

# 1

## INTRODUCING TORT LAW AND ITS CHALLENGES

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## 1

## INTRODUCING THE LAW OF TORTS

### 1.1 What is a tort?

A tort is a special kind of wrongdoing. The word is a legal term that is used to describe a particular category of interpersonal wrongdoing, which is dealt with by the civil justice system. The law of torts covers a wide range of different types of misconduct and it includes many torts with well-known names like ‘assault’, ‘battery’, ‘trespass to land’, ‘defamation’ and ‘negligence’. There have been many attempts to define a tort, but the task is notoriously difficult, given that there are over seventy torts known to the common law world, each with a different focus and a distinctive set of elements that protect different personal interests.<sup>1</sup> Curiously, there does not appear to be any special identifying characteristic that is shared by each one of these torts; nor does there appear to be any unified set of interests that the law of torts seeks to protect to the exclusion of any other compartment of the law. The search for a clear definition is further complicated by the fact that the law of torts is in a constant state of development. Some torts are so outdated that they are no longer recognised in Australia and there are others that have existed in other common law jurisdictions for many years that have not yet been widely accepted here.<sup>2</sup>

Tort law tells us what our rights and obligations are. Each tort describes, forbids and provides a legal remedy for a particular kind of interpersonal wrongdoing.

For example:

- » The tort of *battery* tells us that we must not interfere with or touch the body of another person without lawful justification.
- » The tort of *false imprisonment* tells us that we must not restrain another person’s liberty without lawful justification.
- » The tort of *trespass to land* tells us that we must not interfere with another person’s exclusive possession of land without lawful justification.
- » The tort of *negligence* tells us that under certain conditions we must take reasonable care to avoid acts or omissions that we can reasonably foresee would be likely to injure another person.
- » The tort of *private nuisance* tells us that we must not cause a substantial and unreasonable interference with another person’s use and enjoyment of land.
- » The tort of *defamation* tells us that we must not publish imputations about another person that may lower their reputation in the eyes of others without lawful justification.
- » The tort of *deceit* tells us that we must not knowingly make false statements that induce another person to act to their detriment.

1 Cane, *The Anatomy of Tort Law* (1997) at 3.

2 Some outdated torts include the tort of alienation of spousal affections or enticement of a party to a marriage: see *Magill v Magill* (2006). The invasion of privacy is a tort that may soon be recognised in Australia (see Chapter Five).

Each tort is further defined by a list of ingredients or elements that help us to identify (and avoid) the occasions where we might wrongfully harm others. The law of torts also provides defences that spell out the conditions that must be satisfied if we claim that our conduct was justified. Taken as a whole, the law of torts tells us how to live a good life and how to plan our activities so that we can live up to our legal obligations.

Although many of the torts listed above are frequently encountered in the daily life of a community, you may not have heard the word ‘tort’ before you enrolled in your law degree. The word is a legal term that comes from the Latin word ‘*tortus*’ which means twisted or crooked, and this image explains why the word is used to describe this particular—and rather elusive—category of the law. Tortious wrongdoing is conduct that deviates from the right path; it is conduct that is twisted and crooked when it ought to be straight and true. However, not every deviant act or every type of wrongful conduct is dealt with by the law of torts. To be classified as a tort, the conduct must satisfy four conditions relating to the seriousness and effects of the conduct, the legal response to the conduct and the categorisation of the conduct.

First, the conduct must be regarded as a serious matter that justifies community action. It must be seen as so wrongful, so antisocial or so unwarranted that the community itself should make a rule against it and respond when that rule is broken. Second, the wrongdoing must be interpersonal and harmful. It must be the kind of conduct that can affect other people adversely, either by invading their fundamental rights or by causing them actual damage or harm. A simple act of moral wrongdoing will not be categorised as a tort unless the conduct also has the capacity to harm someone else. So, for example, privately thinking evil thoughts about another person and planning ways to hurt them may be morally wrong, but it is not a tort. Nor will harming another person be enough on its own; even if the harm was deliberately inflicted, the conduct itself must also be recognised as wrongful before it is classified as tortious.<sup>3</sup>

A tort attracts a legal response, which is seen as doing justice between the parties. The response is an essential component of the law; without an enforceable remedy the law’s pronouncements are merely exhortations to do the right thing that carry no power and deliver no promises to victims whose rights are invaded. So, the third criterion distinguishing tortious wrongdoing from other forms of wrongdoing is that it is dealt with by the civil justice system and attracts particular legal remedies. In the usual case, a victim of the wrongdoing (or plaintiff) is entitled to seek a remedy from the wrongdoer (the defendant or ‘tortfeasor’). That remedy is precise: it is normally an award of monetary damages that aims to restore the plaintiff to the position that they would have been in had the tort not occurred; but occasionally justice requires the courts to make an order known as an ‘injunction’ that requires a defendant to do something practical to ameliorate the effects of the conduct or to refrain from any further wrongdoing.

