Good Faith Defences in Tort Law

Iain Field*

Abstract

Statutory good faith defences are largely ignored in the tort law literature. This is despite their long legislative history and continued ubiquity in modern statutes. This article develops an understanding of the essential nature and function of good faith defences and other similar defences. It demonstrates that these defences are governed by various limitations arising from their drafting and construction on the one hand, and the specific justificatory criteria that they comprise on the other. The article considers the implications of these limitations for the operation of good faith defences in specific instances of tortious liability, and demonstrates that good faith defences are capable of defeating liability in numerous circumstances that are beyond the reach of other tort law defences.

I Introduction and Outline

Widespread tort liability is constrained in many contexts by a species of statutory protection that exempts certain classes of defendant from civil liability provided that, in the relevant circumstances, he or she acted in 'good faith' (or 'bona fide', 'honestly', 'without malice', and so forth).[1] Such protections, which this article describes as 'good faith defences', remain 'standard drafting practice' in Australia and 'abound in Australia's regulatory statutes'.[2] They are also commonplace in the United Kingdom, albeit less so than may once have been the case.[3] Despite the fact that good faith defences have generated a considerable body of collective case law,[4] and notwithstanding their long legislative history,[5] good faith defences are all but ignored in the tort law literature. This is not especially surprising, given the somewhat idiosyncratic nature of these defences, the lack of theory pertaining to tort law defences generally,[6] and the historical reluctance of scholars to engage

* Assistant Professor, Faculty of Law, Bond University, Queensland, Australia. Thanks are due to Joachim Dietrich and Rick Bigwood for their comments and guidance, and to Joshua Winter for his research assistance. The author is also grateful to the two anonymous reviewers for their thoughtful contributions.

1 Good faith might also form an express or implied precondition to a defence of statutory authority. See, eg, *CPCF v Minister for Immigration and Border Protection* (2015) 316 ALR 1, 51 [208] (Crennan J), 79 [360] (Gageler J). However, this article is concerned exclusively with provisions that create exceptions to civil liability where a defendant's conduct is *not* authorised by statute.

2 Mark Aronson, 'Misfeasance in Public Office: A Very Peculiar Tort' (2011) 35(1) *Melbourne University Law Review* 1, 11.

3 Ibid.

4 See, eg, *Spooner v Juddow* (1850) 18 ER 734, 744 (Lord Campbell).

5 *Secretary, Department of Education, Employment, Training and Youth Affairs v Prince* (1997) 152 ALR 127, 130 (Finn J).

6 James Goudkamp, *Tort Law Defences* (Hart Publishing, 2013) 7–11.

with tort law's 'legislative component'.[7] What little academic commentary exists is also largely critical of good faith defences on the basis that some of these defences, at least, are unprincipled and arbitrary,[8] or that the social mischiefs to which they respond are exaggerated, if not illusory.[9]

It is not the purpose of this article to challenge the social or legal assumptions upon which specific good faith defences are founded, or to speculate as to the considerations that motivated lawmakers to promulgate this particular species of defence for the benefit of certain groups and not for others. Rather, the purpose here is to develop a theoretical understanding of the essential nature of statutory good faith defences in tort law, to articulate certain of the principles that govern such defences, and to demonstrate the application of these principles in specific instances of tortious liability. Although good faith defences vary greatly in scope and location, courts have nevertheless 'construed such provisions [in part] by reference to general principles',[10] and the explication of these principles might bring greater cohesion to this important area of the law. Insofar as good faith defences represent the assertion of public interests over private law rights, this analysis might also enhance our growing understanding of the interface between public law and private law.[11]

The article begins by defining certain key terms and by stating the taxonomical assumptions upon which analysis will proceed. Good faith defences are described as a species of statutory justification on the basis that good faith articulates a defendant's *reasons* for acting, despite the fact that those reasons may be insufficient to render the defendant's conduct *reasonable*. The article then demonstrates how good faith defences (and other similar defences) are governed in practice by limitations arising from: (1) variations in the drafting of good faith defences and the principles that guide their construction (Parts IIIA–C); (2) the interpretive approach taken when a defendant holds mixed motives or beliefs or lacks certain motives or beliefs (Parts IIID–E); and (3) the relationship between justificatory criteria (such as good faith) and fault criteria (such as negligence,

---

7 James Goudkamp and John Murphy, 'Tort Statutes and Tort Theories' (2015) 131(1) *Law Quarterly Review* 133, 136. See also T T Arvind and Jenny Steele, 'Introduction: Legislation and the Shape of Tort Law' in T T Arvind and Jenny Steele (eds), *Tort Law and the Legislature: Common Law, Statute and the Dynamics of Legal Change* (Hart Publishing, 2013) 1, 1–2; Mark Leeming, 'Theories and Principles Underlying the Development of the Common Law — The Statutory Elephant in the Room' (2013) 36(3) *University of New South Wales Law Journal* 1002.

8 See, eg, Joachim Dietrich, 'Duty of Care under the "Civil Liability Acts"' (2005) 13(1) *Torts Law Journal* 17; Myles McGregor-Lowndes and Linh Nguyen, 'Volunteers and the New Tort Law Reform' (2005) 13(1) *Torts Law Journal* 41, 44–5; James Goudkamp, 'Statutes and Tort Defences' in T T Arvind and Jenny Steele, *Tort Law and the Legislature: Common Law, Statute and the Dynamics of Legal Change* (Hart Publishing, 2013) 31, 45–6.

9 See, eg, Dietrich, above n 8, 27; Dominic Villa, *Annotated Civil Liability Act 2002 (NSW)* (Lawbook, 2nd ed, 2013) 276–7.

10 *Webster v Lampard* (1993) 177 CLR 598, 619 (McHugh J). His Honour goes on to say that courts have sought to develop these general principles 'rather than by a textual analysis of individual enactments'. However, as this article demonstrates, the reality is that courts construe good faith defences in both of these ways.

11 See, eg, Peter Cane, 'Tort Law and Public Functions' in John Oberdiek (ed), *Philosophical Foundations of the Law of Torts* (Oxford University Press, 2014) 148.

intention and so forth) (Part IV). The implications of these limitations are then examined in specific instances of tortious liability (Parts V and VI).

II Terminology

A *What is 'Good Faith'?*

Whereas a considerable amount has been written about the concept of good faith in various branches of private law,[12] the role of good faith in tort law (unlike that of bad faith)[13] remains largely unexplored. What, then, is the meaning of good faith in tort law, how might good faith be demonstrated, and what is the relationship between good faith and bad faith? In tort law, good faith ordinarily describes one or more of a defendant's motives (or reasons) for engaging in conduct or the quality of the beliefs that led to that conduct.[14] Good faith is concerned with the 'ends' to which a defendant's conduct is directed, as opposed to the 'means' by which those ends are achieved or beliefs ascertained (negligently, recklessly and so forth). Conduct that is otherwise tortious might therefore be done in good faith if it is motivated by a desire to serve a particular end (statutory or otherwise), notwithstanding (1) a failure to exercise reasonable care in achieving that end, or (2) a mistaken belief as to the existence of certain facts (such as an emergency), laws (such as a belief that the impugned conduct is authorised by statute),[15] or both (such as the guilt of another party).[16] In *Little v Commonwealth*, Dixon J expressed the essential point as follows:

> The truth is that a man acts in pursuance of a statutory provision when he is honestly engaged in a course of action that falls within the general purpose of the provision. The explanation of his failure to keep within his authority or comply with the conditions governing its exercise may lie in mistake of fact, default in care or judgment, or ignorance or mistake of law. But these are reasons which explain why he needs the protection of the provision and may at the same time justify the conclusion that he acted bona fide in the course he

---

12 See, eg, the lengthy discussion of good faith as it is implied in a variety of contracts in N Seddon, R Bigwood and M Ellinghaus, *Cheshire & Fifoot's Law of Contract* (LexisNexis Butterworths, 10th ed, 2012) 464–79. A comprehensive comparison of the role of good faith in tort law with that of good faith in other branches of private law is beyond the scope of this article, although specific references are made to the broader good faith literature where appropriate.

13 The tort of misfeasance in public office, of which bad faith is an element, has been the subject of numerous academic writings. See especially Aronson, above n 2; John Murphy, 'Misfeasance in a Public Office: A Tort Law Misfit?' (2012) 32(1) *Oxford Journal of Legal Studies* 51.

14 This description of good faith mirrors the two limbs of bad faith outlined by Lord Steyn in *Three Rivers District Council v Governor and Company of the Bank of England (No 3)* [2003] 2 AC 1, 190–1 ('*Three Rivers District Council*').

15 See, eg, *Rumble v Liverpool Plains Shire Council* [2012] NSWDC 95 (5 July 2012), in which council officers trespassed on land in the belief that they were authorised to do so by certain orders issued under the *Environmental Planning and Assessment Act 1979* (NSW).

16 See, eg, *Hermann v Seneschal* (1862) 143 ER 156 (a shopkeeper mistakenly accused a customer of counterfeiting) and *Little v Commonwealth* (1947) 75 CLR 94 (police officers mistakenly detained a plaintiff in the belief that he had offended, and would again offend, against an order issued pursuant to Regulations made under the *National Security Act 1939* (Cth)).

> adopted and that it amounted to an attempt to do what is in fact within the purpose of the substantive enactment.[17]

Although Dixon J did not say so explicitly, he appears to have taken the view that good faith is ultimately concerned with motive, but that beliefs might operate as proxies for motives in circumstances of evidential uncertainty.[18] On this view, proof of an honest belief might suffice as proof of a good faith motive, even if the latter cannot be established definitively. However, if a person is *not* motivated to act in good faith, then the honesty or otherwise of his or her belief as to certain facts, laws, or both will be irrelevant. Thus, for example, a prison officer (D) who honestly but mistakenly believes that she is authorised to use a Taser to subdue a prisoner (P) could not rely on a good faith defence if, in the circumstances, D was motivated to use the Taser on P for purely malicious reasons.

Since beliefs are merely proxies for motives, a defendant need not necessarily prove that he or she held any *specific* belief in order to demonstrate a good motive. In *Read v Coker*,[19] for example, the plaintiff contended that the defendant 'could not have believed that he was acting in the execution of the statutes when he did the acts complained of, inasmuch as it did not appear that he had any knowledge of their existence'. Rejecting this argument, Jervis CJ concluded that if, 'as the jury have found, the defendant bona fide believed he was acting in the assertion of a legal right, he was justified by the law, although he did not precisely know what that law was'.[20]

Clearly, since good faith defences are largely creatures of statute[21] — and although courts endeavour, to the extent possible, to construe good faith defences by reference to general principles — the precise meaning of good faith remains a matter of construction, having regard to the specific context in which the defence applies, the nature of any power conferred, and so forth.[22] It would be a sterile exercise to attempt to construct here a lexicon of the various definitions and descriptions of good faith (or other similar concepts) expressed in the authorities. However, it is trite to observe that, in its core sense, good faith refers to some *subjective mental state*.[23] Even if good faith might be said to describe an objective

---

17 *Little v Commonwealth* (1947) 75 CLR 94, 112.

18 To similar effect, the second limb of the tort of misfeasance in public office (knowledge and conscious indifference) may operate as a proxy for the first limb (targeted malice). See, eg, Murphy, above n 13, 52 n 2.

19 (1853) 13 CB 850, 862; 138 ER 1437, 1442.

