# 1

# Introduction

## 1.1. Tort Law Defences

In morality, a person who is accused of committing a wrong may be able to offer an answer to the allegation made against him. Answers to allegations of wrongdoing can have a bearing on one's moral responsibility. Analogous remarks can be made about the law of torts. A defendant whose conduct falls within the definition of a tort may be able to offer a defence. If accepted, the defence will have a bearing on his responsibility within the law of torts. Defences are the subject of this book. Its concern is not, for the most part, to identify the rationales for specific defences (or lack thereof). Neither is it to determine when individual defences are enlivened (or should be enlivened). These are matters of significant importance about which a great deal could be usefully said. But they are not the agenda of this book. Rather, the overarching aims of this book are to explain how defences operate as a system and to learn how they are woven into the tapestry that is tort law. Although defences are an important part of tort law (there are numerous defences available to every tort) and have existed since its inception, an analysis of this kind – a systematic study of the law of defences as an independent field – has never before been undertaken. This introductory chapter lays the foundations of the argument that follows.

## 1.2. What is a 'Defence'?

### 1.2.1. Multiple Meanings

The word 'defence' bears numerous meanings in the tort law context, and a considerable amount of confusion has been spawned by the widespread failure of legal scholars, judges and legislators to indicate what they mean by the word. This situation is a significant impediment to clear thinking in relation to tort law generally. Accordingly, it is essential to begin the analysis by distinguishing the several senses in which the word 'defence' is used in the tort law context and specifying clearly how it will be used in this book.

#### *1.2.1.1. To include denials of elements of the tort in which the claimant sues*

First, the word 'defence' is sometimes used to refer to any argument made by the defendant with the aim of persuading the court to hold that he is not liable.[1] So understood, the word 'defence' encompasses denials by the defendant of one or more of the elements of the tort in which the claimant sues.[2] Examples of denials include pleas by a defendant in proceedings in negligence that he did not owe the claimant a duty of care, that he acted reasonably or that the claimant did not suffer any damage. These pleas merely attack matters that constitute the claimant's cause of action. They do not introduce into the proceedings any issue that the claimant will not have already put into contention.

#### *1.2.1.2. Liability-defeating rules that are external to the elements of the claimant's action*

In a second and stricter sense, the word 'defence' refers only to rules that, when enlivened, result in a verdict for the defendant even though all of the ingredients of the tort in which the claimant sues are present. A defendant invokes a defence within this meaning of the word when he argues along the following lines: 'Even if I committed a tort, judgment should nevertheless be entered in my favour because of rule so and so.' Denials of elements of the tort in which the claimant sues do not qualify as defences when the word 'defence' is used in this way. Only rules such as limitation bars, public necessity and self-defence qualify. A defendant who relies on any of these rules seeks to avoid liability not by denying the claimant's allegations but by going around them.

Defences in the second sense of the word used to be known as pleas in 'confession and avoidance'. This terminology, which is occasionally still used,[3] is revealing.[4] It brought out clearly the fact that defences on the second meaning of that word are rules that are external to the elements of the claimant's action. Offering a defence involved a defendant 'confessing' that the facts narrated by the claimant in his pleadings amounted to a tort and alleging further facts that, if true, would

[1] It was so used by Brennan CJ and McHugh J in *Chakravarti v Advertiser Newspapers Ltd* [1998] HCA 37; (1998) 193 CLR 519, 527 [8], when they said that 'defences are either by way of denial or confession and avoidance'.

[2] Blackstone thought that the word 'defence' was properly confined to denials. He wrote: 'Defence, in it's [*sic*] true legal sense, signifies not a justification, protection, or guard, which is now it's [*sic*] popular signification; but merely an *opposing* or *denial* (from the French verb *defender* [*sic*]) of the truth or validity of the complaint. It is the *contestatio litis* of the civilians: a general assertion that the plaintiff hath no ground of action, which assertion is afterwards extended and maintained in his plea. For it would be ridiculous to suppose that the defendant comes and *defends* (or, in the vulgar acceptation, justifies) the force and injury, in one line, and pleads that he is *not guilty* of the trespass complained of, in the next': W Blackstone, *Commentaries on the Laws of England*, vol 3 (Oxford, Clarendon Press, 1768) 296–97 (emphasis in original).

[3] Eg, *Bryanston Finance Ltd v de Vries* [1975] QB 703, 734 (CA); *Chakravarti v Advertiser Newspapers Ltd* [1998] HCA 37; (1998) 193 CLR 519, 527 [8].

[4] See further JH Baker, *An Introduction to English Legal History*, 4th edn (London, Butterworths, 2002) 77–78.

enable the usual legal effect of the facts pleaded by the claimant to be 'avoided'. The terminology of confession and avoidance fell into disuse, however, because of its association with the long since abandoned rule that those defendants who wished to dispute liability had to choose between offering a denial and advancing a defence. The word 'confession' marked the fact that defendants could not, in earlier times, offer a denial and a defence. Today, defendants do not need to elect between these pleas.[5] They can simultaneously deny the claimant's allegations and appeal to a rule that circumvents their legal effect. One downside of this change is that it removed an incentive to distinguish rigorously between denials and defences in the second sense of the word.

#### *1.2.1.3. Principles that diminish the claimant's relief*

Thirdly, the word 'defence' is used to refer to principles in the law of remedies that restrict the relief available to claimants who succeed in establishing liability. One of the main situations where the word 'defence' is deployed in this sense concerns contributory negligence. It is commonplace for the provision for apportionment for contributory negligence[6] to be described as a defence.[7] Other remedial principles that are routinely described as defences include the doctrine of mitigation of damage[8] and the doctrine of illegality (which is part of the law of remedies in so far as it operates to diminish recovery under particular heads of damages[9]). This third meaning of the word 'defence' is distinct from the first and second meanings. It refers to rules that diminish the claimant's relief, whereas the former meanings refer to pleas that negate liability.

#### *1.2.1.4. Rules in respect of which the defendant carries the onus of proof*

Fourthly, a defence is sometimes said to be a rule the applicability of which is for the defendant to prove. Tony Weir used the word 'defence' in this way when he wrote: 'Contributory negligence is unquestionably a defence . . . [since] it is for the defendant to plead and prove it.'[10] So did the current editor of *Winfield & Jolowicz* when he said that arrest and certain other pleas that may be raised in the context of false imprisonment 'are defences in the true sense, that is to say, it is for the defendant to raise and to establish them'.[11]

[5] For discussion, see JH Friedenthal, MK Kane and AR Miller, *Civil Procedure*, 4th edn (St Paul, Minn, Thomson West, 2005) 301ff; D Dow, 'The Right to Plead Inconsistent Defenses' (1948) 28 *Nebraska Law Review* 29.

[6] Law Reform (Contributory Negligence) Act 1945 (UK), s 1.

[7] Among countless examples see *Reeves v Commissioner of Police of the Metropolis* [2000] 1 AC 360, 371 (HL); *Corr v IBC Vehicles Ltd* [2008] UKHL 13; [2008] 1 AC 884, 905 [19]; P Cane, *The Anatomy of Tort Law* (Oxford, Hart Publishing, 1997) 58.

[8] Eg, *Halifax plc v Gould* [1998] 3 EGLR 177, 182 (CA).

[9] As in *Gray v Thames Trains Ltd* [2009] UKHL 33; [2009] AC 1339 (damages denied in respect of the consequences of the imposition of a criminal sanction).

[10] T Weir, *An Introduction to Tort Law*, 2nd edn (Oxford, Clarendon Press, 2006) 129.

[11] WVH Rogers (ed), *Winfield & Jolowicz on Tort*, 18th edn (London, Sweet & Maxwell, 2010) 120 [4.19] (footnote omitted).

One who gives the word 'defence' this meaning uses it in a way that is distinct from the senses previously mentioned. It is obviously different from the first meaning of the word. The first sense in which the word 'defence' is used encompasses denials of elements of the claimant's cause of action, and it normally falls to the claimant to prove the elements of his action.[12] In contrast, a defence in the fourth sense of the word is a rule that the defendant bears the onus of establishing.

The distinction between the second and fourth meanings of the word 'defence' is harder to spot and many torts scholars have failed to notice it. Consider the following passage in John Goldberg and Benjamin Zipursky's *The Oxford Introductions to US Law: Torts*:[13]

> Affirmative defenses are legally recognized grounds for defeating liability even when a legal wrong has been committed. To treat these grounds as affirmative defenses is to say that it is the defendant's burden, rather than the plaintiff's, to raise them in court pleadings and to prove them.

Confusingly, Goldberg and Zipursky use the word 'defence' in different ways in this passage. The first sentence adopts the second meaning of the word 'defence', while the second sentence embraces the fourth meaning. It is possible to illuminate the difference between the second and fourth senses in which the word 'defence' is used by considering limitation bars. A limitation bar is a defence in the second identified sense (it is a rule that defeats liability that is external to the elements of the claimant's action) but it is not (at least in England) a defence on the fourth meaning of the word. It is not a defence in the fourth sense of the word because, rightly or wrongly, once a limitation bar is put in issue by the defendant, the claimant bears the onus of showing that the action was brought in time. In the words of the English Law Commission, 'the claimant has the burden of disproving a limitation defence where the defendant has pleaded one'.[14] This reveals the difference between the second and fourth definitions of the word 'defence'. The difference exists because rules that are defences in the second sense of the word do not always need to be established by the defendant.

The fourth meaning of the word 'defence' is also distinct from its third identified meaning. Consider the provision for apportionment for contributory negligence. That provision is a defence in the third sense, as has been noted. It is also a defence in the fourth sense as the defendant bears the onus of showing that it applies.[15] But this does not mean that there is no difference between the third and

[12] See the text accompanying n 66 below and 6.4.

