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BOOK REVIEWS

Tort Law Defences by James **Goudkamp** [Oxford: Hart Publishing, 2013. 270 pp. Hardback: £60.00]

James Goudkamp's recent publication, *Tort Law Defences*, is a bold work that is exploratory and provocative, challenging conventional thinking about tort law. It was awarded joint Second Prize for the 2014 Society of Legal Scholars Peter Birks Prize for Outstanding Legal Scholarship. The last two decades have seen considerable academic work on tort law, largely focused on theoretical frameworks for analysis of the positive elements of torts. There has, however, been little effort given to analysing tort law defences as a unified field, unlike criminal law scholarship, which has devoted itself for decades to theorizing about criminal law defences.

Goudkamp seizes this empty space and makes it his own. In doing so, he draws inspiration from the field of criminal law. On its face, this seems natural; indeed, as Goudkamp muses, it is surprising that this was not done earlier. Torts and crimes share common roots and continue to have considerable overlap, with many acts constituting both torts and crimes. Whether the theoretical underpinnings are interchangeable is something that warrants reflection, and Goudkamp has attempted that elsewhere: (James Goudkamp, "Defences in Tort and Crime" in Matthew Dyson, ed, *Unravelling Tort and Crime* (Cambridge: Cambridge University Press, 2014) at Chapter 8). For this work however, he appears to assume that criminal law theory provides a good base on which to build the theory of tort law defences, despite alluding to the fundamental difference between the functions of criminal law and tort law (at p 205). This review questions that assumption.

While torts and crimes have a common ancestry, their modern functions are quite different. Criminal law theorizing about defences is focused on one concern: the fairness of punishing or labelling the defendant as a criminal. Put another way, it asks: is the defendant deserving of criminal condemnation? Thus, *mens rea*, moral blameworthiness and defences naturally align in a grand theory of criminal law. Tort law, on the other hand, is not solely—or predominantly—concerned with the moral blameworthiness of the defendant. Indeed, much of tort liability is strict or based on negligence, rendering the fault of the defendant less significant.

Unlike criminal law, which has a core moral thread, tort law is comprised of disparate torts, each with its unique fault, damage, remedial and defence elements. Moreover, in practically all tort cases, the defendant is not personally held to account as damages are paid by insurance or a third party, typically the employer. The remedy

depends not just on the defendant's wrong but also on the plaintiff's right. Hence, whether damages or injunctions are appropriate depends as much on considerations relevant to the plaintiff. By contrast, the victim in criminal law (the equivalent of the plaintiff in torts) is largely taken out of the picture and the interaction is primarily between the defendant and the State.

The pressing issue in torts is whether the plaintiff deserves a remedy, not whether the defendant deserves to be sanctioned. Yet, one of Goudkamp's core claims is that partial defences such as contributory negligence are not defences at all, as they merely diminish the plaintiff's relief rather than negate the defendant's liability (at p 3). However, unlike criminal law, which focuses on the defendant's guilt and punishment, the correlative structure of tort law often requires a comparative assessment of the plaintiff's and defendant's conduct to determine liability (cf p 12). Tort defences are naturally plaintiff-centric (should the defendant be liable to the plaintiff?) whereas criminal defences are defendant-centric (does the defendant deserve labelling and punishment?). Thus, within this correlative structure, contributory negligence may fairly be seen to negate the defendant's responsibility for that part of the wrong which is properly attributed to the plaintiff; that it affects the remedy may be viewed merely as an inevitable consequence of its operation as a partial defence.

The principal aim of the book is to develop a taxonomy of tort defences; as Goudkamp explains, "it is largely a classificatory exercise." However, this classification is necessarily premised on certain assumptions about the underlying norms of tort law and tort defences. In the very first paragraph of the book, Goudkamp reveals his view of tort law as one based on moral wrong: "In morality, a person who is accused of committing 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" (at p 1).

Underlying this is the notion that if one is not morally blameworthy, one should not be held liable in tort, or conversely, that one should be held liable in tort only if one is morally blameworthy, as Goudkamp suggests by way of an example at p 79. This is a highly contested claim that is not defended but simply assumed. Moreover, as has been noted elsewhere (E. Descheemaeker, "Tort Law Defences: A Defence of Conventionalism" (2014) 77 Modern Law Review 493 at 500), Goudkamp appears to conflate moral and legal wrong in developing his theory of tort law defences.

