

John Gardner, Quain Lectures: *From Personal Life to Private Law*, UCL, April 28 – May 1, 2014.

Last week, I enjoyed a fascinating set of Quain lectures given by John Gardner at UCL. The overarching argument of the lectures was that aspects of private law are rationally intelligible (only) when considered as continuous with the morality of personal life outside the law. Unfortunately, I missed the first lecture, 'That's the story of my life' – which argued that private law's focus upon outcomes is rationally intelligible in light of the centrality of outcomes to personal identity.¹ What follows is a short overview of the arguments of the second and third lectures, and a few thoughts on each.

Lecture 2: Say it with flowers

This lecture was about apologies. What makes an apology an intelligible response to a situation? Gardner first discussed problems with accounts of apology which emphasise their role in *reconciliation* between a wrongdoer and the victim of a wrong, before providing the outline of an independent account of the rational intelligibility of apologies.

Reconciliation accounts

Linda Radzic has offered an account of apology which holds that apologies are rational as means to bring about reconciliation between wrongdoers and victims. As she writes in *Making Amends*:

A wrongful act distances people from one another. It tears apart social bonds. When past wrongs persist...people are separated from one another by fear and distrust. If this is the case, then to right the wrong is to repair this rupture.²

Gardner offered at least two objections to such accounts. First, might there not still be reason to apologise, even where there is no prospect of reconciliation between the parties? Even if there is no prospect of future conflict between the parties, should not the wrongdoer still apologise? Suppose that the victim is utterly indifferent and unmoved by the wrongdoing – might there not still be a reason for the wrongdoer to apologise? Suppose, Gardner suggested (with some hesitance about such examples), a drug could be administered which made reconciled the parties to each other – is there not still conceivably a reason for the wrongdoer to apologise in the aftermath?

Second, Gardner suggested that reconciliation accounts struggle to explain why *apologies* – saying sorry – are a particularly appropriate response to wrongdoing or why they are particularly suited as means to achieve the desired

¹ The argument drew, I gather, upon J Gardner, 'Obligations and outcomes in the law of torts'.

² L Radzic, *Making Amends: Atonement in Morality, Law and Politics*, (OUP, 2009), 80.

reconciliation. Why not blow a kiss or do a somersault? Such accounts struggle to explain what it is distinctive about *apologies* in particular that makes them rationally appropriate.

An independent case for apology

Gardner's starting point for a different account of apology focussed on his now familiar *continuity thesis*.³ The continuity thesis states that when an obligation is not conformed to the reasons for conformity *continue* to demand compliance with the obligation. Gardner illustrates with a personal example: he promised to give a lecture at Rutgers last year but could not meet his obligation due to Hurricane Sandy's preventing flights into NY on that day. So, the obligation to give the lecture breached, what to do? Not *nothing* – the original obligation, Gardner claims, still exerts a rational force; the reasons for the original promise give rise to a new obligation to contact his hosts at Rutgers and to make the suggestion of arranging an alternative date. His coming to give the lecture on another day would serve as *reparation* for the breach of the obligation since it would act as a *next best* to the obligation never having been breached in the first place. Moreover, he added, an *apology* was an appropriate or intelligible response to the situation.

So is Gardner's account of apology a *reparative* account, with the apology serving as a *next best* to the wrong never having occurred? Not really. The apology is appropriate or intelligible, Gardner claims, as an *expression* of one's emotion of agent-regret – an emotion that one has reason to feel when one has failed to conform to the reasons one had. Agent-regret was the feeling of regret which Bernard Williams claimed was appropriately felt by those who are responsible for some bad outcome.⁴ Apologies are, then, in what Gardner called the 'model case', expressions of the emotion of agent-regret, an emotion which is peculiarly appropriate when one has failed to conform to the reasons which one had. So the rational source of an apology is the emotion which has reason to feel when one has failed to conform to one's reasons. In short: wrongdoing should give rise to or provide reason for feelings of agent-regret, apologies express this regret.

What does this have to do with the *continuity thesis*? The answer, I think, is that agent-regret arises because of the recognition that, in the post-breach-of-obligation-world, the reasons for that obligation cannot now fully be complied with. There is always a 'rational remainder', as Williams also said. So agent-regret arises due to the continuing force of the reasons for the obligation after its breach and the recognition that they cannot now be fully complied with.

Thoughts

Gardner's critique of the reconciliation-focused accounts is persuasive. The reasons for apology are not the same as reasons for reconciliation. But should we see the model apologise as someone expressing their agent-regret? Here are

³ See J Gardner, 'What is tort law for? Part 1 The place of corrective justice'.