[13] JCP Goldberg and BC Zipursky, *The Oxford Introductions to US Law: Torts* (Oxford, Oxford University Press, 2010) 110. See also at 183: 'Affirmative defenses must be pleaded and proved by the defendant. Where applicable, they defeat the plaintiff's claim even though the defendant acted tortiously toward the plaintiff.'

[14] Law Commission, *Limitation of Actions* (Law Com No 270, 2001) 195 [5.29]. See also Law Commission *Limitation of Actions* (Law Com CP No 151, 1998) 170–71 [9.23]–[9.25]; *Lloyds Bank plc v Crosse & Crosse* [2001] EWCA Civ 366; [2001] PNLR 34, 839 [41]; *Fiona Trust & Holding Corp v Privalov* [2010] EWHC 3199 (Comm) [315].

[15] *Flower v Ebbw Vale Steel, Iron and Coal Co Ltd* [1936] AC 206, 216 (HL); *Joslyn v Berryman* [2003] HCA 34; (2003) 214 CLR 552, 559 [18].

fourth meanings of the word 'defence'. Suppose that the legislature enacts a statute that provides that the claimant must prove that he took reasonable care for his own safety in order to avoid having his damages apportioned.[16] Were such a statute passed, the apportionment provision would cease to be a 'defence' in the fourth sense of the word. But it would remain a defence on the third sense.

#### *1.2.1.5. The final element of the claimant's cause of action*

It is sometimes asserted that the absence of defences is the final element of certain torts or of all torts. John Fleming used the word 'defence' in this way. He asserted that the action in negligence consists in five elements, the fifth of which was the absence of any defences.[17] In a similar vein, the Restatement (Second) of Torts organises the action in negligence into four elements, the last of which is the inapplicability of any defences.[18] Perhaps the most striking usage of the term 'defence' in this sense is found in the writings of John Wigmore.[19] Wigmore argued that all torts have three elements: a damage element, a responsibility element and a defences or 'excuse or justification' element.

This usage gives a distinct meaning to the word 'defence'. Unlike the fourth meaning, this meaning, by internalising defences within the definition of the relevant tort, would require claimants to disprove defences. Unlike the third meaning, this meaning of the word 'defence' directs attention to liability rules rather than to remedial rules. Unlike the second meaning, it does not regard defences as rules that stand outside of the elements of the tort in which the claimant sues. And unlike the first meaning, it would produce the result that the only denials that qualify as defences are those that target the supposed 'no defences element'.

### 1.2.2. The Meaning Given to the Word 'Defence' in this Book

The word 'defence' should not be used in the first-mentioned sense. Describing any argument made by the defendant that he should not be held liable as a defence suppresses the difference between the claimant's cause of action and liability-defeating rules that are external to the elements of the claimant's action. Obscuring this distinction is undesirable. This is because it is one of the most basic organising devices in tort law. A sense of its significance may be gleaned from the fact that it is recognised not only in tort law but throughout the law of obligations. A corresponding distinction is also a central feature of the criminal law.

[16] As has been done in many Australian jurisdictions in certain settings: see, eg, Civil Liability Act 2002 (NSW), s 50(3); Motor Accidents Compensation Act 1999 (NSW), s 138.

[17] JG Fleming, *The Law of Torts*, 9th edn (Sydney, Law Book Co, 1998) 115–16. This understanding is preserved in the 10th edition of Fleming's book: C Sappideen and P Vines (eds), *Fleming's The Law of Torts*, 10th edn (Sydney, Lawbook Co, 2011) 122 [6.20].

[18] § 281 defines the action in negligence. The word 'defence' does not actually feature in § 281. But the final clause of § 281, clause (d), incorporates §§ 463–496 by reference. These sections encompass defences.

[19] JH Wigmore, 'The Tripartite Division of Torts' (1894) 8 *Harvard Law Review* 200; JH Wigmore, 'A General Analysis of Tort-Relations' (1895) 8 *Harvard Law Review* 377.

The third meaning of the word 'defence' is also unhelpful. If one uses the word 'defence' to include principles in the law of remedies, one conflates liability rules and remedial rules. These are fundamentally different types of rules and the one term should not be used to refer to them indiscriminately. It is routine for tort law textbooks to discuss rules that merely diminish the remedy to which a successful claimant is entitled (such as the apportionment provision for contributory negligence) alongside rules that prevent liability from arising.[20] This is a significant error in classification induced by the careless use of the word 'defence'. The slipshod use of this term has also led to the frequent commission of the converse and equally bad error, which is to include analyses of rules that preclude findings of liability (such as the doctrine of abatement[21]) in discussions of remedies.[22]

It is difficult to support using the word 'defence' in the fourth identified way. A major problem with saying that defences are rules in respect of which the defendant carries the burden of proof is that it draws within its net many rules that no one would intentionally count as defences. Foreign matter that is identified as defences on this meaning of the word includes the very many procedural rules the applicability of which must be established by the defendant. Such rules encompass the provisions that enable defendants to obtain security for their costs,[23] to obtain accelerated service of a claim form[24] and to amend their pleadings after service.[25] To apply the term 'defence' to any of these rules would be a gross distortion of language.

The fifth meaning of the word 'defence' is downright bizarre. It is doubtful whether those who use the word in this way really intended to do so. The idea that the absence of defences constitutes the final *element* of actions in tort (as opposed to the final *question* to be asked in deciding whether liability should be imposed) simply does not enjoy support in the case law.[26] It is notable that those who claim that the absence of defences is the final element of torts do not cite any authorities that endorse this position. The fifth meaning of the word 'defence' should be assiduously avoided.

In contrast with the other definitions of the word 'defence', the second meaning of the word facilitates clear thinking about tort law. This definition, unlike all of the others, brings into focus the fundamental difference between rules that

[20] Eg, Sappideen and Vines (n 17) ch 12; Rogers (n 11) ch 6; J Murphy and C Witting (eds), *Street on Torts*, 13th edn (Oxford, Oxford University Press, 2012) ch 6.

[21] Abatement is discussed in 5.2.1.3.

[22] Eg, Rogers (n 11) 1069–70 [22.47]; Sappideen and Vines (n 17) 524 [21.280]; WP Keeton, DB Dobbs, RE Keeton and DG Owen (eds), *Prosser and Keeton on Torts*, 5th edn (St Paul, Minn, West Publishing Co, 1984) 641–43. For discussion of this error see R Zakrzewski, *Remedies Reclassified* (Oxford, Oxford University Press, 2005) 47–48.

[23] CPR 25.12.

[24] CPR 7.7

[25] CPR 17.1.

[26] In relation to the tort of negligence, see DG Owen, 'The Five Elements of Negligence' (2007) 35 *Hofstra Law Review* 1671. Owen observes that the courts have enumerated the elements of negligence in many different ways. However, despite his thorough review of the case law, Owen did not uncover any cases in which the absence of defences is regarded as an ingredient of that tort.

define torts and rules that release from liability a defendant whose conduct constitutes a tort. This is a conceptually sound way of organising that part of the law of torts that is concerned with specifying when liability arises. It also gives the concept of 'defence' sensible boundaries (it does not, for instance, encompass procedural rules that no one would count as defences). For these reasons, the second definition of the word 'defence' will be adopted in this book. Thus, a defence will be regarded as a rule that relieves the defendant of liability even though all of the elements of the tort in which the claimant sues are present.

Some readers will doubtlessly find this meaning of the word 'defence' to be rather odd. It excludes from the category of defences the provision for apportionment for contributory negligence. That provision is, as has been observed,[27] widely referred to as a defence. Some might consider it to be the most important defence in the modern law of torts in terms of practical relevance. However, if confusion is to be avoided, basic distinctions, such as that between liability rules and remedial rules, should be reflected in the language that is used to discuss the law of torts. Principles that comprise the law of remedies should not be referred to as defences.

## 1.3. The Neglect of Defences

One of the most striking features of the tort law literature is the neglect of defences. At every turn, the impression is given that they are a peripheral part of tort law that is undeserving of serious consideration. Defences are not mentioned in some introductory books on tort law.[28] No extant defence forms the subject matter of a monograph.[29] Collections of essays on tort law rarely contain contributions concerned with defences.[30] No tort law textbook inspects more than a small selection of defences, and those defences that are treated are typically mentioned cursorily. The authors of some tort law textbooks downplay the significance of defences by

[27] See the text accompanying n 7 above.

[28] Eg, G Williams and BA Hepple, *Foundations of the Law of Tort*, 2nd edn (London, Butterworths, 1984).

[29] However, Glanville Williams wrote a magisterial book that is concerned, in part, with the extinct defence of contributory negligence: GL Williams, *Joint Torts and Contributory Negligence: A Study of Concurrent Fault in Great Britain, Ireland and the Common-Law Dominions* (London, Stevens & Sons, 1951).

[30] Eg, none of the following collections includes an essay on defences: PD Finn (ed), *Essays on Torts* (Sydney, Law Book Co, 1989); NJ Mullany (ed), *Torts in the Nineties* (Sydney, LBC Information Services, 1997); P Cane and J Stapleton (eds), *The Law of Obligations: Essays in Celebration of John Fleming* (Oxford, Clarendon Press, 1998); NJ Mullany and AM Linden (eds), *Torts Tomorrow: A Tribute to John Fleming* (Sydney, LBC Information Services 1998); GJ Postema (ed), *Philosophy and the Law of Torts* (Cambridge, Cambridge University Press, 2001); MS Madden (ed), *Exploring Tort Law* (Cambridge, Cambridge University Press, 2005); JW Neyers, E Chamberlain and SGA Pitel (eds), *Emerging Issues in Tort Law* (Oxford, Hart Publishing, 2007); D Nolan and A Robertson (eds), *Rights and Private Law* (Oxford, Hart Publishing, 2012).

combining their examination of defences with other parts of tort law, such as remedies for torts.[31] Several treatises on comparative tort law ignore almost completely defences in the system of tort law with which they are concerned.[32] Some books about specific torts or particular families of torts barely mention defences to liability arising in the torts under examination.[33]

The lack of interest in defences has left numerous substantial gaps in our understanding of them. The size of these gaps may be put into perspective by comparing our learning regarding torts with what we know about defences. Consider, first, the fact that while concerted efforts have been made to explain what a tort is,[34] no detailed definition of a defence has been developed. Secondly, although comprehensive catalogues of torts have been drawn up,[35] no one has attempted to itemise defences. Thirdly, theorists have suggested systems for classifying torts[36] but no fully articulated taxonomy of defences has been constructed.[37] Fourthly, although many attempts have been made to justify tort law, these attempts tend to leave defences out of the picture.[38] Fifthly, analyses of the differences between the law of torts and other branches of the law virtually never consider how tort law is distinctive in terms of its defence regime. For instance, although we have many 'maps' of the law of obligations that purport to describe the unique topography of tort law,[39] they are all seriously incomplete as they fail to reveal how tort law stands apart from the other parts of the law of obligations in terms of its system of defences.

