2

Elements of Torts

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I. Introduction

In a well-known article, Paul Robinson and Jane Grall traced a revolution that occurred during the twentieth century in understanding regarding the criminal law.[1] They recounted a general shift in scholars' attention from the level of offences to the level of elements of offences. This re-orientation of the prevailing approach to analysis made a major mark on the criminal law. In particular, and as Robinson and Grall emphasised, it revealed that offences often do not have a single *actus reus* or single *mens rea* but are instead commonly constituted by several conduct elements and several fault elements. It also demonstrated that conduct elements sometimes, but do not always, have a corresponding fault element (and vice versa) and that the fault element that is paired with a certain conduct element (if any) may be different from the fault element that relates to another conduct element. These insights may seem banal today but they were anything but at the time.

Glanville Williams was a (if not the) leading figure in this sea change in understanding regarding the criminal law, principally on account of his *Criminal Law: The General Part*.[2] In that pioneering work, Williams partitioned the criminal law into what he labelled the general part and the special part. In outline, the former comprises principles that apply to more than one offence or across the board while the latter concerns rules particular to specific offences. A substantial proportion of the general part concerns ingredients that are common to a range of crimes such as intention, causation and non-consent. Accordingly, in large part Williams's book entailed a search for and elucidation of the fundamental building blocks from which crimes are constructed. It was an exercise in element analysis *par excellence*.

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[1] PH Robinson and JA Grall, 'Element Analysis in Defining Criminal Liability: The Model Penal Code and Beyond' (1983) 35 *Stanford Law Review* 681.

[2] GL Williams, *Criminal Law: The General Part* (London, Stevens & Sons, 1953). For discussion, see P Cane, 'The General/Special Distinction in Criminal Law, Tort Law and Legal Theory' (2007) 26 *Law & Philosophy* 465.

The offence of rape[3] is a good illustration of a crime that cannot be properly understood without descending to the level of its elements. The offence has two conduct requirements, namely, penetration and non-consent. Each of these conduct elements is linked with a fault element. Specifically, the fault element associated with the requirement of penetration is an intention to penetrate whereas that paired with the ingredient of non-consent is the absence of a reasonable belief in consent.[4] It follows that the offence of rape does not have a single *actus reus*. Nor, since it is premised on both intention and the absence of a reasonable belief, does it have a single *mens rea*. The legal complexity of the crime is, therefore, suppressed if one operates only at the level of the offence and speaks simply of its *actus reus* or of its *mens rea*.

Torts, like crimes, are also constituted by elements.[5] Although it has been said that the purpose of a tort textbook is to explain 'the "elements" that must be proved in order to succeed in each kind of tort action',[6] the reality is that tort law has not been studied at the level of elements in anything like the detail that the criminal law has been. This is reflected in the fact that tort textbooks are invariably arranged in terms of torts rather than elements of torts whereas criminal law textbooks often include substantial treatments of commonly occurring ingredients.[7] Analysis of specific crimes is frequently postponed until after the building blocks of criminal liability have been addressed.[8]

Operating at the level of torts can lead to a superficial understanding of the subject. Consider the familiar distinction between fault-based torts and strict liability torts.[9] The difficulty with this dichotomy is that it obscures the fact that torts, like crimes, are regularly constituted by several conduct elements and that these conduct elements are often coupled with different fault elements or, sometimes, no fault element at all. In other words, branding individual torts as being based on strict liability or fault liability is almost always an oversimplification since most torts are blends of both forms of

[3] Sexual Offences Act 2003 (UK), s 1.

[4] The position at common law was different. Liability would not arise under the common law where the defendant believed, whether or not reasonably, that the intercourse was consensual: *DPP v Morgan* [1976] AC 182 (HL).

[5] Indeed, all causes of action in private law are constituted by elements. As regards contract, see *Atlantic Lottery Corp Inc v Babstock* 2020 SCC 19, (2020) 447 DLR (4th) 543 [91] (Brown J observing that '[t]he elements of a cause of action for breach of contract are the existence of a contract and the breach of a term of that contract'). It is well established that 'four elements … constitute the conceptual structure of a claim in unjust enrichment': A Burrows, *A Restatement of the English Law of Unjust Enrichment* (Oxford, Oxford University Press, 2012) 25. And equitable wrongs are similarly comprised of elements: see, eg, *El Ajou v Dollar Land Holdings plc* [1994] 2 All ER 685 (CA) 700 (knowing receipt); *Coco v AN Clark (Engineers) Ltd* [1969] RPC 41 (Ch D) 47 (breach of confidence); *Burns v Burns* [2021] EWHC 75 (Ch) [28] (dishonest assistance). Regarding the role of elements in relation to equitable wrongs, see PG Turner, 'Fusion and Theories of Equity in Common Law Systems' in JCP Goldberg et al (eds), *Equity and Law: Fusion and Fission* (Cambridge, Cambridge University Press, 2019) 19–21.

[6] C Witting, *Street on Torts*, 15th edn (Oxford, Oxford University Press, 2018) 8.

[7] See, eg, D Ormerod and K Laird, *Smith & Hogan's Criminal Law*, 14th edn (Oxford, Oxford University Press, 2015) chs 4–5.

[8] See, eg, ibid.

[9] 'We operate within the paradigm of the opposition of fault and strict liability and assume that this basic dichotomy lies at the foundation of the system': GP Fletcher, 'The Fault of Not Knowing' (2002) 3 *Theoretical Inquiries in Law* 265, 265–66.

liability. Deceit is a striking example of a tort that defies classification according to the divide between strict liability and fault liability. As Peter Cane incisively observes:[10]

> The elements of liability for deceit are: (1) making a false statement; (2) either knowing it to be false, or not honestly believing it to be true; (3) with the intention that another rely on it to their detriment. Liability for deceit extends to (4) harm caused by the making of the false statement, regardless of whether the harm was intended, foreseen or foreseeable. The elements of the tort of deceit, then, are an amalgam of knowledge, belief, intention, recklessness and cause-based (strict) liability. This shows that the various components of legal responsibility judgments (intention, negligence, knowledge, and so on), are building blocks that can be put together to produce complex and subtly different liability criteria. The example of deceit draws attention to an important legal distinction between conduct and extrinsic consequences. It is by no means uncommon for the criterion of liability for conduct to be different from the criterion of liability for the extrinsic consequences ('outcomes') of that conduct. For example, the criterion of liability for conduct might be intention, while the criterion of liability for the outcomes of that conduct might be foreseeability. … Similarly, a criterion of responsibility regardless of fault in relation to conduct may be combined with a fault-based criterion of responsibility for outcomes.

As this passage demonstrates, it would miss an important part of the truth to pigeonhole deceit by reference to the dichotomy between strict liability and fault liability. In reality, torts, including that of deceit, are almost always far more complex creatures than these labels suggest, and it is necessary to descend to the domain of elements in order properly to appreciate their nuances.

The purpose of this chapter is not to populate a periodic table of elements of torts. Nor is its objective to investigate individual elements. Rather, this chapter's concern is with the more fundamental issue of the concept of a tort element itself, which appears to be virgin territory. Among other things, it distinguishes elements from certain related concepts, addresses the functions served by elements as a matter of substantive law, catalogues various types of elements and enquires whether torts should be constituted by elements.

At the outset it is necessary to address the meaning of the word 'element'.[11] Although it is and has long been ubiquitous in the case law[12] and literature,[13] no attempt to define it appears to have been made. The word is sometimes invoked to refer to major structural patterns detected in tort law. For example, John Wigmore claimed that all torts have a damage element, a responsibility element, and an excuse or justification element[14] while Thomas Cooley maintained that torts require the conjunction of

[10] P Cane, *Responsibility in Law and Morality* (Oxford, Hart Publishing, 2002) 89.

