this may be done. It is important to bear in mind, however, quite how path-dependent is the development of the modern law. We did not get to where we are by sudden decision, still less by rational design of the older system. Here as in other areas of enquiry, explaining where we are by reference to intelligent design contradicts the facts: both intelligence and design are frequently noticeable by their absence, or only apparent to a small degree. The evolution of the common law system is an elaborate process, involving much that is (by any definition) political<sup>30</sup>.

## Modern obligations

There is considerable value in what corrective justice has to offer, both on the claimants’ side of the equation and the defendants’ side, though more on the former than the latter.

On the claimants’ side, a leading feature of the corrective justice approach is its emphasis on rights<sup>31</sup>. This emphasis has proved a valuable one in terms of analysis. Yet presumably these rights do not stop dead at the boundaries of tort but also feature in the rest of the law. If we were to see a complete list of the rights protected by tort, might not that list seem very familiar to writers in other areas of the law? And how would it look when compared to supposedly foundational statements of the rights we all have, such as in national constitutions, Bills of Rights, and Human Rights treaties? Here we see something extremely valuable (much of what makes sense in obligations does so because it seems to protect rights) combined with less valuable elements (rights should not be a tool to separate tort from the rest of the legal system, but on the contrary to show how it contributes to wider concerns). But the argument cannot proceed much further without answering the question: What are the rights?

Here Stevens at least is fairly forthcoming, providing a reasonably full list of the rights that tort protects<sup>32</sup>. Beever does not regard this as a sensible undertaking, and excuses himself from explaining what rights we have: “This book is a theoretical examination of the law of negligence as it operates in terms of the categories of enquiry with which we are familiar ... Without becoming entirely unwieldy – and impossibly long – it cannot also become a philosophical

<sup>26</sup> Brian Tamanaha, *Law as a means to an end: threat to the rule of law* (Cambridge: Cambridge University Press, 2006).

<sup>27</sup> Weinrib, *Idea* 6-8.

<sup>28</sup> Beever, *Rediscovering Negligence* 515.

<sup>29</sup> Beever, *Rediscovering Negligence* 42.

<sup>30</sup> For an interesting set of case-studies see TT Arvind and Jenny Steele (eds), *Tort Law and the Legislature* (Oxford: Hart Publishing, 2013).

<sup>31</sup> For discussion see Donal Nolan and Andrew Robertson, *Rights and Private Law* (Oxford: Hart Publishing, 2012) especially ch 1 (Donal Nolan and Andrew Robertson) and ch 2 (Peter Cane).

<sup>32</sup> Stevens, *Tort and Rights* ch 2.

investigation of personal and property rights”<sup>33</sup>. And throughout his account of negligence, he combines scepticism as to what rights people have (a matter for thorough examination and argument) with rigid insistence that this is the question we need to answer<sup>34</sup>. In the final analysis, Stevens seems to share this scepticism: he admits that there is much room for argument over which rights we have<sup>35</sup>, and even that a case can be made that rights-talk is empty<sup>36</sup>; nonetheless, he insists that questions of that sort are the right ones to be asking<sup>37</sup>.

It is this aspect of the theory that many will find its weakest. The most distinctive aspect of both accounts is the insistence on rights at the expense of policy: what academics and judges should be arguing over is not whether it would be *in the public interest* for the claimant to win the case but whether s/he has a *right* to win. But without a solid and principled account of the rights, this claim teeters on the edge of oblivion. If rights-talk is as vague as this, how is it superior to policy-talk? If it allows for as many different viewpoints as it seems to, then how is it any less “political” than any other approach? Every criticism made of a policy-based approach – that it is vague, leads to endless argument, and blurs the line between the political and the non-political – can be made with equal force of a rights-based approach.