20 Ibid, approved by *Little v Commonwealth* (1947) 75 CLR 94, 110 (Dixon J).

21 The position in the Unites States is slightly different, insofar as some states afford public officials a so-called 'qualified [good faith] immunity' at common law. See, eg, *Smith v Stafford*, 189 P 3d 1065 (Alaska, 2008); *Stiebitz v Mahoney*, 144 Conn 443 (1957); *Eliason v Funk*, 233 Md 351 (1964); *Mandel v O'Hara*, 320 Md 103 (1990); *Peterson v George*, 168 Neb 571 (1959); *Bedrock Foundations Inc v Brewster & Son Inc*, 31 NJ 124 (1959). Certain defences at common law may also be said to have the concept of good faith at their core. For example, the defence of self defence might fail if a defendant is motivated by malice. The author is grateful to one of the anonymous reviewers for identifying this point.

22 *Mid Density Developments Pty Ltd v Rockdale Municipal Council* (1993) 44 FCR 290, 299 ('*Mid Density*'); *Bankstown City Council v Alamdo Holdings Pty Ltd* (2005) 223 CLR 660, 674–5 [51] (Gleeson CJ, Gummow, Hayne and Callinan JJ) ('*Alamdo Holdings*').

23 See, eg, *Webster v Lampard* (1993) 177 CLR 598, 608, 610 (Mason CJ, Deane and Dawson JJ).

standard in certain instances,[24] this standard is invariably less demanding than objective reasonableness.[25] As such, and notwithstanding suggestions to the contrary,[26] this article proceeds on the assumptive basis that neither good faith nor its various synonyms or proxies (such as honesty) can be conflated with objective reasonableness. Of course, there must be some evidentiary basis upon which to conclude that a defendant's belief was held in good faith, for it 'would be wild work if a party might give himself protection by merely saying that he believed himself acting in pursuance of a statute'.[27] However, history in this respect has vindicated Fullagar J's view that, while for a belief to be bona fide

> there must be some factual basis for the belief, and while the actual facts known to a defendant may often be relevant to the question of the existence of a real belief, it is not necessary that the belief should be based on reasonable grounds.[28]

The relationships among various criteria of legal liability are considered in greater detail in Part IV below.

B *The Relationship between 'Good Faith' and 'Bad Faith'*

A related issue, which it is necessary to address squarely at the outset, is whether the presence of bad faith precludes the presence of good faith (and vice versa). Courts seldom answer this question directly, although their views may be deduced from the interpretative approaches that they adopt in individual cases. The only axiomatic conclusion in this regard is that if a person acts in good faith to one end, they cannot be said have acted in bad faith to that same end (and vice versa). For example, a paramedic who does an act in good faith to save a patient's life could not, at the same time, be said to have done that act in bad faith so as to endanger that patient's life. Good faith and bad faith in this scenario are mutually exclusive.

However, the presence of good faith as to one end does not necessarily preclude the presence of bad faith as to *some other* end (and vice versa), as a person may do or refrain from doing something for various reasons, some of which are good and some of which are bad ('mixed motives'),[29] and a person

---

[24] See, eg, *Siano v Helvering*, 13 F Supp 776, 780–1 (NJ, 1936); *Mid Density* (1993) 44 FCR 290, 298; *Barrett v South Australia* (1994) 63 SASR 208, 209 (Bollen J) ('*Barrett*'). However, it is debatable whether the standard imposed in the latter two cases is truly objective. This point is considered further in Part VC below.

[25] If good faith were construed in terms synonymous with objective reasonableness it would be rendered redundant as a concept, contrary to the ordinary interpretive presumption 'that no clause, sentence, or word shall prove superfluous, void, or insignificant, if by any other construction, they may all be made useful and pertinent': *R v Berchet* (1688) 1 Show KB 106; 89 ER 480, quoted in *Commonwealth v Baume* (1905) 2 CLR 405, 414 (Griffith CJ); *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 382 [71] (McHugh, Gummow, Kirby and Hayne JJ).

[26] See, eg, *Hughes v Buckland* (1846) 153 ER 883, 887.

[27] *Cann v Clipperton* (1839) 113 ER 221, 224 (Williams J). It is nevertheless conceivable that a belief might be held in good faith despite the fact that it is not rational.

[28] *Trobridge v Hardy* (1955) 94 CLR 147, 157, approved by Mason CJ, Deane and Dawson JJ in *Webster v Lampard* (1993) 177 CLR 598, 607–8. See also *Hermann v Seneschal* (1862) 143 ER 156; *Mid Density* (1993) 44 FCR 290.

[29] Martin A Kotler, 'Motivation and Tort Law: Acting for Economic Gain as a Suspect Motive' (1988) 41(1) *Vanderbilt Law Review* 63, 65–6; Peter Cane, 'Mens Rea in Tort Law' (2000) 20(4)

might hold numerous beliefs at any one time, which set of beliefs may or may not be internally logically consistent.[30] A midpoint between good faith and bad faith also exists where, in respect of certain possible ends, or the existence of certain facts or laws, a person might have no motive or belief whatsoever. When a defendant's conduct is attributable to mixed motives or beliefs, or an absence of motive or belief, the application of a good faith defence will depend in large part upon the interpretive approach adopted in the circumstances. This point is developed further in Part III below.

C *What is a 'Defence'?*

The choice of the term 'defences' also requires some explanation — albeit that this choice is impelled more by analytical convenience than logical necessity. For present purposes, this term is used in the sense favoured by Goudkamp, to connote 'liability-defeating rules that are external to the elements of the claimant's action'.[31] This definition is not uncontroversial,[32] and it is questionable whether all of the good faith protections that it encompasses ought to be classified as defences.[33] It might also be argued that certain statutory good faith protections should be framed as 'denials' — that is to say, as modifications to the definitional elements of the tort in which the plaintiff sues.[34] It is debatable whether the choice of language exercised in this respect might result in qualitatively different legal outcomes.[35] However, sound reasons exist for rejecting the view that statutory good faith protections are denials. As will be seen, most such protections might be

---

Oxford Journal of Legal Studies 533, 539. In a criminal law context, see Martin R Gardner, 'The *Mens Rea* Enigma: Observations on the Role of Motive in the Criminal Law Past and Present' [1993] 3 *Utah Law Review* 635, 715; John Gardner, *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (Oxford University Press, 2007) ch 5. In a commercial law context, see David M J Bennett, 'The Ascertainment of Purpose When Bona Fides Are in Issue — Some Logical Problems' (1989) 12(1) *Sydney Law Review* 5, 6–7.

30 Support for this proposition is found both in jurisprudence (see, eg, Judith N Shklar, *Legalism* (Harvard University Press, 1964)) and social psychology (see especially Leon Festinger, *A Theory of Cognitive Dissonance* (Stanford University Press, 1957)). See also Scott Plous, *The Psychology of Judgment and Decision Making* (McGraw-Hill, 1993). It is also implicit in the exploration of decision-making in tort law undertaken by Hutchinson and Morgan: Allan C Hutchinson and Derek Morgan, 'The Canengusian Connection: The Kaleidoscope of Tort Theory' (1984) 22(1) *Osgoode Hall Law Journal* 69, and explicit in Pedersen's analysis of decision-making in environmental law: Ole W Pedersen, 'Diversity, Dissonance and Denial: Exploring the Canengusian Environmental Connection' (2010) 7 *The Journal Jurisprudence* 379.

31 Goudkamp, *Tort Law Defences*, above n 6, 2.

32 See especially Luís Duarte d'Almeida, 'Defining "Defences"' in Andrew Dyson, James Goudkamp and Frederick Wilmot-Smith (eds), *Defences in Tort* (Hart Publishing, 2015) 35.

33 For example, certain good faith protections defeat the liability of one class of defendant, but do not defeat (and may, in fact, create) a cause of action against another class of defendant (such as the State): see, eg, *Police Service Act 2003* (Tas) s 84. Some good faith protections also merely defeat a specific defendant's liability to pay damages — they do not defeat a defendant's obligation to afford injunctive relief: see, eg, *Public Service Act 2008* (Qld) s 26C. Whether such protections are properly classified as defences will be the subject of a future inquiry by the author.

34 Goudkamp, *Tort Law Defences*, above n 6, 2. This appears to be the view taken by Dietrich, for example, in relation to the protections afforded in various Australian jurisdictions to volunteers and Good Samaritans, which he describes as 'no-duty situations': Dietrich, above n 8, 20, 25.

35 See, eg, Glanville Williams, 'The Logic of "Exceptions"' (1988) 47(2) *Cambridge Law Journal* 261, 277.

applied to any number of torts (and other civil actions), and it is unlikely in the extreme that parliament would intend to implement the wholesale modification of multiple possible causes of action in response to a single mischief. Indeed, it is doubtful that parliament would opt to modify the definitional elements of even a single tort when the 'legislative modification of the law governing defences is less likely to excite controversy'.[36] Framing good faith provisions as denials might also introduce unnecessary complexity to the law, especially when liability-establishing fault criteria are already highly nuanced or multifaceted.[37]

The conclusion that most statutory good faith protections are best described as defences is also reached if one takes the (conventional)[38] view that to qualify as a defence, the enacting provision must cast the burden of proof on the defendant.[39] This is because courts will ordinarily assume, absent 'some identified contrary legislative intention',[40] that the onus of proving the terms of a statutory provision rests on the defendant if it (1) 'expresses an exculpation, justification, excuse, ground of defeasance or exclusion which assumes the existence of the general or primary grounds from which the liability or right arises',[41] or (2) defeats liability in respect of an act connected to the exercise of statutory powers.[42]

D *Justification, Excuse, Immunity, Privilege, (or Other)?*

If it is accepted that (most of) the provisions with which this article is concerned are properly described as defences, the question arises whether comparisons with other categories of defence expose critical features, or otherwise contribute to our understanding, of this particular species of defence. Might good faith defences be classified as a species of justification, excuse, immunity, privilege or some other category of defence, and is it possible to arrange tort law defences according to such conventional categories in any event?

Scholarly interest in tort law defences is growing and various theories and taxonomies of tort law defences now compete for ascendency.[43] This is not the

---

36 Goudkamp, *Tort Law Defences*, above n 6, 195.

37 For example, if good faith were to modify the breach element of a claim in negligence, who then would be the 'reasonable person'? 'Good faith' does not fit neatly within this conventional analysis, hence, even if a good faith provision were framed as a denial, it would still be more logical to treat this criterion as a discrete element of liability.

38 Eric Descheemaeker, 'Tort Law Defences: A Defence of Conventionalism' (2014) 77(3) *Modern Law Review* 493, 499.

39 See, eg, Duarte d'Almeida, above n 32, 44–5, 50.

40 *Webster v Lampard* (1993) 177 CLR 598, 606 (Mason CJ, Deane and Dawson JJ).

41 *Vines v Djordjevitch* (1955) 91 CLR 512, 519 (Dixon CJ, McTiernan, Webb, Fullagar and Kitto JJ) ('*Vines*'), citing *Morgan v Babcock & Wilcox Ltd* (1929) 43 CLR 163; *Pye v Metropolitan Coal Co Ltd* (1934) 50 CLR 614; *Darling Island Stevedoring & Lighterage Co Ltd v Jacobsen* (1945) 70 CLR 635; *Barritt v Baker* [1948] VLR 491, 495 (Fullagar J); *Dowling v Bowie* (1952) 86 CLR 136.

