

## *Foreword by Lord Hoffmann*

This is the first in an ambitious series of essay collections about defences against claims in private law. Defences are a topic to which academic writers have given relatively little attention, compared with, say, the huge literature on the duty of care in negligence or the problems of causation. But in 2013 James Goudkamp published a book on *Tort Law Defences* and he and two other of the younger members of the Oxford Law Faculty organised the conference which has resulted in this book. It shows that the intellectual life of the Faculty is flourishing.

It is unusual for an academic work to have a heroine but this one does: the common law. Flawed in some respects, no doubt, as any plausible heroine must be, but magnificent in her resistance to being confined by systems or taxonomies. The very question of what counts as a defence, as opposed to an element of the cause of action, is disputed ground. Does it depend upon which party bears the burden of proof? Or does the question of the burden of proof depend upon whether, for other reasons, it is regarded as a defence? Even then, Mr Goudkamp is able to produce a Western Australian black swan in the form of the limitation defence, which has to be pleaded by the defendant but, once pleaded, has to be negatived by the claimant. Taxonomy is a subject which, as Lord Macnaughten said of the rule in *Shelley's Case*, can produce 'profound discussions and some very pretty quarrels'; an observation which will be found illustrated in this volume.

Or consider the illegality defence, on which the Chief Justice of Canada has contributed a paper full of good sense and liberal sentiment. English law has no single theory on the subject. It has relied instead, since the time of Lord Mansfield, on a combination of logic and populist penology. This has, it is true, given rise to inconsistencies, caused in some cases, as Lord Sumption recently observed, by 'the distaste of the courts for the consequences of applying their own rule.' On the other hand, the illegality defence is very much a matter of public policy and the courts also have to take into account the likelihood of public distaste for the consequences of not applying it. The efforts of the courts to navigate between these opposing forces without reducing the defence to a rubble of single instances is bound to produce characteristically impure common law solutions.

All the essays in this book contain original and sometimes provocative thoughts and I look forward to the succeeding volumes.

Leonard Hoffmann

# 1

## *Central Issues in the Law of Tort Defences*

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### 1. INTRODUCTION

#### 1.1 The Point of the Project

**T**HIS BOOK IS the first in a series of four that is concerned with defences to liability arising in private law. We feel that the topic has not received the attention that it deserves. Engagement with defences is strikingly absent from many theoretical works in private law.<sup>1</sup> Furthermore, whilst specific defences are often well covered in textbooks, there is a lack of understanding as to how the various defences fit together, both within individual branches of private law, and across private law. The purpose of this series is to take steps towards remedying this situation. The present book focuses on tort law. Later books in the series will address unjust enrichment, contract and equity.

#### 1.2 Defences in Tort, Unjust Enrichment, Contract and Equity?

The division of the four volumes in our project reflects an important premise, namely, that there is some value in dividing defences up according to the area of private law to which they pertain. There is surely *some* value in this approach, and the sheer scale of the law concerning defences in private law prevented us from investigating them satisfactorily within a single volume. However, our chosen classificatory scheme itself raises certain difficult issues, and one might legitimately question whether it reflects any divisions of theoretical importance.

One concern with arranging defences in this way is that it might seem to presuppose the stability and coherence of each of the areas of private law that we have identified. Is it right to say that there is a coherent law of tort, unjust enrichment, contract and equity? These issues have long been discussed.<sup>2</sup> We have adopted

<sup>1</sup> See, eg, the almost complete absence of discussion of defences in J Oberdiek (ed), *Philosophical Foundations of the Law of Torts* (Oxford, Oxford University Press, 2014).

<sup>2</sup> See, eg, the essays in P Birks (ed), *The Classification of Obligations* (Oxford, Clarendon Press, 1997).

this classification partly because it is conventional. However, we have also utilised it because we hope that doing so will result in debates about its satisfactoriness being informed by the law on defences. Discussions about the way in which private law should be organised have tended to focus on matters such as the events that generate obligations and the remedies that are available for failure to comply with those obligations. Rarely has thought been given to how defences might be relevant to the organisation of private law. To what extent are tort, unjust enrichment, contract and equity distinct in terms of defences?

A different concern that one might have is not with the coherence of each *area* of private law but with the value of dividing *defences* in this way. How much unity between defences within each area must there be to justify studying them together? How similar are, for instance, *tort* defences to one another? As it happens, several of the defences addressed in this volume—such as illegality and limitation bars—are not exclusive to tort law but are available throughout private law generally.<sup>3</sup> This fact might be thought to count against organising the series in the way that we have. However, it is also the case that many such defences possess features that are unique to, or at least conditioned by, particular branches of private law.

A final general concern that readers might have is with the very concept of a defence. The term might be thought to have so many distinct meanings that it is impossible to discuss defences as a unified subject. We will examine some of the issues raised by the term in this chapter. There is no doubt that many of the contributors to this volume use the word ‘defence’ in rather different ways from each other. However, we are reassured by the fact that the contributors to this volume engage extensively with each other.

### 1.3 The Topics of the Book

The chapters in the present book range from treatments of broad theoretical questions to analyses of the minutiae of individual defences. As editors we have tried not to prejudge the disputes or topics of interest that might be raised. Consequently, we have not imposed our own views as to whether, for example, certain rules are appropriately regarded as defences,<sup>4</sup> or whether they are appropriately thought of as part of the ‘law of torts’.<sup>5</sup> Of course, not all defences are represented; indeed, some important defences are not discussed at all. One reason for this is that it would be quite impossible to deal satisfactorily with even the most significant tort defences in a single volume. Another reason is that this book is not intended as an encyclopaedia of tort defences. Rather, its aim is to explore themes that run throughout tort defences, especially where those themes might connect with defences in other areas of private law.

<sup>3</sup> This prompted Robert Stevens to contend that illegality should not be studied specifically in relation to tort law: R Stevens, *Torts and Rights* (Oxford, Hart Publishing, 2007) 304–05.

<sup>4</sup> It is, for example, disputed whether contributory negligence is a defence given that it does not prevent liability from arising but merely affects the quantum of recovery. We address this issue below: see Section 2.3.

<sup>5</sup> In relation to the question whether invasion of privacy is a tort, see Barbara McDonald’s chapter at pp 289–97.

## 1.4 The Purpose and Structure of this Chapter

In this chapter, we contextualise some of the debates in the book, in order to bring out some general themes that run through the chapters and also to raise a few questions thrown up by certain specific defences. In selecting general themes, we have tended to focus on issues that generated debate between our contributors, and which featured prominently in discussions at the workshop at which drafts of these chapters were delivered. In selecting for discussion issues that pertain to specific defences, we have attempted to draw out the wider implications of the analyses offered by our contributors and to clarify their relationship with other debates.

We have split this chapter into three principal sections, though the sections are neither exhaustive nor hermetically sealed. We first examine what a defence actually is. In the second principal section we turn to some general questions that the study of defences throws up across private law. Finally, we draw out some themes and defences that are most commonly associated with the criminal law, such as the distinction between justifications and excuses, which may also be of relevance to private law theorists.

## 2. WHAT IS A DEFENCE?

It quickly became clear at the workshop that there was no consensus as to what the term ‘defence’ means. There seem to be several disagreements, many of which arise in the chapters that follow. In this section, we begin by considering a conundrum that pervades this field, namely whether it is possible to separate the *definition* of a defence from the *consequences* of something being a defence. We then consider two principal ways in which scholars have tried to understand the concept of a defence. The first attempts to distinguish defences from denials of a cause of action; the second attempts to define defences by reference to their effects.

### 2.1 Definition or Consequence?<sup>6</sup>

One question that any scholar working on defences faces is: what is a defence? Another question is: what are the implications, if any, of classifying something *as* a defence? These questions might be viewed as distinct: one concerns the *definition* of a defence; the other what the *consequences* are of classifying something *as* a defence.<sup>7</sup> We will, therefore, refer to the distinction as one between definition and consequence. To illustrate the point, consider, first, Tony Weir’s assertion that ‘[c]ontributory negligence is unquestionably a defence ... [since] it is for the defendant to plead and prove it’.<sup>8</sup> Implicitly, Weir seems to claim that a defining characteristic

<sup>6</sup> We thank Luís Duarte d’Almeida for his comments on an earlier draft of this section, which saved us from numerous errors.

<sup>7</sup> L Duarte d’Almeida, ch 3 at pp 45–6.