Why have defences failed to attract more attention? The lack of interest can arguably be chalked up to the gradual decline in the number and potency of

[31] Eg, S Deakin, A Johnston and B Markesinis, *Markesinis and Deakin's Tort Law*, 7th edn (Oxford, Clarendon Press, 2013) pt VIII.

[32] Eg, BS Markesinis and H Unberath, *The German Law of Torts: A Comparative Treatise*, 4th edn (Oxford, Hart Publishing, 2002).

[33] Eg, H Carty, *An Analysis of the Economic Torts* (Oxford, Oxford University Press, 2001); S Douglas, *Liability for Wrongful Interferences with Chattels* (Oxford, Hart Publishing, 2011); T Weir, *Economic Torts* (Oxford, Clarendon Press, 1997). A refreshing exception is J Murphy, *The Law of Nuisance* (Oxford, Oxford University Press, 2010) ch 5.

[34] Eg, P Birks, 'The Concept of a Civil Wrong' in DG Owen (ed), *Philosophical Foundations of Tort Law* (Oxford, Oxford University Press, 1995) 29.

[35] Eg, B Rudden, 'Torticles' (1991–1992) 6/7 *Tulane Civil Law Forum* 105.

[36] Eg, R Stevens, *Torts and Rights* (Oxford, Oxford University Press, 2007) ch 13.

[37] While no comprehensive taxonomy of tort defences has been developed, it is true that vague suggestions can be found in the literature as to ways in which defences might be organised. These suggestions are the subject of ch 7.

[38] This was noted in JL Coleman, *Risks and Wrongs* (Oxford, Oxford University Press, 1992) 216. Coleman wrote that 'few theorists have analyzed the role of . . . defenses in the theory of liability' (footnote omitted). A good illustration of the tendency of theorists to gloss over defences is EJ Weinrib, *The Idea of Private Law* (Cambridge, Mass, Harvard University Press, 1995). After setting out his claim that tort law is an exercise in corrective justice, Weinrib selects the tort of negligence to test this hypothesis. While he discusses the main features of this tort, his treatment of defences to liability in negligence is limited to a single footnote (at 169, n 53). Another example is Robert Stevens's *Torts and Rights* (n 36), which is almost completely silent on the subject of defences.

[39] Eg, P Birks, 'Definition and Division: A Meditation on the *Institutions* 3.13' in P Birks (ed), *The Classification of Obligations* (Oxford, Clarendon Press, 1997) ch 1; Cane (n 7) ch 6; Stevens (n 36) 284–90.

defences over the second half of the nineteenth century and the twentieth century. During this period, many defences were killed off or emasculated.[40] Defences that have been cast out of tort law include common employment,[41] contributory negligence (which was replaced by the apportionment regime), the inter-spousal immunity,[42] the immunity of highway authorities for nonfeasance,[43] the immunities of advocates[44] and expert witnesses,[45] and the charities' immunity.[46] An excellent example of a defence that was previously of considerable importance but which has been deprived of much of its power is the immunity of the Crown.[47] It is conceivable that the shrinking stock of defences combined with the enfeeblement of some that remain prompted scholars generally to conclude that defences are on the way out and are not a research priority.

A second explanation for the lacuna of theorising regarding defences lies in the preoccupation of many torts scholars with the tort of negligence. This preoccupation is significant because there are fewer defences to negligence than to many other torts. In particular, it has no justificatory defences. Much more will be said about this important type of defence later.[48] For the moment, it suffices to say that justificatory defences are defences the application of which depends upon the defendant acting reasonably in committing a tort. There is no logical space for any justificatory defences to negligence because negligence can be committed only if one acted unreasonably, which is simply another way of saying that one acted without justification.[49] The relatively small number of defences available to the tort of negligence may have contributed to defences generally failing to attract the interest of theorists.

A third explanation for the general neglect by scholars of tort law defences relates to the fact that many defences to liability arising in tort are not specific to tort law. Many tort law defences are available throughout the law of obligations. Examples of such defences include abuse of process, illegality,[50] limitation bars,

[40] See further J Goudkamp, 'Statutes and Defences' in TT Arvind and J Steele (eds), *Tort Law and the Legislature: Common Law, Statute and the Dynamics of Legal Change* (Oxford, Hart Publishing, 2013) ch 3.

[41] Law Reform (Personal Injuries) Act 1948 (UK), s 1(1).

[42] See 5.3.1.12.

[43] *Ibid.*

[44] *Ibid.*

[45] See ch 5, n 133.

[46] See 5.3.1.12.

[47] See 5.3.1.8.

[48] See 4.3.1–4.3.2.

[49] For an argument that to act reasonably means to act with justification see J Gardner, 'The Mysterious Case of the Reasonable Person' (2001) 51 *University of Toronto Law Journal* 273.

[50] 'We do not consider that the public policy that the court will not lend its aid to a litigant who relies on his own criminal or immoral act is confined to particular causes of action': *Clunis v Camden and Islington Health Authority* [1998] QB 978, 987 (CA); '[the defence] applies across the board': *Vellino v Chief Constable of Greater Manchester* [2001] EWCA Civ 1249; [2002] 3 All ER 78, 87 [44]; [2002] 1 WLR 218, 228. The defence has defeated proceedings in trespass to the person (*Cross v Kirkby* The Times, 5 April 2000 (CA)), trespass to land (*Brown v Dunsmuir* [1994] 3 NZLR 485 (HC)), negligence (*Delaney v Pickett* [2011] EWCA Civ 1532; [2012] RTR 187), conversion (*Thackwell v Barclays Bank plc* [1986] 1 All ER 676 (QBD)), detinue (*Thomas Brown and Sons Ltd v Fazal Deen* (1962) 108

release and *res judicata*. The fact that numerous tort law defences are defences to liability arising in other branches of the law of obligations has led some writers to conclude that tort lawyers do not need to concern themselves with many tort law defences. This thinking is visible in, for instance, Robert Stevens's *Torts and Rights*. Stevens argues that tort law theorists do not need to dwell on defences such as illegality because it is a defence not only to liability in tort but to 'a claim based upon the assertion of any other right'.[51] Stevens then says:[52]

> All rights, whether they are based upon contract or unjust enrichment, found in law or equity, or *in rem* or *in personam* are subject to the principle of *ex turpi causa non oritur actio* (a base cause does not give rise to an action). Consequently, it is better considered in relation to all rights, rather than specifically in relation to the law of torts.

This thinking overlooks the fact that defences that are not specific to tort law often assume a distinctive shape in the tort context. The very example that Stevens gives – the defence of illegality – exemplifies this situation. The law governing that defence as it applies in the tort law setting is quite different from the law that controls the defence as it operates in other departments of the law of obligations.

A fourth reason why defences may have been largely ignored by legal writers is the fact that they are rules that, generally speaking, enunciate exceptional situations when liability will not arise.[53] The fact that many defences are engaged only relatively infrequently might have led to the perception that defences are a sideshow and that the elements of torts are the 'main event' in tort law, both in practical and theoretical terms. In other words, defences might be considered to be part of the periphery and something with which it is unnecessary to come to grips in order to understand tort law.

A fifth explanation for the relative lack of interest in defences concerns the fact that defences are second-tier questions.[54] The first major question that a court trying a tort action needs to consider is whether all of the elements of the tort in which the claimant sues are present. A court should ask whether a defence applies only if it decides that all of the elements of the relevant tort exist. The fact that the question 'Does a defence apply?' is a subsidiary one may have contributed to defences being largely ignored by legal writers.

A sixth and final reason for the general neglect of defences may have to do with their institutional origins. The law that specifies the elements of torts remains overwhelmingly judge-made. Consider, for example, the building blocks of the action in negligence, namely, a duty of care, a breach of that duty and non-remote damage caused by the breach of duty. The principles that govern these elements are located almost exclusively in the common law, not in acts of Parliament.

CLR 391 (HCA)), and malicious prosecution and misfeasance in a public office (*Emanuele v Hedley* (1997) 137 FLR 339 (ACTSC)).

[51] Stevens (n 36) 304.
[52] *Ibid*, 304–05.
[53] See further 2.3.3.
[54] See further 1.5.

Although we live in the 'age of statutes',[55] they have escaped legislative intervention essentially unscathed. The same can be said of the elements of many other torts, including all of the varieties of trespass, private and public nuisance, the tort recognised in *Rylands v Fletcher*[56] and all of the economic torts. In contrast, a much greater proportion of the law of defences is born of statute.[57] For example, the English legislature has intervened extensively in relation to defences to defamation[58] and trespass.[59] The entire system of limitation of actions[60] is an invention of the legislature. The fact that there is more statutory law in the field of defences than in that which controls the elements of torts is significant for present purposes since, as is well known, lawyers are generally profoundly uninterested in legislation, despite the fact that it is formally superior to the common law as a source of law. As Justice Harlan Stone memorably put it, statutes have usually been perceived by lawyers as 'an alien intruder in the house of the common law'.[61] This is certainly an accurate description of the attitude of most tort lawyers.[62] The greater volume of statutory law in the defence context might have played a role in the relative neglect of defences by scholars.