42 *Newell v Starkie* (1919) 83 JP 113, 117 (Lord Finlay); *Kyloh v Wilsen* [1923] SASR 501, 504 (Poole J); *Barrett* (1994) 63 SASR 208, 221 (Duggan J); *Alamdo Holdings* (2005) 223 CLR 660, 674 (Gleeson CJ, Gummow, Hayne and Callinan JJ). Cf *Hamilton v Halesworth* (1937) 58 CLR 369, 380 (Dixon and McTiernan JJ).

43 See especially Peter Cane, *Responsibility in Law and Morality* (Hart Publishing, 2002) 89–90; Goudkamp, *Tort Law Defences*, above n 6. See generally Andrew Dyson, James Goudkamp and Frederick Wilmot-Smith (eds), *Defences in Tort* (Hart Publishing, 2015).

place to engage in a detailed analysis of those theories and taxonomies.[44] Suffice it to state for present purposes that good faith defences are classified as a species of 'justification', in the sense described by Cane.[45] For Cane, justifications are concerned with a rational defendant's reasons for acting, even if those reasons (such as self-interest) are insufficient to render the defendant's conduct objectively reasonable.[46] Thus, Cane tells us, 'good motives find their place in the concept of "justification", although not all justifications are good motives'.[47]

It might be argued that good faith defences are better classified as a species of 'excuse'. According to Goudkamp, the distinction between an excuse and a justification is that

> an excused defendant, while still offering a rational explanation for his conduct, does not assert that his conduct was *reasonable*. Although there were one or more reasons for an excused defendant to do that which he did, those reasons were insufficiently strong to result in the defendant being justified in his acts.[48]

Good faith defences are excuses according to this definition because good faith invariably denotes a standard that is less demanding than objective reasonableness.[49] In order to achieve the objectives of this article, however, the relationships among various criteria of legal liability must be examined, each of which criteria turns upon an evaluation of a defendant's *reasons* for engaging in impugned conduct (reasonableness, good faith, honesty and so forth). It would not assist in this examination to draw a distinction between reasons that are sufficient to justify conduct on the one hand, and reasons that might merely excuse conduct on the other. This distinction might also prove problematic in the context of defences that comprise more than one exculpatory standard (such as defences that require a defendant to have acted in 'good faith' and 'without negligence'),[50] on which more in Part IV below.

No particular reason exists as to why good faith defences could not also be described as a species of immunity[51] — that is, a defence that defeats civil liability 'because of the status or position of the favored defendant or his relationship with others'.[52] However, whereas immunities (and perhaps privileges)[53] are apt to be

---

44 This topic will be a subject of a future inquiry by the author.

45 Cane, *Responsibility in Law and Morality*, above n 43, 90.

46 See, to similar effect, the observation of Holmes J that some justifications 'may depend upon the end for which the act is done': *Aikens v Wisconsin*, 195 US 194, 204 (1904).

47 Cane, 'Mens Rea in Tort Law', above n 29, 541.

48 Goudkamp, *Tort Law Defences*, above n 6, 86 (emphasis added).

49 See above Part IIA.

50 It seems likely that Goudkamp would classify such a defence as a justification because the defendant's impugned conduct must nevertheless be reasonable: Goudkamp, *Tort Law Defences*, above n 6, 9, 105. If Goudkamp's distinction between justifications and excuses is accepted, however, this label may be misleading because good faith (an excuse) must still be proved for the defence to apply.

51 Ibid 45–6.

52 American Law Institute, *Restatement (Second) of Torts* (1979) § 895 (Introductory Note).

53 No clear definition of the term 'privilege' emerges from the literature. Goudkamp would appear to view privileges as essentially a form of immunity: Goudkamp, *Tort Law Defences*, above n 6, 123. In contrast, the reporters of the *Restatement (Second) of Torts* classify privileges as a species of

viewed through the lens of the specific public policy objectives that they seek to realise, justifications are necessarily concerned with the reasons that guide and explain a defendant's otherwise tortious conduct,[54] and it is those reasons, or the beliefs that support them, expressed in the form of a justificatory criterion, that constitute the defining and distinguishing feature of good faith defences. As such, good faith defences are classified here as one of many possible, distinct sub-species of statutory justification, which may be distinguished from one another on the basis of the specific justificatory criterion imposed (such as 'without negligence', 'without recklessness', and so forth).

III Variations in the Drafting and Construction of Good Faith Defences

A *Good Faith, Statutory Purpose and Statutory Function*

In certain instances, good faith defences are entirely unconnected to the exercise of any particular statutory function or the furtherance of any particular statutory purpose. For example, s 122(1) of the *Trade Marks Act 1995* (Cth) provides that a person does not infringe a registered trade mark if that person uses their own name or the name of a predecessor in business in good faith, or if that person used a sign, in good faith, to indicate certain features of goods or services (such as its quality or intended purpose).[55] The various protections afforded to volunteers and Good Samaritans in Australia also fall within this category.[56] In none of these examples is the availability of the protection connected to the performance of any particular statutory function.

In the paradigm case, however, good faith (or similarly worded) defences limit the liability of government bodies,[57] police officers,[58] emergency services personnel[59] and other public office holders[60] in respect of acts connected in some

---

justification, albeit that they also describe the distinction between immunities and privileges as one of degree: ibid §§ 890D, 895D.

54 Cane, 'Mens Rea in Tort Law', above n 29, 541. In a criminal context see John Gardner, above n 29, 91.

55 See *Johnson & Johnson Australia Pty Ltd v Sterling Pharmaceuticals Pty Ltd* (1991) 30 FCR 326; *Mayne Industries Pty Ltd v Advanced Engineering Group Pty Ltd* (2008) 166 FCR 312; *Australian Postal Corporation v Digital Post Australia Pty Ltd* (2013) 308 ALR 1.

56 See *Commonwealth Volunteers Protection Act 2003* (Cth) ss 6–7; *Civil Law (Wrongs) Act 2002* (ACT) ss 5, 8–9; *Civil Liability Act 2002* (NSW) ss 57, 61; *Personal Injuries (Liability and Damages) Act 2003* (NT) ss 7, 8; *Civil Liability Act 2003* (Qld) ss 26, 39; *Civil Liability Act 1936* (SA) s 74; *Volunteers Protection Act 2001* (SA) s 4; *Civil Liability Act 2002* (Tas) ss 35B, 47; *Wrongs Act 1958* (Vic) ss 31B, 37; *Civil Liability Act 2002* (WA) s 5AD*; Volunteers and Food and other Donors (Protection from Liability) Act 2002* (WA) ss 6–7.

57 See, eg, *Local Government Act 1993* (NSW) s 733.

58 See, eg, *Police Act 1990* (NSW) s 213; *Police Administration Act* (NT) ss 116G, 148B; *Police Powers and Responsibilities Act 2000* (Qld) ss 38, 122, 787; *Police Act 1998* (SA) s 65; *Police Service Act 2003* (Tas) s 84; *Victoria Police Act 2013* (Vic) s 74; *Police Act 1892* (WA) s 137.

59 See, eg, *Fire Brigades Act 1989* (NSW) s 78; *Fire and Emergency Act* (NT) s 47; *Fire and Emergency Services Act 1990* (Qld) ss 153B–C; *Fire and Emergency Services Act 2005* (SA) s 127; *Fire Service Act 1979* (Tas) s 121; *Country Fire Authority Act 1958* (Vic) s 18A; *Fire and Emergency Services Act 1998* (WA) s 37.

way to the operation of a specific statute. In articulating the nature of this connection, legislatures and courts have drawn an important distinction between two categories of defence based on the wording of the enacting provision. The first category of defence extends to acts done in good faith *pursuant to* statutory functions, whether expressed as a power, duty, authority or otherwise (see below Part IIIB).[61] Various words or phrases might be employed to indicate that a defence falls within this category, such as that the impugned act must be done 'in "pursuance", "execution" or "discharge" of some public duty or office', 'or in "carrying" some statute "into effect"'.[62] The second category of defence extends to acts done in good faith *for the purposes of* a particular statute (see below Part IIIC).

The choice of statutory language adopted may be important because courts will ordinarily assume that the legislature has 'chosen its words with complete precision, not intending that such [a protection], granted in the general interest but at the cost of individuals, should be carried further than a jealous interpretation will allow'.[63] Applying this general principle of construction, the circumstances in which a particular good faith defence applies are likely to differ according to whether the provision or provisions enacting that defence fall/s within the first category, the second category, or both categories.

B *Acts Done 'Pursuant to' Statutory Functions*

It is important to appreciate that, if a good faith defence is limited in terms to acts done *pursuant to* a particular statutory function, the defendant's impugned conduct need not be in strict accordance with that function for the defence to apply. Nor must the function in question actually be authorised.[64] According to Dixon J, such defences

> have always been construed as giving protection, not where the provisions of the statute have been followed, for then protection would be unnecessary, but where an illegality has been committed by a person honestly acting in the supposed course of the duties or authorities arising from the enactment …
>
> Clearly the purpose of a provision limiting or qualifying rights of action against [persons] … acting under a statute would not be fulfilled by an interpretation excluding from its operation cases arising from mistaking the law or failing to comply with the requirements of the law.[65]

Good faith defences are remarkable in this respect, the possibility of an honest but mistaken belief being central to the notion of good faith. In contrast,

---

60 See, eg, *Fisheries Management Act 1991* (Cth) s 90; *Local Government Act 1995* (WA) s 9.56; *Criminal Injuries Compensation Act 2003* (WA) s 66. Certain non-public office holders are also afforded limited protection: see, eg, *Australian Postal Corporation Act 1989* (Cth) s 90ZC.

61 See, eg, *Local Government Act 1993* (NSW) s 731; *Plant Protection Act 1989* (Qld) s 28; *Fire and Rescue Service Act 1990* (Qld) s 129(1).

62 *Webster v Lampard* (1993) 177 CLR 598, 605 (Mason CJ, Deane and Dawson JJ).

63 *Board of Fire Commissioners (NSW) v Ardouin* (1961) 109 CLR 105, 116 (Kitto J) ('*Ardouin*').

64 However, the statute in question must have been valid at the relevant time. See *Kable v New South Wales* (2012) 293 ALR 719.

65 *Little v Commonwealth* (1947) 75 CLR 94, 108, 111 (Dixon J). See also *Greenway v Hurd* (1792) 4 TR 553, 555; 100 ER 1171, 1172–3 (Lord Kenyon CJ); *Spooner v Juddow* (1850) 18 ER 734, 744 (Lord Campbell).

most statutory justifications (such as those that require the defendant to have acted 'without negligence') *do* exclude from their 'operation cases arising from mistaking the law', as they extend only to acts that are, in fact, 'directly or expressly authorised or required by the terms of the Act'.[66] This does not mean, however, that a defendant may escape liability if his or her impugned act was done in the performance of *any* actual or imagined statutory function, as the 'well defined approach to the construction of such provisions'[67] has been to limit their scope to 'the very thing, or an integral part of or step in the very thing',[68] which requires some special authorisation by statute to perform.[69] Thus, s 46 of the *Fire Brigades Act 1909* (NSW), which provided persons exercising powers under that Act with a defence in respect of 'any damage caused in the bona fide exercise of such powers', did not provide a Board of Fire Commissioners with a defence to an action in negligence in respect of injuries caused to an infant by a fire engine 'proceeding with all speed to the place of a fire'.[70] As Dixon CJ explained, driving a fire engine is a function of 'an ordinary character involving no invasion of private rights and requiring no special authority'.[71] Similarly, a Council that entered a private agreement to supply irrigation waters to a plaintiff, and supplied the water negligently, was unable to invoke a defence under s 19 of the *Water Administration Act 1986* (NSW).[72] In McHugh J's view, this defence did not 'apply to functions of an ordinary character performed by the respondent and … done pursuant to agreements with the consent of private citizens'.[73] In contrast, fire officers who negligently sprayed a chemical fire with water were entitled to a defence under s 129(1) of the *Fire and Rescue Service Act 1990* (Qld), as the application of water to a fire on private premises was a function that required special authority to perform.[74]

It follows that defences which extend to acts done *pursuant to* statutory functions (whether in good faith or in accordance with some other justificatory criteria) are limited 'primarily to the exercise of powers which of their nature will involve interferences with persons or property'.[75] As such, defences that fall within this category are most likely to defeat liability in trespass or, if an actual function is exercised without due care, in negligence.