<sup>8</sup> T Weir, *An Introduction to Tort Law*, 2nd edn (Oxford, Clarendon Press, 2006) 129. See also WVH Rogers, *Winfield & Jolowicz on Tort*, 18th edn (London, Sweet and Maxwell, 2010) 120 [4.19] (footnote omitted).

of a defence is that they are rules that the defendant must plead and prove.<sup>9</sup> But now consider Robert Stevens' claim that '[t]he most important practical effect of characterising an issue as being a defence is that it will usually determine who has to prove what as a matter of evidence'.<sup>10</sup> If some doctrine is a defence, Stevens claims, a consequence is that this classification will ('usually') determine which party bears the onus of proof in relation to it.<sup>11</sup>

The interrelation between these questions is important. In particular, it seems that certain answers to the first question cannot be used to infer answers to the second. Consider, for instance, Andrew Burrows' claim that '[t]he very notion of a defence ... carries with it the practical consequence that the legal burden of proving a defence is on the defendant'.<sup>12</sup> This might be understood as a definition, namely, that defences are those doctrines that the defendant must prove. But Burrows also claims: (1) that limitation is a defence; (2) that the burden of disproving limitation is on the claimant and, therefore; (3) that English law should be changed to place the burden of proving limitation on the defendant. This reasoning would be fallacious if Burrows' initial claim indeed were that defences should be defined in terms of their burden of proof: (1) and (2) would then be plainly inconsistent. Whether or not Burrows actually subscribes to this reasoning is debatable, for he also seems to be attracted to defining defences according to the distinction between denials and defences.<sup>13</sup>

## 2.2 Denials and Defences

If a claimant sues in negligence, the defendant might deny that a duty of care was owed. To many writers, such a claim is not appropriately characterised as a *defence*; instead, it is a contention that, because one of its elements is absent, the cause of action in negligence is not made out. These writers therefore distinguish denials from defences. As Virgo puts it, '[a] denial negates an element of the tort claim, whereas a defence is a rule that relieves the defendant of liability where all the elements of the tort for which the claimant sues are present'.<sup>14</sup>

This distinction raises two important (and closely connected) disputes. The first is whether, as Luís Duarte d'Almeida puts it in his chapter, 'the familiar contrast of denials/defences is substantively warranted'.<sup>15</sup> Several contributors to this volume—including Andrew Burrows,<sup>16</sup> James Goudkamp and Lorenz Mayr,<sup>17</sup>

<sup>9</sup> Our point here is not exegetical: even if we misread Weir's purpose, such a claim is clearly plausible.

<sup>10</sup> See ch 13 at p 250.

<sup>11</sup> Notice that at p 250, Stevens explicitly rejects the suggestion that this proposition is 'a defining feature of what a defence is'. On the relevance of pleadings to defences, see Section 2 of Richard Epstein's chapter: we are unsure whether to read the claim as one of definition or of derivation (or whether he would reject this distinction).

<sup>12</sup> See ch 16 at pp 314–15.

<sup>13</sup> *ibid.*

<sup>14</sup> See ch 8 at p 139 (footnote omitted).

<sup>15</sup> See ch 3 at p 36. Further disagreements might manifest here over what makes a distinction 'substantively warranted'. Having noted this further important complication, for brevity's sake we set it to one side.

<sup>16</sup> See ch 16 at p 314.

<sup>17</sup> See ch 12 at p 234.

Robert Stevens<sup>18</sup> and Graham Virgo<sup>19</sup>—employ the distinction. But none offers a justification of it. Can a compelling justification be offered? The line between denials and defences can certainly appear razor thin. Most simply, both defences and denials can result in the same substantive outcome, that is, no liability.<sup>20</sup> Further, individual doctrines seem to resist categorisation. This might be for a number of reasons. One reason might be that an individual doctrine can, on some definitions, be *both* a defence *and* a denial. Consider, in this respect, Roderick Bagshaw's claim that defences are 'those doctrines that allow a defendant to resist in whole, or in part, a tort claim, other than by denying an essential element of it'.<sup>21</sup> This appears to endorse the denial/defence distinction. With reference to this definition, Bagshaw claims that the 'intervening acts doctrine' is a defence.<sup>22</sup> But because this doctrine can prevent an action of which damage is the gist, such as negligence, from being constituted,<sup>23</sup> it appears *sometimes* to be a denial. This is not a point Bagshaw contests; his purpose is not to classify the doctrine in terms of defences and denials. But it illustrates a possible hazard of the denial/defence distinction. Perhaps with such concerns in mind, James Edelman and Esther Dyer simply reject the distinction: '[a] defence has always included a plea by way of denial'.<sup>24</sup> In other words, for these writers a defence can include a denial of a cause of action.<sup>25</sup> Most fundamentally, Duarte d'Almeida raises what he calls the 'Incorporationist Challenge'. This argument claims that defences and denials are 'equivalent' because 'both amount to the negation that all the elements required for the claimant to succeed are present'.<sup>26</sup> To answer this challenge, theorists must explain in what the distinction consists.

This raises the second important disagreement enlivened by the distinction between denials and defences: if there *is* a substantially warranted distinction between the two concepts, what, precisely, is it? Duarte d'Almeida suggests a possible answer in his chapter. He suggests that we should understand the distinction in terms of the 'contrasting probatory behaviour' of various facts. He points out that:<sup>27</sup>

Unless all the elements of a tort (including 'negative' elements like absence of consent) are established, the claimant will fail; but the claimant's success does not similarly depend on the absence of each valid defence being established.

<sup>18</sup> See ch 13 at p 250.

<sup>19</sup> See ch 8 at p 139.

<sup>20</sup> Duarte d'Almeida at p 49 ('from the purely consequentialist perspective there is simply no difference between "denials" and "defences"').

<sup>21</sup> See ch 6 at p 92, cf n 20. Consider also Goudkamp and Mayr's contention that the doctrine of illegality sometimes functions as a denial and sometimes as a defence: see ch 12 at pp 234–38.

<sup>22</sup> Discussed by Bagshaw, ch 6 at p 93.

<sup>23</sup> See, eg, *Modbury Triangle Shopping Centre Pty Ltd v Anzil* [2000] HCA 61; (2000) 205 CLR 254.

<sup>24</sup> Ch 9 at p 179. Epstein may also be read as rejecting the distinction. His approach is to favour a minimal *prima facie* case, supplemented by subsequent pleadings in a theoretically infinite sequence: Epstein, ch 14, Section 2. This may well deny any rigid notion of cause of action and defence. See, further, our discussion at Section 3.2.

<sup>25</sup> See, for instance, *Chakrabarti v Advertiser Newspapers Ltd* [1998] HCA 37; (1998) 193 CLR 519, 527 [8] (Brennan CJ and McHugh J): 'defences are either by way of denial or confession and avoidance'.

<sup>26</sup> See ch 3 at p 37.

<sup>27</sup> *ibid* 44. For a fuller account, see L Duarte d'Almeida, 'A Proof-Based Account of Legal Exceptions' (2013) 33 *OJLS* 133 and L Duarte d'Almeida, *Allowing for Exceptions: A Theory of Defences and Defeasibility in Law* (Oxford, Oxford University Press, 2015).

Does this suggestion adequately capture the distinction that commentators seek to draw by employing the vocabulary of denials and defences? The account will prove controversial. But we hope that it will also prompt others to explain in depth how they understand the distinction.

### 2.3 What do Defences do?

Legal concepts might be defined wholly or partly in terms of their legal effects.<sup>28</sup> For instance, a cause of action has been defined as ‘a factual situation the existence of which entitles one person to obtain from the court a remedy against another person’.<sup>29</sup> Likewise, Peter Birks once argued that unjust enrichment and restitution ‘quadrate’, such that all restitutionary responses are instances of unjust enrichment.<sup>30</sup> Can we, in a similar fashion, define defences in terms of their effects?

Some writers contend that the recognition of something *as* a defence does not determine the legal outcome of the doctrine. For instance, Edelman and Dyer argue that duress ought to be a tort defence but are silent on the question of whether compensation must be paid when it applies: they see this as a question that can be dealt with *once the defence is recognised*.<sup>31</sup> This suggests that, for these writers, not every effect of a defence is crucial to its definition as such. They might claim that *some* effects are constitutive of the concept of a defence. Many would make such a claim. There is, however, disagreement about the precise relationship between definition and effect, a disagreement that we addressed above.<sup>32</sup> Some scholars define defences in terms of their effects (the effect of some doctrine is, in other words, constitutive of that doctrine being a defence);<sup>33</sup> others claim that particular doctrines have (or *should* have) various effects *because they are defences*.<sup>34</sup> In this subsection we do not take sides on these issues, but seek to enumerate some of the various effects that are claimed can constitute, or can be the consequence of, defences.

We should first consider the distinction between substance and procedure. This is often invoked, but in what does it consist? Speaking generally, we suggest that the answer might correspond to the distinction between obligations owed by agents and

<sup>28</sup> By ‘effect’ we mean, speaking loosely, to denote the consequences that flow from the fact that a defence applies, as distinct from the implications for a given rule of it being classified as a defence.