⁴ See his 'Moral luck'.

some questions and doubts about this. First, does *agent-regret* extend to cases of wrongful *omissions* and wrongs which do not involve the production or failure to prevent an injurious outcome? Agent-regret is the regret of someone whose *agency* – whose doing – has brought about an outcome. But clearly apologies extend to cases of wrongful omission and wrongs not based upon the production of injurious outcomes. Second, Gardner's account, at present, seems too wrongdoer-focused. Isn't an important part of apology the expression of regret *to* the victim (isn't it 'second-personal?'). Third, how do we get from reasons to *feel* agent-regret to reasons to *express* it? Gardner rejected a bridge principle (supported by Skorupski⁵) according to which if one has reason to feel an emotion, one has reason to express it.

Lecture 3: The way things used to be

Do we have reason to care about keeping the life that we have? Is there a reason to keep things in one's life the way they are? As Gardner put it: is there a reason for *holding on* to what we have, even where there are better options open to us? That's the question this lecture addressed. After some clarification of precisely what this question is asking, Gardner offered a positive answer to it and argued that the resolution of the question was of great importance to the justification of private law.

A clarification of the question

To understand the question, it's important, Gardner said, to set aside reasons for keeping one's life the same which stem from the negative consequences of change (the 'transaction costs' of change, as he put it at one point). He gave the example of leaving a difficult relationship one is in – one reason for staying in the relationship is to avoid all of the costs of moving on (the difficult process of sorting out who will look after the children; arranging emergency finances etc.). These reasons however are not reasons for keeping things the same *as such* – they doesn't point to an (intrinsic?) value in keeping things in one's life the same. So: the question seeks to identify a value in keeping things in one's life going along the same track which is independent of the good or bad consequences of change.

Gardner also put the question, slightly differently, as a question about the rational significance of *loss* – is there a reason to care about the absence of 'what used to be' as such?

Why the answer matters to private law

Why does this matter to private law? It matters, Gardner claimed at first, for the justification of the principle of *restitutio in integrum* – namely, the principle that the claimant should be placed 'back' in the position they would have been in had the wrong (the tort or breach of contract) not occurred.

⁵ See J Skorupski, *The Domain of Reasons* (OUP, 2010).

This principle faces the following kind of challenge. Suppose that as a matter of distributive justice, my extensive holdings are unjust. Then suppose that I am the victim of a tort, which reduces those holdings. How can I have a claim to be put back to my unjust holding? As Coleman puts it: *what kind of justice is it that permits injustice?*

In Gardner's view, if one could point to a value in people's keeping the life they have, this would provide some rational support for the principle of *restitutio in integrum*. It would give a reason to put people back, so far as possible, to the way they were. It would give a reason for things to be the way they used to be.

Explanations for keeping the life one has

Gardner seemed to have three overlapping explanations why keeping the life one has might have an intrinsic value.

The first was that the value of some goals which one has adopted are outcome-orientated in the sense that their value depends upon one's having achieved the outcome or at least a major part of their value depends upon this. Consequently, if that outcome has been destroyed by some disruptive event, the value of the goal is thereby diminished. Only restoration of the outcome would restore the value.

A second, broader, explanation which Gardner also endorsed was that, as finite beings, it is valuable for us to have goals, where the value of having certain goals is not wholly dependent on the value of (achieving) the goals themselves. Since our lives are finite, we have to commit to certain projects rather than remaining 'open' to the multitude of different possible projects open to us. Gardner brought this out by reference to Williams' objection to act utilitarianism. An act utilitarian, Williams claimed, would not be able rationally to *commit* to certain projects – for her, all commitments are open to revision if better – more valuable – projects come along. Such a person would not have a recognisably human *life*. Our having such a life depends upon *commitment* to certain goals. As finite beings there is only a limited extent to which we can give up on our existing projects and start entirely afresh. So this explanation seemed to locate the value of keeping things the way they are in one's life as the value of commitment, which in turn gained rational significance from the importance of having goals in one's life to having any sort of life at all.

A final, and Gardner said, very tentative explanation was that there is a difference between existing value and not-yet-existent value. There is a difference in our attitudes to these. We think we owe a respect to already existing value which we don't owe to not-yet-existent value. It's not that the former is more valuable, it's that we have a different attitude to it. This distinction between existing value and future value underlies many (common sense) moral distinctions. For example, the act/omission distinction reflects this distinction. The greater moral problem of causing harm than failing to benefit reflects a difference in attitude towards harm to the status quo of existing value and to that of future value.

Back to private law

So how exactly, if these explanations work, does this all affect the justification of *restitutio in integrum* in private law?

Gardner said something quite surprising here. He said that the value of keeping things the way they are enters into the justification of *primary rights and duties* in tort law. Tort law duties, he said, protect *security* – they are what Neil MacCormick called ‘security rights’. Tort law duties are justified (in part?) by protection of the lives people have.