## 1.4. Why are Defences Worth Investigating?

There are at least two reasons why defences are of such general theoretical significance that they deserve considerably more attention than they have received to date. The first reason is that they make a significant contribution to tort law's correlative structure,[63] that is to say, the fact that tort law is notionally concerned

[55] G Calabresi, *A Common Law for the Age of Statutes* (Cambridge, Mass, Harvard University Press, 1982).

[56] (1866) LR 1 Exch 265 (Exch Ch).

[57] The details are given in Goudkamp (n 40). Possible reasons for the legislature's concentration on defences when legislating with respect to tort law are given in 9.1.2.

[58] Eg, Defamation Act 1952 (UK); Defamation Act 1996 (UK); Defamation Act 2013 (UK).

[59] Eg, Mental Health Act 1983 (UK); Police and Criminal Evidence Act 1984 (UK), pts 1–2; Mental Capacity Act 2005 (UK); Criminal Justice and Police Act 2001 (UK), pt 2.

[60] Limitation Act 1980 (UK).

[61] HF Stone, 'The Common Law in the United States' (1936) 50 *Harvard Law Review* 4, 15. Similarly, Jack Beatson observed that lawyers see 'statutes as evil devices marring the symmetry of the common law': J Beatson, 'Has the Common Law a Future?' (1997) 56 *Cambridge Law Journal* 291, 299. Likewise, Andrew Burrows writes that 'those with a deep love of the common law, and working in an area such a contract or tort or unjust enrichment, have tended to regard statutes as an unwelcome visitor into a territory dominated by case law': A Burrows, 'The Relationship between Common Law and Statute in the Law of Obligations' (2012) 128 *Law Quarterly Review* 232, 232.

[62] TT Arvind and J Steele complain that 'there has been a relative lack of scholarly attention devoted to legislation in the law of tort' and that 'legislation tends to be left at the periphery of the subject, either unconsciously, or deliberately': TT Arvind and J Steele, 'Introduction: Legislation and the Shape of Tort Law' in TT Arvind and J Steele (eds), *Tort Law and the Legislature: Common Law, Statute and the Dynamics of Legal Change* (Oxford, Hart Publishing, 2013) 1, 1–2.

[63] In relation to defences to liability in negligence, see A Beever, *Rediscovering the Law of Negligence* (Oxford, Hart Publishing, 2007) ch 10.

with both parties equally.[64] Consider the focus of torts and defences respectively. Generally speaking, the issues listed under the 'tort' heading are concerned primarily with the defendant's behaviour. Take, for example, the tort of negligence. That tort directs attention mainly to the defendant's conduct. Did the defendant act reasonably? Should he have foreseen that the claimant might be injured by his conduct? The same is true of most other torts. Conversely, issues that fall under the 'defence' heading tend to centre attention on the claimant. A good example is the defence of illegality. That defence is claimant-orientated. It is concerned with whether the claimant was injured while acting illegally. The defendant's conduct features only in modest ways in relation to it. Defences, therefore, play a central role in counterbalancing the disproportionate attention that the elements of torts place on the defendant's conduct. Unless due attention is given to them, the correlative nature of the law of torts cannot be fully understood.

Defences contribute to the correlative structure of tort law not only by compensating for the tendency of the elements of torts to centre on the defendant's behaviour. They also further tort law's bilateral nature via the rules governing the onus of proof.[65] It is a general and well-established rule that the claimant bears the onus of proving facts that satisfy the elements of the tort in which he sues, while it is for the defendant to establish facts that enliven any defences.[66] Because of this principle, defences have a role in tort law's placing both parties under a burden of proof. If defences did not exist, as the rules concerning the assignment of the onus of proof presently stand, only claimants would be obliged to prove anything in relation to liability. This would be incompatible with tort law's correlative structure. Tort law would not treat the parties equally in terms of procedure if only claimants were put under a burden of proof.[67]

The second reason why defences deserve much more scholarly interest than they have received concerns the fact that they are avenues by which responsibility in tort law can be avoided. As mentioned at the very beginning of this chapter, outside the law, a person who is accused of wrongdoing may be able to give an answer to the allegation. An account of a person's moral responsibility that ignored answers would be seriously incomplete. The same is true in relation to the law of torts. Any theory of a person's responsibility in the law of tort that could not account for defences would be manifestly deficient. As Peter Cane remarked, 'No account of criteria of legal liability . . . is complete without reference to answers. Answers are an integral part of judgments of responsibility.'[68]

It is worth observing that it cannot be plausibly said that the law governing defences does not deserve greater attention than it has received because it is less

[64] Regarding the correlative structure of tort law, see generally Weinrib (n 38) ch 5.

[65] For further discussion see A Porat and A Stein, *Tort Liability under Uncertainty* (Oxford, Oxford University Press, 2001) 37–42; Beever (n 63) 446–47. See also 2.3.4, 6.4.

[66] *Hall v Hebert* [1993] 2 SCR 159, 184; *Marcic v Thames Water Utilities Ltd* [2001] EWCA Civ 64; [2002] QB 929, 994–95 [86]; *Grant v Torstar Corp* [2009] SCC 61; (2009) 3 SCR 640, 658 [28]–[29].

[67] See further 2.3.4.

[68] P Cane, *Responsibility in Law and Morality* (Oxford, Hart Publishing, 2002) 90–91 (footnote omitted).

complicated or less bulky than the law that specifies the elements of torts. The law controlling defences is at least as complex and as extensive as the law that controls the elements of torts. Defences to some torts are very numerous. Consider, for instance, the tort of trespass to the person. There are a bewildering number of defences available to liability arising in this tort. The same may be said in relation to the tort of defamation. (It seems likely that this state of affairs is a result of attempts to offset the fact that it is very easy to commit the torts of trespass or defamation. As a general rule, the fewer the matters that comprise the claimant's action, the greater the number of defences that are available.)

## 1.5. The Temporal Logic of Tort Law

An important but under-appreciated feature of tort law is its temporal logic. Tort law is structured so that trial judges should deal with certain issues in a prescribed sequence.[69] It is necessary to grasp this logic in order to understand how defences fit into tort law's framework. The first matter with which a trial court should deal is whether a tort has been committed. If no tort has been committed, judgment should be entered for the defendant. No other substantive issues arise for consideration. If, however, all of the elements of a tort are in place, the court should ask whether a defence is applicable.[70] If a defence is engaged, the court should rule in favour of the defendant. All other substantive issues fall away. Conversely, if no defence is enlivened, the court ought to find in favour of the claimant and consider the remedy that he should be granted.

Although express support can be found in the case law for analysing torts, defences and remedies in this sequence,[71] many tort law theorists seem to believe that torts, defences and remedies should be dealt with in a different order. For instance, Robert Stevens argues in *Torts and Rights* under a heading that reads 'How to Write a Torts Textbook' that a properly structured textbook on tort law would put remedies before defences.[72] Stevens offers no rationale for treating remedies as an anterior matter. It addition to defying the temporal logic approved by the authorities, that structure is unhelpful, since the issue of remedies needs to be addressed if and only if no defence is applicable. If the defendant has a defence, the claimant has no entitlement to a remedy. Were a court to deal with the issue of relief before defences, it might well be wasting its time. The structures of some other books on tort law imply that consideration of defences should precede

[69] Some parts of tort law may be temporally inert. It is unnecessary to explore this possibility here.

[70] 'Affirmative defenses are relevant only if the plaintiff has made a prima facie case by providing testimony to show all the required elements and if the jury believes that testimony': DB Dobbs, *The Law of Torts* (St Paul, Minn, West Group, 2000) 37.

[71] Eg, *Perrett v Sydney Harbour Foreshore Authority* [2009] NSWSC 1026 [39]–[40]; *Boehmke v Grant* [2010] BCSC 682 [151].

[72] Stevens (n 36) 303–04. Textbooks that adopt this structure include C Sappideen and P Vines (eds), *Fleming's The Law of Torts*, 10th edn (Sydney, Lawbook Co, 2011) pt 3; Rogers (n 11) chs 22, 25.

enquiries into whether the defendant committed a tort.[73] This structure is also flawed. This is so partly because it is often impossible to talk sensibly about defences until it is determined whether a tort has been committed. For example, it is nonsensical to discuss the issue of whether the defendant acted in self-defence before ascertaining whether the defendant acted in a way that satisfies the elements of the action in battery.

It is true that trial judges sometimes proceed in a sequence other than that which has just been described. For example, defences may be raised in a strike-out application and hence dealt with first. It might be suggested that this demonstrates that there is no temporal logic to tort law or that tort law is temporally ordered other than has been claimed. Such a suggestion should be rejected. When a defence is dealt with in a strike-out application, the court asks whether the defence relied upon by the defendant renders it a foregone conclusion that the claimant will fail. Consequently, the court proceeds *on the footing* that the facts alleged by the claimant are true (ie, that all of the elements of a tort are present).[74] Instances where the courts consider defences first in strike-out applications do not, therefore, disprove the existence of the temporal structure described above. On the contrary, they paradoxically affirm it.[75]

## 1.6. Labels in Tort Law

This section considers the role that labels play in tort law. It is worth thinking about labels in their own right. However, the primary purpose of turning attention to labels here is that doing so is a prelude to the argument in the next section in relation to the concept of a partial defence.[76] Lawyers have devised labels to

[73] Eg, AM Dugdale and MA Jones (eds), *Clerk & Lindsell on Torts*, 20th edn (London, Sweet & Maxwell, 2010).

[74] *Hill v Chief Constable of West Yorkshire* [1989] AC 53, 58 (HL); *Malik v Bank of Credit and Commerce International SA* [1998] AC 20, 33 (HL).