---

66 *Colbran v Queensland* [2007] 2 Qd R 235, 246 [34] (Jerrard JA) ('*Colbran*'); *Hamcor Pty Ltd v Queensland* [2015] QCA 183 (2 October 2015) [45] (Gotterson JA, Atkinson and Mullins JJ agreeing).

67 *Colbran* [2007] 2 Qd R 235, 240 [5] (Williams JA).

68 *Ardouin* (1961) 109 CLR 105, 117 (Kitto J).

69 Unless, of course, the statutory provision in question specifically states otherwise. See, eg, *Mental Health Act 2014* (WA) s 583(2).

70 *Ardouin* (1961) 109 CLR 105, 108.

71 Ibid 110.

72 *Puntoriero v Water Administration Ministerial Corporation* (1999) 199 CLR 575 ('*Puntoriero*').

73 Ibid 588–9 [37].

74 *Hamcor Pty Ltd v Queensland* [2015] QCA 183 (2 October 2015) [40] (Gotterson JA).

75 *Ardouin* (1961) 109 CLR 105, 109 (Dixon CJ).

C *Acts Done 'For the Purposes of' a Statute*

In contrast, good faith defences that extend to acts done in good faith *for the purposes of* a particular statute are likely to be limited to acts that *do not* require some special authority to perform. In *Colbran*, Williams JA reviewed the authorities and concluded as follows:

> The pattern emerges that there is a distinction between an act which can only lawfully be done if done pursuant to an expressed power conferred by an Act, and an act done in furtherance of the purposes of the legislation which does not require the conferral of power in order for it to be done lawfully.[76]

In fact, none of the cases to which Williams J referred in his reasons concerned provisions that were limited in terms to acts done in good faith *for the purposes of* a particular statute. Nevertheless, and with respect, his Honour is surely correct. If a defence framed in this way were interpreted so as to impliedly authorise conduct that would otherwise interfere, by its very nature, with individual rights, the breadth of the protection afforded would be staggering. Almost any tortious interference with protected rights and interests might conceivably be justified on this basis, provided the defendant acted for a good reason. In the absence of clear language to this effect, it is highly doubtful that parliament would ever intend to interfere with individual rights in such an indiscriminate manner. That being so, good faith defences that extend to acts done *for the purposes of* a particular statute are unlikely to defeat liability for trespass or other torts that are, in the absence of authority, inherently unlawful. However, such provisions might still defeat liability for otherwise tortious wrongdoing that takes place in the course of consensual dealings, such as performing functions on land with consent,[77] or entering into or performing contractual obligations.[78]

One final observation that should be made at this stage is that good faith may operate as a sole liability-defeating criterion, or it may form one component of a complex liability-defeating criterion. An example of the latter can be seen in pt 5 of the *Law Reform Act 1995* (Qld), which protects doctors, nurses and other medical professionals in the delivery of medical care, provided that they acted in 'good faith' and without 'gross negligence'. The function of good faith as one component of a complex liability-defeating criterion is examined in Part VI below.

D *Mixed Motives*

Just as the drafting and construction of a good faith defence might restrict the acts, or perhaps omissions, to which it notionally extends, so too might variations in drafting and construction determine whether a good faith defence extends to a defendant who holds mixed motives for acting or, perhaps, failing to act. Suppose, for example, that a police officer (D) were to detain a person (P) in the honest but mistaken belief that she is authorised to do so by virtue of an authority granted to

---

[76] [2007] 2 Qd R 235, 241 [10]. See, to similar effect, the reasons of Jerrard JA and Philippides J: at 246 [34], 252 [55].

[77] See, eg, *Colbran* [2007] 2 Qd R 235.

[78] See, eg, *Puntoriero* (1999) 199 CLR 575.

her by a statute providing for the detention of intoxicated persons, and that D is motivated to exercise this supposed power by a desire to fulfil her statutory duties (a good motive). Suppose, further, that an express object of this statute is to enhance public safety and wellbeing. If D is also motivated to detain P because she knows him to be an acute claustrophobic, and because she derives wicked satisfaction from witnessing his distress in a prison cell (a bad motive), ought D to benefit, nevertheless, from the statute's protection?

If the meaning of good faith is interpreted such that D's motives are only considered 'relevant' insofar as they relate in some way to the performance of her statutory functions, then the answer to this question might be yes, because D's bad motive does not negate the conclusion that she was also and relevantly motivated to act in good faith to this statutory end. Such an approach might lead to appropriate outcomes in certain instances, but (as this example arguably demonstrates) it might run counter to the object of the enacting statute in others.

A second approach is to identify a defendant's 'predominant motive' for acting,[79] and to deny protection 'if it appears that the defendant was, in fact, "actuated solely or predominantly by a wrong or indirect motive"'.[80] Were this approach adopted, D may or may not be entitled to the statute's protection, depending on whether her act is 'predominantly' attributable to her good motive or to her bad motive. One difficulty with this approach is that, as Gardner has explained, it is 'anybody's guess' whether one of many 'sometimes conflicting motives is more prominent than any other'.[81] To similar effect, Bennett has concluded that 'it is meaningless to ask a court to select between these purposes or, if they both exist, to weigh which is the dominant purpose or what proportion should be attributed to the one or the other'.[82] A predominant-motive approach also does nothing to solve the problem of determining *which* motives ought properly to fall within the scope of the protection afforded — that is, which motives are *relevant* — it merely assists in the allocation of legal significance to different motives when one or more of those motives *is* deemed to be relevant.

A third approach is to classify good faith as an 'excluder' term. The term 'excluder' is borrowed from the contract law literature, where it is expounded by Summers as follows:

> [I]n cases of doubt, a lawyer will determine more accurately what the judge means by using the phrase 'good faith' if he does not ask what good faith itself means, but rather asks: What, in the actual or hypothetical situation, does the judge intend to rule out by his use of this phrase? Once the relevant form of bad faith is thus identified, the lawyer can, if he wishes, assign a specific meaning to good faith by formulating an 'opposite' for the species of bad faith being ruled out. … In contract law, taken as a whole, good faith is

---

79 Cane, 'Mens Rea in Tort Law', above n 29, 541.

80 *Webster v Lampard* (1993) 177 CLR 598, 606 (Mason CJ, Deane and Dawson JJ), citing *Trobridge v Hardy* (1955) 94 CLR 147, 162 (Kitto J).

81 Martin R Gardner, above n 29, 715. Gardner is speaking here of competing motives in a criminal context, but his observations apply mutatis mutandis to tort law.

82 Bennett, above n 29, 6. Bennett's comments are related to good faith as it bears upon the so-called fiduciary obligations of company directors, but his observations clearly have general application.

> an 'excluder'. It is a phrase without general meaning (or meanings) of its own and serves to exclude a wide range of heterogeneous forms of bad faith.[83]

If good faith is interpreted as an excluder term, then D may or may not be entitled to the statute's protection, depending on whether or not, properly construed, the deriving of satisfaction from the suffering of others through imprisonment (or some similar construction of D's motive) is one of the 'heterogeneous forms of bad faith' that the protective provision seeks to exclude. There do not appear to be any instances of this approach being applied to a good faith defence, presumably because those defences typically emphasise the connection between a defendant's motives and the performance of a particular statutory function, or the furtherance of a particular statutory purpose — both of which must be assumed to be 'good' things — as opposed to the forms of bad faith that the defence seeks to exclude. There might, nevertheless, be circumstances in which this approach has some utility, such as when the defendant lacks any relevant good motive — of which, more shortly.

It will be noted that all three of the interpretive approaches identified in the preceding analysis admit of competing motives. However, a court might also adopt a fourth, quite different interpretive approach, which rejects competing motives. That is, a court might find good faith — in its particular statutory context — to be incompatible with *any* form of bad faith.[84] Clearly, were this approach adopted in our scenario, D would not be entitled to the statute's protection, as her act was motivated, in part, by bad faith. However, no examples of such an approach being applied appear in practice.

E *Absence of Motive to Act Pursuant to a Statute*

What, though, if a defendant has no motive to act pursuant to a particular statutory end, but is motivated to achieve some other end or ends? For example, suppose that the preceding scenario is varied slightly, so that D *is* authorised by statute to detain P but that D is not motivated to act by a desire to fulfil this or any other statutory function. If D detains P in such circumstances, but does so negligently causing physical injury to P, ought she to benefit from the statute's protection? The answer in this scenario will depend on the nature of D's *actual* motive or motives for acting. Clearly, if D is only motivated to act in bad faith to achieve some ulterior end — if, for example, she merely wishes to cause P suffering — then the defence cannot apply. No difficulty arises in this scenario because there are no competing motives to choose between and D was not motivated in any way to perform her statutory duties.

---

[83] Robert S Summers, '"Good Faith" in General Contract Law and the Sales Provisions of the Uniform Commercial Code' (1968) 54(2) *Virginia Law Review* 195, 200–1.

[84] According to Finnis, for example, one's 'conduct will be right only if *both* one's means *and* one's end(s) are right; … *all* the aspects of one's act must be rightful for the act to be right': John Finnis, 'Intention in Tort Law' in David G Owen (ed), *Philosophical Foundations of Tort Law* (Oxford University Press, 1995) 229, 238 (emphasis in original). Cf Peter Cane, *The Anatomy of Tort Law* (Hart Publishing, 1997) 35.

However, if D is motivated to act for various reasons, some of which are good and some of which are bad, but none of which relate to the pursuance of her statutory functions, then the interpretive approach adopted might again prove determinative. Clearly, if good faith were construed as being incompatible with any form of bad faith in this scenario, then the defence could not apply. Nor could the defence apply if motives are construed as being relevant only insofar they relate to acts done pursuant to D's statutory functions. On this view, the fact that D inadvertently exercised an authority (or would have done but for her negligence) is neither here nor there. This being so, a more appropriate approach might be to interpret good faith as an excluder term. Were good faith interpreted in this way, D may or may not be entitled to the statute's protection, depending on whether or not her bad motive is of a kind that the defence seeks to exclude — a question more apt to be answered by reference to the general purpose of the legislation than a literal reading of the provision itself.

IV The Relationship between Fault Criteria and Justificatory Criteria

A *Limitations Arising by Virtue of the Justificatory Criteria Employed*

The preceding Part demonstrates that the operation of good faith defences, and other statutory justifications, is ordinarily limited by variations in the drafting and construction of good faith defences and by the interpretive approach adopted when a defendant holds mixed motives or beliefs, or lacks certain motives or beliefs. However, statutory justifications are also subject to various logical and normative limitations that arise by virtue of the specific justificatory criteria that they comprise ('in good faith', 'without negligence', 'without recklessness', and so forth). These limitations govern the range of torts in respect of which those defences might apply because, in order to be effective, a justificatory criterion must identify a narrower group of wrongdoers than the fault criterion of the cause of action against which it is deployed. In order to illustrate this proposition, it is necessary to begin by unpacking the concept of 'fault' as it operates in an inculpatory (liability-establishing) context.