[11] The term 'ingredient' appears to be used interchangeably with it: see, eg, *OBG Ltd v Allan* [2007] UKHL 21, [2008] 1 AC 1 [191].

[12] See, eg, *Allen v Flood* [1898] AC 1 (HL) 98.

[13] See, eg, the sources referred to in nn 14–15 below.

[14] 'There are, therefore, three distinct classes of limitations dealt with in the law relating to Torts, which may be conveniently termed the Primary, Secondary, and Tertiary limitations. The first class deals with the sort of harm to be recognized as the basis of the right; this may be called the Damage element. The second class deals with the circumstances fixing the connection of the obligor with this forbidden harm; this we may call the Responsibility element. The third class deals with the circumstances in which, assuming both the Damage and the Responsibility elements to be present, the nexus still has no validity, – in other words, the considerations which allow the harm to be inflicted with impunity; this we may term the Excuse or Justification element': JH Wigmore, 'Tripartite Division of Torts' (1894) 8 *Harvard Law Review* 200, 202–203.

two elements namely, a wrong and damage.[15] Cane employed the idea of an element in the same or a similar way when he contended that:[16]

> [e]very cause of action in tort … has two basic (sets of) elements, one concerned with the position of one party to a bilateral human interaction (the 'victim' of the tortious conduct) and the other concerned with the position of the other party to that interaction (the perpetrator of the tortious conduct, or the 'injurer').

Much more frequently, however, the language of 'elements' is employed to refer to the confluence of circumstances that the law stipulates needs to exist in order for a tort to have been committed. So understood, an element is a necessary part of a set of conditions that are collectively sufficient to constitute a tort. This is how Lord Hope used the word 'element' in *Three Rivers District Council v Governor and Company of the Bank of England (No 3)*:[17]

> The following are the essential elements of the tort [of misfeasance in a public office] … First, there must be an unlawful act or omission done or made in the exercise of power by the public officer. Second, as the essence of the tort is an abuse of power, the act or omission must have been done or made with the required mental element. Third, for the same reason, the act or omission must have been done or made in bad faith. Fourth, as to standing, the claimants must demonstrate that they have a sufficient interest to sue the defendant. Fifth, as causation is an essential element of the cause of action, the act or omission must have caused the claimants' loss.

It is with this sense of the word 'element' that this chapter is concerned.

II. General Observations Regarding Elements

As a prelude to the analysis that follows, it is convenient to draw attention to several basic characteristics of elements.

A. The Distinctiveness of Elements

Elements of torts can be distinguished from several related concepts. One contrast concerns compounds. Compounds are composites of two or more elements. They are commonly mistaken for elements. The tort of negligence supplies notorious illustrations. To give just one example, it is regularly claimed that causation of damage is an element

[15] Under the heading 'Element of a Tort', Cooley wrote 'It is said by the authorities that it is the conjunction of damage and wrong that creates a tort, and there is no tort if either damage or wrong is wanting. Here the word wrong is used in the sense of a thing amiss; something which for any reason the party ought not to do or to permit, and which does not become the actionable wrong called a tort unless the other element is found in the same case, namely, a damage suffered in consequence of the thing amiss': TM Cooley, *A Treatise on the Law of Torts or the Wrongs Which Arise Independent of Contract* (Chicago, Callaghan & Co, 1879) 62 (footnote omitted).

[16] P Cane, *The Anatomy of Tort Law* (Oxford, Hart Publishing, 1997) 13.

[17] *Three Rivers District Council v Governor and Company of the Bank of England (No 3)* [2001] UKHL 16, [2003] 2 AC 1 [42].

of the tort of negligence.[18] This is incorrect. Causation of damage is a compound rather than an element of the tort since the issue of whether C suffered damage is fundamentally different from whether D's breach of duty caused it.[19] A failure to distinguish compounds from elements is fraught with danger. For example, if the courts mistake two elements of a given tort for a single requirement there is a serious risk that they will not properly investigate whether both elements are present. Another obvious problem that can arise from treating two elements as though they were a single ingredient is that rules governing one element may be extended to the other. Of course, difficult questions will sometimes arise as to whether one is dealing with an element or a compound. The Court of Appeal was concerned with this issue in *Kawasaki Kisen Kaisha Ltd v James Kemball Ltd*.[20] It considered whether Lord Hodge had been correct in *Global Resources Group Ltd v Mackay* to isolate as an element of a claim for inducing a breach of contract the requirement that 'A must induce B to break his contract with C by persuading, encouraging or assisting him to do so'.[21] The parties in *Kawasaki Kisen Kaisha* had treated this requirement as entailing two elements, one of which was based on inducement and the other being concerned with causation. However, Popplewell LJ considered that there was just a single element and wrote:[22]

> As formulated by Lord Hodge the … ingredient, of inducement, encompasses both the conduct which constitutes an inducement and the causative effect it has on B breaching the contract. Before us and the Judge below, these were to some extent treated as separate ingredients, comprising inducement and causation, but I would respectfully agree with Lord Hodge's treatment of them as a single ingredient because, as appears from the discussion below, it is of the essence of conduct by A which can amount to inducement that it should have some causative effect on B breaking the contract.

Another concept that can be differentiated from that of an element is a standing requirement. It is often said that a claimant, in order to be able to sue for certain torts, must have *locus standi*. For example, it is commonly asserted that in order for a claimant to be able to sue for private nuisance he must have standing,[23] in the form of a proprietary interest in the land in issue. It is debatable whether tort law in fact recognises principles that are properly regarded as standing requirements.[24] But if it does, elements would appear to be distinct from them in that elements are constitutive of the wrong in issue whereas standing rules are not.

Liability for some torts is said to depend on an actionability precondition being satisfied, and such preconditions can be contrasted with elements. For instance,

[18] See section III.

[19] Regarding the tendency to conflate the causation and damage elements of the tort of negligence, see D Nolan, 'Rights, Damage and Loss' (2016) 37 *OJLS* 255, 270–72.

[20] *Kawasaki Kisen Kaisha Ltd v James Kemball Ltd* [2021] EWCA Civ 33.

[21] *Global Resources Group Ltd v Mackay* [2008] CSOH 148, 2009 SLT 104 [11].

[22] *Kawasaki Kisen Kaisha* (n 20) [22].

[23] See, eg, *Hunter v Canary Wharf Ltd* [1997] AC 655 (HL) 717.

[24] Consider, for example, Peter Cane's remark that 'Standing is not normally a requirement for bringing a "private law claim" … There are certain private-law concepts that resemble rules of standing: for example, duty of care in the tort of negligence, and the principle that breach of a statutory duty will be actionable in tort only if the duty is owed to the claimant as an individual (as opposed to the public generally) … However, these are not seen as separate from the rules that define the relevant wrong, but as part of the definition of the wrong': P Cane, *Administrative Law*, 5th edn (Oxford, Clarendon Press, 2011) 281–82.

John Murphy contends with reference to the tort of deceit that 'the need to show consequential loss is a mere condition of actionability, but not an element of the tort *strictu sensu*'.[25] In support of this claim Murphy refers to the dictum of Stephenson LJ in *Diamond v The Bank of London and Montreal* that '[i]n deceit … the false representation … has to cause damage to be actionable, but no damage to the plaintiff is necessary for the tort to be committed'.[26] Whether or not this is correct is debatable.[27] However, the important point for present purposes is that if actionability requirements exist they are distinct from elements in that, like standing rules, they are not constitutive of the wrongs to which they relate. Whether or not actionability requirements are synonymous with standing requirements is unclear.