[75] What about appeals? Is it not the case that appellate courts, when dealing with appeals that raise both the issue of whether a tort was committed and whether a defence applies, sometimes deal fist with the ground of appeal that concerns the defence? Indeed it is (for a recent example see *Pegasus Management Holdings SCA v Ernst & Young* [2010] EWCA Civ 181; [2010] 3 All ER 297 (addressing a limitation bar defence before a plea of 'no duty of care')). However, this does not undermine the claim that consideration of the question whether a tort was committed should precede analysis as to whether a defence applies. To see why this is so, some basic differences in the procedure that governs trials and appeals must be kept in mind. Trial judges must address *all* of the issues on which the parties are in dispute. They cannot cherry-pick issues that they will consider. Even if they reach a decision on a given issue that is fatal to one party's case, they must decide all of the outstanding issues in contention. This is to avoid the need for retrials in the event of errors that are subsequently corrected on appeal (see *Kuru v New South Wales* [2008] HCA 26; (2008) 236 CLR 1, 6 [12]). The procedure that guides appellate judges is quite different. Appellate judges can be selective in considering the grounds of appeal. This is because, in order to reach the conclusion that an appeal should be allowed, only one of the grounds of appeal needs to be accepted as valid. Given that appellate courts can be selective in dealing with the grounds of appeal, the fact that they do not respect the temporal logic of tort law is immaterial.

[76] See 1.7.

refer to many torts. For example, when lawyers speak of the 'tort of slander' they mean to refer to the intentional or negligent publication of a statement in transient form that tends to lower the defendant in the estimation of others with the result being that the defendant suffers special damage. Similarly, 'the tort of private nuisance' refers to a state of affairs for which the defendant is responsible that interferes unreasonably with the claimant's right to the quiet enjoyment of his land. Lawyers also use labels to refer to defences. For instance, when spelt out in full, the phrase the 'defence of self-defence' means the application of proportionate defensive force in circumstances where it was objectively necessary to use defensive force.

### 1.6.1. The Purpose of Labels

Labels are used in tort law merely for convenience. They are a form of shorthand. They have no legal significance.[77] The following three facts bear this point out. First, as a matter of civil procedure, labels do not need to be mentioned in pleadings.[78] A claimant does not need to identify the tort that he alleges was committed against him in his statement of case. It is sufficient for him to set out the facts on which he relies.[79] The same is true of defences. A defendant who wishes to rely on a defence does not need to mention the defence concerned in his statement of defence. It is enough for him to describe facts which, if true, would enliven a defence.[80]

Secondly, not all torts have been assigned a label.[81] The classic example of an innominate tort is that committed in *Wilkinson v Downton*.[82] The defendant in that case, in the course of what he considered to be a practical joke, falsely told the claimant that her husband had been seriously injured in an accident. His statement caused the claimant to suffer psychiatric injury. The trial judge, Wright J,

[77] There are some minor and presently irrelevant exceptions to this position. For example, the label may matter from the point of view of an insurance contract. An insurer may have contracted to insure a tortfeasor for liability in, say, negligence but not in trespass to the person.

[78] Interestingly, the situation in the criminal law is different. Allegations in informations or counts in indictments should name the offence with which the defendant is accused of committing: CrPR 7.3(1), 14.2(1).

[79] CPR 16.2(1)(a); *Vandervell (No 2)* [1974] Ch 269, 321–22 (CA).

[80] CPR 16.5.

[81] 'There is no necessity whatever that a tort have a name. New and nameless torts are being recognized constantly . . .': Keeton *et al* (n 22) 3 (footnote omitted); '[T]ortious liability is constantly expanding and there is ample evidence that a plaintiff's claim is not necessarily prejudiced because the plaintiff is unable to find a specific label for the wrong of which he complains. New and innominate torts have been constantly emerging . . .': Sappideen and Vines (n 17) 7 [1.30]; 'Most wrongs have no special names': HT Terry, 'The Arrangement of the Law. II' (1917) 17 *Columbia Law Review* 365, 380; '[T]he various kinds of torts which have received specific names do not include all the wrongs which courts are accustomed to recognize as coming under the general head of torts. Hence the admission that, besides wrongs with particular names, there are "wrongs without names" ("innominate grievances,") which are subjects of action, and for which damages are recoverable': J Smith, 'Torts without Particular Names' (1921) 69 *University of Pennsylvania Law Review* 91, 93 (footnote omitted).

[82] [1897] 2 QB 57 (QBD).

held that the claimant had a good cause of action. His lordship reached this conclusion despite the fact that no label for the defendant's conduct existed (the labels of 'battery' and 'assault' were inapplicable since, among other reasons, there was no physical contact or fear thereof respectively). Just as there are innominate torts, there is no requirement that defences have a name.[83]

Thirdly, labels in tort law are not really used to draw morally salient distinctions between litigants.[84] They tend to lump litigants of widely varying degrees of culpability within a single category.[85] A good example is the tort of battery. Tortious batteries range from the slightest and most innocuous touching[86] to brutal beatings, rape and murder. Another illustration is the defence of truth to liability in defamation. This defence is available to all defendants whose defamatory imputations are factually accurate. It is equally open to defendants who did not think and had no reason to suspect that their statement was defamatory[87] and to defendants who knew of the defamatory character of their statement and published it solely in order to humiliate the claimant. In this respect, tort law differs radically from the criminal law. Labels in the criminal law are, on the whole, considerably more refined. There are, for instance, many different types of offences against the person, and many of these offences are subdivided to reflect, among other things, the status of the victim, the extent and type of harm caused, and the species of fault exhibited by the defendant.[88]

### 1.6.2. On What Basis are Labels Selected?

Although labels in tort law have no legal significance, it is worth saying a few words about how they are chosen. Most torts have been named by reference to the right that they protect. Obvious examples include defamation, false imprisonment and

[83] 'Many privileges are well-established; many are called by commonly used names. But there is no closed master list of privileges any more than there is a closed list of claims': Dobbs (n 70) 155.

[84] Although in *Ashley v Chief Constable of Sussex Police* [2008] UKHL 25; [2008] 1 AC 962 the House of Lords seemed to think that the label attached to a litigant might not be unimportant in this regard. In this case, the defendant admitted liability in negligence for the death of a man but denied liability in assault and battery. Before the House, the defendant argued that since it had admitted liability in negligence, the proceedings in assault and battery should be stayed. This argument was rejected. It is unnecessary to go into the House's reasons in detail here. It suffices to say that the House thought that it was important for the claimants to have the opportunity to pursue the assault and battery actions for vindicatory purposes (see especially at 975–77 [22]–[23], 985–89 [56]–[72]).

[85] But note that tort law attaches different labels to defendants who utter false statements that are detrimentally relied upon depending on the type of fault exhibited by the defendant. Fraudulent misrepresentations attract the label 'deceit'. Negligent misrepresentations are referred to as 'negligent misstatements'.

[86] 'It has long been established that any touching of another person, however slight, may amount to a battery': *Collins v Wilcock* [1984] 3 All ER 374, 378; [1984] 1 WLR 1172, 1177 (QBD) (Robert Goff LJ).

[87] *Maisel v Financial Times Ltd* [1915] 3 KB 336 (CA); *Pamplin v Express Newspapers Ltd (No 2)* [1988] 1 All ER 282; [1988] 1 WLR 116n (CA).

[88] See A Ashworth, *Principles of Criminal Law*, 6th edn (Oxford, Oxford University Press, 2009) 297–324.

private nuisance. The main exception to this trend is the tort of negligence. This tort has been branded in accordance with the type of fault that the defendant must exhibit in order to be held liable for it.[89] While the labels assigned to torts have, for the most part, been chosen by reference to the right that they protect, the titles of defences have been bestowed haphazardly. The names of some defences describe conduct on the part of the defendant. Examples include innocent dissemination, honest comment and responsible journalism. Others are derived from behaviour on the part of the claimant, such as illegality. Several defences, such as self-defence and discipline, allude to behaviour on the part of both parties.

## 1.7. Complete Defences and Partial Defences

A distinction is often drawn between 'complete defences' and 'partial defences' to liability in tort.[90] Those who draw this distinction consider a 'complete defence' to be a rule that prevents liability from arising and a 'partial defence' to be a rule that reduces the damages to which a successful claimant is entitled. The provision for apportionment for contributory negligence is typically given as an example of a partial defence. The problem with this understanding is that, as has been seen,[91] it elides the law governing liability with the remedial law. Principles in the law of remedies should not be called defences at all. They should not, accordingly, be described as partial defences. This description serves only to confuse.

Criminal lawyers also speak of complete and partial defences. However, the meaning that they ascribe to the term 'partial defence' is quite different from that given to it in the tort law domain. Criminal lawyers do not count rules that mitigate the sentence imposed on the defendant – the criminal law equivalent of rules that diminish the remedy to which a claimant who establishes liability is entitled – as partial defences. Rather, for criminal lawyers, a partial defence is a rule that, when applicable, results in the defendant being convicted of a lesser offence than that with which he was charged.[92] The most important partial defences to criminal liability are diminished responsibility[93] and provocation (in the United Kingdom, loss of control[94]), both of which reduce liability from murder to manslaughter.

[89] For criticism of this aberration see Birks (n 34) 23; Stevens (n 36) 291; A Burrows, *Understanding the Law of Obligations: Essays on Contract, Tort and Restitution* (Oxford, Hart Publishing, 1998) 5–6.

[90] Eg, *Imperial Chemical Industries Ltd v Shatwell* [1965] AC 656, 672–73 (HL) (Lord Reid); A Burrows, *Remedies for Torts and Breach of Contract*, 3rd edn (Oxford, Oxford University Press, 2004) 129; Weir (n 10) 129.

[91] See 1.2.2.