It is far from clear how Beever’s and Stevens’s “rights” relate to rights elsewhere in the law. Beever does not (so far as I can see) discuss this issue anywhere. Stevens takes a notably defensive position, observing that “rights” have been defined in a number of ways, and then announcing that he is only addressing one particular definition (the Hohfeldian claim right)<sup>38</sup>. This he takes to excuse him from discussing rights more generally, as the expression is usually used more widely – he rejects any need to discuss human rights, as they are only “rights” in a broader sense<sup>39</sup>. Again, Stevens rejects any similarity between “rights” and the interests the law protects – this is simply a confusion, he thinks<sup>40</sup>. But again, the differences may simply be ones of emphasis. “Interest” is a somewhat weaker word than right, but the strength of a right is always open to debate; rights are simply a sub-set of interests, with considerable scope for argument over how powerful an interest must be before it can claim recognition as a right. (Many people might have “interests” in a house; which of those interests are powerful enough to be called “rights” might require argument.) And to look at tort’s remedies through the lens of the interest protected opens the way to examining the maze of regulations that are also designed (amongst other things) to protect those interests. In corrective justice as currently practised there is a depressing reluctance to engage with public law, in the attempt to build up a “common sense” picture of private law institutions without mentioning public law institutions, even traditional ones such as basic criminal law.

This is a pity, as a comparison between Stevens’s list of rights and a human-rights-lawyer’s list shows interesting differences of emphasis as well as some obvious similarities. Yet private law does not exist in a vacuum, and a theory which treats it as entirely self-sufficient can only have limited explanatory power. Of course, theories of private rights start from a very different place from theories of human rights. Private rights are thought of as primarily matters between individuals, with the state either absent or irrelevant (and of course for most of the history of obligations the King – the State – could Do No Wrong<sup>41</sup>); whereas Human Rights are primarily complaints that the state has fallen down on its obligations, with the notion that private individuals should respect each others’ rights being a modern interloper of dubious status. It is indeed amazing, given that unpromising beginning, how much similarly there is between the content of the two sets of rights. This convergence, if it is a convergence, deserves further study.

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<sup>33</sup> Beever, *Rediscovering Negligence* 62.

<sup>34</sup> A good example is in relation to nervous shock, where he discusses alternative views a corrective justice theorist might hold, concluding “I do not argue here that either view necessarily captures the correct understanding of Kantian right nor that Kantian right necessarily provides the best understanding of interpersonal morality. My claim is that we need to decide whether people have a right to their psychological integrity or not. And if we decide that they do, we need to elucidate that right. When we have done so, the rest should fall into place”: Beever, *Rediscovering Negligence* 411.

<sup>35</sup> Stevens, *Tort and Rights* 337-341.

<sup>36</sup> Stevens, *Tort and Rights* 350.

<sup>37</sup> Stevens, *Tort and Rights* 350, the concluding words of the book.

<sup>38</sup> Stevens, *Tort and Rights* 4-5.

<sup>39</sup> Stevens, *Tort and Rights* 5, 236-242.

<sup>40</sup> Stevens, *Tort and Rights* 289-290.

<sup>41</sup> In the UK, the rule was in most situations abolished by the Crown Proceedings Act 1947, though see also Crown Proceedings (Armed Forces) Act 1987).

In any serious study of what rights the law makes available, it is impossible to ignore the public and the political, no matter how “private” the rights are said to be. Those tempted to bask in the obvious importance of tort and contract within the legal system, and the legal system’s importance in the regulation of society, must surely realise that this importance reflects wider political judgments reflecting particular conceptions both of the public interest and of the role of tort and contract. The growth of negligence to its current status would have been impossible without certain key decisions – *political* decisions – about how claimants and defendants would be funded, and about what other avenues of complaint were to be made available. Or again, the law of defamation and of privacy is today strongly influenced by legal cases involving celebrities – some famous for particular abilities, some famous for being in the wrong place at the wrong time, some famous merely for being famous – and decisions made by those claimants, and the government’s responses to them, have a serious influence on the development of the law. Very often, the key political question is simply, who has the ability to attract the state’s attention. A theory of justice which is deliberately inward-looking, and sees politics as an aberration that rational people avoid, will miss much of what is going on.