B *Fault Criteria*

In tort law, fault ordinarily refers to intention or negligence.[85] However, some torts (such as the tort of deceit)[86] also comprise elements of recklessness; some torts (such as the tort of misfeasance in public office or malicious prosecution) may require malice;[87] and, in some instances, liability may be strict. Cane has explained that:

---

[85] Cane, *Responsibility in Law and Morality*, above n 43, 37.

[86] *Derry v Peek* (1889) 14 App Cas 337; *Tresize v National Australia Bank Ltd* (2005) 220 ALR 706.

[87] *Northern Territory v Mengel* (1995) 185 CLR 307, 345–6 (Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ); *Three Rivers District Council* [2003] 2 AC 1, 192 (Lord Steyn), 229–30 (Lord Hobhouse), 235 (Lord Millett), 267 (Lord Hutton); *Odhavji Estate v Woodhouse* [2003] 3 SCR 263.

> Legal criteria of fault have two types of components: mental elements and standards of conduct. Legal fault consists either of failure to comply with a specified standard of conduct, or of failure to comply with a specific standard of conduct accompanied by a specified state of mind. … The mental elements of legal fault criteria are 'intention', 'recklessness', 'knowledge/belief' and 'malice'. … Strict legal liability is liability regardless of fault, that is, liability regardless of whether the defendant engaged in conduct that breached a legally specified standard of conduct, and regardless of whether the conduct was accompanied by any particular mental state. … Standards of conduct are concerned with the quality of conduct, that is, with whether for instance, physical harm was caused *negligently* or *recklessly* or *intentionally*.[88]

According to Cane, negligence is a failure to exercise reasonable care in respect of a foreseeable risk, irrespective of the existence of any particular state of mind,[89] and intention refers to a specific mental state that is inferred from an agent's conduct.[90] Intention may relate to the conduct itself (for example, intentionally interfering with another's exclusive possession of land), to the outcome of that conduct (for example, intentionally causing loss by unlawful means),[91] or both.[92] When intention relates to outcome, it might also be described as a defendant's *reason* for acting, although this reason need not necessarily coincide with his or her motives.[93] That is to say, a defendant might intend one outcome, yet be motivated to act for some other reason.

Recklessness and gross negligence can be more controversial to define, and definitions may differ between the civil and criminal law.[94] For present purposes, however, gross negligence is defined as unreasonable conduct that creates (or ignores) an obvious risk (as opposed to a merely foreseeable risk),[95] regardless of whether or not the defendant actually knew of that risk. In contrast, recklessness is defined as deliberate conduct undertaken with 'conscious disregard' for a substantial risk that is actually known to the agent.[96] So defined, the salient distinction between gross negligence and recklessness is that the latter requires the drawing of an inference as to a particular state of mind (actual knowledge), whereas the former does not. Recklessness may be distinguished from intention on the basis that it does not describe one of a person's reasons for acting, but rather a mental state from which an inference as to reasons need not be drawn.

---

88 Cane, *Responsibility in Law and Morality*, above n 43, 78, 79, 82, 83 (emphasis in original).

89 Ibid 79. Of course, negligence may be accompanied by mental states such as 'carelessness'. See David Hodgson, 'Book Review: *Responsibility in Law and Morality* by Peter Cane' (2002) 25(3) *University of New South Wales Law Journal* 904, 906–7. However, carelessness does not form a definitional criterion of 'negligence'.

90 Cane, *Responsibility in Law and Morality*, above n 43, 46–8.

91 *OBG Ltd v Allan* [2008] 1 AC 1.

92 Cane, *Responsibility in Law and Morality*, above n 43, 79.

93 Ibid 82. See also Jim Evans, 'Choice and Responsibility' (2002) 27 *Australian Journal of Legal Philosophy* 97, 106.

94 Cane, *Responsibility in Law and Morality*, above n 43, 80.

95 Ibid.

96 *Imobilari Pty Ltd v Opes Prime Stockbroking Ltd* (2008) 252 ALR 41, 50 [28] (Finkelstein J). See also *Derry v Peek* (1889) 14 App Cas 337; *Pendlebury v Colonial Mutual Life Assurance Society Ltd* (1912) 13 CLR 676; Cane, *Responsibility in Law and Morality*, above n 43, 80; Evans, above n 93, 107.

C *Justificatory Criteria*

Justificatory criteria also consist of standards of conduct or standards of conduct accompanied by a specified state of mind. However, as parliament is free to choose any descriptive label that it sees fit, there is no obvious limit to the range of justificatory criteria that might be identified. For example, parliament might introduce a justificatory rule that exculpates those who exercise 'utmost care'. Conduct that satisfies this standard would, presumably, satisfy the definition of 'reasonable care' and most other justificatory liability criteria. It is also possible, and not uncommon, for justificatory criteria to be defined as the *absence* of certain fault criteria.[97] Thus, a defence might apply only if a defendant acted 'without malice' or without 'bad faith'.[98] Likewise, certain justificatory criteria might be framed in inculpatory terms. For example, a defendant might be held liable for acting 'without good faith'.[99] However, and crucially, a justificatory criterion framed as the absence of a particular fault criterion (or vice versa) imposes *precisely the same* legal standard as its counterpart. For example, a justificatory criterion that requires a defendant to prove that he or she acted 'without recklessness' imposes exactly the same legal standard as a fault criterion that requires a plaintiff to prove that a defendant acted 'with recklessness'. Putting aside difficulties of proof, both criteria limit liability to a specific group of wrongdoers — namely, those who acted 'recklessly'. The inclusion of the preposition 'without' might indicate where the onus of proof should lie,[100] but it does not alter the standard imposed.

D *Fault Criteria and Justificatory Criteria May Be Nested*

Since all justificatory criteria and fault criteria measure a defendant's actual conduct (or, perhaps, beliefs) against some specified legal standard, it follows that all such standards must operate and interact according to a common set of principles if the law is to function coherently. To this end, Cane's observation that legal fault criteria are 'nested' provides a useful starting point.[101] Cane illuminates the relationship between fault criteria in terms of the *evidentiary burden* that the law places upon plaintiffs to establish them. For example, '[i]t may be easier', Cane tells us, 'to prove that the person's conduct was reckless or negligent even if, in fact, it was intentional.'[102] Fault criteria are also nested in purely *definitional* terms, however, since conduct that *does* satisfy the definition of intentional conduct *will*, by logical necessity, satisfy the definition of reckless conduct, negligent conduct, conduct that attracts strict liability, and so forth. This must be so, since a person could not form intent without actual knowledge that their conduct posed a substantial risk of the event in question occurring (recklessness);

---

97 *Vines* (1955) 91 CLR 512, 519 (Dixon CJ, McTiernan, Webb, Fullagar and Kitto JJ).

98 See, eg, *Fire Service Act 1979* (Tas) s 121.

99 However, because torts are typically sensitive to a limited suite of liability criteria, and because parliament is less likely to modify the definitional elements of torts than it is to introduce novel defences, this is less likely to occur in practice.

100 *Vines* (1955) 91 CLR 512, 519 (Dixon CJ, McTiernan, Webb, Fullagar and Kitto JJ).

101 Cane, *Responsibility in Law and Morality*, above n 43, 88.

102 Ibid.

if a person had actual knowledge of a risk, then the materialisation of that risk must have been obvious (thus ignoring it would be grossly negligent); and, if a risk was objectively obvious, then it must also have been foreseeable (thus failing to exercise reasonable care in respect of it would be negligent).

Justificatory criteria may also be nested, in both of the senses described: they may be nested in evidentiary terms, in that it may be easier for a defendant to prove certain justificatory criteria (such as acting without recklessness), than it is to prove certain other justificatory criteria (such as acting reasonably), and so forth; and they may be nested in definitional terms, in that conduct that satisfies the definition of certain justificatory criteria (such as acting reasonably) will also satisfy the definition of certain other justificatory criteria (such as acting without recklessness), and so forth. It will be noted, however, that whereas fault criteria are nested around some minimum standard of conduct, justificatory criteria are nested around a standard of conduct accompanied by a specified state of mind (such as malice).

Justificatory criteria might also be nested with fault criteria, in that the satisfaction of a particular fault criterion (such as recklessness) might preclude the satisfaction of certain justificatory criteria (such as 'without recklessness' or 'without negligence'), and vice versa. It might also be easier to prove certain justificatory criteria than it is to disprove certain fault criteria.[103] For example, if a plaintiff were required to prove that certain conduct was done recklessly, he or she would also be required to prove (implicitly) that the same conduct satisfies the definition of gross negligence and negligence. In contrast, if a defendant were required to prove that certain conduct was done without recklessness, he or she need merely demonstrate that it lacked this particular quality — it would be unnecessary to show that this conduct was objectively reasonable. Indeed, a defendant might concede that he or she acted in manner that was grossly negligent or negligent. This observation is of particular importance in the context of statutory justifications that require defendants to have acted without negligence, without gross negligence or without recklessness, of which more in Part VI.

For the preceding reasons, it is important to recognise that, in some circumstances, justificatory criteria and fault criteria are nested. However, this observation is of limited utility in respect of justificatory criteria that describe motives, such as good faith. This is because, as explained in Part III, a person might hold mixed motivations, or he or she might hold no motive whatsoever as to certain ends. There is no logical reason, therefore, why a person who acted without good faith as to one end must necessarily have intended some other end, or been reckless, grossly negligent or negligent as to that end occurring. Nor does the fact that a person was motivated to act for a good reason necessarily mean that he or she did not intend to engage in the impugned conduct.

It is also possible that a justificatory criterion might be directed to the quality of conduct giving rise to a mistaken belief, as opposed to the quality of the defendant's impugned conduct. For example, a council surveyor might be said to have acted 'without negligence' in making appropriate enquiries, notwithstanding that he was negligent in formulating the advice ultimately provided. In this example,

---

[103] Ibid. See also *Barrett* (1994) 63 SASR 208, 209 (Bollen J), 210 (Millhouse J), 221–2 (Duggan J).

the justificatory criterion and fault criterion are not nested as they describe the quality of different conduct. This possibility is considered further in Part VIE.

E *Justificatory Criteria Narrow the 'Class' of Wrongdoer*

Since the legal standard imposed by a particular criterion of liability — although not necessarily the difficulty of proving or disproving that standard — is the same regardless of whether that criterion is expressed in inculpatory or exculpatory terms, justificatory criteria and fault criteria may be arranged side-by-side on a single continuum, one end of which is occupied by criteria that identify broader classes of wrongdoers (such as those who fail to act with reasonable care), and the other end of which is occupied by criteria that identify narrower classes of wrongdoers (such as those who act maliciously in one or other respect). The precise order in which these criteria are arranged will depend upon how each criterion is defined in the circumstances. That said, liability criteria at the broader end of this continuum (negligence, gross negligence, and so forth) are typically concerned with the manner in which the defendant carried out the impugned act itself (the 'means'), whereas liability criteria at the narrower end of this continuum (malice, good faith, dishonesty, and so forth) ordinarily describe a person's motives for doing or omitting to do a certain act (the 'ends').