B. Variability in the Number of Elements

Considerable variability exists regarding the number of ingredients from which individual torts are made. Rightly or wrongly, some torts are said to have just a single element. For example, in *Johnson v Chief Constable of Surrey* Neill LJ claimed that the tort of false imprisonment has just one element, namely, imprisonment.[28] By contrast, most torts are usually understood as having several elements, typically three or four. Some torts, such as the torts of inducing a breach of contract[29] and malicious prosecution,[30] are said to have as many as five. According to Lord Steyn in *Three Rivers*, the tort of misfeasance in public office has six.[31] Whether or not the elements of the foregoing torts have been accurately counted is debatable. However, the point of interest for present purposes is simply that there is considerable divergence in terms of the number of ingredients from which torts are made.

Why are some torts more intricate assemblages than others? One possible explanation is that there is, for one reason or another, a particular concern precisely to locate

[25] J Murphy, 'Misleading Appearances in the Tort of Deceit' (2016) 75 *CLJ* 301, 323.

[26] *Diamond v The Bank of London and Montreal* [1979] QB 333 (CA) 349.

[27] For discussion, see J Neyers, 'Form and Substance in the Tort of Deceit' in A Robertson and J Goudkamp (eds), *Form and Substance in the Law of Obligations* (Oxford, Hart Publishing, 2019).

[28] 'In one sense it is true to say that the tort of false imprisonment has two ingredients; the fact of imprisonment and the absence of lawful authority to justify it … But as I understand the law, the gist of the action of false imprisonment is the mere imprisonment': *Johnson v Chief Constable of Surrey*, The Times, 23 November 1992 (CA).

[29] '[F]irst, there must be a contract, second, there must be a breach of that contract; thirdly, the conduct of the relevant defendant must have been such as to procure or induce that breach; fourthly, the relevant defendant must have known of the existence of the relevant term in the contract or turned a blind eye to the existence of such a term; and fifthly, the relevant defendant must have actually realised that the conduct, which was being induced or procured, would result in a breach of the term': *Aerostar Maintenance International Ltd v Wilson* [2010] EWHC 2032 (Ch) [163] (Morgan J). Some scholars deny the existence of the tort of inducing a breach of contract and argue that the supposed tort is simply a form of accessorial liability: see, eg, PS Davies, *Accessory Liability* (Oxford, Hart Publishing, 2015) 139–40. The merits of this view are beyond the scope of this chapter.

[30] 'The claimant must show: i) He was prosecuted by the defendant. ii) The prosecution was determined in his favour. iii) The prosecution was without reasonable and probable cause. iv) It was malicious. v) He suffered actionable damage': *Rees v Commissioner of Police for the Metropolis* [2018] EWCA Civ 1587 [43] (McCombe LJ referring with approval to the trial judge's description of the elements of the tort).

[31] *Three Rivers* (n 17) 191–96.

the borders of certain torts, and the inclusion of additional elements reflects an attempt to realise this goal. Another potential reason for the variability may lie in a concern to prevent particular torts from imposing liability too readily. On this view, extra elements are incorporated simply in order to limit liability rather than (as per the previous explanation) to fine-tune a tort's scope. A final possibility is that some torts have simply been the subject of greater scrutiny than others and that this has led to their being dissected into a greater number of components.

C. Minimum Requirements

All torts have at least one conduct element.[32] Thus, the tort of conspiracy in both of its guises involves the defendant combining with co-conspirators and concerted action being taken pursuant thereto, the tort of trespass to land entails the defendant entering upon the claimant's land and the tort of conversion consists in the defendant usurping the claimant's rights over a chattel. It follows from the fact that all torts incorporate a conduct element that there are no torts that consist exclusively in a mental element. Accordingly, tort law, like the criminal law, never attaches liability to a mere mental state.[33] The point can be taken further. Not only are there no torts that consist exclusively in a mental element but there are no torts that require proof of a mental element in connection with a consequence without that mental element being accompanied by a conduct element. Thus, all torts that require proof that the defendant intended to injure the claimant (such as both forms of conspiracy and the unlawful means tort) are committed only if the defendant actually causes the claimant to suffer damage. Because tort law, when liability depends on a mental state in connection with a consequence, always requires that the defendant brought about that consequence before liability will arise, simply attempting to commit a tort is never itself tortious.[34]

D. Interdependence

The elements of torts are often interlinked. Denning LJ drew attention to this in the negligence context in *Roe v Minster of Health* when he said that 'you will find that the three questions, duty, causation and remoteness, run continually into one another'.[35] Consider also the following comments of Lord Pearson in *Home Office v Dorset Yacht Co Ltd*:[36]

> The form of the order [providing for the court to determine as a preliminary issue whether the defendant owed the claimant a duty of care] assumes the familiar analysis of the tort of negligence into its three component elements, viz., the duty of care, the breach of that duty and the resulting damage. The analysis is logically correct and often convenient for purposes of exposition, but it is only an analysis and should not eliminate consideration of the tort of negligence as a whole.

[32] The concept of a conduct element is explored further below in section V. E–F.
[33] 'The mere intent cannot constitute actionable matter': Cooley (n 15) 61–62 (footnote omitted).
[34] See generally JCP Goldberg and BC Zipursky, 'Unrealized Torts' (2002) 88 *Virginia Law Review* 1626.
[35] *Roe v Minster of Health* [1954] 2 QB 66 (CA) 86.
[36] *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004 (HL) 1052.

Interconnections between elements can occur in several different ways. One or more elements of a given tort may draw upon a common concept. For example, in the tort of negligence the idea of foreseeability features in relation to whether a duty of care was owed, whether any duty that was owed was breached and whether the claimant's damage was non-remote.[37] Thus, in order for a duty of care to arise, injury to a person such as the claimant must be foreseeable,[38] before a duty will be breached there must have been a foreseeable risk of injury to the claimant[39] and the requirement that the damage not be remote will be unsatisfied unless the loss was of a foreseeable kind.[40] Although the concept of foreseeability is not applied in precisely the same way in relation to each of these parts of the tort of negligence, it is nevertheless a common thread running through them.

Elements of torts can also be interconnected in that the process of determining whether one ingredient of a given tort is present may call for consideration of another. The tort of negligence again serves as an excellent illustration.[41] For example, because very different duty rules apply depending on the nature of the claimant's loss it is inadequate to ask whether a defendant owed the claimant a duty of care without first enquiring as to the nature of the claimant's damage.[42] Similarly, the issue of whether a claimant's act of self-harm will prevent causation from being established depends on whether the defendant's duty of care extended to taking reasonable steps to prevent the claimant from injuring himself.[43] One strongly suspects that this symbiosis is a feature of all torts to at least some degree albeit it is not always as visible or pronounced as in the case of the tort of negligence.

The structure of judgments and textbooks sometimes imply that elements of torts, or at least some torts, should be addressed sequentially.[44] However, the interdependence of elements suggests that this may not always be possible. It may be the case that a judge sometimes cannot properly reach a final conclusion regarding the existence of particular elements of certain torts without considering another element. In such situations, a judge may need to reach merely provisional conclusions regarding the presence of a given element and revisit that initial view in the light of the analysis of other ingredients. On this account, the process of ascertaining whether a tort has been committed is different from following a recipe[45] or chain.[46]

[37] See J Goudkamp and D Nolan, *Winfield & Jolowicz on Tort*, 20th edn (London, Sweet & Maxwell, 2020) para 5.003.

[38] See, eg, *Robinson v Chief Constable of West Yorkshire* [2018] UKSC 4, [2018] AC 736 [73]–[74].