Another focus of corrective justice is on the defendant’s responsibility: the “correlativity” which corrective justice theorists demand insists that it is vacuous to talk to rights unless those rights point to an effective remedy against the defendant who breaches the rights. Again, the insight is a valuable one, but very imperfectly realised in current theories of corrective justice. The law has not abandoned the personal responsibility of actual real people – how could it? – but tort and contract have little to say on it. Personal responsibility has largely moved elsewhere. Take any major category of tort litigation in the UK:

- *Car accidents* – the law goes to a great deal of trouble to establish personal responsibility, but does this through the criminal law, untrammelled by considerations of interpersonal rights or correlativity. The cost of the civil liability is met by compulsory insurance, and the personal civil defendant plays only a nominal part in any actual claim, which is indeed not much affected even if the defendant is untraceable, insolvent or uninsured<sup>42</sup>.
- *Accidents at work* – personal liability here is, in the UK at least, maintained in form only, on condition that it is not allowed to affect anyone’s rights. So we pretend that defendants personally responsible for accidents are liable for the result, but then invoke vicarious liability to ensure that someone else – the company, their insurers – picks up the bill, with a “gentleman’s agreement” that the employee’s liability will remain theoretical only<sup>43</sup>.
- *Medical liability* – again, it is taken for granted that individuals will not be held responsible, but rather will have taken out insurance<sup>44</sup>.

In relation to tort, it is no secret that liability is only rarely a matter of personal liability, almost invariably being borne by a company, perhaps an insurer, or perhaps the state<sup>45</sup>. That this became so is partly a matter of government fiat – compulsory liability insurance is a major factor here – but also simply the economics of the

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<sup>42</sup> See generally Peter Cane, *Atiyah’s Accidents, Compensation and the Law* (Cambridge: Cambridge University Press, 6<sup>th</sup> ed, 2004) (hereafter “Cane, *Accidents*”) especially 175-177, 200-201, 208-212. Some argue that, while in theory the system depends on proof of fault (though we do not then insist that judgment is met by the person at fault), in practice it operates on strict liability lines: see Nora Freeman Engstrom, “Sunlight and Settlement Mills” (2011) 86 *New York University Law Review* 805.

<sup>43</sup> Cane, *Accidents* especially 177-179. The “gentleman’s agreement” was discussed in *Morris v. Ford Motor Co* [1973] QB 792. Some jurisdictions have preferred not to trust that insurers are “gentlemen”, explicitly enacting that insurers may not seek an indemnity from negligent employees, absent compelling circumstances such as employee fraud: see Paula Giliker, *Vicarious Liability in Tort* (Cambridge: Cambridge University Press 2010) 32-34.

<sup>44</sup> Cane, *Accidents* especially 179-181. For the effects of liability insurance on actual behaviour by medical professionals, see Ben CJ van Velthoven and Peter W van Wijck, “Medical Liability: Do Doctors Care?” (2012) 33 *Recht der Werkelijkheid* 28. For those who suspect that I am cherry-picking my examples to minimise the importance of personal responsibility, I would point out that those three categories of claim together compromise over 85% of negligence personal injury claims: Cane, *Accidents* 168.

<sup>45</sup> Some argue that mechanisms for enforcing tort judgments against individuals are today so feeble that personal tort liability is not a meaningful threat to most individuals: Stephen Gilles, “The judgment-proof society” (2006) 83 *Washington and Lee Law Review* 603.

matter, a claim against a single individual being far less of a good financial prospect. The law often makes that individual suffer for their misbehaviour, but it does not usually do so through the medium of tort; “the claims which are brought closely match the areas where liability insurance is to be found”<sup>46</sup>.