The fourth criterion is an artificial one that derives from the history of the English legal system, which created a range of different common law and equitable causes of action to deal with different kinds of wrongs. Before any particular example of wrongdoing is classified as a tort, it must be accepted that it does not belong more

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Every tort has a  
remedy.

.....  
The family of torts  
is not united by any  
unique identifying  
characteristic.

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<sup>3</sup> See, for example, *Bradford Corporation v Pickles* (1895).

appropriately to any other branch of private law—for example, the law of contract, trusts or restitution. In this sense, the law of torts is a catch-all category that deals with any interpersonal wrongs that do not seem to fit better elsewhere in the civil justice system. To add to the uncertainty, parts of the law of torts overlap with the category of criminal wrongdoing. Given that there are many different ways to wrong another person and that there are many different ways in which a person can suffer harm as a result of the conduct of another, these criteria explain why there is such a large and apparently disparate family of individual torts and why it is difficult to find any unique identifying feature that unites that family and marks out any given example of wrongdoing as ‘a tort’. The four crucial dimensions of a tort are set out in Table 1.1. Each of these matters gives rise to challenges that make the law of torts a fundamentally important subject of study. We examine these four aspects of the law in detail in the first two chapters of *Connecting with Tort Law*.

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See Chapters One and Two for detailed examination of the four dimensions of a tort.

**TABLE 1.1 The four dimensions of a tort**

1 The dimension of <i>wrongdoing</i>	A tort is a civil or interpersonal wrong that is committed by a person engaging in conduct that deviates from a standard that the community thinks is right.
2 The dimension of <i>harm</i>	The conduct must have the capacity to affect other persons adversely, either by invading their fundamental interests or by doing actual damage to them.
3 The dimension of <i>justice</i>	The conduct must attract certain legal consequences, including a duty imposed on the tortfeasor to do justice to the victim of that wrongdoing.
4 The <i>technical legal dimension</i>	A tort is a civil or interpersonal wrong that does not fit better into any other category of common law or equitable wrongdoing.

If we combine each of these four aspects, we can define a tort as an act of *civil wrongdoing* that has the capacity to *harm* another person, which in turn attracts a legal *remedy* that is seen as doing *justice* between the parties, and which does not fit better into any other *civil law category*. The two central tasks performed by the law of torts are to define this particular kind of wrongful conduct and to provide a system of justice aimed at righting those wrongs once they occur. The first task is the general one of laying down the law for the benefit and guidance of the community as a whole. The second is more specific and requires the courts to apply the law to resolve disputes between the parties in individual cases. These two tasks explain why you need to master the foundational skills of legal argument, case analysis and practical problem solving.

Because tort law is deeply concerned with justifying, defining and changing the rules governing fundamental aspects of interpersonal wrongdoing you need to master the art of legal argument and case analysis; and because the law of torts plays a crucial part in resolving disputes you must develop your legal problem solving skills.

## 1.2 The moral and coercive power of the law of torts

The law is a powerful force in the community. It can force a person into bankruptcy and strip them of their assets, and for this reason alone it demands our respect. The law is also aspirational. We are supposed to obey the law not just out of fear but also because the law tells us what is right and what is wrong. Its rules set the standards by which we ought to live and its force is both moral and coercive. The law of torts specifies the conditions that allow individuals and certain officers of the state (like police, for example) to interfere with the rights and liberties of other members of the community and consequently we have a double duty to ensure that the rules made and enforced by our courts are grounded in our shared moral values and serve the greater good of the community. This means that you need to be aware not only of the moral values underlying the law of torts but also of the social, economic and political values that may affect our critique of the law. As you will discover in Chapter Three, the law has its own set of legal values that affect the way that judges decide torts cases. You need to be aware of your own values so that you can recognise your blind spots. You need to be perceptive of the values of others so that you can construct arguments that will persuade them of your case. Finally, you need to understand that sometimes our moral, social, political and legal values compete; so, there will be difficult cases where we must choose between competing values. It is relatively easy to decide a contest between a good thing and a bad thing—but it is quite a different matter to choose between two good things, or to decide upon the lesser of two evils.

We have a moral duty to get the law right.

See section 1 in Chapter Three on the legal values that judges use when deciding cases.

## 1.3 Tort law's guiding principles

The rules laid down by the law of torts are based on principles as well as values. This follows from the definition of a tort as an act of wrongdoing. Many of these fundamental principles have played a crucial role in defining some of our basic human rights and in protecting many of our most important interests. The principles found in the law of torts tell us in a general sense how to live a good life and how to treat others properly, and they justify and support the more precise rules of conduct that are laid down in individual cases. These principles assist us to appreciate better tort law's functions, its moral authority and its meaning. Some of these principles are collected in Table 1.2. You need to understand that the principles that underpin the law of torts are just as much a part of 'the law' as the rules themselves. Each of the content chapters in Part Two of *Connecting with Tort Law* will help you to identify the key principles that support, justify and shape each one of these different areas of the law.