<sup>29</sup> *Letang v Cooper* [1965] 1 QB 232 (CA) 242–43 (Diplock LJ).

<sup>30</sup> For instance, P Birks, *An Introduction to the Law of Restitution*, rev edn (Oxford, Clarendon Press, 1989) 16–18. Compare his definition of ‘wrongs’, where any response was thought to be logically possible: P Birks, ‘Definition and Division: A Meditation on the *Institutions* 3.13’ in P Birks (ed), *The Classification of Obligations* (Oxford, Clarendon Press, 1997) 31. For a general discussion of these issues, see F Wilmot-Smith, ‘§38 and the Lost Doctrine of Failure of Consideration’ in C Mitchell and W Swadling (eds), *The Restatement Third, Restitution and Unjust Enrichment: Critical and Comparative Essays* (Oxford, Hart Publishing, 2013) 64–69.

<sup>31</sup> See ch 9 at p 182. This raises two questions: first, what the defence does, if not relieve the defendant from an obligation to pay damages; and, more generally, how much commentators must explain when they argue that a defence should be recognised.

<sup>32</sup> See Section 2.1 on the distinction between definition and consequence.

<sup>33</sup> This may be the best way to understand Bagshaw’s claim that defences are those rules that ‘operate to prevent the claimant from being awarded a particular form of remedy which would have been available had the conditions for the applicability of the “defence” not been established’: see ch 6 at p 92.

<sup>34</sup> This is one way to read Stevens’ claim in ch 13 at p 250.

the ability to have those obligations enforced by a court. By ‘substantive’ doctrines, theorists seem to denote those doctrines that affect the responsibilities that individuals have. For instance, contributory negligence (which, for some, is a doctrine that counts as a defence) reduces the amount of damages the defendant owes the claimant, and is consequently counted as substantive.<sup>35</sup> Other doctrines—those doctrines that commentators call ‘procedural’—do not seem to function in this manner. For instance, Andrew Burrows notes that ‘with rare exceptions’ a limitation defence does not extinguish the obligation to pay damages;<sup>36</sup> instead, it bars *enforcement* of that duty in court.<sup>37</sup> A practical consequence of this distinction can be demonstrated in the law of unjust enrichment. Suppose that a defendant owes a claimant £100, but the claimant’s claim is time barred. If the defendant pays the claimant £100 in the mistaken belief that the claim is not time barred, she cannot recover the money paid.<sup>38</sup> The reason is that, although the expiration of the limitation period barred *enforcement* of the claim, the substance of the claim remained: there is, in the language of *Goff and Jones* a ‘justifying ground’ for the payment.<sup>39</sup>

Doubtless, the import of this distinction between substance and procedure remains a topic worthy of further consideration. For our purposes, however, the crucial question is whether the distinction furthers our understanding of what a defence is. Duarte d’Almeida claims that it is vital.<sup>40</sup> He distinguishes elements which bear ‘on the merits’ of the case from ‘[b]ackground presuppositions and conditions ... that are often called “procedural”’.<sup>41</sup> The procedural rules are not, he claims, the proper subject of a theory of defences: hence he excludes challenges to jurisdiction and limitation as defences.<sup>42</sup> Bagshaw disagrees. He includes within his definition of defences those rules that ‘will prevent a claimant from being awarded an injunction if he or she has waited too long before seeking such a remedy’.<sup>43</sup> As these rules concern the enforcement of an obligation, Bagshaw implicitly rejects Duarte d’Almeida’s claim.

This provides us with an illuminating lens through which to consider the famous case of *Vincent v Lake Erie Transportation Co.*<sup>44</sup> A captain secured his ship to the claimant’s dock to prevent it from being destroyed by a storm. The storm repeatedly threw the ship against the dock, damaging the dock in the process. The defendant ship owner was found liable to the claimant in trespass even though (the court held) the captain had acted reasonably in securing the ship to the dock. The conventional

<sup>35</sup> We do not think that it matters in this connection whether one believes the defendant to be under a duty to pay these damages, or merely a liability: see also n 36.

<sup>36</sup> There is some controversy over whether the defendant is under a *duty* to pay damages: eg, S Smith, ‘Why Courts Make Orders (And What This Tells us About Damages)’ (2011) 64 *Current Legal Problems* 51. However, whatever term is used, we suggest that it is important to distinguish between the defendant’s responsibility to pay damages and his liability to a court order enforcing that responsibility.

<sup>37</sup> Burrows, ch 16 at p 314, n 12.

<sup>38</sup> *Moses v Macferlan* (1760) 2 Burr 1005; 97 ER 676.

<sup>39</sup> C Mitchell, P Mitchell and S Watterson, *Goff and Jones: The Law of Unjust Enrichment*, 8th edn (London, Sweet and Maxwell, 2011) para 1–12.

<sup>40</sup> We believe that his distinctions at ch 3 pp 48–49 roughly track ours.

<sup>41</sup> Duarte d’Almeida, ch 3 at p 48.

<sup>42</sup> *ibid* 48, 50.

<sup>43</sup> See ch 6 at p 92.

<sup>44</sup> 109 Minn 456; 124 NW 221 (1910).

way of explaining this case, which is embraced by Graham Virgo in his chapter,<sup>45</sup> is to say that it recognises a privilege to act out of private necessity.<sup>46</sup> This privilege is said to be evident from the fact that, were it possible to obtain injunctions instantly, and had the claimant sought one to restrain the captain from tethering the ship to his dock, a judge would have refused one.<sup>47</sup> But the privilege is incomplete. It is incomplete because the defendant was still liable to pay damages to the dock owner. How we should understand the case remains a hotly disputed matter.<sup>48</sup> That is not a question we consider; instead, our concern is with the possible implications for the concept of a defence. Let us suppose that the suggested privilege simply recognises that an injunction will not be granted to restrain a trespass committed in circumstances of private necessity. Assuming that it is right to understand these rules as procedural, that is, as concerning when a court will specifically enforce an obligation an individual has, whether so-called incomplete privileges are an appropriate topic for scholars of defences then turns on whether it is correct to define defences as *substantive* doctrines.

Plainly, not every substantive doctrine is a defence. Assuming that defences are substantive doctrines, then, *which* substantive doctrines are they? Can we, in particular, use the different substantive effects that doctrines can have to delineate the concept of defences yet further? (Or are defences delineated by reference to some other criteria?) For instance, some doctrines defeat entirely a defendant's responsibility, while others merely reduce the extent of the defendant's obligations. By way of example, a successful plea of illegality might result in no liability,<sup>49</sup> whereas a successful plea of contributory negligence might merely reduce the damages owed from (say) £100 to £50. Does this distinction have any value when it comes to defining defences? Bagshaw<sup>50</sup> and Stevens<sup>51</sup> deny that it does: both claim that contributory negligence is a defence. However, other scholars, such as Francis Trindade, Peter Cane and Mark Lunney, have claimed that the fact that contributory negligence only reduces the extent of damages means that it is not a defence.<sup>52</sup>

To sum up, one popular way of understanding defences is to distinguish them from denials. Another way (and the way that we have addressed here) is to hive off procedural rules and to exclude them from the concept of a defence. Of course,

<sup>45</sup> See ch 8, Section 3.2.

<sup>46</sup> See, eg, WP Keeton, DB Dobbs, RE Keeton and DG Owen, *Prosser and Keeton on Torts*, 5th edn (St Paul MN, West Publishing Co, 1984) 147–48.

<sup>47</sup> The privilege is also thought to be revealed from the fact that had the claimant cut the ship loose, the claimant would have been liable to the ship owner: *Ploof v Putnam* 81 Vt 471; 71 A 188 (1908).

<sup>48</sup> This reading of the case is controversial amongst our contributors. As well as Virgo, see Goldberg, ch 4 at p 62 and Smith, ch 5 at pp 75–76.

<sup>49</sup> *Joyce v O'Brien* [2013] EWCA Civ 546; [2014] 1 WLR 70. Illegality can in some cases merely reduce the extent of the primary obligation: *Hewison v Meridian Shipping Services Pte Ltd* [2002] EWCA Civ 1821; [2003] ICR 766 (the illegality prevented the recovery of lost illegal earnings, but not the recovery of damages for other losses suffered as a result of injury caused to the claimant).

<sup>50</sup> See ch 6 at p 93.

<sup>51</sup> See ch 13 at p 250 ('it ... is better described as a remedial defence' (footnote omitted)). See also Barbara McDonald's chapter where she refers to contributory negligence as 'a key defence to a negligence action': ch 15 at p 298.