[39] See, eg, *Jones v Whippey* [2009] EWCA Civ 452 [16]. According to a different line of authority, the need for the risk that materialised to have been foreseeable is not a precondition to the breach element being satisfied but simply a factor to take into account in deciding whether the defendant was negligence. The rival view is addressed in Goudkamp and Nolan (n 37) para 6.017.

[40] See, eg, *The Wagon Mound* [1961] AC 388 (PC) 426.

[41] See further J Stapleton, *Three Essays on Torts* (Oxford, Oxford University Press, 2021) ch 3.

[42] For discussion, see Goudkamp and Nolan (n 37) para 5.005.

[43] *Reeves v Commissioner of Police for the Metropolis* [2000] 1 AC 360 (HL).

[44] Consider, eg, the cases cited in n 64 below.

[45] Consider Cane (n 16) 3–10.

[46] Consider Turner (n 5) 19–20.

E. Coincidence

One of the first rules to which students of the criminal law are introduced is the coincidence principle. This doctrine stipulates that in order for liability to arise the *mens rea* and *actus reus* of an offence must occur simultaneously. The rule is heavily qualified. For example, it will be satisfied if the *mens rea* is superimposed on an already present *actus reus*. Thus, in *Fagan v Metropolitan Police Commissioner*[47] it was held that D was rightly convicted of battery when, having accidentally driven his car onto the foot of a police constable, he intentionally left it there. It did not matter that the *actus reus* commenced before the required *mens rea* existed in circumstances where the *actus reus* was ongoing. The courts sometimes exclude the doctrine by analysing a series of events as a single transaction. Thus, the coincidence principle was no answer to liability for murder in *Thabo Meli v R*[48] in which the defendants mistakenly thought that they had killed a man by bludgeoning him and throwing him off a cliff whereas he in fact died some while later from exposure. Lord Reid said that 'it is much too refined a ground of judgment to say that, because [the defendants] were under a misapprehension … and thought that their guilty purpose and been achieved before in fact it was achieved, therefore they are to escape the penalties of the law'.[49]

The coincidence principle is not mentioned in torts textbooks, which is odd given that tort law provides for several causes of action that match, in both name and definition, criminal offences. However, it is obvious that tort law also embraces the coincidence principle. For example, it is surely the case that D will not incur liability for deceit unless he intended to defraud C at the time of making the misrepresentation in issue. If D intended to defraud C but no longer held that intention at the time of making the misstatement concerned liability for deceit will not arise. Nor, undoubtedly, will D be liable for conspiring to injure C unless he intended, at the time of entering into the conspiracy, for C to be injured by the conspiracy's implementation. The possession by D at some other point in time of an intention to injure C will not suffice.

It is worth observing that tort law insists on certain elements being simultaneously present in a way that goes beyond the strict requirements of the coincidence principle, which is concerned only with whether conduct elements and fault elements overlap temporally. For example, liability will not arise for the tort of negligence in respect of an injury that D caused to C unless a duty of care arose no later than the time of the careless conduct. Similarly, C must have a proprietary interest in land at the time when D interferes with C's use and enjoyment thereof if C is to have a valid claim for private nuisance.[50] It is obvious that liability will not accrue if C disposed of his interest prior to the interference or acquired it after the interference has ceased.

[47] *Fagan v Metropolitan Police Commissioner* [1969] 1 QB 439 (Div Ct).
[48] *Thabo Meli v R* [1954] 1 WLR 228 (PC).
[49] ibid 231.
[50] The discussion here ignores the possibility that the need for a proprietary interest is not an element of the tort of private nuisance but is instead a standing requirement. See the text accompanying n 23 above.

III. Instability in the Elements of Torts

Whenever it is objected that tort law is uncertain, the target is typically the scope of a particular element of a given cause of action. Often, however, the uncertainty runs far more deeply than is generally appreciated and afflicts not only the parameters of discrete ingredients of torts but the contents of the list of ingredients itself. This is symptomatic of insufficient concern with the elements of torts and hence worth briefly addressing. Consider the tort of negligence.[51] In *Matthews v Ministry of Defence*, Lord Phillips MR said that '[a] cause of action in negligence, as a matter of substantive law, requires duty, breach of duty and entitlement to a remedy'.[52] In *Rothwell v Chemical & Insulating Co Ltd*, Lord Rodger offered a very different formulation. His Lordship wrote that:[53]

> three elements must combine before there is a cause of action for damages for personal injuries caused by a defendant's negligence … There must be (1) a negligent act … by the defendant, which (2) causes an injury to the claimant's body and (3) the claimant must suffer material damage as a result.

Seabrook v Adam[54] supplies yet another variation. In that case, Asplin LJ said that in order for a claim in negligence to succeed 'the defendant must owe the claimant a duty of care, that duty must have been breached and the breach must have caused damage of a kind which is recoverable'.[55] These configurations differ meaningfully from each other. It follows that they cannot all be correct. In fact, none of them is accurate. It is beyond the scope of this chapter to isolate all of the difficulties from which they suffer. It suffices to say that Lord Phillips MR's and Asplin LJ's lists respectively omit and elide the causation and damage elements[56] while Lord Rodger's overlooks the need for a duty of care.

Similar definitional diversity exists in the textbooks. The authors of *Clerk & Lindsell on Torts* claim that the tort of negligence has four elements, namely: (i) a duty of care; (ii) breach; (iii) causation and damage; and (iv) the damage must not be too remote.[57] By contrast, Nicholas McBride and Roderick Bagshaw also perceive the tort as being composed of four elements but their list is as follows: (i) a duty of care; (ii) breach; (iii) causation of 'some kind of loss'; and (iv) the loss suffered must be actionable.[58] The author of *Street on Torts* enumerates the elements of the tort in yet another way, namely: (i) duty of care; (ii) breach of duty; (iii) 'factual causation of damage'; and (iv) neither the damage is too remote nor any defence is applicable.[59] These definitions differ not only from the definitions drawn from the cases identified above but also from each other. Again, none of them is correct. Among other problems, they are all afflicted by the same difficulty as Asplin LJ's, that is, they conflate the question of whether the claimant suffered damage with the issue of whether the defendant caused it.[60]

[51] See further DG Owen, 'The Five Elements of Negligence' (2007) 35 *Hofstra Law Review* 1671 (identifying the diversity of ways in which the elements of the tort of negligence have been propounded in the US).
[52] *Matthews v Ministry of Defence* [2002] EWCA Civ 773, [2002] 1 WLR 2621 [66].
[53] *Rothwell v Chemical & Insulating Co Ltd* [2007] UKHL 39, [2008] 1 AC 281 [87].
[54] *Seabrook v Adam* [2021] EWCA Civ 382, [2021] 4 WLR 54.
[55] ibid [11].
[56] Regarding this error, see Nolan (n 19).
[57] *Clerk & Lindsell on Torts*, 23rd edn (London, Sweet & Maxwell, 2020) para 7.4.
[58] NJ McBride and R Bagshaw, *Tort Law*, 6th edn (Harlow, Pearson, 2018) 72.
[59] Witting (n 6) 25.
[60] See Nolan (n 19).