Tort law is based on principle.

**TABLE 1.2 Tort law's guiding principles**

The principles	The area of law
The principle of human dignity	→ underpins the trespass torts.
The principle of bodily inviolability	→ is the basis of the tort of battery.
The principles of self-determination and autonomy	→ support the rules on consent in the trespass torts and the duty to advise of risks in negligence.
The principle of individual liberty	→ underpins the tort of false imprisonment.
The principles of personal privacy and security of the home	→ underpin the tort of trespass to land.
The principle of humanity towards others	→ grounds the action on the case for the intentional infliction of personal injury.
The principle that human life is sacred	→ prevents a person who kills another in order to save their own life from claiming the defence of necessity.
The principle of illegality	→ underpins some of the defences to the trespass torts and negligence law.
The 'neighbour' principle	→ is the basis of the tort of negligence.
The vulnerability principle	→ supports a duty of care in negligence.
The 'volenti' or 'assumption of risk' principle	→ bars liability in negligence where a plaintiff has accepted the risk of a particular kind of harm occurring.
The principle of vicarious liability	→ imposes legal liability on a person on the basis of a defined legal relationship with the tortfeasor.
The principle of personal responsibility	→ supports some decisions about duty in negligence and the doctrine of contributory negligence.
The principle of honesty	→ is the basis of the tort of deceit.
The 'give and take' or 'live and let live' principle	→ underpins some of the rules of private nuisance.
The principle of freedom of speech and opinion	→ grounds some of the defences to defamation.
The compensation principle and the 'once and for all' principle	→ are the basis of the common law rules on awarding damages.

As we have seen, one of tort law's challenges lies in the fact that our values, and consequently the principles they support, may point in different directions. Another challenge lies in the fact that principles are necessarily vague. There is not always one single and obviously right answer to every legal problem. This is because competing answers to any question may be based on competing goods or evils—and deciding upon

the relative ranking of those good or evil things is a matter upon which reasonable people often differ. One of the secrets to constructing successful legal arguments lies in learning how to overcome these difficulties. We return to this issue in much more detail in the following chapters.

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There is not always an obvious answer to every legal question.

## 1.4 The central concerns of the law of torts

Tort law seeks answers to these two essential questions:

- What standards of right and wrong should govern our conduct towards others?
- How should we do justice between the parties when these standards are breached?

The difficulties that the courts experience in carrying out these essential functions account for many of the features of the law of torts that frustrate and fascinate torts students, academics, lawyers and judges who must grapple with this complex and constantly evolving body of law. These challenges, which are discussed below, are:

- the problem of uncertainty, which lies at the heart of the law of torts;
- the difficulty of defining wrongdoing and setting precise standards of conduct;
- the conflict between the desires for stability and change in the law; and
- the need to limit the law.

To understand the special nature of the law of torts, you need to appreciate how these difficulties arise and to master the methods that the courts have developed to meet them. The first two chapters of *Connecting with Tort Law* focus on developing that understanding. This chapter explores the sources of tort law's special challenges and identifies some of the solutions that have been found by the common law judges. Chapter Two explains how the law of torts is shaped by judges and parliaments into a meaningful category of law that serves a distinctive role in the community. It concludes by reflecting upon how successful some of those solutions are, identifying some of the criticism that has been levelled at the law of torts, and considering the suggestion that the system does not deliver upon its promise of justice.

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See Chapter Two for how judges and parliaments have shaped the law of torts.

# 2

## EXPLORING TORT LAW'S CHALLENGES

### 2.1 Tort law's heart of uncertainty

It is not possible to define a tort precisely. Most definitions provided in legal dictionaries and textbooks suffer from the same vagueness that affects the one given in section 1.1 of this chapter, and this suggests that the notion of 'a tort' is somewhat artificial. This ambiguity that lies at the heart of the law of torts is highly significant—and it is pervasive. Any survey will reveal that many of the crucial standards and tests that determine whether a tort has been committed are subject to vagueness and uncertainty, and that, within the common law world, there are significant disagreements about the overall

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See section 1.1 of this chapter.

Tort law must maintain a balance between our conflicting desires and goals.

scope of the law as well as the definitions and elements of many of the torts. However, the temptation to conclude that torts is a meaningless body of law should be resisted, because the ambiguity that pervades the subject does not prevent us from understanding tort law—it simply means that our understanding must be found by taking a different route.