If a justificatory criterion describes the quality of a defendant's impugned conduct, then to be effective it must limit liability to a *narrower* class of wrongdoers than the fault criterion of the cause of action with which it competes. Deployed against an action in negligence, for example, a defence that defeats liability only if the impugned act is done 'without negligence' would simply replicate the breach enquiry,[104] whereas a defence that defeats liability for acts done 'without malice' might be effective even if the defendant acted unreasonably ('I acted negligently, but I did so without malice').[105] This rule might be effective because the range of wrongdoers who aim to achieve malicious ends is narrower than the range of wrongdoers whose means are merely negligent.

Applying the same reasoning, a statutory justification might provide an answer to most trespass actions, regardless of how broad or narrow the justificatory criteria imposed, it being sufficient for liability in battery, false imprisonment, trespass to land and trespass to goods that the defendant deliberately and voluntarily did the impugned act.[106] In such instances the introduction of any justificatory criteria might be effective, as there is, in effect, no fault criteria do defeat. Thus, a bank that unwittingly collected cheques and credited the proceeds to 'bogus accounts' operated by a fraudulent employee — conduct that would have been sufficient at common law to establish liability in the tort of conversion — was

---

104 *Colbran* [2007] 2 Qd R 235, 245 [30] (Jerrard JA).

105 See, to this effect, the comments of Mason CJ, Deane and Dawson JJ in *Webster v Lampard* (1993) 177 CLR 598, 605–6.

106 See, eg, Kit Barker et al, *The Law of Torts in Australia* (Oxford University Press, 5th ed, 2012) 37–41, 48–9, 100, 165–7, 231–2. Assault may be different from other trespass actions as the defendant must have intended 'the consequence that the plaintiff should reasonably apprehend an imminent battery': at 46.

not liable as they had received the funds 'without negligence', in accordance with s 95(1) of the *Cheques and Payment Orders Act 1986* (NSW).[107]

In contrast, the utility of a statutory justification is more limited in the context of torts that require proof of intention as to outcome, since the class of potential wrongdoers — and therefore the range of possible justificatory criteria — is already comparatively narrow, and the likelihood that parliament would seek to further restrict a plaintiff's remedy (such as by narrowing the range of wrongdoers to those who act maliciously) is negligible.

If a justificatory criterion describes the quality of conduct giving rise to a mistaken belief, then it may be effective regardless of the cause of action against which it is deployed. For example, a rule that defeats liability if a council surveyor acts 'without negligence' in making enquiries might be effective as an answer to negligence, because the class of persons who make reasonable enquiries yet act unreasonably in the light of those enquiries is narrower than the class of persons who act unreasonably and who do not make reasonable enquiries. It follows that, whereas a common law justificatory defence (such as self-defence or defence of property) is not ordinarily available as an answer to negligent conduct,[108] a statutory justification might be effective if it describes the quality of conduct giving rise to a defendant's mistaken beliefs, even if the standard imposed is one of objective reasonableness.

V Good Faith Defences in Context

It remains to be seen how the conclusions reached in the preceding Parts of this article bear upon the operation of good faith defences specifically, and the implications of those conclusions, if any, for justificatory defences that adopt good faith as one element of a complex justificatory criterion. This Part addresses the first of these questions. How, then, and in which circumstances, might a good faith defence be effective as a means of defeating liability for intentional outcome-based torts, intentional conduct-based torts (trespass), and negligence?

A *Good Faith as an Answer to Intentional Outcome-based Torts*

In theory, the principles outlined in Part IV govern the application of good faith defences vis-à-vis all torts that require proof of intention or recklessness as to outcome, or proof of a bad motive, such as certain economic torts,[109] the tort of misfeasance in public office, the tort of deceit, and the tort of intentional infliction of emotional distress. That is to say, for a good faith defence to be effective as an answer to these torts, the justificatory criterion must confine liability to a narrower class of wrongdoer than those who acted 'recklessly', 'intentionally' or 'maliciously' (such as those who, in the relevant respect, acted honestly).

---

[107] *Mercedes-Benz (NSW) Pty Ltd v National Mutual Royal Savings Bank Ltd* (Unreported, New South Wales Court of Appeal, Priestley, Clarke and Sheller JJA, 1 April 1996) [30]–[35] (Sheller JA).

[108] Goudkamp, *Tort Law Defences*, above n 6, 9.

[109] Namely, the torts of intentional interference with contractual relations, intimidation and conspiracy.

It is certainly possible to conceive of scenarios in which a good faith defence might operate when a defendant *intentionally* causes harm. Suppose, for example, that a procurement officer employed by a local council were to intentionally interfere with the contractual relations of a third party (P), by entering into an exclusive contract with P's supplier (S) for the provision of essential equipment to the council, in full knowledge of the existence of the contract between S and P. Suppose also that the local council is administered by a statute that states that council employees are not liable for any 'act done in good faith for the purposes of' that statute. Since entering into a contract is a function that does not require any special authority to perform, D might argue that he acted in good faith for the purposes of the statute by ensuring the ongoing operation of essential council services.

In practice, however, normative limitations all but preclude the operation of a good faith defence as an answer to most intentional (outcome-based) torts. As McDonald observes,

> the range of defences to a claim will be influenced by the fault element of the cause of action. *Deliberate* conduct which invades another's rights will require strong grounds establishing a weightier competing interest or some other high level of justification to excuse it. Careless conduct on the other hand may be more easily tempered by the carelessness of others or by the force of circumstances.[110]

Certainly, it is highly unlikely that good faith (on any sensible definition of the term) could be inferred, or the legislative purpose of such a protection served, in circumstances where a defendant *maliciously* brought about a harmful or proscribed outcome. Thus, conduct capable of founding an action for malicious prosecution has been said to be inconsistent with the concept of good faith adopted by s 52 of the *Police Regulation Act 1898* (Tas),[111] and it seems axiomatic that a good faith defence could never exculpate liability for the tort of misfeasance in public office.[112] As Brennan J explained in *Northern Territory v Mengel*,

> the mental element [of this tort] is satisfied when the public officer engages in the impugned conduct with the intention of inflicting injury or with knowledge that there is no power to engage in that conduct and that that conduct is calculated to produce injury. These are states of mind which are inconsistent with an honest attempt by a public officer to perform the functions of the office. Another state of mind which is inconsistent with an honest attempt to perform the functions of a public office is reckless indifference as to the availability of power to support the impugned conduct and as to the injury which the impugned conduct is calculated to produce.[113]

As this extract reveals, few circumstances are likely to exist where conduct that is reckless might satisfy the definition of good faith. Recklessness, although

---

[110] Barbara McDonald, 'Privacy Claims: Transformation, Fault, and the Public Interest Defence' in Andrew Dyson, James Goudkamp and Frederick Wilmot-Smith (eds), *Defences in Tort* (Hart Publishing, 2015) 289, 299 (emphasis in original).

[111] *Louis v A-G (Tas)* [1997] TASSC 8 (24 February 1997) [64] (Crawford J).

[112] *Holloway v Tasmania* (2005) 15 Tas R 127, 136, 139 (Evans J); *Holloway v Tasmania* (2006) 15 Tas R 127, 141 (Blow J).

[113] (1995) 185 CLR 307, 357. See also *Sanders v Snell* (1998) 196 CLR 329, 346–7 (Gleeson CJ, Gaudron, Kirby and Hayne JJ).

unconcerned with reasons, nevertheless describes a mental state characterised by indifference to certain outcomes, and a person who acts in such a way can hardly claim to have acted for a legitimate purpose. Indeed, and perversely, conduct that is reckless might actually be *less* compatible with good faith than conduct that is intentional. This is because intentional conduct is targeted conduct, whereas reckless conduct is indiscriminate as to its consequences, and therefore generally precludes a conclusion that conduct was done in good faith toward a broader range of ends. As such, proof of good faith is unlikely to defeat liability in the tort of deceit.

B *Good Faith as an Answer to Intentional Conduct-based Torts (Trespass)*

In contrast, certain good faith defences (namely, those that extend to acts done pursuant to statutory functions) are well suited to defeating liability for trespass, whether to land, property or person (except, perhaps, assault).[114] This is because (1) trespassory acts require special authorisation to perform, and (2) a person's beliefs or motives are irrelevant in trespass.[115] In most instances, trespassory conduct is 'intentional' if the interfering act (as opposed to the definitional outcome of that act) is voluntary and deliberate.[116] Thus, ordinarily the legal effect of a good faith defence as an answer to trespass is to narrow the class of wrongdoers who may be liable from those who deliberately and voluntarily did an act (such as entering land), to those whose reasons for doing that act do not satisfy the relevant definition of good faith.

Of course, the practical utility of a good faith defence as an answer to trespass is limited insofar as a defendant who acts in good faith might also satisfy the requirements of some other justificatory defence at common law (such as public or private necessity,[117] self-defence, defence of others, or defence of property). There are, nevertheless, numerous circumstances in which a good faith defence might operate, but a justificatory defence at common law would not. The most obvious circumstances include cases of mistaken-fact trespass;[118] cases in which the belief that impelled the wrongful act, though formed in good faith, was either unreasonable or disproportionate to the threatened or imminent harm;[119] and cases in which the defendant believed in good faith that their trespass was rendered lawful by some statutory power or authority.

---

[114] See Barker et al, above n 106, 37–41, 46, 48–9, 100, 165–7, 231–2.

[115] See, eg, *R v Governor of Brockhill Prison; Ex parte Evans (No 2)* [2001] 2 AC 19, 42 (Lord Hobhouse).

[116] See Barker et al, above n 106, 37–41, 46, 48–9, 100, 165–7, 231–2.

[117] It is debatable whether private necessity is actually a defence in tort law. See, eg, John C P Goldberg, 'Tort Law's Missing Excuses' in Andrew Dyson, James Goudkamp and Frederick Wilmot-Smith (eds), *Defences in Tort* (Hart Publishing, 2015) 53, 59–63.

[118] For example, a good faith defence might be available, but a justificatory defence at common law could not, if a volunteer Park Ranger were to enter upon private land in the honest but mistaken belief that it was government land.

[119] For example, a good faith defence might be available, but a plea of defence of another would not, if a Good Samaritan were to witness a farmer burning crops on land and to enter upon that land in the honest but unreasonable belief that the fire constituted a threat to the farmer's life.

An example of the final scenario can be seen in *Rumble v Liverpool Plains Shire Council*.[120] In that case, the owners of a junk yard sued their local council after council officers entered their land and removed various cars and car parts. The officers entered the land in the mistaken belief that they were authorised to do so by certain orders issued under s 121(1)(b) of the *Environmental Planning and Assessment Act 1979* (NSW). In fact, the orders were invalid. The council conceded trespass, but argued successfully that it (and its officers) were immune from liability by virtue of s 731 of the *Local Government Act 1993* (NSW), on the basis that they had acted 'in good faith for the purpose of executing [a function under] this or any other Act'.

C *Good Faith as an Answer to Negligence*

If the conclusions reached in Part III are correct, then a good faith defence might provide an answer to negligence in two scenarios: (1) if the defence extends to acts done pursuant to some actual or purported function and a defendant exercises that function negligently; or (2) if the defence extends to acts done for the purposes of a statute and the defendant negligently performs some function to that end, that function being one that does not require special authority to perform. Since good faith ordinarily denotes a subjective mind state, and is in any event less demanding than objective reasonableness,[121] the effect of a good faith defence in either scenario is to narrow the class of potential wrongdoers from those whose conduct was objectively unreasonable to those whose reasons for doing the negligent act do not satisfy the relevant definition of good faith. The same point may be expressed by saying that, as an answer to negligence, good faith defences meet inculpatory 'means' with exculpatory 'ends'.