Related to the problem of definitional instability is the tendency for facts to be treated as pertaining to a given element of a tort when, in actuality, they bear upon a different ingredient. This error, which can result in valid claims being denied or in the success of proceedings that ought to fail, is ubiquitous throughout tort law but is particularly prevalent in the negligence context. A notorious illustration is *Darnley v Croydon Health Services NHS Trust*.[61] In this case, the Court of Appeal considered that the amount of care that the defendant hospital took for a patient bore upon whether it owed the patient a duty of care. This led the Court to conclude that no duty of care arose. Two fundamental difficulties with this reasoning are obvious.[62] First, there was no scope for argument as to the existence of a duty of care because precedent establishes that hospitals owe a duty of care to their patients. Second, the amount of care that the defendant exercised has, in any event, no bearing on the existence of a duty of care but instead pertains to the breach element of the tort of negligence. The Supreme Court put things right on appeal[63] but there are many other cases in which facts relevant to the breach ingredient were wrongly treated as affecting the existence of a duty of care.[64]

IV. The Functions of Elements

It is conventional for judges hearing tort claims to enumerate the elements of the tort that the claimant contends the defendant committed[65] and then proceed to consider, *seriatim* and often in a highly structured manner, whether each is present.[66] Elements of torts are clearly thought to be important. But why, specifically, is this the case?

A. Substance

Elements are substantively important for the simple reason that liability in tort cannot arise unless all of the elements of the tort for which the claimant sues are present.[67]

[61] *Darnley v Croydon Health Services NHS Trust* [2017] EWCA Civ 151, [2018] QB 783.

[62] For further discussion, see J Goudkamp, 'Breach of Duty: A Disappearing Element of the Action in Negligence?' (2017) 75 *CLJ* 480.

[63] [2018] UKSC 50, [2019] AC 831.

[64] See, eg, *Orange v Chief Constable of West Yorkshire Police* [2001] EWCA Civ 611, [2002] QB 347 [48]; *Fernquest v City & County of Swansea* [2011] EWCA Civ 1712 [20].

[65] See, eg, *Reckitt & Colman Products Ltd v Borden Inc* [1990] 1 WLR 491 (HL) 499 (passing off); *Aerostar* (n 29) [163] (inducing a breach of contract); *Dowson v Chief Constable of Northumbria Police* [2010] EWHC 2612 (QB) [142] (harassment); *Berezovsky v Abramovich* [2011] EWCA Civ 153, [2011] 1 WLR 2290 [5] (intimidation); *Dunnage v Randall* [2015] EWCA Civ 673, [2016] QB 639 [121] (negligence); *O v Rhodes* [2015] UKSC 32, [2016] AC 219 [73] (intentional infliction of physical or psychological harm); *Zurich Insurance Co plc v Hayward* [2016] UKSC 48, [2017] AC 142 [58] (deceit); *Pirtek (UK) Ltd v Jackson* [2017] EWHC 2834 (QB) [54] (malicious falsehood); *FM Capital Partners Ltd v Marino* [2018] EWHC 1768 (Comm) [94] (unlawful means conspiracy); *Rees* (n 30) [43] (malicious prosecution); *Secretary of State for Health v Servier Laboratories Ltd* [2019] EWCA Civ 1160, [2020] Ch 717 [19] (causing loss by unlawful means); *London Borough of Lambeth v AM* [2021] EWHC 186 (QB) [20] (misuse of private information).

[66] Good examples of decisions that adhere to this approach include *Chalfont St Peter Parish Council v Holy Cross Sisters Trustees Incorporated* [2019] EWHC 1128 (QB); *Vald Nielsen Holdings A/S* [2019] EWHC 1926 (Comm).

[67] *cf* Lord Neuberger's curious suggestion in *O* (n 65) [105] regarding the tort of intentional infliction of physical or psychological harm that 'it would be dangerous to say categorically that each ingredient of the tort must always be present'.

Thus, it is often stressed that the ingredients of torts must be 'separately'[68] established before a remedy can be granted, and that a claimant cannot avoid the need to substantiate a given element by proving some other fact, such as that the defendant acted maliciously[69] or was guilty of *crassa negligentia*.[70] Accordingly, if an element of a tort for which the claimant sues is absent, the court cannot award the claimant a remedy,[71] and that is so regardless of whether, according to some conception of justice, the claimant is nevertheless thought to be deserving of relief.[72] *Kaye v Robertson*[73] illustrates the point. In this case, the claimant was convalescing in hospital when journalists working for the defendant newspaper burst into his room and interviewed and photographed him. When the newspaper announced that it intended to publish an article based on the interview, the Court granted an interim injunction on the basis that the publication would amount to malicious falsehood. However, Bingham LJ emphasised that had the claimant 'failed to establish any cause of action, we should of course have been powerless to act, however great our sympathy for [him] and however strong our distaste for the defendants' conduct'.[74] Of course, if a court wishes to grant the claimant a remedy, it may abolish a particular element or broaden an element or even recognise a new tort.[75] However, none of this affects the points set out above. The fact remains that the claimant must establish the presence of all of the elements of the tort (howsoever they are defined) in which he sues in order for liability to arise.

Just as the absence of any of the elements of the tort for which the claimant sues dictates that the claimant cannot obtain a remedy however worthy the claimant's claim may otherwise be thought to be, where all of the ingredients of a claim in tort are present the court has no choice but to award the claimant at least nominal damages. Thus, the court cannot withhold damages because it considers, despite the claimant having proven all of the elements of a tort, that the claimant is, for one reason or another, undeserving of a remedy. In *Re T & N Ltd* David Richards J put the point as follows in the negligence context: 'There is no element of discretion … If the ingredients of the tort of

[68] See, eg, *Qema v News Group Newspapers Ltd* [2012] EWHC 1146 (QB) [58]; *Mosley v Associated Newspapers Ltd* [2020] EWHC 3545 (QB), [2021] 4 WLR 29 [32].

[69] For instance, in *Mosley* (n 68) [32] Nicklin J wrote that '[e]vidence of malice, of whatever degree, cannot dispense with or diminish the need to establish separately each of the [other] elements of the tort' of malicious prosecution.

[70] 'A man is entitled to be as negligent as he pleases towards the whole world if he owes no duty to them': *Le Lievre v Gould* [1893] 1 QB 491 (CA) 497 (Lord Esher MR).

[71] According to Mitchell McInnes, it is 'trite' that 'regardless of the nature of the remedy sought, every element of a tort must be satisfied': M McInnes, 'Restitution, Disgorgement, and Waiver of Tort in the Supreme Court of Canada' (2021) 137 *LQR* 188, 190.

[72] Instances where the court evidently had sympathy for the claimant but in which a remedy was withheld because one or more of the elements of the tort on which the claimant relied was missing are innumerable but see, eg, *Seligman v Docker* [1949] Ch 53 (Ch D) 66–67; *Wilsher v Essex Area Health Authority* [1998] AC 1074 (HL) 1092; *Croft v Broadstairs & St Peter's Town Council* [2003] EWCA Civ 676 [76]; *Hewes v West Hertfordshire Acute Hospitals NHS Trust* [2020] EWCA Civ 1523 [100]; *Brand v No Limits Track Days Ltd* [2020] EWHC 1306 [2]; *HXH v Surrey County Council* [2021] EWHC 250 (QB) [45]–[48].

[73] *Kaye v Robertson* [1991] FSR 62 (CA).

[74] ibid 70.

[75] Classic examples include *Wilkinson v Downton* [1897] 2 QB 57 (QBD); *Willers v Joyce* [2016] UKSC 43, [2018] AC 779.

negligence … are established, the claimants are entitled to damages. [That entitlement does] not depend on an exercise of discretion by the court'.[76]

B. Procedure

The concept of an element is also important procedurally. It is convenient to give three examples. Consider, first, the fact that claimants must plead facts that satisfy all of the elements of a tort known to the law, or the elements of a tort that they contend that the law ought to recognise, or they risk having summary judgment entered against them or having their claim struck out. *Fowler v Lanning*[77] is a famous illustration. In this case, Diplock J said that '[t]respass to the person does not lie if the injury to the plaintiff, although the direct consequence of the act of the defendant, was caused unintentionally and without negligence on the defendant's part'.[78] Because the claimant had alleged simply that the defendant had shot him his Lordship struck the claim out.