The first step is to appreciate that the three highly contested and abstract concepts of wrongdoing, harm and justice that are built into our concept of a tort all give rise to difficulties when we try to give them practical form. A system that forbids wrongdoing must be able to define that wrongdoing clearly. A system that aims to do justice to the victims of wrongdoing and compensate them fairly for the harms done to them must be able to define and measure those harms and to justify and limit its responses to the wrongdoers who caused them. The law of torts cannot be reduced to a simple, certain and unchanging set of rules because of the inherent problems that we encounter when we try to shift from theory to practice and give precise legal form to moral matters. The second step is to accept the ambiguity and recognise that human beings have found ways to manage the conflict between the desire for certainty and the fact of uncertainty. We live not only in a physical world where people get hurt, but also in a world of moral values and a world of desire—and inevitably there are times when our values conflict and our desires point us in different directions. We have learned how to balance our competing values and navigate a way between our contrasting goals. So, although we feel the need for defined rules so that we can live together as a community in some kind of harmony, the secret to coping with the uncertainty in the law of torts lies in understanding that ‘law’ is not just a set of rules and principles, but is also a culture of argument about those rules and principles. Our institutions of justice are built upon this knowledge and once you master the methods of argument that have been developed over hundreds of years by the judges and lawyers who have shaped tort law’s solutions to these problems, you will do well.

Let go of your desire for certainty and embrace the uncertainty principle.

See Chapter Three, especially section 4.8, for techniques for dealing with uncertainty.

Uncertainty is not a barrier to understanding tort law; rather, it is the source of that understanding. This means that success does not lie in memorising definitions and rules, but in exploring the full range of possibilities that open up as a result of this uncertainty. It means accepting that change is a permanent feature of the law of torts and supplementing your knowledge and skills in argument with imagination, ingenuity and creativity. Learning how to exploit tort law’s inherent ambiguity is a necessary and exciting part of your legal education. The techniques for dealing with uncertainty are explored in greater depth in Chapter Three.

## 2.2 Defining wrongdoing and managing disagreement

Tort law is all about right and wrong. However, the everyday concept of wrongdoing, just like the legal concept of a tort, resists practical definition. Both words carry the same core meaning of misconduct or transgression against prevailing morality,<sup>4</sup> but the problem for law makers is that these definitions are legally empty. They do not

<sup>4</sup> The dictionary gives an early use of the adjective ‘wrong’ as meaning ‘twisted, bent’ or having ‘a crooked or curved form’ (SOED at 3732–3); see also section 1.1 above: ‘What is a tort?’.

give us any practical guidance or ‘litmus test’ that enables us to draw a clear line that neatly divides right from wrong. This leads to another set of problems, because our characterisation of any given conduct as a tort depends, not upon the fact that we have detected a special mark of ‘tortiousness’ within the conduct itself, but upon the fact that we have agreed that it deviates from community standards of right conduct and have decided that the law of torts should be used to deal with it. Wrongdoing is a concept that often creates disagreement and because the claim that something is wrong is a claim that must be justified, the issue of where to draw the lines poses one of tort law’s greatest challenges. We need rules—but not just any rules will do. The law is aspirational and we have to get it right. To state the law clearly and precisely is an essential skill that takes time to develop, but learning how to justify the state of the law takes even more effort.

Central examples of wrongdoing are usually uncontroversial but at the boundaries of the law of torts opinions will differ. In these controversial or ‘hard cases’, competing values make the decision difficult and even when the judges turn to moral theories or community standards for guidance, they may find only more reasons to disagree—as you will see. On some matters the community itself remains divided. However, disputes cannot be left undecided while we wait for consensus to emerge; so we solve the problem by allowing designated representatives of the community to decide the matter by a vote based on informed debate, experience and conscience. In a legal case, the issues can ultimately be decided by the majority of the judges sitting on the case in the High Court. If parliament decides that a court’s decision is not in the best interests of the community, then it can change the law, again by a majority vote.<sup>5</sup>

The challenges posed by the concept of wrongdoing for lawyers and for law students are directly related to these inherent difficulties. Lawyers have the task of advising clients, predicting how a case may be resolved and, if necessary, arguing the case in court. In straightforward cases the matter may never need to go that far, but in the contested cases lawyers have to construct more complicated arguments to put before the courts. While the judges have to make and justify the decisions in these difficult cases, the lawyers from each side must present the arguments and the counter-arguments that lead to those decisions. It should come as no surprise to learn that while you are at law school, you will focus far more on the difficult cases and the complicated arguments and spend much less time on the easy ones. So, how do you acquire the art of legal argument? Fortunately, you do not have to walk that path alone; you can follow in the footsteps of those who have gone before you, and your teachers will guide you through the journey. The best way to learn how to construct your own persuasive and reasoned legal arguments is to start by deconstructing the arguments that have been made in earlier cases, and this is why so many torts teachers require you to discuss so many ‘hard cases’ as part of your legal training.