We should not exaggerate, of course. There are occasionally cases where individual liability in tort actually matters. Battery is, occasionally, committed by individuals culpable enough and rich enough to satisfy tort claimants. But even in relation to those individuals – the Dominique Strauss-Kahns, the Jimmy Saviles – claimant lawyers will tend to look for other, corporate, deep-pocketed defendants rather than rely on the chancy business of suing a real person. In discussing the practical workings of defamation law, personal liability – or at least, the threat of personal liability – is a powerful force in a general sense, if not often actually used. And sometimes we see personal responsibility acting through tort but in a very indirect fashion, such as when liability insurers put pressure on potential defendants to act more responsibly<sup>47</sup>. It is not my case, therefore, that personal liability is *irrelevant* to tort, though it is much less significant than corrective justice theorists claim. Rather, its true significance and operation deserves investigation and is not elucidated by pretending that it is the standard way by which tort operates, ignoring the workings of insurance, corporate form and the state.

In contract too, the focus on individual agreement in contract is in many ways misleading, as it pretends that the detail of any contract derives from negotiation between the parties, rather than being provided for from outside – whether by one side’s having prepared standard terms before the event, or by the state. “Boilerplate” terms, which cannot be negotiated and can only with difficulty be rejected, are a major feature of the modern law, and where we have escaped from them it is usually by the state’s substituting boilerplate of its own<sup>48</sup>. The fictions used to support the corrective justice approach appear to be enduring ones – generations of law students now have solemnly repeated that there is a “duty to read” terms introduced by the other party, even though such a duty would not be acknowledged by other party and would in most cases be severely impracticable, if possible at all<sup>49</sup>.

But again, it is important not to exaggerate. While in a large number of cases, contracts are not so much agreements as pre-manufactured items, agreement does sometimes play a role; and often the law looks for genuine agreement by a circuitous route, such as by saying that consumers are bound by standard terms unless they are “unfair”, which often turns out to mean “not agreed”. The point is not that contract terms are never agreed – sometimes, if rarely, they are – as that the extent to which they are agreed demands careful investigation.

So the notion of personal responsibility which corrective justice employs cannot work in the modern legal system, not because we have given up on the idea of personal responsibility, but because it plays a very different role in the modern legal system. As will be clear, the sticking points in the corrective justice account are mainly over the relevance of corporate form and the relevance of the welfare state. Corrective justice as currently expounded relies entirely on personal responsibility. It does its best to ignore or to minimise the importance of the ways in which we modify the law to make it applicable to corporate entities: by pretending that corporations are people, by extending vicarious liability so that corporations are guilty of whatever wrongdoings their employees commit. It also does its best to ignore the expanded role of the state, the modern idea that misfortunes which befall ordinary people are the state’s responsibility, and that the injured are not merely objects of charity but have a right to expect the state to do something about their plight.

Seen in that light, it is obvious that the ideals of corrective justice cannot bear the weight that their supporters wish to place on them. We live in a world dominated by collectivities, where most serious economic activity, and most

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<sup>46</sup> Richard Lewis, “How Important are Insurers in Compensating Claims for Personal Injury in the UK?” (6 October 2011, [ssrn.com/abstract=1939971](https://ssrn.com/abstract=1939971)) 14. For discussion see Rob Merkin and Sheila Dziobon, “Tort Law and Compulsory Insurance” in TT Arvind and Jenny Steele (eds), *Tort Law and the Legislature* (Oxford: Hart Publishing, 2013) 303. Whether (or to what extent) the distribution of insurance reflects market forces, principled governmental action, or raw political power, is a discussion for another occasion.

<sup>47</sup> Omri Ben-Shahar and Kyle Logue, “Outsourcing Regulation: How Insurance Reduces Moral Hazard” (2012) 111 Michigan Law Review 197.

<sup>48</sup> For general discussion see Margaret Radin, *Boilerplate – The fine print, vanishing rights, and the rule of law* (Princeton: Princeton University Press, 2013), esp ch 4.