A second example of the procedural significance of elements relates to the burden of proof. The simple point is that the claimant carries the onus of establishing facts that satisfy the elements of the tort in which he sues. Thus, the fact that a given issue constitutes an element determines the party that bears the onus of proof in relation to it.[79] It is true that claimants sometimes bear the onus of establishing various matters that are not elements of torts. For example, if a defendant raises a limitation defence, the claimant is obliged to show that he issued the claim form before the expiry of the relevant time period.[80] And claimants must prove facts relevant to the availability of the remedy claimed. Thus, if the claimant seeks punitive damages, the claimant must prove facts that bring the claim within the categories established by *Rookes v Barnard*.[81] But this does not alter the fact that if an issue constitutes an element of a tort the claimant carries the onus of proof in respect of it.

A third illustration of the procedural importance of elements concerns the running of time for limitation purposes. As a general rule, time starts running when the cause of action concerned accrues. This occurs when 'the last element constituting it has come into existence'.[82] It follows that one needs to be able to ascertain the elements of any given tort in order to identify when the limitation period commenced.

[76] *Re T & N Ltd* [2005] EWHC 2870 (Ch) [55].
[77] *Fowler v Lanning* [1959] 1 QB 426 (QBD).
[78] ibid 439.
[79] *Kuwait Oil Tanker Co SAK v Al Bader* [2000] 2 All ER (Comm) 271 (CA) [132]; *Hall v Herbert* [1993] 2 SCR 159 (SCC) 184.
[80] *Lloyds Bank plc v Crosse & Crosse* [2001] EWCA Civ 366, [2001] PNLR 34 [41]; *Fiona Trust & Holding Corp v Privalov* [2010] EWHC 3199 (Comm) [315].
[81] [1964] AC 1129 (HL).
[82] A Zuckerman, *Zuckerman on Civil Procedure: Principles of Practice*, 4th edn (London, Sweet & Maxwell, 2021) para 26.15 (footnotes omitted).

V. Types of Elements

Elements come in different types. As we will see, the case law and literature are populated by references to conduct elements, consequence elements, fault elements, primary elements, mental elements and more. This section explores the various species of element.

A. Alternative Elements

Unless the claimant proves all of the elements of the tort for which he sues, liability will not arise. However, some torts can be established by one or more different sets of elements. Such torts incorporate alternative elements.[83] Take, for example, the tort of deceit. In order to succeed in a claim for deceit the claimant must prove, among other things, that the defendant made a false statement and that he did so with a relevant state of mind. Specifically, the claimant must demonstrate that the defendant made the false representation concerned '(i) knowingly, (ii) without belief in its truth, or (iii) recklessly, careless whether it be true or false'.[84] In effect, therefore, the requirement that the defendant make a false statement has linked with it three alternative fault elements. Another example of a tort with alternative elements is that of misfeasance in a public office. This cause of action requires proof, among other things, of either (i) 'targeted malice by a public officer, i.e. conduct specifically intended to injure a person or persons' or (ii) that the public officer concerned acted knowing that he lacked the power to perform the act in question and that it would probably harm the claimant.[85]

B. Negative Elements

Most tort elements require proof of the presence of something, such as a particular state of mind on the part of the defendant or the existence of damage. Sometimes, however, the absence of something must be established. A good illustration of a tort that incorporates a negative element is that of malicious prosecution, which requires the claimant to demonstrate that his prosecution was 'without reasonable and probable cause'.[86] Another example is the tort of battery, which is committed only where the claimant withheld consent to the defendant's contact concerned.[87] Tort law makes use of negative elements rather sparingly. One possible explanation for this situation may

[83] It is not only tort law that makes use of alternative elements. Perhaps the most striking use of alternative elements is found in the context of unjust enrichment. One of the elements of a claim in unjust enrichment is the existence of an unjust factor, and the law recognises a lengthy catalogue of unjust factors any one of which will supply this element.

[84] *Derry v Peek* (1889) 14 App Case 337 (HL) 376 (Lord Herschell).

[85] *Three Rivers* (n 17) 191 (Lord Steyn). See also at 192.

[86] *Clerk & Lindsell on Torts* (n 57) para 15.13.

[87] Consent is sometimes characterised as a defence to liability in battery as opposed to a negative element. The better view is that non-consent is part of the definition of a battery: see J Goudkamp, *Tort Law Defences* (Oxford, Hart Publishing, 2013) 65–67.

lie in the fact that the onus of proving elements falls on the claimant.[88] The significance of this is that it is often supposed, rightly or wrongly, that it is unfairly onerous to require a party to prove a negative.[89]

C. Non-Elements

Non-elements are matters that are not part of the definition of a tort. Accordingly, where the law declares that something is a non-element of a particular tort, the tort concerned is simply insensitive to the issue of whether the thing concerned exists. Consider the defamation context. It is often observed that it is not an element of the torts of libel or slander that the statement in issue be false.[90] Nor is it an element of those torts that the claimant be individually named by the statement concerned or that any particular person otherwise understood the statement to refer to the claimant.[91] To take some examples from different settings, 'negligence is not an essential element in nuisance',[92] 'the elements of liability under the rule in *Rylands v Fletcher* do not include want of reasonable care',[93] 'bad faith' is not an ingredient of the tort of false imprisonment[94] and dishonesty is not an element of the tort of conspiracy.[95]

D. Primary Elements

Reference is often made to the 'primary elements' of torts.[96] Sometimes the word 'primary' is used in such a way that it adds nothing to the word 'element'.[97] When the term 'primary' is so employed, the primary elements of a tort are simply its ingredients. On other occasions, however, the language of primary elements is invoked such that defences to liability in tort are presented not as rules that are external to the definitions

[88] See n 79 above.

[89] Consider Lord Kerr's remark in *Crawford Adjusters (Cayman) Ltd v Sagicor General Insurance (Cayman) Ltd* [2013] UKPC 17, [2014] AC 366 [109] that '[e]stablishing the various rudiments of the tort of malicious prosecution is no easy task. … It has to be shown that there was no reasonable or probable cause for the launch of the proceedings. This requires the proof of a negative proposition, normally among the most difficult of evidential requirements'.

[90] See, eg, *Barron v Vines* [2015] EWHC 1161 (QB) [15].

[91] *Lachaux v Independent Print Ltd* [2015] EWHC 2242 (QB), [2016] QB 402 [15].

[92] *Overseas Tankship (UK) Ltd v Miller SS Co Pty* [1967] 1 AC 617 (PC) 639 (Lord Reid).

[93] *Margereson v JW Roberts Ltd* [1996] PIQR 154 (QBD) 179 (Holland J).

[94] *R v Governor of Brockhill Prison* [2001] 2 AC 19 (HL) 42.

[95] *ED&F Man Sugar Ltd v T&L Sugars Ltd* [2016] EWHC 272 (Comm) [33].

[96] The courts also refer to 'basic elements' (see, eg, *Clerk & Lindsell on Torts* (n 57) para 21.163), 'core elements' (see, eg, *Planet Art LLC v Photobox Ltd* [2019] EWHC 1688 (Ch) [66]), 'essential elements' (see, eg, *Overseas Tankship* (n 92) 639; *Zurich* (n 65) [58]), 'prima facie elements' (see, eg, *Ware v McAllister* [2015] EWHC 3086 (QB) [27]), 'necessary elements' (see, eg, *Overseas Tankship* (n 92) 640); *Secretary of State for Health v Servier Laboratories Ltd* [2021] UKSC 24 [2]–[3]) and 'substantive elements' (see, eg, *Ivy Technology v Martin* [2019] EWHC 2510 (Comm) [12]) of torts. It is unclear whether these expressions bear a meaning different from that of 'primary elements'.