This focus on hard cases means that you have to be aware of the kinds of arguments that lawyers and judges use when they disagree about the proper state of the law. The key to solving these disagreements can be found in the nature of the concept of wrongdoing itself, which can be defined as conduct that deviates from a standard that is

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Deconstructing  
torts cases teaches  
you the art of legal  
argument.

<sup>5</sup> See Cane, ‘Taking Disagreement Seriously’ (2005); Spigelman, ‘Negligence’ (2005).

See Table 1.2 for some principles that animate the law of torts.

See Chapter Two for further goals and policies guiding tort law.

thought to be right. The negative concept of a wrong therefore implies the existence of a corresponding positive notion of something thought to be right or good. This is a useful insight, because when judges have to decide hard cases and set (or reset) the boundaries of the law of torts they will often justify their decisions by pointing to the positive objects that the proposed rules and standards of behaviour aim to protect. In this way the judges use their perception of the community's *positive* needs and values to define and justify the community's *negative* laws that forbid these kinds of interpersonal wrongdoing. We have already looked at some of the principles that animate the law of torts in Table 1.2 and the next chapter considers some of tort law's other positive goals and associated policies that justify the decisions made by judges in hard cases. You will practise using all of these legal tools to help construct arguments (and counter-arguments) in Part Two of *Connecting with Tort Law*.

### 2.3 Making rules and setting standards

Human life is complex and tort law mirrors that complexity.<sup>6</sup> So, even in cases where we agree, the law itself must inevitably reflect the fact that matters of right and wrong are not always simple, straightforward and absolute, but include many shades of grey. Plain, clear rules are always desirable, but they are not always possible. One method that the courts have adopted to overcome this problem is to lay down a broad rule first and then to modify that rule in subsequent cases, either by adding a series of exceptions to the rule or by allowing a number of defences so that the defendant can escape liability in deserving cases. This ensures that the rules can capture all of the complexity and the nuances of interpersonal wrongdoing.

For example:

In the tort of *battery*, the very broad rule forbidding any contact with the body of another is immediately qualified by an 'everyday contact' exception, which covers ordinary, innocent and unavoidable daily contact that may occur on social occasions or in crowded spaces. It is then limited even further by a range of defences like consent, discipline, self-defence and necessity. In this way the fundamental right that each person has to bodily integrity is announced and protected, but at the same time, the value that the community places on the other competing interests that it deems worthy of recognition can also be weighed in the balance.

A second method of dealing with the difficulty of setting standards that fully reflect the community's views and values is to incorporate express references to 'the ordinary reasonable person', 'right-thinking members of society' or 'ordinary people of fair average intelligence' within the rules and tests for liability. In fact, the fundamental concept of reasonableness appears throughout the law of torts: sometimes in the elements of the torts themselves, sometimes in the defences to the torts, and often at both stages of the process.

<sup>6</sup> See Cane, *The Anatomy of Tort Law* (1997) at 21–2.

For example:

- » In the rights-based trespass torts like *battery* and *false imprisonment*, we can observe a pattern where strong, broad rules that draw very clear lines are counterbalanced by the ‘fuzzy’ reasonableness criteria that are embedded in many of the available defences.
- » In the torts of *negligence* and *nuisance*, an assessment of reasonableness is carried out in the initial liability-imposing phase where the elements of both torts contain express reference to the concept of reasonableness. While the defences to the tort of nuisance are relatively few in number and do not include a reasonableness criterion, in the blurry tort of negligence, the ubiquitous concept of reasonableness appears not only in the elements of the tort, but also in many of the defences.

The incorporation of a reasonable person standard into the law recognises that a set of rules cannot necessarily anticipate and describe every possible eventuality in advance. As the case law builds up, the courts provide further guidance on the application of these rules and so lawyers are constantly being supplied with more examples to help them to advise their clients and predict their chances of success. This is why legal research skills are included in your torts studies and assessment tasks.

Questions about reasonableness are not always easy to answer because even reasonable people may disagree on moral and practical matters. This suggests that the price we pay for increasing the law’s flexibility and responsiveness to community values is to make the law more complicated, more open to argument, and consequently, more uncertain. A rule that contains the meaningful but inherently fuzzy concept like reasonableness within it cannot draw a clear, bright and easily discernible line between right conduct and wrongful conduct. So, if we want the law of torts to fully reflect the fine distinctions of human wrongdoing, the complexity of human lives and the standards of reasonable persons within the community, we must engage in a constant process of balancing and negotiating compromises between our conflicting desires and competing values. However, as the enduring icon of the scales of justice symbolises, this process of weighing argument against counter-argument to arrive at a balanced decision is an eternal and familiar part of doing justice. This method of argument is explained and illustrated in Chapter Three. You will have many opportunities to develop this skill as you work through the later chapters of this book.

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See Chapter  
Three for more on  
weighing arguments  
against counter-  
arguments.