If the value of security enters into justification of primary rights, then, by virtue of the *continuity thesis*, it also helps to justify *restitutio in integrum*. In other words, if part of the reason for the primary rights/duties in tort law is the protection of people’s lives as they are, then, by virtue of the continuity thesis, that should affect the rational purpose of the award of damages. Damages should also aim to put the person back to the life they had because the protection of people’s lives as they are was part of the point of the original obligation breached.

Thoughts

One might disagree with Gardner on (1) whether there is a distinct value in keeping the life one has and/or (2) the relevance of such a value to private law. Gardner is on to something with (1) but I am more sceptical about (2).

(1) The value of keeping the life one has

The essence of Gardner’s argument is that there is a kind of fragility to our capacity to have a life; there needs to be some degree of continuity and stability in our commitments lest we no longer have any kind of ‘life’ at all. Hence there is a value to keeping the life one has.

Should we think of this value as an *intrinsic* value? Is there a reason ‘as such’ to keep the life one has? I’m not sure if Gardner succeeded in showing this (if that was his intention). Suppose that a concert pianist’s wrist is injured midway through her successful career, ending it. She decides to become a novelist and goes on to enjoy an equally successful life as she would have continued to have, but as a novelist. She takes a stoic attitude to life and regrets not a jot the loss of her previous career. Does she have *reason* to regret the discontinuity in her life, even though, by her lights, things are going just as well? It’s not obvious that this is so.

Furthermore, might not the stoic novelist example suggest that the value of staying the same is *contingent* upon one’s having adopted a certain attitude of commitment? Even if one thought that there is an intrinsic value to keeping the life one has, having adopted certain commitments, there are still questions surrounding what reason there is for commitment (apart from instrumental

reasons). I'm not sure whether Gardner wants to explain the value of commitment in terms of a more abstract value of 'having a life' (or is the explanatory relation the other way around?). If so, I'm still a bit unclear what the nature of this abstract value of 'having a life' is.

Finally, it might also be questioned, in light of the stoic novelist example, whether the value of keeping the life one has is ultimately a purely instrumental value. Staying the same is only valuable so far as it staves off certain psychological or other costs of change. It will then be objected that the value of keeping the life one has is what rationally *explains* the psychological costs of change, when those costs are felt. It shows why those feelings are *rational*. Maybe. But plausibly there are situations where the intensity of our attachments outstrip the reasons for having them, such that the psychological costs of change might be great, even if they flow from attachments whose intensity is rationally underdetermined. And, more mundanely, shifting career or moving to a new country can involve financial costs which have nothing to do with the abstract value of keeping the life one has.

(2) Importance of keeping the life one has to private law

I'll only make some remarks about tort law (though in passing it's worth noting that it's far from straightforward to see how contract law's primary obligations are underpinned by reasons relating to keeping the life one has). Two points here: (a) many torts do not seem to be explained as protecting interests in people's keeping the life they have (b) the rational support for *restitutio in integrum* is already pretty strong without factoring in an interest in keeping the life one has.

On (a), as Gardner himself pointed out, D can commit a tort against C by touching C's property without C's consent, even where C has no clue that the property exists at the time of the tort. In such a case, the continuity and stability of C's life is perfectly intact. Harmless trespasses in general are difficult to explain as involving interferences with the stability of one's life. Even in more humdrum cases of negligently caused broken arms and legs, it seems overblown, barring special circumstances, to say that these disruptions challenge the very integrity of one's life. Minor injuries are unlikely to require one to re-set one's path in life significantly enough that we'd say that the narrative continuity of a person's life is endangered.

On (b), it seems that we don't need the idea of keeping the life one has to explain the justifiability of *restitutio in integrum*, or more specifically, its resilience against Coleman's challenge that it allows injustice. Consider the latter problem. The problem is that compensatory damages are insensitive to the distributive positions of the parties; the victim is put back to their potentially unjust distributive position. Most people, however, think that many of the moral wrongs underpinning the legal wrongs in tort law are wrongful for reasons independent of the antecedent distributive positions of the parties. The wrongfulness of intentionally physically injuring another person is independent

of the wealth or poverty of the injurer and victim. If that's true, and we accept Gardner's continuity thesis – that post-breach, the reasons for conformity still await conformity – it is not surprising that compensatory damages should have at least some independence of distributive considerations. If the reasons for the duty are (relatively) distribution-independent, then, by virtue of the continuity thesis, the secondary obligation should also be relatively distribution-independent. Deny this and deny the wrongfulness of the original wrong itself. What Gardner seems to be aiming to do is to provide an account of *why* the reasons for the primary duty are distribution-independent. But it's implausible that the main reason why this is so is people's interest in having a stable, continuous life.