In the introductory chapter, Goudkamp outlines five ways in which the term "defence" is used in tort law: (i) denial of tort elements; (ii) liability-defeating rules that are external to the elements of the claimant's action; (iii) principles that diminish the claimant's relief; (iv) rules in respect of which the defendant carries the burden of proof; and (v) the final element of the tort action. While any of these can loosely be termed a defence, Goudkamp restricts the formal definition of defence to the second category: in his view, it is only this view of defences that allows it to exist separately from the elements of the tort.

Chapter 2 sets out to explore the distinction between torts and defences, a distinction which Goudkamp argues has not been sufficiently considered by scholars. Goudkamp provides detailed reasons why tort law can and should be separated into torts and defences. Chapter 3 then argues that a variety of conventional defences, including voluntary assumption of risk, illegality, consent and contributory negligence, are properly viewed not as defences but as denials of one or more elements of

the particular tort. This is despite Goudkamp recognising that a particular plea may well operate as a denial in some instances and as a defence in others.

Consider voluntary assumption of risk, which Goudkamp treats as a denial of tortious wrong rather than as a defence. The cases he uses to support his argument involve situations of inherently dangerous activity where the issue can be resolved by recourse to breach of duty. For example, Goudkamp criticises the decision in *Proctor v Young* [2009] NIQB 56, in which the claimant, while exercising a racehorse, fell and suffered injury when the horse stumbled in a depression in the sand for which the defendant was alleged to have been negligent. The court denied liability on the ground of voluntary assumption of risk, but Goudkamp argues that the claim could also have been dismissed on the basis of no breach of duty.

To take a different scenario, what happens when two persons enter dangerous premises—A with full knowledge and acceptance of the risks, B without? The risk eventuates and both individuals suffer injury. A has voluntarily assumed the risk but B has not. It would be odd to say that the defendant had not taken sufficient care with respect to B but had taken sufficient care with respect to A. This is similar to the variable standard approach eschewed in *Nettleship v Weston* [1971] 2 QB 691. Perhaps, the better view is that A's claim is defeated on the basis of the defence of *volenti non fit injuria* whereas B's succeeds as there is no defence. In neither case are the elements of the tort denied.

Chapter 4 contains the heart of the book, where Goudkamp sets out his taxonomy, classifying all defences into two groups, one based on justification and the other based on public policy. The former are defined as "defences that relieve the defendant of liability on the basis that he acted reasonably in committing a tort" (at p 76). The latter are "defences that are insensitive to the rational defensibility of the defendant's conduct" (at p 76). In explaining his theory of justification, Goudkamp goes out on a limb, shunning conventional understanding for a radical one. He argues that under the conventional view, all pleas of justification would in fact be denials, for what is justified cannot be wrong. Goudkamp explains the radical view in this manner: "A defendant who asserts that he was justified in his act is, on the radical view, not denying that he committed a wrong but is offering an explanation for admitted wrongdoing."

In making his case for the radical view of justification, he criticises the conventional view as leading to the conclusion that wrongs cannot be justified because if the wrong is justified, it ceases to be a wrong. He states:

> . . . the conventional view leads to the startling conclusion that wrongs (including torts) cannot be justified (since if one is justified no wrong (and no tort) is committed). The conclusion that wrongs cannot be justified is a reason for looking askance at the conventional view, because if anything calls for justification, it is wrongs. In John Gardner's words, "One might think that the fact that an action is wrong yields a powerful rational objection to its performance, and that *wrongdoing* therefore calls for justification if anything does." [emphasis added]

Note that Gardner refers specifically to *wrongdoing* calling for justification. A justification does not negate the wrong; it merely negates wrongdoing by the actor. The former is a denial of the offence elements while the latter accepts that the offence

elements are established, but provides moral reason to justify the action of the actor, leaving it within the realms of confession and avoidance. An excuse is where the moral reason does not negate the wrongdoing but provides reasons not to punish the actor. Goudkamp's radical view of justification blurs the line between justification and excuse. More significantly, one of the implications of Goudkamp's analysis is that many of the conventional defences would be treated as denials of offence elements, which means that the defendant would have the benefit of being relieved of proving most of the traditional defences, as the burden of proof with respect to the elements of the tort lies with the plaintiff (at pp 138–139). Thus, the plaintiff would have to disprove contributory negligence when suing in negligence or truth when suing in defamation. This would indeed be radical.

Tort Law Defences is an intellectually honest and imaginative work although it contains some radical and bold ideas that may not convince everyone. Goudkamp's mission in developing a theoretical framework for tort defences is a salutary project, and while criminal law may be "a rich vein that is well worth mining" (at p 27), some caution needs to be exercised in the transplantation of ideas from criminal law to torts. That said, this book is a pathbreaker in theorising about tort law defences and deserves a space on the shelves of law libraries and tort law academics.

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