## 2.4 Forms of wrongdoing: Acts and omissions

Tort law focuses on wrongful conduct by one person that has the capacity to harm another. It is important to understand that in the law of torts, the term ‘conduct’ can include both overt actions as well as failures to act, which are known as omissions. We can wrong other people by what we actually *do to them* as well as by the things that we *fail to do for them*. This is implied by the idea of wrongdoing as a failure to live up to, or a deviation from, a proper standard of conduct. Logically, there is no necessary condition that the behaviour under consideration be limited only to positive actions. So, while the law of torts forbids positive acts, like hitting another person without lawful justification, it also deals with certain kinds of omissions, for example, by declaring it to be wrong for doctors to fail to advise their patients of material risks inherent in their medical

treatment. Courts have traditionally been slower to impose liability for omissions (or ‘non-feasance’) than for positive acts of wrongdoing (or ‘misfeasance’) and we will explore this issue in greater depth in the chapters on negligence where the history of legal liability for omissions is most significant.

## 2.5 Wrongdoing and the concept of fault

The notion of wrongdoing is closely associated with the idea of fault. Both concepts carry a common connotation of a poor fit or mismatch with a moral or normative standard.<sup>7</sup> We can wrong others not only by our external physical conduct towards them but also by our internal mental conduct or our attitudes towards them. As a community we are normally reluctant to impose legal liability on a person unless we are convinced not only that their conduct has fallen short of a proper standard but also that they were personally at fault for engaging in that conduct. A person is seen to be at fault if their conduct is motivated by wrong values or if it is characterised by an attitude that fails to respect the value of other persons. Assessments of fault are based on a specific reading of an individual’s responses to the situation that they have found themselves in and, ultimately, a judgment of the values that have guided their choices. When courts consider the aspect of fault, they take into account the person’s state of mind, intentions and motives, attitudes to others, knowledge, capacity, and degree of control over events, all considered in the light of their surrounding circumstances. So, while our assessments of fault and wrongdoing are closely related, the issue of fault directs us towards a more particularised analysis of individuals, events and circumstances.

In the law of torts, fault is generally found in a defendant’s state of mind. So, if a defendant has intended to harm another person or has been reckless or careless about harming other people, they will generally be held to be at fault. The dimension of wrongdoing, which is essential to our concept of a tort, has a double focus on these two linked aspects of fault and conduct (or mind and body).

For example:

- » If a person deliberately intends or desires a particular harmful result, their conduct is described as *intentional*.
- » If a person foresees that a particular result may occur, but goes ahead regardless and knowingly accepts the risk of the harm occurring, their conduct is described as *reckless*.
- » If a person’s mind never turns towards the particular result and they do not realise that their conduct may risk harm to others, their conduct is described as *inadvertent*, *careless* or *negligent*.

Tort law tends to equate reckless conduct with intentional conduct because in both cases the defendant’s mind has turned towards (or adverted to) the harmful consequences that may result. So, when you find the word ‘intentional’ in the definition of any tort, you need to remember that the term ‘intentional’ includes recklessness. You also need

<sup>7</sup> The SOED at 923 defines a fault as a ‘deficiency, lack or want of’; a ‘default, failing, neglect’; or ‘defect, imperfection, or blemish of character’. The verb to ‘fault’ is to ‘be wanting’; to ‘come short of an accepted standard, fail’; or to ‘be deficient or lacking in’ some quality.

to remember that the word ‘negligence’ is used in two different ways in tort law. In the intentional torts, the word ‘negligence’ is used in its ordinary sense as a synonym for ‘carelessness’. We use it when we want to distinguish negligent (or inadvertent) conduct from intentional (or advertent) conduct. When you encounter the tort of negligence, you need to remember that the word is being used as a special legal category or ‘term of art’ and carries the connotation of a breach of a legal duty to take reasonable care to avoid causing foreseeable harm to others.

An important feature of our deliberations about fault in the law of torts is the fact that we often base an inference of fault directly on our observations of a person’s conduct. If we see someone wildly shooting a gun in a crowded street we infer that they must have known the risks that they were undertaking, whatever they may say in the witness box. Lawyers, witnesses, judges and juries cannot read a person’s mind but in some cases we judge a person to be blameworthy because we ‘read’ their conduct as conveying an attitude of disrespect or we interpret the conduct as being intrinsically faulty. Some conduct speaks for itself. However, there are certain circumstances where liability is imposed even in the absence of one of these recognised types of fault. This kind of liability is described as ‘strict liability’ to contrast it with the more common fault-based liability and we look at this aspect again in Chapter Fourteen.

Different torts require different levels of fault. Some torts specify that certain conduct must be accompanied by a specific state of mind; some require a person to live up to an objective standard; some require a specific intention to cause a defined result; and others require only that a defined act be voluntary and intentional. There is a tendency to counterbalance the fault elements and the harm-based elements of any tort: so, if the conduct directly threatens harm to a particularly important interest or right, then the fault element may often be correspondingly low, and vice versa.