[92] For discussion of the concept of a partial defence to criminal liability, see M Wasik, 'Partial Excuses in the Criminal Law' (1982) 45 *Modern Law Review* 516; S Uniacke, 'What are Partial Excuses to Murder?' in SMH Yeo (ed), *Partial Excuses to Murder* (Sydney, Federation Press, 1990) 1; J Horder, *Excusing Crime* (Oxford, Oxford University Press, 2004) 143–52; D Husak, *The Philosophy of Criminal Law: Selected Essays* (Oxford, Oxford University Press, 2010) ch 12.

[93] Homicide Act 1957 (UK), s 2.

[94] Coroners and Justice Act 2009 (UK), ss 54, 56(1).

Partial defences to criminal liability really are defences since they block liability for the more serious offence.

Unlike the criminal law, tort law does not recognise any rules that answer to the description of a 'partial defence' as this concept is properly understood. There are no rules that relieve the defendant of liability for one tort and result in his being held liable for a 'lesser tort'. Why do tort law and the criminal law differ in this regard? The answer to this question is found in the principle of fair labelling. That principle holds that wrongs should be labelled so as to describe accurately what their commission entails.[95] The criminal law embraces this principle for several reasons, the most important of which is that it would be unfair to offenders to misdescribe the nature of their wrongdoing. Defendants in the criminal sphere do not care only about whether they are convicted. The label that is applied to them on conviction is also significant. Partial defences promote the principle of fair labelling as they result in different labels being applied to different offenders on the basis of their culpability. This is a large part of the story of why the criminal law provides for partial defences. Unlike the criminal law, however, tort law does not embrace the principle of fair labelling. As has been seen, the label that is applied to a tortfeasor upon being found liable is of no real consequence.[96] This explains why there are no partial defences in tort law.

## 1.8. Who Can Raise Defences?

Who can raise defences? The answer to this question may seem to be obvious. It might be replied quickly that it falls to the defendant to decide whether to rely on a defence. To an extent, this is true. However, matters are not quite so simple.

### 1.8.1. Insurers

Defendants to tort actions are typically insured.[97] Consequently, it is normally the defendant's insurer rather than the defendant who has the power to make decisions concerning defences (as with all tactical matters).[98] Thus, even though a defendant

[95] The principle of fair labelling was first articulated in A Ashworth, 'The Elasticity of Mens Rea' in CFH Tapper (ed), *Crime, Proof and Punishment: Essays in Memory of Sir Rupert Cross* (London, Butterworths, 1981) 45. For further discussion of it, see G Williams, 'Convictions and Fair Labelling' (1983) 42 *Cambridge Law Journal* 85; J Chalmers and F Leverick, 'Fair Labelling in Criminal Law' (2008) 71 *Modern Law Review* 217; V Tadros, 'Fair Labelling and Social Solidarity' in L Zedner and JV Roberts, *Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth* (Oxford, Oxford University Press, 2012) 67; Ashworth (n 88) 78–80.

[96] See 1.6.1.

[97] Statistics are provided in P Cane, *Atiyah's Accidents, Compensation and the Law*, 7th edn (Cambridge, Cambridge University Press, 2006) 233.

[98] Insurers invariably enjoy the ability to determine how the case for the defendant will be conducted under the terms of the insurance policy. For discussion, see *Beacon Insurance Co Ltd v Langdale* [1939] 4 All ER 204 (CA); *Groom v Crocker* [1939] 1 KB 194 (CA).

may wish to admit liability,[99] his insurer can invoke a defence. Similarly, even if a defendant would like to rely on a certain defence, the insurer is for the most part free to admit liability or present a different defence.[100] The insurer does not usually even have to consult with or notify the defendant of the course it will take.[101]

### 1.8.2. The Court

Can the court raise defences that are open on the facts?[102] As a general principle, it cannot.[103] It is a basic rule that the courts only have jurisdiction to decide matters that are in dispute between the parties.[104] Rightly or wrongly, however, there are some exceptions to this situation. For example, the court can raise the defence of illegality *proprio motu*.[105] Courts are compelled by statute to invoke certain defences. Consider section 1(1) of the State Immunity Act 1978 (UK), which confers a general immunity on foreign States. Section 1(2) obliges the courts 'to give effect to this immunity even though the [defendant State] does not appear in the proceedings in question'. This provision therefore requires the court to raise the defence in section 1(1) on its own motion.[106]

## 1.9. Multiple Defences

Just as a single set of facts can generate liability in multiple torts, so too can several defences arise in a given case. In other words, defences may overlap. Indeed, certain

[99] An obvious situation where a defendant may want liability to be admitted is where the claimant and defendant are domestic partners.

[100] Regarding limits of the power of the insurer to determine the tactical posture adopted, see *Groom v Crocker* [1939] 1 KB 194, 201–04, 223–24, 227–28 (CA).

[101] Of course, if the defendant wishes, he can release his insurer from its contractual obligations and take control of the proceedings: *ibid*, 227–28.

[102] See further 6.9.

[103] Consider the decision in *Dann v Hamilton* [1939] 1 KB 509 (KBD). In that case, the court felt that it could not consider a defence (*viz*, contributory negligence, which was a defence at the time) that was plainly open on the facts because it had not been raised by the defendant.

[104] *Khiaban v Beard* [2003] EWCA Civ 358; [2003] 3 All ER 362, 366 [13]–[14]; [2003] 1 WLR 1626, 1630; *Island Maritime Ltd v Filipowski* [2006] HCA 30; (2006) 226 CLR 328, 355 [81]; A Zuckerman, *Zuckerman on Civil Procedure: Principles of Practice*, 2nd edn (London, Sweet & Maxwell, 2006) 397–403 [10.8]–[10.24]. This principle is discussed further in 6.9, 8.5.1.2.

[105] *Cross v Kirkby* The Times, 5 April 2000 (CA); Law Commission, *The Illegality Defence: A Consultative Report* (Law Com Consultation Paper 189, 2009) 133 [7.22]. Consider also the contract law cases of *Lipton v Powell* [1921] 2 KB 51 (Div Ct); *Ferguson v John Dawson & Partners (Contractors) Ltd* [1976] 3 All ER 817, 821; [1976] 1 WLR 1213, 1218 (CA); *Pickering v Deacon* [2003] EWCA Civ 554; The Times, 19 April 2003. The position in Australia is apparently different. Illegality must be pleaded by the defendant: see, eg, Uniform Civil Procedure Rules 2005 (NSW), r 14.14(3); *Corliss v Gibbings-Johns* [2010] QCA 233.

[106] *NML Capital Ltd v Republic of Argentina* [2010] EWCA Civ 41; [2011] QB 8, 21 [49] (not doubted on appeal to the Supreme Court: *NML Capital Ltd v Republic of Argentina* [2011] UKSC 31; [2011] 2 AC 495).

defences tend to be triggered in tandem. A good example of this tendency concerns the defences of self-defence and illegality.[107] In proceedings in battery, these pleas are often raised together.[108] If C attacks D and D exercises defensive force that causes injury to C, D may be able to succeed on the defence of self-defence and the defence of illegality.

Two things that are connected with the fact that defences can overlap are worth observing. First, where multiple defences are potentially applicable, the defendant can escape from liability if he proceeds in a way that enlivens only a single defence. For example, if an intruder threatens D's life and D's property, D may be able to avoid liability on the basis of the defence of self-defence if he kills the intruder, even though the defence of property defence is inapplicable because it was excessive to use such force to protect property.[109] Secondly, the defendant does not stand to gain much in practical terms from the fact that more than one defence is available to him.[110] One defence is just as good as ten offences in terms of preventing liability from arising.

## 1.10. Scope of the Book

### 1.10.1. Tort Law

This is a book about tort law defences. It is not a book about defences to liability arising in the law of obligations, or about defences in the law generally. Setting the scope of this book in this way requires thought to be given to which actions are actions in tort. In particular, attention needs to be paid to how actions in tort differ from actions in equitable wrongs and for breaches of contract. Some brief remarks will be made in this connection momentarily. Fortunately, however, it is unnecessary to go into much detail in this regard. This is because it is inessential for present purposes to distinguish tort law rigorously from the other branches of the law of obligations. There are two main reasons why this is so. The first reason is that theorists broadly agree which actions are actions in tort. This is

[107] The connection between the defences of self-defence and illegality is explored in J Goudkamp, 'Self-Defence and Illegality Under the *Civil Liability Act* 2002 (NSW)' (2010) 18 *Torts Law Journal* 61.

[108] Eg, *Cross v Kirkby* The Times, 5 April 2000 (CA).

[109] This example is taken from PH Robinson, *Criminal Law Defenses*, vol 2 (St Paul, Minn, West Publishing Co, 1984) 11. The defence of defence of one's property probably does not permit lethal force to be used: see 5.2.1.2.

[110] However, defendants may have reason to prefer one defence over another nevertheless. This possibility is explored in 8.6.2.

not, of course, to deny the existence of points of controversy in this regard. No definition of a tort has been developed that commands anything approaching universal support.[111] But, plainly, there is a generally accepted understanding which actions are actions in tort. If no such understanding existed it would be impossible to have meaningful discussions about tort law, and this is self-evidently not the case.

The second reason why it is possible for this book largely to avoid the debate about how tort law differs from other departments of the law of obligations is that a certain amount of the analysis that will be offered is capable of being applied, *mutatis mutandis*, to the law of obligations generally.[112] It is obvious that the defence regimes of all of the branches of the law of obligations have a great deal in common. Many defences to liability in tort are defences to liability arising out of events that are not torts.[113] However, this book does not attempt to prove that that which holds true in relation to tort law defences goes also for defences to liability arising in the law of obligations generally.