<sup>52</sup> '[C]ontributory negligence is strictly a plea in mitigation of damages rather than a defence': F Trindade, P Cane and M Lunney, *The Law of Torts in Australia*, 4th edn (Oxford, Oxford University Press, 2007) 685.

neither way of trying to get to grips with the idea of a defence suggests a comprehensive definition of a defence. They are both just ways of saying what defences are not. It is clear, for instance, that even if procedural rules are not defences, not all substantive rules qualify as defences. These two ways of conceiving of defences do not exhaust the possible bases by which the concept of a defence might be isolated. We have focused on these ways of determining what a defence is because they have featured prominently in the chapters that constitute this volume.

### 3. THEMES ACROSS PRIVATE LAW

#### 3.1 The Interplay of Causes of Action and Defences

It is trite that the elements of a cause of action must have a bearing on the defences that are available to liability arising in that action. This point applies across private law's causes of action. For example, if the absence of justification is part of the definition of a cause of action, it is impossible for there to be a justificatory defence to liability arising in that action.<sup>53</sup> If the defendant was justified, the action will not be constituted; it follows that no question of defences can arise. But commentators have not explored this type of interrelation in any depth.

In her contribution to this volume, McDonald makes some general claims on the topic. She suggests that the 'fault element in the tort can influence the available defences'.<sup>54</sup> For instance, she claims that 'negligence is essentially about a defendant's failure to take reasonable precautions against a *foreseeable* risk of injury to the claimant'.<sup>55</sup> It follows, she claims, that it is 'morally justifiable' for the law 'to consider also the claimant's behaviour in relation to that risk'.<sup>56</sup> This leads McDonald to the conclusion that the doctrine of contributory negligence is justifiably applicable in the context of negligence-based torts.<sup>57</sup> Other scholars, including Ernest Weinrib<sup>58</sup> and Kenneth Simons,<sup>59</sup> have made broadly similar claims regarding the doctrine of contributory negligence. In contrast to the tort of negligence, McDonald says that:<sup>60</sup>

intentional torts generally involve a *prima facie* wrong and a more culpable level of fault, and thus will be more difficult to defend, requiring a higher level of culpability or responsibility

<sup>53</sup> This point is made, albeit in slightly different terms, by Steve Smith in his contribution to this volume: see ch 5 at pp 65–66.

<sup>54</sup> See ch 15 at p 298.

<sup>55</sup> *ibid* (emphasis in original).

<sup>56</sup> *ibid*.

<sup>57</sup> Cf Robert Stevens' chapter in this volume.

<sup>58</sup> 'The defense [of contributory negligence] expresses an idea of transaction equality: the plaintiff cannot demand that the defendant should observe a greater care than the plaintiff with respect to the plaintiff's safety. ... Because contributory negligence looks at the fault of the plaintiff relative to the fault of the defendant in their interaction, it is entirely a transaction notion': EJ Weinrib, *The Idea of Private Law* (Cambridge MA, Harvard University Press, 1995) 169 n 53.

<sup>59</sup> '[W]hat victims can legitimately expect of injurers, injurers can legitimately expect of victims': K Simons, 'The Puzzling Doctrine of Contributory Negligence' (1995) 16 *Cardozo Law Review* 1693, 1722 (footnote omitted).

<sup>60</sup> See ch 15 at p 298 (footnote omitted).

on the claimant's part to excuse the defendant's conduct. Thus while contributory negligence is powerful in a negligence claim, it is irrelevant to an intentional tort.

McDonald applies these claims to the defence of public interest to a privacy tort.<sup>61</sup> She argues that breach of privacy is an intentional wrong and claims that we should therefore 'immediately ignore defences to negligence actions. Contributory negligence, for example, should be no more a defence to an invasion of privacy than it is to any other intentional tort'.<sup>62</sup> Depending on how McDonald defines the term 'defence', we suspect that this claim is too strong, since it is doubtful that *all* defences to negligence should be inapplicable to actions for breach of privacy. Does McDonald mean to say that limitation bars, for example, should have no application to actions for breach of privacy?<sup>63</sup> Regardless, the general claim that the presence or lack of a fault element may influence, or should influence, the availability of defences is worthy of further investigation.

Richard Epstein, in his chapter on voluntary assumption of risk, also engages with the interaction between causes of action and defences. He argues: 'As a matter of basic normative theory, the proper role of defences is heavily dependent on the content of the *prima facie* case, which in turn depends heavily on whether the starting point for liability is strict liability, negligence, or intention'.<sup>64</sup> If one incorporates a fault rule into what he calls the '*prima facie* case', many pleas that could otherwise be introduced as defences are dealt with by the fault rule and cannot therefore operate as defences. Conversely, if the cause of action is based on strict liability, a much larger number of pleas are available to function as defences. Epstein believes this to be an advantage of strict liability. His reason for so thinking is that putting the minimum amount of information in the '*prima facie* case' necessary to put the defendant under an onus of explanation sharpens the enquiry. This is primarily because it allows the pleas to be introduced in a clear and logical sequence.

### 3.2 The Generality and Specificity of Defences

Although some scholars have argued to the contrary,<sup>65</sup> the prevailing view today is that we have a law of torts rather than a law of tort, in the sense that there is no single principle of liability that unites this entire branch of private law.<sup>66</sup> We have many different *actions* in tort, rather than a single action in tort, and similar observations can be made about other areas of private law, such as unjust enrichment, where it is conventional to speak of *an* action in unjust enrichment rather than *the* action in unjust enrichment. It is interesting to observe a parallel here between

<sup>61</sup> McDonald has in mind the action in cases such as *Campbell v MGN Ltd* [2004] UKHL 22; [2004] 2 AC 457.

<sup>62</sup> See ch 15 at p 302.

<sup>63</sup> McDonald might, instead, deny that limitation is a defence: for a possible route to this conclusion, see Section 2.3 and Duarte d'Almeida, ch 3 at pp 50–51.

<sup>64</sup> See ch 4 at p 267.

<sup>65</sup> Eg, PH Winfield, *The Province of Tort Law* (Cambridge, Cambridge University Press, 1931) ch 3.

<sup>66</sup> Eg, WVH Rogers writes: 'There is ... no doubt that we have a collection of torts rather than a single principle of liability': WVH Rogers, *Winfield & Jolowicz on Tort*, 18th edn (London, Sweet and Maxwell, 2010) 63. The contribution that has come to epitomise the 'law of torts' view is B Rudden, 'Torticles' (1991–1992) 6/7 *Tulane Civil Law Forum* 105, which seeks to list all torts.

causes of action and defences. It would be perfectly possible to have, for example, a single justificatory defence operating across all of tort law. However, what we find (at least according to the way in which defences tend to be presented in tort textbooks) is a large number of justificatory defences that each operate within their own spheres of influence.<sup>67</sup> These justificatory defences include rules such as necessity, self-defence, defence of property, publication of a defamatory statement in the public interest, and so on.

Why have tort defences (and, perhaps, defences in some other branches of private law) developed in this way? Furthermore, is this state of affairs satisfactory? Several of the chapters in the present volume offer thoughts in this connection. Barbara McDonald, for example, queries how defences should be developed in relation to an action for breach of privacy. The law could opt for a very broad defence of public interest, or it could fashion several more precise defences that are sensitive to public interest considerations. McDonald (without expressing a firm conclusion) seems to be sympathetic to the latter approach, on the basis that defendants will be able to predict more easily whether they will benefit from a defence than would be possible if there were a single broad, generalised defence. A broad defence, she claims, will ‘leav[e] it to the judgment of an individual judge as to whether the balance justifies the defendant’s behaviour in the particular case’.<sup>68</sup>

Paul Davies, in his chapter on defences and third parties, also touches upon this theme. His major concern is with the defence of justification in the context of secondary participation in a breach of contract. Davies asks whether the defence should be cast broadly or instead confined to specific situations, which is very closely related to the point addressed by McDonald.<sup>69</sup> Davies enunciates some arguments for and against making the defence available to the entire ocean of factual situations in which accessories might incur liability in tort, versus what might be called an ‘island’ approach. He sees a broad approach as having the advantage of flexibility but at the cost of reduced certainty, and notes that the criminal law in the context of the statutory offence of assisting or encouraging crime<sup>70</sup> has taken this route.<sup>71</sup>

### 3.3 Theories of Tort Law and Defences

Several scholars have offered general theoretical accounts of the law of torts. These include economic accounts<sup>72</sup> and explanations of torts as a law of interpersonal

<sup>67</sup> Of course, some of these defences have a larger sphere of influence than others and there is an extensive amount of overlap. For example, the defence of necessity (which is addressed by Graham Virgo in his chapter in this volume) is not limited by much of the fencing that confines the defence of self-defence, although both defences cover some of the same terrain. If the two defences might be envisaged in terms of intersecting circles, we suggest that the circle representing necessity would be considerably larger.