This proposition is most clearly demonstrated when good faith is interpreted in terms synonymous with honesty. Thus, when a New South Wales Road Traffic Authority ('RTA') inspector in charge of a weigh station negligently instructed the driver of a truck to reconfigure the position of an excavator on his vehicle, subsequent to which the driver of the truck recklessly damaged a bridge under the RTA's control while attempting to drive beneath it, the inspector (and thus the RTA and the State) were not jointly liable by virtue of s 234 of the *Roads Act 1993* (NSW).[122] At the relevant time, s 234 stated that neither 'the Crown nor any other person is liable to the driver of a vehicle or to any other person for any loss or damage arising from the exercise or purported exercise in good faith of a power conferred by this division'. Justice Price explained his reasoning as follows:

> The insurers submitted that … [the inspector's] actions were so unreasonable as not to be an exercise of good faith. I reject that submission. The evidence in this case does not permit a finding that [the inspector] was not acting in good faith. He made an honest attempt to deal with the overload but was imprudent in failing to observe the increase in height … In my opinion, s 234

---

120 [2012] NSWDC 95 (5 July 2012).

121 See above Part IIA.

122 *Roads and Traffic Authority of New South Wales v Barrie Toepfer Earthmoving and Land Management Pty Ltd (No 7)* [2014] NSWSC 1188 (28 August 2014).

> protects the RTA and the State from liability, because even though [the inspector] acted negligently, his acts were done in good faith.[123]

Even if good faith is interpreted as meaning something *more* than just honesty, however, proof thereof will still defeat liability for negligence. This point is well demonstrated by a series of cases in which good faith has been interpreted so as to require proof that a 'real attempt' or a 'genuine attempt' was made to fulfil certain statutory functions.

In *Mid Density*,[124] the appellant, a property developer, brought an action against Rockdale Council on the basis that it had failed to 'read and give close attention to … two flood studies' prior to issuing the appellant with certificates under s 149 of the *Environmental Planning and Assessment Act 1979* (NSW). Annexures to the certificates made no mention of the fact that the land was at risk of flooding or tidal inundation, despite the fact that this information was readily available at the relevant time. In reliance on these certificates, the appellant purchased the land for redevelopment. Planning permission was subsequently granted. However, as a condition of the permission the Council required that the floor level be raised above a minimum height in accordance with a newly enacted flood policy. In the result, the redevelopment became unprofitable. The Council argued that it was not liable for the plaintiff's loss by virtue of s 582A of the *Local Government Act 1919* (NSW),[125] the relevant portions of which stated that a council does not incur any liability for advice furnished in good faith, or for things done or omitted to be done in good faith, in respect of 'flood liable land'. Since the functions in question were specifically identified as attracting the protection of s 582A, no question arose as to whether providing such advice was something that required special authority to perform. However, the Full Federal Court held that, in this particular context, 'good faith' required more than mere honesty. The Council was liable as it had made no attempt whatsoever to have recourse to the relevant information:

> A council is reasonably to be expected to respond to an application for information of a character of the obvious significance of that sought here by recourse to its records. If the council represents that it has done so ('The above information has been taken from the Council's Records …') then it still may have been acting in 'good faith' if a real attempt has been made, even though an error was made in the inspection or the results of the inspection were inaccurately represented in the certificate which is issued. … The statutory concept of 'good faith' with which the legislation in this case is concerned calls for more than honest ineptitude. There must be a real attempt by the authority to answer the request for information at least by recourse to the materials available to the authority. In this case there was a failure to meet that standard.[126]

The Court's judgment yields no clear answer as to whether the standard identified — a 'real attempt' — is objective or subjective in nature. It might be argued that this standard imports 'compliance with objective standards such as

---

123 Ibid [202], [206].
124 (1993) 44 FCR 290 (Gummow, Hill and Drummond JJ).
125 This provision is now substantially restated in s 733(1) of the *Local Government Act 1993* (NSW).
126 Ibid 299–300 (emphasis added).

advertence to the purpose to which the power or function was exercised',[127] and that good faith in this specific statutory context is therefore objective in nature. Alternatively, it might be argued that a 'real attempt' denotes a subjective mind state, proof of which involves the drawing of an inference as to a defendant's reasons for acting (what he or she actually attempted to achieve). On this view, good faith might be evidenced by proof of compliance with objective criteria, but good faith remains essentially subjective in nature. On either interpretation, though — and crucially — the standard imposed limits liability to a class of wrongdoer that is narrower than those who failed to exercise reasonable care, yet broader than those who merely acted 'honestly'.

Similar interpretations of good faith were adopted in *Barrett*[128] and *South Australia v Clark*.[129] Both of those cases arose out of the purchase by the State Bank of South Australia of the Oceanic Capital Corporation for a price that far exceeded its actual value. At the relevant time, Barrett and his co-defendants were directors of the Bank, and Clark was the Bank's managing director and chief executive officer. In addition to various breaches of fiduciary duty, the directors were found liable in negligence for failing to obtain a satisfactory independent valuation of Oceanic prior to purchase. The directors argued that they were protected against liability in this respect by s 29(1) of the *State Bank of South Australia Act 1983* (SA), which provided as follows:

> (1) No liability attaches to a Director or other officer of the Bank for an act or omission done or made, in good faith, and in carrying out, or purporting to carry out, the duties of his office.

All of the judges agreed that good faith for the purposes of s 29 required something more than honesty.[130] Again, though, no consensus emerges from the judgments as to whether the standard imposed is objective or subjective in nature. In *Barrett*, Bollen J held that the protection provided 'does not extend to cases of gross negligence or to cases where there was no real attempt by a director to fulfil the duty of care and diligence imposed on him by his position'.[131] In *Clark*, Perry J 'eschewed reliance upon the label "gross negligence"' as a proxy for lack of good faith, but concluded, nevertheless,

> that there will be cases, of which the *Mid Density* case is an example, where the failure to discharge the duty of care required of the director in question is of such a nature that it could not be said that the director is acting in 'good faith'. If it is necessary to formulate a test or particular form of words, I would prefer to say that such a circumstance will arise where the director has failed to make a *genuine attempt* to answer to the standard of care required of him or her. Gross negligence will normally connote a breach of an objective standard, but there might, nonetheless, be a *subjectively genuine attempt* to discharge the duty.[132]

---

127 *Attrill v Richmond River Shire Council* (1995) 38 NSWLR 545, 555 (Kirby P) (referring to an argument presented by the appellants).

128 (1994) 63 SASR 208.

129 (1996) 66 SASR 199 ('*Clark*').

130 Millhouse J and Duggan J nevertheless declined to express a preference for any particular definition of good faith: *Barrett* (1994) 63 SASR 208, 210 (Millhouse J), 215 (Duggan J).

131 Ibid 209.

132 (1996) 66 SASR 199, 234 (emphasis added).

Ultimately, the directors were unable to invoke the protection afforded by s 29 as their conduct (whether described in terms of recklessness, gross negligence or some other criterion of fault) was inconsistent with having made a real or genuine attempt to fulfil their duty by obtaining an independent valuation. There may, nevertheless, be circumstances in which a finding of negligence, or even gross negligence, is consistent with the conclusion that a real or genuine attempt was made to fulfil a statutory function. One hypothetical example was provided in *Mid Density* (negligently making an error in the analysis or reporting of results after a real attempt to make enquiries has been made), and a further example was provided in *Clark*:

> [A]n inexperienced junior officer of the bank may be asked to carry out a particular function which is clearly beyond him or her. It might be possible to say that he or she was guilty of gross negligence if that fell to be judged by an objective standard. Nonetheless, that person may have made a genuine attempt to discharge his or her duty, and for that reason may not properly be said to have failed to act in good faith.[133]

The relationship between gross negligence and good faith is considered further in Part VI below.

VI Good Faith and Complex Justificatory Criteria

A *Justificatory Criteria That Describe the Defendant's Impugned Conduct*

So far, discussion has focused on defences that adopt good faith as a sole justificatory criterion. However, it is not uncommon for good faith (or some similar concept such as honesty) to form one component of a complex justificatory criterion. Numerous combinations of liability criteria might be adopted in this way.[134] However, legislatures routinely adopt one of three formulations, which locate good faith alongside the requirement that the defendant's conduct be done 'without negligence',[135] 'without gross negligence'[136] or 'without recklessness'.[137]

Defences that comprise complex justificatory criteria can be confusing, not least because legislatures seldom articulate the circumstances in which they envisage such defences being applied.[138] Nor do legislatures ordinarily indicate

---

133 Ibid.

134 One especially complex example was provided by s 59A of the *Adoption of Children Act 1964* (Qld), repealed by the *Adoption Act 2009* (Qld): 'in good faith and without malice and with reasonable care'.

135 See, eg, *Penalties and Sentences Act 1992* (Qld) s 63; *Body Corporate and Community Management Act 1997* (Qld) s 101A; *Adoption Act 2009* (Qld) s 321; *Mental Health Act 2000* (Qld) s 536; *Police Powers and Responsibilities Act 2000* (Qld) ss 38, 122, 787; *Mental Health Act 2013* (Tas) s 218(3).

136 See, eg, *Law Reform Act 1995* (Qld) s 16.

137 See, eg, the protections afforded to volunteers and in the Australian Capital Territory and South Australia, and to Good Samaritans in the Australian Capital Territory, Northern Territory, Queensland , Tasmania, Western Australia and South Australia: above n 56.

138 An exception is the defence afforded to health practitioners by s 77 of the *Mental Health Act 2014* (Vic), which is limited to claims in assault or battery that arise in the context of urgent medical treatment.

whether each component of a complex justificatory criterion describes the quality of a defendant's impugned conduct on the one hand, or the conduct that led to a mistaken belief being held (such as a failure to exercise due diligence)[139] on the other.[140] Any such confusion may be mitigated, however, if analysis proceeds in the first instance on the assumption that both (or all) components of a complex justificatory criterion describe the quality of a defendant's impugned conduct. Thus, criteria such as 'without negligence', 'without gross negligence' and 'without recklessness' are assumed to describe the means by which the defendant engaged in the impugned conduct, whereas good faith is assumed to describe a defendant's reasons for engaging in that conduct (the ends).

To the extent that this assumption holds true, and bearing in mind that both components must be satisfied for the relevant defence to apply, one effect of introducing a criterion that describes the quality of the means employed by the defendant is to limit, immediately, the range of tortious conduct in respect of which liability might be defeated. Thus, defences qualified by the requirement that conduct be 'without negligence' may be effective only in respect of strict-liability torts and intentional conduct-based torts (namely, trespass), and defences that apply only if conduct is done 'without gross negligence' or 'without recklessness' may be effective only in respect of strict-liability torts, trespass, or negligence. Interpreted in this way, none of these defences could ever defeat liability for an intentional outcome-based tort, since conduct that is done intentionally to bring about a wrongful outcome would also satisfy the definition of having been done recklessly, with gross negligence, or negligently.

