

Book Review

Tort Law Defences

by James Goudkamp (2013) Hart Publishing

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This book is concerned with defences in tort law, and, in particular, with creating a taxonomy of defences in order to promote clearer thinking and more coherent legal development. It is an original and ambitious project. As James Goudkamp reminds us, no similar investigation has previously been undertaken, and the lack of earlier systematic analysis is compellingly demonstrated when Goudkamp comes to place his own proposals alongside other writers' suggestions (in ch 7).

The project is ambitious in two ways. First, in its inclusion of all torts. Second, in its jurisdictional range, for the book considers the United Kingdom, Australia, Canada and the United States, as well as other common law jurisdictions. This jurisdictional range is particularly skilfully handled: Goudkamp resists the temptation to blur together authorities from different jurisdictions as if there were a single 'common law world' system, and is, instead, careful to explain that the materials are being used to construct an overarching analytical structure. He quite deliberately avoids the investigation of jurisdictional differences on specific points.

The argument of the book proceeds in two distinct stages. The first stage involves clearing away principles that, despite appearing to fall within the 'defences' classification, are properly classified under a different heading. This is achieved by excluding all those doctrines that fail to satisfy his definition of a defence 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'.¹ The significance of this definition of 'defence' quickly becomes apparent. The insistence on relieving the defendant of liability takes contributory negligence out of the book's scope, and the emphasis on defences being distinct from the elements of the tort excludes doctrines that, although typically raised by defendants, have the underlying effect of merely challenging the existence of the requirements for liability. Thus, illegality — at least as expounded in *Gray v Thames Trains Ltd*² — is held not to be a defence, but a challenge to causation. Goudkamp's term for such challenges is 'denials'.

Once those doctrines properly labelled as defences have been identified, they are classified into two categories — 'justifications' and 'public policy

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¹ James Goudkamp, *Tort Law Defences* (Hart Publishing, 2013) 7.

² [2009] AC 1339.

defences'. The crucial difference between the two is that while justifications derive their (moral) force from the reasonableness of the defendant's conduct, public policy defences are indifferent to reasonableness. Justifications are then subdivided into private justifications and public justifications so that, for instance, self-defence is a private justification, and public necessity is a public justification. Examples of public policy defences include immunities, limitation bars and, perhaps surprisingly, honest comment and offer of amends in defamation. Much of the book is concerned with defending these categories against other theorists' objections, and allocating defences to the correct categories. Toward the end of the book, Goudkamp suggests that if, as he would advocate, tort law came to recognise defences of insanity and infancy, the taxonomy would have to be expanded to include a category of 'lack of basic responsibility'.

The emphasis on taxonomy immediately suggests the influence of Peter Birks, whose later work dealt with this subject at some length. Goudkamp's debt to Birks is clear from the epigraphs — only three chapters have them, and two of those three are quotations from Birks — and at times the brisk, confident, slightly staccato style of the prose recalls the earlier writer.³ Like Birks, Goudkamp is deeply committed to the importance of taxonomy, not merely as an end in itself, but in order to promote a more coherent understanding of the law, and to encourage informed legal development. Thus, for instance, Goudkamp argues that once the nature of public policy defences is fully appreciated, their future expansion can be approached with appropriate caution and scepticism. Further, the consistent use of the terminology of 'denials', 'justifications' and 'public policy defences' can be adopted as a readily comprehensible shorthand in new statutory or judicial developments. The result, Goudkamp argues, would be greater clarity and certainty.

There can be no doubting that Goudkamp carries through this ambitious and original project with great skill and expertise. The book is extremely clearly written and demonstrates a mastery of materials across the jurisdictions, as well as an impressive use of criminal law theory. Yet, despite all these admirable qualities, I have to confess that the book did not leave me entirely convinced. One reservation stemmed from an equivocation between stipulative definitions and analyses of judicial reasoning. Thus, one of the book's great strengths is its close reading of judicial language — a good example is the discussion as to the effect of self-defence in battery.⁴ But, on the issue of whether contributory negligence is a defence or not, judicial views that it is a defence are made to yield to the author's stipulative definition that defences must relieve a defendant of all liability. The relationship between normative fiat and deference to judicial reasoning is not completely transparent.

A second reservation revolves around the methodological approach. To put it baldly, the logic of taxonomy insists that each specimen must be placed in one category or another; but where the specimen is a legal doctrine, that can lead to difficulties. There is no way to account for legal development in the course of

³ See, eg, the passage about limitation bars: Goudkamp, above n 1, 130–1.

⁴ Ibid 106–7.

which a doctrine has moved from one category to another, or to reflect the composite nature of a doctrine. Thus, the decision to treat *Gray v Thames Trains Ltd* as a denial of causation rather than a defence can be made with confidence only if one focuses exclusively on the speech of Lord Hoffmann (as Goudkamp does).⁵ Lord Rodger's view was subtly different. For him, the illegality doctrine was essentially about causation, but the causation principles were being modified, for public policy reasons, to have a more restrictive effect than might otherwise have been the case. The most accurate way to characterise Lord Rodger's speech would be to put it mostly in denials, but also partly in public policy defences; unfortunately the taxonomical approach does not permit that kind of compromise. Similarly, later courts have acknowledged that Lord Hoffmann's position does not tell the whole story,⁶ but the taxonomical approach seems to necessitate the obliteration of such nuances. The same kind of point can be made about the treatment of honest comment and offer of amends. Both are classified as public policy defences — that is, as paying no regard to whether the defendant's action was reasonable. Yet honest comment requires that an honest person could have held the opinion, and that it had a sufficient factual basis; offer of amends seems to rest, at least in part, on a defendant's reasonable conduct in the immediate aftermath of the tort, when he or she acknowledges the wrong, apologises and offers full compensation. That is not to deny that there is something of public policy in those defences as well, but it does serve to highlight the perils of mutually exclusive classification. Goudkamp hints at the problem when he comments that '[o]ffer to make amends is a public policy defence, since the fact that the defendant may have acted reasonably in publishing the defamatory statement is insufficient to enliven it'.⁷ The emphasis here on reasonableness in publishing the statement tends, perhaps, to distract attention from the significance of the overall reasonableness of the defendant's conduct; but, even so, this is as close as Goudkamp comes to acknowledging that reasonableness and public policy may both have a part to play in the operation of particular defences. The point is not developed further, but the implications of that statement are surely significant. For, given that some defences draw on both reasonableness and public policy, does that not suggest the need for a hybrid category, which might then seem like a more apt home for defences like public necessity? The underlying problem is that the taxonomical logic relentlessly demands that classificatory choices be made, in a way that risks oversimplifying the bases of particular defences.

My final assessment cannot, therefore, satisfy a taxonomist! This is an excellent, thought-provoking and rigorously analytical book, which is clearly written and meticulously researched. But at times its methodology forces it to take absolute positions where a more nuanced approach would give a more convincing picture of the current legal position.

⁵ Ibid 61.

⁶ See *Lexi Holdings plc v DTZ Debenham Tie Leung Ltd* [2010] EWHC 2290 (Ch).

⁷ Goudkamp, above n 1, 133.