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See Chapter  
Fourteen for more  
on strict liability.

For example:

- » In the tort of *battery*, the law does not require an intention to cause actual damage because our right to bodily integrity and to control access to our own body is so important. The definition of this tort specifies that the defendant must directly cause physical contact or interference with the body of the plaintiff. The fault element requires only that the defendant should intend to make that physical contact (or be reckless or negligent as to contact occurring). It does not require any higher element of hostility or personal ill-will towards the plaintiff.
- » In the tort of *deceit*, the conduct element specifies that the defendant must have made a false representation to the plaintiff. The two fault-based elements require first, that the defendant made the statement with knowledge that it was false (or was reckless or careless as to whether it was false or not), and second, that the defendant intended the plaintiff to rely upon the false representation.<sup>8</sup>
- » The tort of *negligence* requires either an act or, in some circumstances, an omission by the defendant that causes a recognised form of harm. The fault element in this tort specifies that the defendant must have failed to live up to an objective standard of reasonable care.

<sup>8</sup> See *Magill v Magill* (2006) at paragraph [114].

Fault can be considered at two different stages of a torts case.

There are two different stages where the aspect of fault is considered. In most cases the issue of fault is considered at the initial liability-imposing phase because most torts include a fault-based element in their definition, like intention, recklessness or negligence. However, the issue of fault can also be considered again at a later stage, when the defendant raises a defence. Some of these defences are *partial* and are based on the view that, while the defendant's conduct was faulty, the full cost of compensating for the damage that flowed from that wrongdoing should not be imposed on the defendant because the plaintiff was also at fault and should therefore bear part of the blame. Other defences provide a *total* justification.

For example:

- » In cases of *contributory negligence*, a defendant will have to pay only a proportionate share of the damages bill. If liability is imposed on the basis of fault, then fairness and consistency require that it should also be limited by an assessment of relative fault. Other defences to negligence, like *volenti non fit injuria*, provide a total justification.
- » If a person has deliberately stabbed someone else, their conduct has fallen short of the rule of *battery* that says we should not apply force to the body of another person. Nevertheless, if they were acting reasonably in *self-defence* we do not judge them as being at fault for their conduct. Liability is completely excused when we decide that a person is not at fault, even if they have intentionally caused harm and their conduct would normally be seen as a breach of the law. Such people are absolved of blame because their response is seen to be fair and reasonable in the circumstances. The true blame for the events is cast upon the other person who was initially at fault by making the threat or attack.

**TABLE 1.3 Wrongdoing: Conduct and fault**

The conduct aspect	The aspect of fault
<b>Definition:</b> Wrongful conduct is an act or an omission that deviates from a standard or norm of conduct that is thought by the community to be right.	<b>Definition:</b> A person is at fault if their personal responses and attitudes to others are not as they should be in the circumstances, ie, if they deviate from those that are thought by the community to be right.
<b>Focus:</b> The body—or physical conduct. Externally observed conduct towards others.	<b>Focus:</b> The mind—or mental attitudes. Internal responses and attitudes to the value of others.
<b>Location in the law:</b> The conduct aspect is specified in the elements of the tort.	<b>Location in the law:</b> The aspect of fault is considered in the elements of the tort and/or in the defences to the torts.
The feature uniting these two concepts is the idea of a deviation from a moral or normative (ie, value-based) standard. That deviation can be found in: <ul style="list-style-type: none"> <li>• actions—or what a defendant has done;</li> <li>• in omissions—or what a defendant has failed to do; and</li> <li>• in a defendant's state of mind—or their attitudes or responses to others, (which are sometimes revealed in, or read from, their conduct).</li> </ul>	

The two concepts of wrongdoing and fault are compared and contrasted in Table 1.3 and they will both feature in the explanations of the elements of the various torts that are discussed in Part Two of *Connecting with Tort Law*. For a person to be held liable for their wrongful conduct, they must normally be at fault, but as you will see when we discuss vicarious liability, this is not always the case and there are times when the law imposes liability on one person for the torts committed by another regardless of fault.

.....  
See Part Two  
for more on the  
roles of fault and  
wrongdoing in the  
elements of the  
torts.

## 2.6 The conflict between stability and change

The fundamental uncertainty that lies at the heart of the law of torts arises from the nature of its two primary tasks. Tort law must define the boundaries between right and wrong and do justice in individual cases by righting those wrongs once they occur. The answers that we give to these questions will be determined by our values, and, because we constantly debate and re-evaluate our conception of what it means to live a good and valuable life, our judges and legislators are constantly being asked to change the law of torts and redraw the boundaries of behaviour that will attract legal sanctions. This creates a conflict between the desire for stability and certainty in the law and the need to keep the law up to date with community values.