[97] Consider *Jones v Environcom Ltd* [2011] EWCA Civ 1152, [2012] PNLR 5 [19].

of torts but as negative elements of torts. For example, the authors of *Clerk & Lindsell on Torts* write:[98]

> When a claimant fails to establish the primary elements of the particular tort of which he complains, his action necessarily fails. He may however succeed in proving that prima facie a tort has been committed, only to be met with a defence by virtue of which the defendant argues that he is exculpated from liability in all the circumstances.

So understood, the primary elements of a tort are matters that, when present, merely suggest that a tort may have been committed (hence the language of 'prima facie') but this provisional conclusion may turn out to be incorrect when defences are considered. This construes defences as bearing upon whether a tort exists in the first place rather than as, for example, justifications for torts.

Although defences are often conceptualised as negative elements of torts[99] this understanding is controversial. A rival view is that defences are rules that preclude liability from arising despite a tort having been committed. On this account, using the language of primary elements in the way that the editors of *Clerk & Lindsell on Torts* do is misleading. That is because defences are not things that prevent 'prima facie' torts from maturing into actual torts but are things that are external to the elements of torts and which, accordingly, have no bearing on whether a tort exists. This is not the place to debate the merits of these alternative accounts of the nature of defences.[100] My own allegiance lies with the view that defences exist independently of torts. The significant point to note for present purposes is that the language of primary elements, depending on how it is used, raises the issue of whether defences are negative elements of torts.

E. Conduct Elements and Fault Elements

Conduct elements are often distinguished from fault elements.[101] This dichotomy[102] seems loosely to track that which the criminal law recognises between the *actus reus* of an offence and its *mens rea*. Examples of conduct elements include making contact with the body of another person (which is the conduct element of the tort of battery) and entering land in the possession of another (which the conduct element of the tort of trespass to land). Illustrations of fault elements include the requirement that a person know or ought to know that a given course of conduct amounts to harassment of another (which is the fault element of the tort of harassment[103]) and an intention to strike at the claimant through a third party (which is the fault element of the unlawful means tort).

[98] *Clerk & Lindsell on Torts* (n 57) para 3.01.

[99] See, eg, the position taken in *Street on Torts* quoted at the text accompanying n 59 which expressly defines the tort of negligence as involving the absence of defences.

[100] They are addressed in Goudkamp (n 87) ch 2 in an analysis that owes much to J Gardner, *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (Oxford, Oxford University Press, 2007) chs 4–5.

[101] See, eg, *Zurich* (n 65) [58] (Lord Toulson referring to the 'conduct element' and 'fault element' of the tort of deceit).

[102] A related distinction is that between conduct elements and mental elements, the latter being a subset of fault elements: see, eg, *O* (n 65) [73] (Lady Hale and Lord Toulson referring to the 'conduct element' and 'mental element' of the tort of intentional infliction of physical or psychological harm).

[103] Protection from Harassment Act 1997 (UK), s 1(1)(b).

Several points are of interest regarding the separation between conduct elements and fault elements. First, it is doubtful that the distinction is exhaustive. An example of an element that does not appear to be either a conduct element or a fault element is the need for the purposes of the tort of malicious prosecution for the prosecution to have terminated in the claimant's favour. Negligence (in the sense of a falling short of the standard of the reasonable person) does not map easily onto the distinction either. Negligence is a form of conduct rather than a state of mind[104] and so it may be thought that a negligence requirement is a conduct element. Conversely, negligence is a species of fault with the result that a negligence requirement can be identified as a fault element.

Second, conduct elements are sometimes but not always paired with fault elements. When a conduct ingredient is not linked with a fault requirement the tort in question imposes strict liability at least in so far as the conduct ingredient in question is concerned. An illustration of a tort which has conduct elements that are not linked with fault elements and which accordingly, to a degree, makes use of strict liability is that of trespass to land.[105] Thus, the conduct requirement that the defendant enter upon land in the claimant's possession is not matched with a fault element. It is immaterial to liability in trespass to land, for example, whether the defendant reasonably believed that the claimant had consented to the entry or that the land was the defendants.[106]

Third, fault elements are often classified as being subjective or objective. Subjective fault elements are prescribed states of mind. Cane identifies these mental states as "'intention", "recklessness", "knowledge/belief" and "malice"'.[107] By contrast, objective fault elements involve comparing the defendant's conduct with that in which the reasonable person would have engaged. However, the distinction between subjective fault elements and objective fault elements is far from straightforward. In the first place, because mental states are not directly observable and must (exceptions aside[108]) be ascertained indirectly by reference to conduct, all fault elements are in a sense objective. Second, recklessness, although it is sometimes classed as a form of subjective fault,[109] is in fact neither purely subjective nor purely objective type of fault. Recklessness has two components, namely: (i) D must have been actually aware of a particular risk; and (ii) D must have run the risk despite its being unreasonable to do so. The first half of this definition is subjective while the second half is objective. Third, the issue of whether the defendant was objectively at fault often does not reduce to comparing the defendant's conduct with that in which the reasonable person would have engaged and the reality is that the defendant's state of mind is often considered. For example, in determining whether a defendant was negligent the courts routinely investigate what the defendant

[104] See HLA Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford, Oxford University Press, 1968) 147–48.

[105] Consider also the unlawful means tort: see section V.F.

[106] *Conway v George Wimpey & Co Ltd* [1951] 2 KB 266 (CA) 273–74.

[107] Cane (n 10) 78. Tort law generally does not discriminate between intention and recklessness but treats intention as encompassing recklessness. However, there are some exceptions to this position. For example, the tort of deceit is specifically concerned with whether the defendant made the misrepresentation concerned recklessly: see the text accompanying n 84. In the context of the tort of intentional infliction of physical or psychological harm, intention is defined so as to exclude recklessness: *O* (n 65) [87].

[108] Consider, eg, admissions and confessions.

[109] See the text accompanying n 107.

actually knew about the situation in issue.[110] And where the defendant was aware of some circumstance relevant to the reasonableness of his conduct, that knowledge will be factored into the analysis even if the reasonable person in his position would not have been aware of the matter concerned.[111]

F. Conduct Elements, Circumstance Elements and Consequence Elements

The divide between conduct elements and fault elements has just been discussed. A related distinction, often drawn by criminal law scholars,[112] is that between conduct elements, circumstance elements and consequence elements, and it is to that distinction to which attention is now turned. In this trichotomy, the idea of a conduct element relates to the defendant's acts and omissions. Conduct elements have both physical and fault aspects. For example, the physical dimension of the conduct element of the tort of defamation is publishing a statement to a third party while the accompanying fault requirement is an intention to publish the statement or being negligent with respect to the risk that the statement would reach a third party.[113] Circumstance elements refer to the conditions in which the defendant performed the conduct element. Like conduct elements, they have both physical and fault dimensions. Thus, the tort of deceit has a physical circumstance element, namely, the statement concerned must be false, while the associated fault requirements are that the defendant must have made the statement in issue knowing that it was false, without belief in its truth or reckless as to whether it is true or false.[114] Consequence elements are concerned with outcomes and they too can be understood in physical and fault terms. Thus, it is a physical consequence requirement of the tort of unlawful means conspiracy that the claimant suffer damage while the associated mental ingredient is an intention to injure the claimant. The elements of some torts can be neatly arranged according to this threefold classification. An example of such a tort is that of causing loss by unlawful means as per the table below. Arranging the elements of torts in this tabular form shows the extent to which a particular tort makes use of fault liability and strict liability. Thus, the table below reveals that the unlawful means tort, contrary to what Lord Hoffmann said in *OBG Ltd v Allan*,[115] simultaneously imposes both fault liability and strict liability. The conduct and consequence elements are governed by a fault standard whereas the circumstance element is not.