<sup>68</sup> See ch 15 at p 309.

<sup>69</sup> See ch 15 at pp 110–13.

<sup>70</sup> Serious Crime Act 2007 (UK), ss 44–49.

<sup>71</sup> *ibid* s 50.

<sup>72</sup> Richard Posner was responsible more than anyone else for what might be called the first wave of the law-and-economics movement, mainly as a result of his RA Posner, ‘A Theory of Negligence’ (1972) 1 *Journal of Legal Studies* 29 and WM Landes and RA Posner, *The Economic Structure of Tort Law* (Cambridge MA, Harvard University Press, 1987).

wrongs.<sup>73</sup> Some of these theorists contend that their account can explain not just tort law but private law generally.<sup>74</sup> The chapters by Chief Justice McLachlin, John Goldberg and Robert Stevens raise an issue as to the significance of defences for such theories. Two questions are presented. The first is how we should understand particular defences within general theories of tort law. The second is what should be done if we find that a particular defence does not seem to cohere with the theory in particular. What are the implications of a lack of concordance between a defence and a theory?

### 3.3.1 *Corrective Justice*

Several theorists, such as Ernest Weinrib<sup>75</sup> and Allan Beever,<sup>76</sup> claim that tort law is explained by a theory of corrective justice. Very simply, these theorists argue that torts are injustices committed by a single defendant against a single claimant, and that tort remedies aim to reverse that injustice. The Chief Justice, in her contribution to this volume, posits that these theories provide a ‘principled basis for the law of tort’.<sup>77</sup> However, her inquiry is not into the theory as a whole; instead, she aims to explain how the law on illegality can be squared with the corrective justice theory.<sup>78</sup>

Two key claims are made in the Chief Justice’s chapter. The first is that invoking the doctrine of illegality to deny claims simply because the claimant happened to be injured while acting illegally, even if the criminal act is causally implicated in the claimant’s damage, is inconsistent with corrective justice. This is because it ‘asks the court to consider the claimant independently of the defendant. In doing so it disrupts the correlative and integrated structure of a corrective justice model’.<sup>79</sup> The fact that the claimant acted illegally has nothing, the Chief Justice writes, to do with the relationship between the parties. The second claim is that in very limited circumstances denying recovery on the ground of illegality is consistent with corrective justice. The main situation that the Chief Justice has in mind is where the claimant seeks damages in respect of the imposition of a criminal law sanction. The Chief Justice considers that rejecting such claims via the illegality defence is consistent with corrective justice on the basis that the claimant has suffered no loss, and without a loss, there is not correctible injustice.<sup>80</sup>

The Chief Justice considers that the law on illegality in Canada complies with corrective justice,<sup>81</sup> while the very different rules that govern the defence elsewhere in the common law world do not.<sup>82</sup> She does not state whether she believes that the

<sup>73</sup> We have in mind here writings such as Weinrib (n 58), Stevens (n 3) and JCP Goldberg and BC Zipursky, ‘Torts as Wrongs’ (2010) 88 *Texas Law Review* 917.

<sup>74</sup> See, eg, Weinrib (n 58).

<sup>75</sup> *ibid*.

<sup>76</sup> A Beever, *Rediscovering the Law of Negligence* (Oxford, Hart Publishing, 2007).

<sup>77</sup> See ch 11 at p 208.

<sup>78</sup> *ibid* 209.

<sup>79</sup> *ibid* 220–21.

<sup>80</sup> *ibid* 221–22.

<sup>81</sup> See, especially, *Hall v Hebert* [1993] 2 SCR 159 (SCC).

<sup>82</sup> See, eg, *Miller v Miller* [2011] HCA 9; (2011) 242 CLR 446 and *Gray v Thames Trains Ltd* [2009] UKHL 33; [2009] 1 AC 1339.

law elsewhere, which she asserts does not comply, at least not fully, with corrective justice, ought to be changed *on account* of the lack of compliance with corrective justice. However, significantly, she criticises the law on illegality in tort in other jurisdictions on the basis that it is unsupported by policy considerations, such as whether the doctrine deters offending.<sup>83</sup> Given that the centrality of corrective justice theory to her chapter, this suggests that she regards policy considerations as relevant to corrective justice accounts of tort law, contrary to the views of several prominent corrective justice theorists.<sup>84</sup>

### 3.3.2 Rights Theory

In *Torts and Rights*, Stevens contended that a rights-based theory provides the best explanation of the whole of the law of torts.<sup>85</sup> Expressed very simply, the central idea is that torts are violations of primary rights and that, *inter alia*, tort law provides victims of such violations with a remedy that is substitutive of that primary right. Stevens' analysis in *Torts and Rights* only addressed the doctrine of contributory negligence in passing.<sup>86</sup> It did not consider the relationship between the doctrine and his theory of tort; instead, Stevens confined himself to criticising the drafting of the British apportionment legislation, namely, the Law Reform (Contributory Negligence) Act 1945 (UK).<sup>87</sup>

In his contribution to this volume, Stevens specifically addresses the law on contributory negligence. He argues that the entire law on contributory negligence (and not just the scheme of apportionment adopted by the 1945 Act) should be abolished, with the result being that fault on the part of the claimant would ordinarily have no bearing on either liability or the quantification of damages. Contributory negligence should, in his view, cease to be a free-standing rule, and fault on the part of the claimant should be relevant only insofar as other rules, such as the principle of intervening causation, are sensitive to it.

Stevens regards the defence of contributory negligence as incompatible with his rights theory. He begins by suggesting that the issue of 'whether contributory fault should be a defence [should be] determined by why it is thought that damages are payable for the commission of torts'.<sup>88</sup> Stevens then claims: (1) that tort law is about rights; and (2) that the doctrine of contributory negligence is not explicable in terms of rights because the claimant's rights are unaffected by carelessness on his part that risks only his own interests.<sup>89</sup> As a further step, Stevens also implies (3) that the law

<sup>83</sup> See ch 11 at pp 212–13.

<sup>84</sup> See, eg, Beever (n 76) 52–54; Weinrib (n 58) 220–21.

<sup>85</sup> Stevens (n 3).

<sup>86</sup> *ibid* 125–27. Other theorists who are committed to explaining tort law in terms of rights have similarly not engaged with the doctrine. John Goldberg and Benjamin Zipursky, for example, have not, so far as we can tell, tried to accompany the doctrine (which is generally known as the doctrine of comparative responsibility in the United States) with their theory of tort law. The defence is not treated in the recent collection of essays on rights theory edited by Donal Nolan and Andrew Robertson: see D Nolan and A Robertson, *Rights and Private Law* (Oxford, Hart Publishing, 2012).

<sup>87</sup> Stevens (n 3) 124–26.

<sup>88</sup> See ch 13 at p 252.

<sup>89</sup> '[T]he risks I run in relation to my own interests are nobody's concern but mine' (at p 253).

should be changed to bring it into conformity with the rights-based understanding of tort law, by abolishing apportionment for contributory negligence.<sup>90</sup>

### 3.3.3 Civil Recourse Theory

John Goldberg has promoted a theoretical account of tort law that is based on civil recourse for wrongs.<sup>91</sup> This theory shares much in common with both corrective justice theory (it has been argued that the theories are effectively the same<sup>92</sup>) and with rights theory. The gist of civil recourse theory is that tort law is not a system for providing compensation for losses caused by accidents, or for deterring inefficient behaviour (although it has those effects), but is a mechanism by which victims of interpersonal wrongs can hold the wrongdoer to account. Goldberg's chapter in this volume addresses the role of excuses in tort law through the lens of civil recourse theory.<sup>93</sup> We discuss excuses directly later,<sup>94</sup> and engage more fully with Goldberg's chapter there. For present purposes, we confine our remarks to the implications of Goldberg's analysis for civil recourse theory. Goldberg considers that tort law is largely insensitive to excuses although he believes that excuses occasionally intrude into tort law. What are the implications of this claim (if it is correct) for his theory? One might think that the general lack of excuses is a challenge to the theory: if excused defendants are not released from liability does that mean that tort is affixing liability to conduct that is not really wrong?<sup>95</sup> Goldberg's response is that it is possible coherently to say that an excused defendant commits a wrong. This leads him to the conclusion that tort law 'can cogently refuse to recognise excuses'.<sup>96</sup> As this expression suggests, Goldberg does not appear to regard excuses as anathema to tort law. However, he does seem to regard a tort law without excuses as more principled than one without them. He suggests that the exclusion of excuses 'grants to victims' of wrongs 'the power to excuse'. This 'directs wrongdoers to make their excuses to the victim'. For this reason, tort law might be seen as implementing the principle of civil recourse more fully when it excludes excuses.