<sup>49</sup> For discussion see Omri Ben-Shahar, “The Myth of the ‘Opportunity to Read’ in Contract Law” (18 July 2008, [ssrn.com/abstract=1162922](https://ssrn.com/abstract=1162922)).

serious attempts to regulate it, must be dealt with at the collective level. The relatives of a man killed at work would not regard it as acceptable to be told (as they would probably have been told a century-and-a-half ago) that they have a remedy only against an individual person who could be shown to have been at fault for the accident; the victim of a road accident would today not accept that whether they have a remedy must turn on the chance whether the driver who ran them down has enough money to compensate. And corporate entities create problems which demand solutions: we might agree that people should be held to their bargains, yet regard it as unfair that one (large, corporate) party should be able to draft terms in advance and then secure “agreement” from their customers simply by flourishing the document at them. The point is both political and moral: politically, the law is influenced by the existence of corporations, and morally, corporations lead to situations where a “corrective justice” solution would actually be unjust.

Nor is this a recent state of affairs. In the same decade as *Donoghue v. Stevenson*, liability insurance was made compulsory for car drivers, and employer liability insurance was already a standard feature of commercial law<sup>50</sup>; and the key decisions in contract law, establishing that a consumer’s practical incapability of reading complex standard forms was no bar to treating them as having “agreed” to those terms<sup>51</sup>, are around the same time. One might have thought that the last gasp of the classical corrective justice theory was *Gowar v. Hales* in 1927<sup>52</sup>. Here, in a case over a motor-cycle accident, the Court of Appeal was shocked to hear that the jury had been told that the defendant was insured – which, the court held, rendered a fair trial impossible, a fair trial being one where “the real issue between the parties, the plaintiff and the defendant, should be decided upon the merits of that issue without a supervening and prejudicial circumstance not really material being introduced ...”<sup>53</sup>. Yet when we see much the same argument being made in the second decade of the 21<sup>st</sup> century, clearly something has gone wrong. Whatever may have been the right time for arguments based on the exclusivity of corrective justice, that time has long gone. It can still play its role, though, as one element in the legal system.

## Conclusion

Matthew Hale famously commented on the paradox that common law boasts a high degree of continuity of tradition, and rarely acknowledges that change has happened, and yet, when viewed over any long historical period, it is impossible to deny that change has taken place.

... From the Nature of Laws themselves in general, which being to be accommodated to the Conditions, Exigencies and Conveniencies of the People, for or by whom they are appointed, as those Exigencies and Conveniencies do insensibly grow upon the People, so many Times there grows insensibly a Variation of Laws, especially in a long Tract of Time ... But tho' those particular Variations and Accessions have happened in the Laws, yet they being only partial and successive, we may with just Reason say, They are the same English Laws now, that they were 600 Years since in the general. As the Argonauts Ship was the same when it returned home, as it was when it went out, tho' in that long Voyage it had successive Amendments, and scarce came back with any of its former Materials; and as Titius is the same Man he was 40 Years since, tho' Physicians tells us, That in a Tract of seven Years, the Body has scarce any of the same Material Substance it had before ...<sup>54</sup>

So much of what we do in tort and in contract can be traced back to earlier centuries, perhaps even to times where the role of the state was (by modern standards) minimal and economic activity (by modern standards) sluggish and on a tiny scale. In such a world, corrective justice made a great deal of sense as the basis of private law. But with new “Conditions, Exigencies and Conveniencies of the People” a different set of considerations obtains, and if the old legal concepts still make sense, they must necessarily be put to very different uses. There is still a role for corrective justice in this new world, but it must be merely as one strand in a more complex legal system.

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<sup>50</sup> For an account of tort law’s drift to collective concerns see Steve Hedley, “Tort and Personal Injuries, 1850 to the present” in TT Arvind and Jenny Steele (eds), *Tort Law and the Legislature* (Oxford: Hart Publishing, 2013), 235.

<sup>51</sup> Particularly *L’Estrange v. Graucob* [1934] 2 KB 394.

<sup>52</sup> *Gowar v. Hales* [1928] 1 KB 191 (11 April 1927).

<sup>53</sup> Lord Hanworth MR at 1 KB 194.

<sup>54</sup> Mathew Hale, *History of the common law* (Dublin: James Moore, 1713) 60.