### 1.10.2. Equitable Wrongs

Wrongs recognised in equity include breach of trust, knowing receipt of trust property, breach of confidence and breach of fiduciary duty. Although some of these wrongs are sometimes referred to as torts,[114] the conventional view is that they are not torts. The traditional understanding is epitomised by Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ's claim in *Tanwar Enterprises Pty Ltd v Cauchi* that there are no 'equitable torts'.[115] James Edelman rejects the conventional view.[116] He contends that all equitable wrongs are torts. If he is right, defences to such wrongs would need to be included in the analysis offered in this

[111] '[A] really satisfactory definition of a tort is yet to be found': Keeton *et al* (n 22) 1; 'Tort is what is in the tort books, and the only thing holding it together is their binding': Weir (n 10) ix; 'a satisfactory definition of tort remains somewhat elusive': Murphy and Witting (n 20) 4; 'Numerous attempts have been made to define a "tort" or "tortious liability", with varying degrees of lack of success': Rogers (n 11) 1 [1.1].

[112] Indeed, it is hoped that the framework for thinking about tort law defences promoted in this book can be adapted to serve as a model for understanding defences to all civil wrongs: see 9.4.

[113] See the text accompanying nn 50–52 above.

[114] Eg, breach of confidence is described as a tort in *Re A Local Authority (Inquiry: Restraint on Publication)* [2003] EWHC 2746 (Fam); [2004] Fam 96, 111–12 [55]; *Campbell v MGN Ltd* [2004] UKHL 22; [2004] 2 AC 457, 464–65 [14]–[15]; *Hosking v Runting* [2004] NZCA 34; [2005] 1 NZLR 1, 15 [42], 16 [47], 30 [109]; *McKennitt v Ash* [2006] EWCA Civ 1714; [2008] QB 73, 80 [8]; *HRH Prince of Wales v Associated Newspapers Ltd* [2006] EWCA Civ 1776; [2008] Ch 57, 123–24 [64]–[65]; cf *Kitechnology BV v Unicor GmbH Plastmaschinen* [1995] FSR 765, 777 (CA); *Douglas v Hello! Ltd* [2005] EWCA Civ 595; [2006] QB 125, 160 [96].

[115] [2003] HCA 57; (2003) 217 CLR 315, 325 [24].

[116] J Edelman, 'Equitable Torts' (2002) 10 *Torts Law Journal* 64.

book. Edelman offers two arguments in support of his position. His first argument is that equitable wrongs are torts because both equitable wrongs and torts are breaches of duties. Although Edelman is obviously correct in saying that both torts and equitable wrongs are breaches of legal duties, this argument does not work.[117] Merely because one legal concept has a characteristic (or, indeed, several characteristics) in common with another concept does not mean that they are one and the same thing. The hearsay rule and the bad character rule are both exclusionary rules of evidence, but it would be a mistake to say that the hearsay rule is the bad character rule or vice versa. It simply does not follow from the fact that equitable wrongs, like torts, are breaches of duties that equitable wrongs are torts. Edelman's second argument is that equitable wrongs are torts because the courts respond to equitable wrongs in the same way as they do to torts. This argument rests on the same fallacy as the first. It is incorrect to say that because two wrongs are met by an identical legal response they are the same type of wrong. As Nicholas McBride and Roderick Bagshaw point out, 'We would not say that rape is murder even if the law responded to a rape in exactly the same way as it does to someone's committing murder'.[118]

John Gardner recently attempted to distinguish torts from equitable wrongs. Gardner argues that torts and equitable wrongs differ in terms of the reasons for their existence. He contends:[119]

> The main reason why the defendant has duties to the plaintiff in the law of torts is to protect the plaintiff from losses, and the main mode of recourse that a plaintiff has against the defendant in a tort case is therefore recourse in respect of his losses. This contrasts with the position in equity, where the main reason for the defendant's duties is to secure that the defendant's dealings are conducted for the plaintiff's advantage, and not for the defendant's own. So the emphasis in equity is on the diversion of advantage – in the form of assets or profits – as opposed to the causation of loss, which is tort law's first concern.

There are various difficulties with Gardner's argument.[120] A central problem with it is that many of the wrongs that Gardner counts as equitable wrongs do not exist, at least not primarily, in order to ensure that the defendant promotes the claimant's interests rather than his own. Consider the action for breach of trust. Suppose that a trustee who is empowered to buy shares under the trust instrument sells his own shares to the trust and makes an enormous profit in the process. This does not constitute a breach of trust. It is quite immaterial for the purposes of determining the liability of the trustee *qua* trustee that the trustee acted to advance his own

[117] Some of what follows here is based on penetrating remarks made in NJ McBride and R Bagshaw, *Tort Law*, 3rd edn (Harlow, Pearson Longman, 2008) 8, n 19. These remarks have been omitted from the 4th edition of this book, although the position adopted by McBride and Bagshaw in this regard is clearly unchanged: see NJ McBride and R Bagshaw, *Tort Law*, 4th edn (Harlow, Pearson, 2012) 20–21.

[118] McBride and Bagshaw (2008) (n 117) 9, n 19.

[119] J Gardner, 'Torts and Other Wrongs' (2012) 39 *Florida State University Law Review* 43, 51 (footnote omitted).

[120] Several weaknesses are pointed out in N McBride, 'Thinking About Tort Law – Where Do We Go From Here?' (forthcoming).

interests.[121] The fact that there is no breach of trust in this scenario suggests that, contrary to Gardner's claim, the action in breach of trust is not concerned, at least not mainly, with ensuring that the defendant acts to promote the claimant's interests rather than his own. Note also that the action in breach of trust may be available even if the defendant has not acted for his own benefit. Suppose, this time, that a trustee, attempting to discharge his obligations *qua* trustee, conveyed trust property to a fraudster because he reasonably believed that the fraudster was the beneficiary. The trustee is liable for breach of trust (since liability for breach of trust is strict) even though he was trying to advance only the beneficiary's interests.

The easiest way to separate equitable wrongs from torts is on the basis of their separate historical development. Whereas torts are wrongs that were developed by the common law courts, equitable wrongs were created by the chancery courts. This is not to deny that there may be additional ways in which torts are distinct from equitable wrongs. But it is unnecessary to explore this possibility here. The important point to note is that dividing torts from equitable wrongs on the basis of their different histories is a sound, albeit conceptually uninteresting, basis for distinguishing between them. Defences to equitable wrongs that are not also tort defences can, therefore, be left to one side for this book's purposes.

### 1.10.3. Breach of Contract

It is widely thought that breaches of contract and torts are separate wrongs. Peter Birks rebelled against this view. He argued that breaches of contract are torts, since both torts and breaches of contract involve a breach of duty. As he put it, 'the common law . . . [i]n effect . . . adds breach of contractual duty to the list of torts'.[122] The main difficulty with this argument is that merely because a breach of contract and a tort can both be described as a breach of a duty, does not mean that breaches of contract are torts. This is same fallacious reasoning to which Edelman subscribes.[123] Manslaughter by criminal negligence involves a breach of duty, but no one thinks that this wrong should be counted as a tort rather than as a crime. Birks's argument should be rejected.

This is not the place to look comprehensively at respects in which torts and breaches of contract are distinct.[124] To do so would consume much more space than is available. However, the most promising way of separating torts from breaches of contract would seem to be by reference to the different sources of tortious duties and contractual duties. A breach of contract is a breach of a duty the

[121] It is true that the trustee commits a breach of fiduciary duty, but that fact is irrelevant for that is a separate wrong.

[122] Birks (n 34) 51.

[123] See the text accompanying n 117 above.

[124] For a small sampling of the literature on this point, see PS Atiyah, *Essays on Contract* (Oxford, Clarendon Press, 1986) 40–42; C Bridgeman and JCP Goldberg, 'Do Promises Distinguish Contract from Tort?' (2012) 45 *Suffolk University Law Review* 873; Burrows (n 89) 8–14; Cane (n 7) 183–86; PH Winfield, *The Province of the Law of Tort* (Cambridge, Cambridge University Press, 1931) ch 6.

existence and content of which is determined predominately by the parties' agreement. In contrast, the existence and content of tortious duties are specified primarily by the law. It is of course true that the law indicates when an agreement will give rise to a contractual duty. It is also true that agreements between the parties' can play a role in the recognition and scope of a tortious duty. But when due weight is given to the claim that contractual duties spring *mainly* from the parties' agreement whereas tortious duties arise *primarily* by the law, it is possible to distinguish between torts and breaches of contract, at least in a rough-and-ready way. It is for this reason that defences to liability arising in breach of contract that are not also tort law defences will not be discussed in this book.

### 1.10.4. Conclusion

Some very brief remarks have been made about how torts differ from equitable wrongs and breaches of contract. However, for the reasons given at the start of this section, it has not been necessary to explore in any detail here the distinctiveness of tort law in this regard. There is a general agreement about which wrongs are torts, and this book is a book about defences to those wrongs. Defences to liability arising in respect of equitable wrongdoing and breaches of contract are not discussed, and no attempt is made to extend the claims that will be made about tort law defences to defences to these other wrongs.

## 1.11. Jurisdictions

The analysis offered in this book is not specific to any jurisdiction. It is intended to be relevant to all legal systems that are based on the common law. Although reference is made to legal materials in Australia, Canada, the United Kingdom and the United States more frequently than to sources in other jurisdictions, the overall message of the book would be the same were illustrations drawn from elsewhere in the common law world. In not confining the analysis to a single jurisdiction it is not, of course, being suggested that law governing defences to liability in tort in one jurisdiction is the same as in another. Different approaches are certainly taken in relation to specific defences in different jurisdictions. These differences are sometimes significant. Nevertheless, typically, the variation that exists is usually unimportant for the purposes of this book. It is possible to identify broad themes regarding tort defences that unite common law jurisdictions. It is with such broad themes that this book is concerned.

## 1.12. Methodology

### 1.12.1. Taxonomic Analysis

Some brief remarks need to be made about the general methodological approach adopted in this book. There are several things that this book does not seek to do. As was explained at the beginning of this chapter,[125] it does not attempt to describe the law controlling individual defences. It does not, in other words, attempt to determine the circumstances in which particular defences are enlivened. Neither is this book concerned, on the whole, with the reasons (or lack of reasons) underpinning specific defences or with when specific defences should (or should not) be enlivened. Rather, the main aim of this book is to suggest how the law governing tort defences as a whole should be conceptualised. Expressed differently, it is largely a classificatory enterprise.