<sup>90</sup> It is worth noting that, although a radical reform, Stevens is not alone in making this recommendation. Patrick Atiyah famously suggested that the doctrine should be abandoned, at least in the context of personal injuries: P Cane, *Atiyah's Accidents, Compensation and the Law*, 8th edn, (Cambridge, Cambridge University Press, 2013) 52–7. Given that Atiyah had very different theoretical allegiances from Stevens, it is not surprising that Atiyah's argument is distinct from that of Stevens.

<sup>91</sup> Probably the fullest statement of this thesis is Goldberg and Zipursky (n 73).

<sup>92</sup> EJ Weinrib, 'Civil Recourse and Corrective Justice' (2011) 39 *Florida State University Law Review* 273, 297 arguing that 'differences between civil recourse and corrective justice, if they exist at all, are gossamer thin'. Cf BC Zipursky, 'Civil Recourse, Not Corrective Justice' (2003) 91 *Georgetown Law Journal* 695.

<sup>93</sup> The contribution to this volume is part of a wider project on excuses in tort law: see, further, JCP Goldberg, 'Inexcusable Wrongs' (2015) 103 *California Law Review* (forthcoming).

<sup>94</sup> See Section 4.2.3.

<sup>95</sup> This does seem to be a concern of Goldberg: see the discussion ch 4 at p 56.

<sup>96</sup> *ibid*. We suggest, below, that Goldberg might in parts of his chapter go rather further than this and claim that tort law is properly insensitive to excuses: see Section 4.2.3.

### 3.4 Statute Law and Defences

Several chapters in this volume engage with defences that are at least partially statute-based. For instance, Andrew Burrows tackles issues in the law of limitation of actions, much of which is legislative in origin. There are several important points to make in this respect. First, the present law on limitation is a warning to those considering piecemeal statutory reform. As Burrows highlights, many seemingly arbitrary differences exist as one moves from one cause of action to another in relation to both the duration of the limitation period<sup>97</sup> and the point at which time begins to run.<sup>98</sup> Secondly, limitation is also an excellent illustration of the fact that, generally speaking, legislation has infiltrated the law on tort defences to a much greater extent than in relation to that part of the law of torts that specifies the elements of causes of action. The fact that the legislature's attention has been skewed in this way is a notable feature of tort law. One possible explanation for this focus is that when the legislature wants to provide a particular group of stakeholders with protection from liability in tort, it finds it easier to do this by way of tweaking the law on defences rather than the elements of torts. It is relatively simple to single out specific groups of persons for heightened protection by changing the law on defences, whereas if the elements of torts are altered there is (or might be thought to be) an increased risk that the change will be broader than necessary.<sup>99</sup>

In his contribution, Donal Nolan is also concerned with statutory tort defences. Nolan's principal interest is the law regarding the effect of planning permission and its relationship with the defence of statutory authority. Judges regularly observe, as Nolan notes, that the fact a defendant has been granted planning permission to carry out a given activity is not the same as statutory authorisation of that activity. However, Nolan argues that 'in amenity nuisance cases where the implementation of planning permission is deemed to have changed the nature of the locality, the planning consent has the same effect as the statutory authorisation of the defendant's activity'.<sup>100</sup> Nolan claims that this rule concerning planning permission is, therefore, a de facto extension of the statutory authority defence. Nolan criticises this situation on the ground that allowing planning permission to mimic the defence of statutory authority is unsupported by the rationale for recognising the defence of statutory authority, namely, that it gives expression to the will of Parliament. As Nolan puts it: 'the justification for allowing direct expression of legislative will to abrogate private rights [via the defence of statutory authority] does not extend to administrative decisions of the kind involved in the planning process'.<sup>101</sup> This argument illustrates another cautionary tale of statutes and the common law: the need to examine carefully a particular statutory defence (including its rationale) before relying on it for a common law analogy. Although Nolan is concerned only with the law of nuisance,

<sup>97</sup> Burrows, ch 16.

<sup>98</sup> ibid.

<sup>99</sup> This suggestion is discussed further in J Goudkamp 'Statutes and Tort Defences' in J Steele and TT Arvind (eds), *Tort Law and the Legislature: Common Law, Statute and the Dynamics of Legal Change* (Oxford, Hart Publishing, 2013).

<sup>100</sup> See ch 10 at p 191. Locality is irrelevant in physical nuisance cases pursuant to *St Helen's Smelting Co v Tipping* (1865) 11 HL Cas 642, 650–51; 11 ER 1483, 1486.

<sup>101</sup> See ch 10 at p 193.

his analysis is of wider significance. One area of the law on which it might throw light is the defence of illegality, where judges have, at least in some jurisdictions, often developed the common law on this point by reference to the criminal law legislation that the claimant contravened.<sup>102</sup>

#### 4. THEMES FROM THE CRIMINAL LAW

##### 4.1 Is Criminal Law Scholarship and Doctrine Relevant?

In contrast with the scant learning that exists regarding tort defences, the scholarship on defences in the criminal law is voluminous and highly sophisticated.<sup>103</sup> It is tempting, therefore, for tort scholars to look to this work for inspiration and arguments, especially given the apparent parallels that exist between many tort law defences and criminal law defences. One might also be inclined to argue that tort law should adopt certain criminal law principles. Virgo does both of these things in his chapter, as do Edelman and Dyer. For instance, in thinking about the defence of necessity, Virgo makes ‘extensive reference … to criminal law theory and doctrine’.<sup>104</sup> He does this ‘in part because much more work has been done by criminal law theorists in analysing the nature of defences generally and necessity in particular’.<sup>105</sup> Edelman and Dyer claim that the definitional elements of the tort of intimidation were developed by reference to criminal liability for unlawful pressure (menaces). They then suggest that ‘[t]he same process of parallel development, applied to defences, would see the well-recognised defence of duress in criminal law extended to torts’.<sup>106</sup> But whether it is legitimate to draw upon criminal law scholarship and principles is contentious. As Chief Justice McLachlin observes in her chapter:<sup>107</sup>

The traditional approach is to think of tort law and criminal law as non-overlapping magisteria, or separate bodies of law. While the norms of tort law and criminal law can sometimes be applied to the same event, neither body of law is relevant to the other because their objectives are different.

A question that arises, therefore, is the extent to which these scholars can make use of criminal law theory and doctrine. Is it permissible to incorporate directly large amounts of criminal theory and doctrine? Should they, instead, proceed more cautiously and selectively? Or should torts scholars refrain completely from looking to

<sup>102</sup> See, eg, *Revill v Newbery* [1996] QB 567 (CA); *Miller v Miller* [2011] HCA 9; (2011) 242 CLR 446.

<sup>103</sup> For a taste of the criminal law writing, see HLA Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford, Clarendon Press, 1968); G Williams, ‘Offences and Defences’ (1982) 2 Legal Studies 233; GP Fletcher, *Rethinking Criminal Law* (Boston, Little, Brown & Co, 1978) chs 7, 9–10; PH Robinson, *Criminal Law Defences* (St Paul MN, West Publishing Co, 1984) (two volumes); J Gardner, *Offences and Defences: Essays in the Philosophy of Criminal Law* (Oxford, Oxford University Press, 2007) chs 4–9; J Horder, *Excusing Crime* (Oxford, Oxford University Press, 2004); Victor Tadros, *Criminal Responsibility* (Oxford, Oxford University Press, 2005) chs 4, 10–12; RA Duff, *Answering for Crime* (Oxford, Hart Publishing, 2007) chs 9, 11.

<sup>104</sup> See ch 8 at p 135.

<sup>105</sup> *ibid.*

<sup>106</sup> See ch 9 at p 159.

<sup>107</sup> See ch 11 at p 218 (footnote omitted).

the criminal law for guidance? At this last extreme, Jules Coleman claims that ‘[t]he differences between torts and the criminal law are so fundamental that the net result of applying one’s understanding of the criminal law to torts is bad philosophy and total confusion’.<sup>108</sup>

A slightly different question from that of whether criminal law theory and doctrine should ever be applied in the tort law context is whether tort law’s rules ought to be fashioned in the light of the criminal law’s principles. Chief Justice McLachlin contends that it is imperative that tort law (and, as we read her, private law generally) ought to be so developed, on the ground that the law as a whole must be coherent for rule-of-law reasons.<sup>109</sup>

Regardless of where one stands on the broader methodological issues, scholarship in tort law is increasingly dealing with several themes most commonly associated with criminal law defences. In the remainder of this section we examine two of these themes which were pertinent at the workshop and in the chapters in this book.