[110] See, eg, *Tedstone v Bourne Leisure Ltd (t/a Thoresby Hall Hotel & Spa)* [2008] EWCA Civ 654 [15] (Moore-Bick LJ dismissing an appeal against a judgment absolving the defendant of negligence on the basis that '[t]here was no evidence that the defendant knew that a significant pool of water was likely to appear in the area in which the claimant fell …, and accordingly the evidence called by the claimant did not point to the conclusion that prima facie there was a breach of duty on the part of the defendant').

[111] See, eg, *Baker v Quantum Clothing Group Ltd* [2011] UKSC 17, [2011] 1 WLR 1003 [104].

[112] See, eg, Robinson and Grall (n 1) 706–10.

[113] See Goudkamp and Nolan (n 37) para 13.027; *cf* D Rolph, 'The Concept of Publication in Defamation Law' (2021) 27 *Torts Law Journal* (forthcoming).

[114] See the text accompanying n 84 above.

[115] In *OBG* (n 11) [141] Lord Hoffmann claimed that '[t]he tort is not one of strict liability'.

Table 1 The elements of the unlawful means tort

	Conduct element	Circumstance element	Consequence element
Physical	Conduct interfering with the claimant's ability to deal with a third party[116]	The means employed must be unlawful	Damage to the claimant caused by the unlawful means
Fault	Intention to engage in the conduct concerned	None[117]	Intention to injure the claimant

G. Presumed Elements

The claimant carries the onus of proof in respect of all of the elements of the tort in which they sue.[118] In certain circumstances, however, elements will be presumed. Consider, for example, the torts of libel and slander. In the case of libel, once it has been shown that the statement concerned is defamatory, damage will be taken to exist,[119] apparently on the footing that damage is likely to have been suffered. The same rule applies in relation to slander in two situations,[120] namely, where: (i) the defendant disparages the claimant in the course of any profession or trade carried on by him; and (ii) the defamatory imputation is to the effect that the claimant is guilty of a criminal offence punishable by a sentence of imprisonment.[121] On one view, damage is an element of all torts but is presumed to exist in relation to torts that are actionable *per se* upon proof that their other ingredients exist.[122] On this account, the position that has just been described in relation to libel and slander is simply part of a wider pattern.

H. Implicit Elements

Many elements are implicit. For instance, it is strongly arguable that all torts, like all crimes, contain a volition element,[123] that is, an ingredient that requires some type of voluntary action. This is separate from, and more basic than, for example, a requirement that the defendant intend to bring about some result. To give an example of an implicit element particular to a specific tort, it is surely the case that the tort of deceit impliedly requires that C understand D's statement concerned. If C suffers damage because, for

[116] *Secretary of State for Health v Servier Laboratories Ltd* [2021] UKSC 24, [2021] 3 WLR 370.

[117] *Racing Partnership Ltd v Sports Information Services Ltd* [2020] EWCA Civ 1300, [2021] 2 WLR 46 (holding that it is irrelevant that the defendant did not know that the means were unlawful).

[118] See n 88.

[119] *Lachaux v Independent Print Ltd* [2019] UKSC 27, [2020] AC 612 [6].

[120] Historically, there were four such situations. The other two were purged by the Defamation Act 2013 (UK), s 14.

[121] See *Gatley on Libel & Slander*, 12th edn (London, Sweet & Maxwell, 2017) ch 4.

[122] This was Cooley's opinion: see Cooley (n 15) 62–64. *cf Brownlie v Four Seasons Holdings Inc* [2017] UKSC 80, [2018] 1 WLR 192 [52] (Lady Hale contending that 'damage is not an essential part of every cause of action in tort').

[123] See Goudkamp and Nolan (n 37) para 3.002.

example, he is frightened by D's statement despite his not having comprehended it, D will not be liable in deceit (although he may be liable for another tort, such as assault).

VI. Should Torts be Element-Based?

Because torts are, as a matter of positive law, constituted by elements, tort law cannot be properly understood without element analysis. But this does not dispose of the issue of whether the law should conceive of torts as being based on elements. The principal objection to structuring torts in terms of elements is doing so elevates form over substance. On this view, perceiving torts as things that are comprised of ingredients diverts attention from the merits of claims and reduces the enquiry as to whether a given defendant wronged a particular claimant to a mere box-ticking exercise. It is certainly the case that deciding claims in tort by reference to the existence or otherwise of elements precludes tort law from adhering fully to the maxim *ubi jus, ibi remedium*.[124] Unfortunately, however, abandoning an element-based understanding of tort law is no solution. Dispensing with formal prerequisites to liability risks creating a legal vacuum in which judges would impose or withhold liability based on an instinctive sense of whether a wrong had been committed.

In addition to ensuring that tort claims are decided according to rules rather than whims, significant advantages flow from comprehending torts in terms of elements. In the first place, structuring torts in terms of elements increases the precedential value of decisions. Because certain elements, such as intention and damage, are common to numerous torts, decisions regarding the parameters of such ingredients are in, principle, generalisable.[125] By contrast, if judges were to decide whether a defendant was a tortfeasor not by reference to the elements of the tort on which the claimant relies but according to some amorphous conception of justice, decisions in tort cases would have little or no value as authority.

Second, understanding torts as being constituted in terms of elements permits causes of action in tort to be precisely calibrated with a view to addressing various anxieties. For example, if there is concern that a particular tort may impose overly extensive liability, a more demanding fault element could be selected. The law could insist, for example, that recklessness as to a particular outcome will not suffice and that nothing short of an intention to bring about the consequence concerned will do.[126] Similarly, if a particular tort is defined in a way that unduly favours

[124] Consider Lord Sumption's remark in *Crawford Adjusters (Cayman) Ltd v Sagicor General Insurance (Cayman) Ltd* (n 89) [122] that '[d]efining the legal elements of a tort and the legal limitations on its ambit will commonly involve a large element of policy which may conflict with the simple principle that for every injustice there should be remedy at law'.

[125] cf Lord Sumption and Lord Lloyd-Jones's remark in *JSC BTA Bank v Khrapunov* [2018] UKSC 19, [2020] AC 727 [6] that '[s]ome of the elements of the [economic] torts, notably intention and unlawful means are common to more than one of them. But it is dangerous to assume that they have the same content in each context'.

[126] Consider the remarks in *O* (n 65) [87].

one of the parties, it may, for example, be appropriate to rebalance things by jettisoning an element (to make it more claimant favourable) or adding a new ingredient (to improve the position of defendants). No such fine-tuning of the parameters of liability would be possible if wrongs were defined in wholly generalised terms.

Third, breaking torts down into elements tends to promote rationality in decision making and encourages judges to deal comprehensively with the matters for decision. For example, isolating discrete requirements reduces the prospect that aspects of the tort for which the claimant sues will be glossed over. It also guards against the possibility of enquiries being duplicated since structuring torts in terms of elements greatly increases the visibility of the issues for determination and thus operates as a check on a particular matter being inadvertently counted twice.

VII. Conclusion

Although cases and textbooks are replete with references to elements of torts, the concept of a tort element has not previously been the subject of sustained consideration. Accordingly, this chapter aimed to unpack it. Among other things, it sought to show precisely why elements matter, to demonstrate that elements are distinct from various related concepts, to identify the different types of elements that tort law recognises and to consider the case for structuring torts in terms of elements.