When both components of a complex justificatory criterion describe the quality of the defendant's impugned conduct, good faith operates in much the same way as it would if it were the sole justificatory criterion — that is, by narrowing the class of potential wrongdoers to those whose means not only fail to satisfy a minimum legal standard, but whose ends also fail to satisfy the definition of good faith. The only material difference may be evidential, in that to invoke a complex justificatory criterion a defendant would ordinarily need to prove that he or she *did not* act negligently, with gross negligence or recklessly, whereas if good faith is the sole justificatory criterion, the plaintiff might be required to prove that the defendant *did* act negligently or intentionally.[141]

---

139 Cane, *Responsibility in Law and Morality*, above n 43, 105.

140 But see s 77 of the *Mental Health Act 2014* (Vic), which extends its protection to a 'health practitioner who, in good faith, carries out, or supervises the carrying out, of medical treatment in the belief on reasonable grounds that the requirements of this section have been complied with'. See also the 'immunities' afforded by the *Mental Health Act* 2013 (Tas) s 218(3) and the *Mental Health and Related Services Act* (NT) s 164, both of which distinguish between the defendant's impugned conduct (which must be done in good faith and with reasonable care) and the basis of the belief that conduct is authorised (an order, authority or document 'apparently given or made in accordance with' the relevant Act).

141 See above Part IVC.

B *In Good Faith and Without Negligence*

Since both criteria of a complex justificatory criterion must be satisfied to defeat liability, the effect of requiring that impugned conduct be done 'without negligence' is to limit the application of such defences to strict-liability torts or intentional conduct-based torts (namely, trespass). This conclusion is also often borne out by the subject matter of the statutory powers in respect of which such protections are afforded.[142] For example, s 38 of the *Police Powers and Responsibilities Act 2000* (Qld) states that a 'handler of a detection dog' 'does not incur civil liability for an act done, or omission made, *honestly and without negligence*',[143] for certain otherwise trespassory interferences that might occur in the course of detection acts (such as 'contact' between a detection dog and a member of the public, or damage caused by a detection dog to 'a thing that has in or on it an unlawful dangerous drug or explosives or firearms').[144] Similarly, s 536 of the *Mental Health Act 2000* (Qld) would appear to afford protection primarily in respect of conduct that might otherwise constitute trespass to the person.[145]

C *In Good Faith and Without Gross Negligence*

The effect of requiring that impugned conduct be done 'without gross negligence' is to limit the range of protected defendants to those whose conduct was, at most, *negligent*. In enacting this requirement, legislatures proclaim that negligent conduct will be countenanced in certain contexts, but that gross negligence will not. What, then, is the difference between negligence and gross negligence?

It must be said that gross negligence is a somewhat curious standard for lawmakers to adopt, insofar as the civil law has overwhelmingly rejected gross negligence as a criterion of fault as distinct from mere negligence.[146] In *Wilson v Brett*, Rolfe B confessed that he 'could see no difference between negligence and gross negligence — that it was the same thing, with the addition of a vituperative epithet'.[147] More recently, in *Armitage v Nurse*, Millett LJ observed:

> It would be very surprising if our law drew the line between liability for ordinary negligence and liability for gross negligence. In this respect English law differs from civil law systems, for it has always drawn a sharp distinction between negligence, however gross, on the one hand and fraud, bad faith and wilful misconduct on the other. The doctrine of the common law is that: 'Gross negligence may be evidence of mala fides, but is not the same thing'.[148]

---

142 This limitation may also be explicit. See, eg, the *Mental Health Act 2014* (Vic) s 77, which defeats civil liability only in respect of assault and battery.

143 Emphasis added.

144 See also ss 122, 787.

145 See further below, Part VIE.

146 In criminal law, in contrast, gross negligence might 'justify the imposition of stiffer penalties than a holding of ordinary negligence would justify': Cane, *Responsibility in Law and Morality*, above n 43, 80.

147 (1843) 11 M & W 113, 115–16; 152 ER 737, 739.

148 [1998] Ch 241, 254, citing *Goodman v Harvey* (1836) 4 A & E 870, 876 (Lord Denman CJ).

As noted earlier, one useful distinction that might be drawn between negligence and gross negligence is the likelihood of the risk in question arising. Thus, negligence might be defined by reference to foreseeable risks, whereas gross negligence might be defined by reference to obvious risks. If this distinction is accepted, then a defendant who acts in good faith, but who fails to exercise care in relation to an obvious risk, would be unable to invoke such a defence. In contrast, a defendant who acts in good faith, but who fails to exercise reasonable care in relation to a foreseeable (but not obvious) risk, might be able to invoke such a defence. Of course, if a defendant does not act in good faith, the defence could not be invoked, regardless of the quality of care exercised. It follows that each component of this complex justificatory criterion may have work to do, depending on how and why a defendant engaged in the impugned conduct.

D *In Good Faith and Without Recklessness*

The effect of requiring that impugned conduct be done 'without recklessness' is to extend the range of protected defendants to those whose conduct, although reckless, nevertheless satisfies *some lesser* criterion of fault that is nested within this criteria. Thus, a defendant might concede that his or her conduct was negligent or even grossly negligent, yet come within the scope of the protection afforded.[149] This is because, accepting the definitions adopted in this article,[150] negligence and gross negligence denote standards of conduct, whereas recklessness denotes a standard of conduct accompanied by a particular state of mind — namely, actual knowledge of risk.

The scope of the protection afforded by a defence that merely excludes recklessness is far broader than a defence that excludes gross negligence. Suppose, for example, that a Good Samaritan (D) were to witness a car accident in South Australia and to remove an injured party (P) from her car, despite the fact that P was not in any immediate danger, causing P to suffer a spinal injury. D might seek to rely on s 74 of the *Civil Liability Act 1936* (SA), on the basis that he acted 'in good faith and without recklessness in assisting a person in apparent need of emergency assistance'. While D's conduct is likely to satisfy the definition of gross negligence, as the risk of moving D would be obvious to a reasonable person, if D were able to prove that he did not actually know of this risk, the defence might apply.

Provided that D was motivated, however misguidedly, to assist P, he is likely to be able to demonstrate that he acted in good faith. There might, nevertheless, be circumstances in which a Good Samaritan does not act in good faith. For example, if D were motivated to act by a desire to impress a third party, or to win a wager with a friend, and had no desire to assist P, then it might be possible to conclude that he did not act in good faith, despite the fact that his actual conduct was not reckless. The answer in this case would ultimately depend, of

---

[149] A defendant might even concede that their conduct was unreasonable in the *Wednesbury* sense — that is, that *no* reasonable defendant could have considered it reasonable. See, eg, *Hamcor Pty Ltd v Queensland* [2015] QCA 183 (2 October 2015) [47] (Gotterson JA).

[150] See above Part IVB.

course, upon the interpretive approach adopted to resolve the fact that D lacked what is presumably the relevant motive (to assist P).[151]

Since defences that require conduct to have been done without recklessness only exclude conscious wrongdoing from their operation, these defences are typically reserved for classes of persons — such as Good Samaritans — that legislatures consider particularly deserving of protection.

E *Justificatory Criteria That Describe Conduct Giving Rise to Mistaken Beliefs*

The analysis in this Part has so far assumed that justificatory criteria invariably describe the quality of a defendant's impugned conduct (whether means or ends). However, there might be instances where one or other component of a complex justificatory criterion is interpreted as describing the quality of the conduct that led to certain mistaken beliefs being held, in which case the range of circumstances in respect of which the defence in question applies might be altered significantly.

Suppose, for example, that a mental health practitioner (D) were to detain a mental health patient (P), thus creating prima facie liability in false imprisonment, in the mistaken belief that she was entitled to do so in accordance with a power conferred by the *Mental Health Act 2000* (Qld). Suppose also that D undertook reasonable enquiries in order to reach the conclusion that she was authorised to detain P, and acted honestly in all respects, but that she failed to exercise reasonable care in the performance of this purported function, causing D physical injury. D might seek to rely on s 536 of the Act, which provides that '[a]n official [such as a health practitioner] does not incur civil liability for an act done, or omission made, honestly and without negligence under this Act'. Whether D is protected will depend upon whether each component of this criterion is interpreted as applying to D's impugned conduct on the one hand, or the conduct that gave rise to her mistaken belief on the other. Section 536 might therefore be construed in four different ways:

(1) 'Without negligence' might be interpreted as describing the quality of D's impugned conduct, and 'honestly' might be interpreted as describing the quality of the conduct that gave rise to D's mistaken belief. On this construction, the defence *could not* apply, as although D acted honestly, she performed her purported function negligently.

(2) Both criteria might be interpreted as describing the quality of D's impugned conduct. On this construction, the defence *could not* apply, for the same reason as (1).

(3) 'Without negligence' might interpreted as describing the quality of the conduct that gave rise to D's mistaken belief, and 'honestly' might be interpreted as describing the quality of D's impugned conduct. On this construction the defence *could* apply, as although D was negligent in the performance of her purported function, she nevertheless exercised

[151] See above Parts IIID–E.

that function honestly and was not negligent in reaching the conclusion that she was authorised to carry out this function.

(4) Both of these criteria might be interpreted as describing the quality of the conduct that gave rise to D's mistaken belief. On this construction, the defence *could* apply, as D was not negligent in reaching the conclusion that she was authorised to detain P and because she reached this conclusion honestly.

Any of these constructions are possible. However, constructions (3) and (4) are unlikely to be adopted, as the effect of either would be to extend the scope of the protection afforded to mental health practitioners (and other 'officials' to whom the provision extends)[152] who act negligently in the performance of functions that they mistakenly believe to be authorised. In the absence of clear language to this effect, it must be assumed that this is not what Parliament intended. Indeed, it seems likely that what Parliament actually intended was to allow mental health practitioners to perform what they honestly believe to be essential and authorised functions, which functions would otherwise require special authorisation to perform,[153] but only insofar as those functions are exercised reasonably. A similar conclusion is likely to be reached for most provisions that seek to protect public officers from liability in respect of conduct that is otherwise trespassory, and which are qualified by the requirement that the defendant acted 'without negligence'.

However, there does not appear to be any particular reason in principle to prefer construction (1) or (2). Construction (1) would allow mental health practitioners to interfere with the liberty of patients, provided they exercise reasonable care in doing so and seek honestly to ascertain the scope of their powers in the first place. Construction (2) would allow mental health practitioners to interfere with the liberty of patients, provided they exercise reasonable care in doing so and exercise their functions (real or imagined) for a relevant and good reason. Since it seems reasonable to expect mental health practitioners to act honestly (or in good faith) in all instances, the better conclusion may be that this criterion describes both the quality of defendant's impugned conduct *and* the quality of enquiries giving rise to any mistaken beliefs held.

VII Conclusion

This article has demonstrated that the operation of good faith defences (and other similar protections) is governed in practice by well-established principles of drafting and construction on the one hand, and by the relationship between good faith and fault criteria on the other. It has also demonstrated that good faith defences are capable of defeating liability in numerous circumstances that are beyond the reach of conventional tort law defences. This is because good faith defences operate in a space that tort law has eschewed, by excluding liability if a

---

[152] Mental Health Act 2000 (Qld) s 536(3) states that 'official' means the 'Minister, the director, an administrator of an authorised mental health service, health practitioner, ambulance officer, authorised officer or approved officer or an appointed person under section 429,' or a person acting under the direction of such a person.

[153] See above Part IIIB.

defendant's motives are good, notwithstanding some error in fact or law, or some default in the manner in which conduct is performed. The opportunity remains to examine the implications of the conclusions reached in this article for specific classes of defendants; to investigate, compare and contrast the nature and function of good faith as it operates in this, and other, areas of tort law; to consider what learning (if any) might be gleaned from the good faith literature as it pertains to other branches of private law; and to consider how, if at all, good faith defences might be classified according to prevailing taxonomies of tort law defences.