## 4.2 Justifications and Excuses

### 4.2.1 Is the Division Useful?

Criminal lawyers conventionally distinguish between justificatory and excusatory defences, and a vast literature exists in this regard.<sup>110</sup> Should tort lawyers think in these terms? This question proved to be highly controversial at the workshop. Some participants were concerned only with the substantive outcomes of a successful plea and, considering that both justificatory and excusatory defences (assuming that the latter already exist in tort law or are introduced into tort law<sup>111</sup>) yield a verdict for the defendant, doubted whether we should care about such a classification. In their chapter on duress, James Edelman and Esther Dyer reject the usefulness of employing the labels ‘justification’ and ‘excuse’ in tort law for different reasons. Their main claim in this regard is that these terms are unhelpful because there is no consensus as to their meaning.<sup>112</sup> In particular, they point out that criminal lawyers are deeply divided as to whether the defence of duress is a justification or an excuse (or both, as some have argued<sup>113</sup>). This leads them to argue that, if a defence of duress is introduced into tort law, it should be known as a ‘privilege’.<sup>114</sup>

Nevertheless, several contributors to this volume insist on retaining the distinction between justifications and excuses both for theoretical and practical reasons. John Goldberg, for example, sees at least theoretical value in separating justifications from

<sup>108</sup> JL Coleman, *Risks and Wrongs* (Oxford, Oxford University Press, 1992) 222.

<sup>109</sup> See ch 11 at pp 218–20.

<sup>110</sup> Douglas Husak observes that ‘[p]erhaps the most significant and controversial research program among contemporary criminal theorists is the investigation of the advantages and limitations of applications of the distinction between justification and excuse’: DN Husak, ‘Justifications and the Criminal Liability of Accessories’ (1989) 80 *Journal of Criminal Law & Criminology* 491, 491.

<sup>111</sup> See, in this connection, Section 4.2.3.

<sup>112</sup> See ch 9 at p 178.

<sup>113</sup> See, eg, K Greenawalt, ‘The Perplexing Borders of Justification and Excuse’ (1984) 84 *Columbia Law Review* 1897, 1912.

<sup>114</sup> See ch 9 at p 181.

excuses. As we will discuss below, he believes that tort law properly admits justifications to its repertoire of defences but for the most part refuses to recognise excuses.<sup>115</sup> In his chapter, Paul Davies points to one way in which the distinction might be significant in practical terms. He contends that if a principal wrongdoer has a defence, the issue of whether it is a justification or an excuse may affect whether an accessory is entitled to the same defence.<sup>116</sup> Consider the following two situations (our examples, not Davies'). In the first situation, D1 uses reasonable force against C, who was about to attack her. D2 assists D1. If D1 is justified (as she plainly is), D2 might be able to invoke that justification. In the second situation, D1 strikes C because C provoked her. D2 (who was not provoked) assists D1. Many theorists believe that in this situation D1 merely has an excuse,<sup>117</sup> and it might be asserted that any defence that the law gives to D1 should not, because D1 is excused, be enjoyed by D2.<sup>118</sup>

We note that, if the distinction between justifications and excuses is brought to bear on tort law defences, it would plainly not capture all tort defences. For example, limitation bars (which are addressed by Andrew Burrows in his chapter) are neither in the nature of a justification nor an excuse.<sup>119</sup> The same is true of the doctrine of illegality, which is treated by Chief Justice McLachlin, and by Goudkamp and Mayr in their chapters. The non-exhaustive nature of the distinction between justifications and excuses is specifically adverted to by Edelman and Dyer in their chapter, and they seem to see that as a reason for tort lawyers to avoid using the distinction.<sup>120</sup> We have reservations about whether that is a good reason to shun the distinction as an organising device. Justifications and excuses do not exhaust all criminal law defences, and few criminal lawyers contend that the distinction should be abandoned for that reason.<sup>121</sup>

#### *4.2.2 How We Should Understand Justified Acts?*

One of the most disputed questions in the philosophy of the criminal law, at least in recent years, is whether justified conduct is wrong. The conventional view is that justified conduct is not wrong. Endorsing that view, George Fletcher writes: '[c]laims of justification ... challenge whether the act is wrongful'.<sup>122</sup> The rival view, which has lately been gathering support, is that acts that enliven a justification defence remain wrong. John Gardner, for instance, doubts the conventional view.<sup>123</sup> Surely, one might think, if anything calls for a justification, it is a wrong; yet on the conventional view, wrongs cannot be justified (because justified acts on that view are not wrong).<sup>124</sup>

<sup>115</sup> See Section 4.2.3.

<sup>116</sup> See ch 7 at pp 109–10.

<sup>117</sup> See, eg, Gardner (n 103) 109.

<sup>118</sup> See, eg, PH Robinson, 'Criminal Law Defenses: A Systematic Analysis' (1982) 82 *Columbia Law Review* 199, 280.

<sup>119</sup> Of course, it might be disputed whether limitation bars are defences: see Section 2.3.

<sup>120</sup> See ch 9 at p 181.

<sup>121</sup> Antony Duff considers precisely the argument made by Edelman and Dyer in this regard and contends that consigning the justification/excuse distinction to oblivion 'would be an unnecessarily drastic solution': Duff (n 103) 265.

<sup>122</sup> Fletcher (n 103) 759.

<sup>123</sup> Gardner (n 103) especially at 77–82, 96–97.

<sup>124</sup> Consider Gardner's comments, *ibid* 77.

Three contributors to the present volume appear to endorse the conventional view. John Goldberg writes: ‘A *justification* maintains that, even though the defendant’s conduct meets the definition of the relevant wrong, it is not wrong when all relevant facts have been considered’.<sup>125</sup> Robert Stevens claims that a justification will entail that ‘all things considered, nothing wrongful has been done’.<sup>126</sup> Graham Virgo perhaps embraces the conventional view more strongly than either Goldberg or Stevens, claiming that justified defendants do not even act in a ‘morally conflicted fashion’.<sup>127</sup> Paul Davies, by contrast, adheres to the rival view. He asserts that ‘[a]lthough it has been argued that “justifications deny wrongdoing”, the better view seems to be that even where the “primary wrongdoer” is justified, a wrong may might nevertheless have been committed’.<sup>128</sup>

There are several comments that we want to add to the foregoing. First, none of our contributors mounts a full-fledged argument in support of either view. They merely state their position en route to making other arguments. However, that distinct views on the question have arisen shows that the question may deserve closer attention in future work.<sup>129</sup> Secondly, the extent of the practical significance of the distinction between the conventional view and the rival view remains to be seen. Davies suggests one way in which the issue might have real-world consequences. He suggests the rival view means that liability can properly attach to an accessory to a wrong even if the primary wrongdoer is justified.<sup>130</sup> Conversely, he implies, if the conventional view were right, it would not be correct for the law to hold an accessory liable if the principal is justified. Thirdly, we believe that the word ‘wrong’ may be being used in different ways by different theorists, with the result that supposed differences between theorists may sometimes be illusory.<sup>131</sup> An act might be ‘wrong’ in the sense of being in infringement of a right. This is how Robert Stevens uses the word in his chapter when he writes: ‘If you violate [my] right by punching me, you wrong me’.<sup>132</sup> But an act might not violate any rights, but still be wrong in that there were undefeated, sufficient reasons not to perform it.<sup>133</sup>

A related question to that of whether justified acts are wrong is whether justified acts should be encouraged. Some criminal law theorists, most notably Paul Robinson, have contended that they should be.<sup>134</sup> Graham Virgo, in his contribution to the present volume, subscribes to this view. He writes that where a justification defence applies ‘it follows that the defendant’s conduct, which would otherwise be

<sup>125</sup> See ch 4 at p 54 (emphasis in original).

<sup>126</sup> See ch 13 at p 250.

<sup>127</sup> See ch 8 at p 140.

<sup>128</sup> See ch 7 at p 109 (footnotes omitted).

<sup>129</sup> The extent to which the criminal law debate can be transplanted depends in part on whether the notion of wrongfulness is shared: on this question, see Goldberg, ch 4 at p 56.

<sup>130</sup> See ch 7 at pp 109–10.

<sup>131</sup> Goldberg alludes to this risk: ch 4 at p 56. See, for the need to specify this term precisely, and multiple meanings, D Parfit, *On What Matters* (Oxford, Oxford University Press, 2011) ch 7.

<sup>132</sup> Stevens, ch 4 at p 253.

<sup>133</sup> We might refer to a driver making a ‘wrong turn’. Stephen Smith claims that this refers to a particular breach of a duty: ch 4 at p 69. But we doubt that rights are infringed in such a case.

<sup>134</sup> PH Robinson, ‘A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability’ (1975) 23 *University of California Los Angeles Law Review* 266, 274.

unlawful, is lawful and should be encouraged'.<sup>135</sup> The claim that justified conduct ought to be encouraged is controversial. Many criminal law scholars view it with caution.<sup>136</sup> Whether or not this caution is warranted, it seems likely, given the interest that this issue has attracted among criminal law scholars, that it is also an important question for future tort law scholarship.