The law of torts is dynamic and contingent. You need to understand that it could be different, depending on our choices and the balance that we strike between our competing interests, values and principles. More than any other area of private law, the law of torts is shaped by visions of what the law ought to be rather than by the need that the community has for stability in the law. On the other hand, the law needs to be clear, predictable and certain so that people can plan their lives and their enterprises to comply with their legal obligations, avoid legal liability and protect themselves from claims. The law of torts is not set in stone like the Ten Commandments and much of the time in your torts classes will be spent in examining the arguments and reasons put forward by judges, academics and legislators to justify changing and improving the law. Many of the disputes about the law of torts arise from the different views that compete to fill the gaps created by tort law's inevitable uncertainty and from opposing views about the proper boundaries of the law. At times, judges, parliaments and members of the community feel that the pendulum has swung too far in one direction and decide that the law needs to be re-balanced to achieve a more moderate position.<sup>9</sup> These characteristic features of the debates about tort law explain why you need to:

- be aware of what the law *could* and *should be*, rather than become fixated only on what it *currently is*; and
- supplement the art of critical analysis and the art of argument with an imaginative and creative approach to the law.

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<sup>9</sup> See: Ipp, 'Themes in the Law of Torts' (2007); Spigelman, 'Negligence' (2005); Cane, 'Taking Disagreement Seriously' (2005).

## 2.7 The need for limits

Tort law needs limits. The requirement for limits on the scope and reach of the law is a consistent theme in the law of torts, and our need to limit the law takes three forms, each of which is directly related to the three most important dimensions of a tort, namely, wrongdoing, harm, and doing justice in response. First, we need to set limits on what is to count as wrongdoing so that the law does not forbid conduct that we agree should be left unregulated. Second, we need limits on the kind of adverse effects that will be classified as harms and are therefore seen as worthy of the law's protection. Finally, we need limits on the extent of the remedies and responses that the law of torts can impose so that we do not go too far when we track the harmful results of a wrongdoer's conduct. Justice does not require wrongdoers to keep on paying forever for all the consequences of their wrongdoing—in fact, justice itself requires us to limit the legal responses to those that are fair. The need for limits is particularly acute in the ever-expanding tort of negligence, and we will examine the difficulties that the courts and parliaments have faced in justifying and imposing limits on the law in much more depth in Part Two of *Connecting with Tort Law*.

See Part Two for more on justifying and imposing limits on the law.

## 3

## CONCLUSION

This chapter has given you a definition of the elusive concept of a tort and introduced you to some of the challenges that inevitably arise from the nature of this important category of the civil law, which serves the community by setting standards of right and wrong and doing justice in individual disputes. It has explained that the law of torts is inherently uncertain and ambiguous, and shown you how this ambiguity creates fertile opportunities for argument and openings for change.

You can understand tort law better once you understand that tort law is not just a set of rules backed up by legal remedies. This chapter has explained that it is an evolving set of aspirational rules based on the shared principles and underlying values that together make up our community's conception of what it means to live a good life. Moreover, tort law is a culture of argument about those rules, principles and values, and, because reasonable people may disagree about the relative weight to be given to these competing goods, you need to understand that there is sometimes no obviously right answer to the problems posed by the law of torts.

See Chapter Two for tort law's conception of justice and account of harm.

See Chapter Three for deconstructing arguments in torts cases.

The next two chapters will help you learn how to participate in this culture of argument by explaining some more of the law's solutions to the challenges posed by this particular category of legal wrongdoing. Chapter Two extends your understanding of the law of torts by explaining its special conception of justice, identifying its two-part account of harm, and outlining its structure and functions. Chapter Three shows you how to use this knowledge to deconstruct the arguments that you will find when you have to read torts cases and which you must use when you have to construct your own arguments in problem solving questions, essays and other commonly encountered torts assessment tasks.

## TEST YOUR UNDERSTANDING ...

### ... of the nature of tort law

- 1 Explain what a tort is by referring to its four key dimensions.
- 2 Explain why these four aspects of a tort result in the fact that the law of torts is inevitably uncertain and is in a constant state of development.
- 3 Explain how this uncertainty creates opportunities for legal arguments.

### ... of the nature of law

- 1 Identify two reasons why we should obey the law.
- 2 Explain this statement: 'The law not just a set of rules backed up by remedies.'
- 3 Explain why there is sometimes no single right answer to a legal problem.

### ... of the nature of wrongdoing and its challenges

- 1 Explain why the concept of wrongdoing poses a challenge to law makers.
- 2 Identify and explain two ways that the law of torts deals with the problem of making rules and setting standards about right and wrong.
- 3 What is the difference between an act and an omission?
- 4 Explain how the concepts of wrongdoing and fault are linked, and give three examples of when a person's conduct is seen as 'faulty'.

## References for Chapter One

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