Why is this type of analysis offered? There are three main reasons. The first is that no serious attempt has previously been made to construct a detailed map of the entirety of this area of the law. Secondly, as this book will show, much can be discovered about the law of tort defences by thinking about how defences should be classified. The third reason is that the classificatory treatment offered here may feed into any attempt to work out what the law of tort law defences ought to be. Put differently, the manner in which the law of tort defences is conceptualised might impact upon whether a given defence should have its scope expanded or contracted, whether new defences should be created and whether existing defences should be abolished. There is a case, therefore, for beginning with a taxonomic analysis of the law of tort defences before talking about the appropriate ambit of specific defences.

### 1.12.2. Criminal Law Theorising Regarding Defences

In sharp contrast with the lack of interest shown by tort lawyers in tort law defences,[126] criminal law theorists have generated a voluminous and highly sophisticated literature concerning criminal law defences. In particular, criminal law scholars have spent a very substantial amount of time thinking about the organisation of criminal law defences.[127] This book draws in places on relevant criminal

[125] See 1.1.

[126] See 1.3.

[127] Eg, GP Fletcher, *Rethinking Criminal Law* (Boston, Little, Brown & Co, 1978) chs 7, 9–10; Robinson (n 109) (two volumes); DN Husak, *Philosophy of Criminal Law* (Totowa, Rowman & Littlefield, 1987) ch 7; JC Smith, *Justification and Excuse in the Criminal Law* (London, Stevens & Sons, 1989); Horder (n 92) esp ch 3; J Chalmers and F Leverick, *Criminal Defences and Pleas in Bar of Trial* (Edinburgh, W. Green & Son Ltd, 2006); RA Duff, *Answering for Crime: Responsibility and Liability in the Criminal Law* (Oxford, Hart Publishing, 2007) esp chs 9 and 11; J Gardner, *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (Oxford, Oxford University Press, 2007) esp chs 4–9.

law writing. It might be thought that this is ill-advised. Traditional learning has it that tort law and the criminal law are so different that there is little scope for cross-fertilisation. Jules Coleman embraced this view when he said that 'The 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.'[128] It is of course undeniable that there are very significant differences between the criminal law and tort law.[129] Consequently, learning in one context should not be applied automatically to the other. But it does not follow that tort lawyers cannot profitably have recourse to criminal law scholarship.[130]

It is important not to lose sight of the many fundamental similarities between tort law and the criminal law in so far as their defence regimes are concerned.[131] Two general parallels are particularly noteworthy for present purposes. First, many defences to criminal liability are also defences in tort law. Examples include arrest, discipline, lawful authority, limitation, necessity and self-defence. The principles that govern the criminal and tort versions of these defences are remarkably similar.[132] In considering the scope of the tort versions of these defences judges routinely consult the authorities that control their criminal law counterparts[133] and vice versa. Likewise, the writers of books about tort law usually have little compunction in citing criminal law cases as authorities regarding the scope of tort law defences.[134] Indeed, the authors of one casebook, in their discussion of self-defence, go so far as to say that 'The privilege of self-defense is covered in Criminal Law, and detailed discussion must be left to that course.'[135] The writers

[128] Coleman (n 38) 222.

[129] Regarding the relationship between tort and crime generally, see Winfield (n 124) ch 8; J Hall, 'Interrelations of Criminal Law and Torts' (1943) 43 *Columbia Law Review* 753 and 967; RA Epstein, 'The Tort/Crime Distinction: A Generation Later' (1996) 76 *Boston University Law Review* 1; A Ripstein, *Equality, Responsibility, and the Law* (Cambridge, Cambridge University Press, 1999) ch 5; G Virgo, '"We do this in the criminal law and that in the law of tort": a new fusion debate' in E Chamberlain, J Neyers and S Pitel (eds), *Challenging Orthodoxy in Tort Law* (Oxford, Hart Publishing, 2013) (forthcoming).

[130] 'It is appropriate for those working on different sides of the frontier to have regard to what is being done on the other side': Virgo (n 129) (forthcoming).

[131] Criminal law defences and tort law defences are compared and contrasted in J Goudkamp, 'Defences in Tort and Crime' in M Dyson (ed), *Unravelling and Organising Tort and Crime* (forthcoming).

[132] There are admittedly sometimes differences in the detail. Consider, for example, the remarks in *Ashley v Chief Constable of Sussex Police* [2008] UKHL 25; [2008] 1 AC 962 in relation to self-defence. This case is discussed in some detail in 9.3.4.

[133] Eg, *Presidential Security Services of Australia Pty Ltd v Brilley* [2008] NSWCA 204; (2008) 73 NSWLR 241, 262 [122], 264 [134]–[135] (self-defence); *Watkins v State of Victoria* [2010] VSCA 138; (2010) 27 VR 543, 560–61 [70]–[75] (self-defence); *XA v YA* [2010] EWHC 1983 (QB) [103]–[106] (discipline); *Sidaway v Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital* [1984] QB 493, 511, 515 (CA) (consent).

[134] Eg, Tony Weir in his *A Casebook on Tort* extracted several criminal law cases in the course of describing tort law defences: T Weir, *A Casebook on Tort*, 10th edn (London, Sweet & Maxwell, 2004) 402–03 (*Townley v Rushworth* (1963) 62 LGR 95 (Div Ct) (prosecution for assault raising the issue of self-defence)), 406–07 (*Whatford v Carty* The Times, 29 October 1960 (Div Ct) (prosecution for assault presenting the issue of defence of property)).

[135] VE Schwartz, K Kelly and DF Partlett, *Prosser, Wade and Schwartz's Torts: Cases and Materials*, 12th edn (New York, Foundation Press, 2010) 104.

of criminal law textbooks also have recourse to authorities regarding tort defences,[136] albeit probably to a lesser extent. The obvious parallels between many criminal law and tort law defences prompted Graham Virgo to claim that 'defences are generally defined in the same way, regardless of whether they are being deployed in the criminal or civil law'.[137] Secondly, criminal law and tort law defences often depend on the same basic concepts. For example, the concept of justification is of fundamental importance to defences in both contexts.

The foregoing considerations lie behind this book's reliance on theorising regarding criminal law defences. This learning is a rich vein that is well worth mining.[138]

## 1.13. Outline of the Argument

It may be helpful to provide an outline of the argument that will be presented in the following chapters. The primary goal of chapter two is to explore the distinction between torts and tort defences. Two main questions are considered. First, should the distinction be retained? Secondly, in the event that the distinction should be kept, what determines the allocation of issues relevant to liability as between the tort and defence camps? Few concrete conclusions are reached in relation to either of these questions. This is because they represent terrain that tort theorists have left essentially unexplored. The analysis simply puts forward various ideas that may point the way towards correct answers to these questions.

In order to understand defences, it is necessary to purge from the category of defences extraneous matter. Denials by the defendant that one or more of the elements of the tort that the claimant alleges was committed against him are mistaken for defences with alarming regularity. Unless they are corrected, such mistakes will seriously compromise efforts to come to grips with defences. Accordingly, chapter three identifies a large number of pleas that are denials rather than defences.

Chapter four is the conceptual core of the book. It develops a taxonomy of tort law defences. It is argued that all tort defences can be separated into just two categories: justification defences and public policy defences. These categories are derived from the story that the defences that constitute these categories tell about the quality of the defendant's practical reasoning. Justification defences reveal that the defendant acted reasonably in committing a wrong. Public policy defences are silent on the justifiability of the defendant's wrongful act. Attention is given to

[136] Eg, J Herring, *Criminal Law: Text, Cases, and Materials*, 5th edn (Oxford, Oxford University Press, 2012) 656 includes extracts from the reasons given in *Southwark London Borough Council v Williams* [1971] 1 Ch 734 (CA), a tort case concerned with the defence of necessity.

[137] Virgo (n 129) (forthcoming).

[138] It is interesting to observe that although criminal law scholarship is, on the whole, considerably more advanced than tort law theory, tort lawyers have not generally looked to this scholarship for guidance. Instead the tendency has been to attempt to find insights from writing about other branches of private law, especially the law of contract.

whether tort law recognises other types of defences, in particular excuses and defences that are enlivened by a lack of 'basic responsibility'[139] on the part of the defendant, that is to say, a lack of the capacity to be guided by reasons. It is concluded that no additional defences exist in tort law.

Chapters five, six and seven build upon the analysis presented in chapter four. Chapter five applies the twofold taxonomy. It suggests how a large selection of tort law defences should be classified. Chapter six discusses several implications that might be derived from the taxonomy. It shows that the bipartite taxonomy is pregnant with important practical ramifications. Chapter seven looks at several alternative ways in which tort defences might be organised. It concludes that these rival methods of division are all inferior to the twofold taxonomy.

Chapter eight is concerned with defences that are engaged by a lack of basic responsibility. The criminal law provides for several such defences, most notably insanity, infancy and unfitness to plead. Denial of basic responsibility defences are not recognised by tort law. It is argued that this position is unsatisfactory. Insanity and infancy (but not unfitness to plead) should join the ranks of defences to liability in tort. If these defences were to be welcomed into tort law, it would be necessary to add an extra category to the taxonomy of tort defences developed in chapter four in which to house them.

Chapter nine concludes the book by considering a selection of issues that are important to the future of tort defences. It begins by discussing the consequences of the 'statutorification' of the law of tort defences. It then addresses how the reform of the law governing tort defences ought to proceed. Next, it considers a range of ways in which the law of tort defences interacts with other parts of the law. Lastly, it calls for the analysis presented in this book to be extended to the other departments of the law of obligations. A map of defences to civil wrongs generally is needed to complement the advances that have been made in recent decades regarding the classification of those wrongs.

[139] The terminology is taken from Gardner (n 127) ch 9.