#### *4.2.3. Do Excuses to Torts Exist? Should They?*

It is widely accepted that the criminal law recognises excuses.<sup>137</sup> What do tort lawyers think about their subject in this regard? Tort lawyers sometimes say things like ‘A will be liable to B if she does X without “justification or excuse”’.<sup>138</sup> This suggests that some lawyers believe that tort law is sensitive to excuses, although such remarks are often made other than in the course of addressing squarely the issue of whether excuses exist in tort law, and so it is difficult to know how much one can read into them. Many—perhaps most—theorists who have considered directly the question claim that tort law does not recognise excuses.<sup>139</sup> So the prevailing wisdom might fairly be said to be that excuses are alien to tort law. Is that wisdom correct? And, regardless of the answer to that question, should excuses play a role in tort law?<sup>140</sup> Several of the contributors to this volume address these questions in varying degrees of detail. The most extensive engagement is offered by John Goldberg.<sup>141</sup> We have already discussed Goldberg’s chapter,<sup>142</sup> focusing on the relevance of excuses to his civil recourse theory of tort law. We return to his chapter here to look directly at what he says about excuses. As we noted earlier, Goldberg claims that tort law is largely insensitive to excuses and that this insensitivity extends not only to the determination of liability, but also to the assessment of damages. However, he accepts that excuses creep in at tort law’s margins. For example, he observes that defendants who exercise self-defence on the basis of a reasonable mistake of fact are released from liability,<sup>143</sup> and suggests that at least some of these defendants are excused, while others may be justified. The best way of understanding cases involving a reasonable mistake as to the need for self-defence is a matter of dispute

<sup>135</sup> See ch 8 at p 140 (footnote omitted). Dickson J, in the Supreme Court of Canada, in *Perka v The Queen* [1984] 2 SCR 232 (SCC) 246–47 is quoted at length by Edelman and Dyer (ch 9 at p 180). In this quote his Honour makes similar comments to Virgo.

<sup>136</sup> J Dressler, ‘New Thoughts about the Concept of Justification in the Criminal Law: A Critique of Fletcher’s Thinking and Rethinking’ (1984) 32 *University of California Los Angeles Law Review* 61, 83; J Gardner, ‘Justification under Authority’ (2010) 23 *Canadian Journal of Law & Jurisprudence* 71, 81.

<sup>137</sup> See, eg, Duff (n 102) ch 11.

<sup>138</sup> See, eg, NJ McBride and R Bagshaw, *Tort Law*, 4th edn (Harlow, Pearson, 2012) 409 (discussing trespass to land).

<sup>139</sup> Gardner (n 135) 92; J Raz, ‘Responsibility and the Negligence Standard’ (2010) 30 *OJLS* 1, 10.

<sup>140</sup> One of us has discussed whether tort law should recognise excuses: see J Goudkamp, ‘Defences in Tort and Crime’ in M Dyson (ed), *Unravelling Tort and Crime* (Cambridge, Cambridge University Press, 2014) 217–31.

<sup>141</sup> See, further, the general comments of Stephen Smith (ch 5 at p 65).

<sup>142</sup> See Section 3.3.3.

<sup>143</sup> This is the law in, at least, England and Wales: *Ashley v Chief Constable of Sussex Police* [2008] UKHL 25; [2008] 1 AC 962.

among criminal lawyers.<sup>144</sup> Some criminal theorists believe that defendants who use defensive force as a result of a reasonable mistake are justified while others think that such defendants are excused. The suggestion, however, that there might be both justified and excused defendants in the category of defendants who act on the basis of a reasonable mistake as to the need for defensive force is, we think, a novel one. What does Goldberg say in relation to the issue of whether tort law should recognise excuses? We noted earlier that Goldberg claims that it is justifiable for tort law to deny excuses.<sup>145</sup> However, we wonder whether he is not in fact committed to the proposition that excuses should have no role in tort law. In arguing that tort law can sensibly exclude excuses, Goldberg contrasts tort law (understood in terms of his civil recourse theory) with the criminal law. The criminal law, Goldberg reminds us, provides various protections to defendants, who are ‘pitched against the well-resourced state’. These protections include the presumption of innocence, the principle that ambiguous penal statutes should be construed in the defendant’s favour, a steeply asymmetrical onus of proof in favour of the defendant, and restrictions on the prosecution leading certain types of evidence, such as evidence of the defendant’s bad character. Goldberg claims that these protections include excuses.<sup>146</sup> Conversely, he asserts, in tort law, the parties are equals and the law therefore deals with their interests in a ‘more evenhanded way’. Goldberg says: ‘because tort law is in the business of empowering those who are wronged [in the inter-personal] sense, the demands placed on claimants are, on the whole, less onerous than those placed on prosecutors’.<sup>147</sup> A key question here is whether withholding excuses actually deals with the parties ‘even-handedly’. Why should Goldberg’s claim about the general lack of excuses in tort law lead us to think that tort law so deals with the parties? Perhaps the denial of excuses actually gives an undue advantage to claimants. However, if Goldberg is correct, does it follow that the denial of excuses is merely justifiable? Given Goldberg’s belief that tort law deals with the parties even-handedly, if withholding excuses is necessary in order to treat the parties equally surely the absence of excuses in tort law is justified?

Graham Virgo considers that tort law recognises an excuse in the form of private necessity. Since (at least in some jurisdictions<sup>148</sup>) the defendant remains liable to pay damages in private necessity cases, he reasons that the defendant cannot be

<sup>144</sup> Compare, eg, GP Fletcher, ‘Domination in the Theory of Justification and Excuse’ (1996) 57 *University of Pittsburgh Law Review* 553, 63–67 (contending that a person who reasonably but mistakenly thinks that they are justified is excused) and, eg, Tadros (n 103) 280–90 (contending that a person who proceeds on the basis of a reasonable mistake is justified).

<sup>145</sup> See Section 3.3.3.

<sup>146</sup> Goldberg writes:

Because criminal prosecutions are brought by a powerful state that operates the system through which accountability occurs, and because the point of such prosecutions is to inflict punishment, criminal law provides certain protections for defendants. These include ... the recognition of excuses both with respect to liability and punishment (ch 4 at p 57).

Associating excuses with the procedural protections that the criminal law affords to defendants is a highly controversial move, to which few, if any, criminal lawyers have subscribed. There is little consensus among criminal lawyers as to the precise reason why excuses exist. But the accounts offered (several are addressed in Fletcher (n 103) 798–817; see also HLA Hart’s analysis: Hart (n 103) 17–24) differ radically from Goldberg’s.

<sup>147</sup> See ch 4 at p 57.

<sup>148</sup> Eg, Minnesota: *Vincent v Lake Erie Transportation Co* 109 Minn 456; 124 NW 221 (1910).

justified. This suggests, Virgo says, that the defendant must instead be excused.<sup>149</sup> It is unclear to us precisely what Virgo thinks defendants in private necessity cases are excused *from* if they remain liable to pay damages.

Edelman and Dyer's chapter is also relevant to the issue of whether excuses should exist in tort law. They contend that a defence of duress should be ushered into tort law. We have already noted that Edelman and Dyer prefer to avoid using the label 'excuse', at least in relation to duress.<sup>150</sup> However, duress is often thought to be in the nature of an excuse. If, contrary to what Edelman and Dyer contend, the label 'excuse' is rightly applied to duress, it is interesting to consider what implications their analysis may entail. One question is whether their analysis also supports welcoming certain other defences that are generally thought to be excuses into tort law, such as provocation (or loss of control, as it is now called in English criminal law<sup>151</sup>). Some might argue that consistency demands this: if duress, which is often considered to be one of the criminal law's core excuses, is ushered into tort law, it might be thought strange to exclude other excusatory defences found in the criminal law. Edelman and Dyer are silent on this issue.

## 5. THE STRUCTURE OF THE BOOK

We have divided this book into two parts. Part A is concerned, roughly speaking, with issues of general interest to tort law defences as a whole. Part B is concerned with specific tort law defences. The distinction we have sought to draw is a rough one. Some of the chapters on general issues engage with some specific defences in detail; some of the chapters on specific defences raise questions of general interest. Indeed, some specific defences are of general application (for instance, limitation bars and illegality are defences to all torts) and some are not (contributory negligence, for example, probably applies only to the tort of negligence).

<sup>149</sup> See ch 8 at pp 149–50.

<sup>150</sup> See above the text accompanying n 111.

<sup>151</sup> Coroners and Justice Act 2009 (UK), ss 54, 56(1).