Using the wider common law as a baseline to defend subversion by statute? The case of the professional negligence ‘defence’ in New South Wales

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This article considers the tension that can exist between traditional common law reasoning about tort matters and changes created by statute. The fact that statute overrides the common law must be accepted; but should judges discard all concepts that have been traditional in the face of statute? Where statutes are ambiguous we argue that the wider common law structures which compartmentalise legal matters should not lightly be discarded. The example of the Civil Liability Act (NSW) s 50 is considered. The courts have held that the provision, which concerns the standard of care in breach of the duty of a professional, to be a defence. Is this conclusion a problem in the context of the traditional approach of treating questions of standard of care as going to the elements of the cause of action (namely breach) rather than going to defences? We argue that problems of coherence and justice are created by confusing these matters and that the distinction between cause of action and defence is one example of a common law structure which should require clear language from parliament before being discarded.

Introduction

In a world increasingly based on statute, considering how tort law (indeed any law), is reconstituted by or responds to statutes is important. As the general rule is that statute overrides common law, but judges can interpret statute, one has to ask how the legislation and methods of statutory interpretation may affect the structures of common law reasoning. This article considers an aspect of how statutes interact with the common law in one area and how judges should approach statutory interpretation in such cases. We consider whether the statutory treatment of some of the law of negligence in Australia blurs the line between the elements of the cause of action in negligence and defences to that cause of action. We argue that the distinction between the cause of action and a defence is an important common law structure which should not lightly be discarded. We also note that the definition of a defence is somewhat confused and has only recently begun to be discussed in detail. We consider how these factors interact and propose that statutory interpretation in such contexts should include presumptions that such common law structures stay in place unless a clear statutory intention to remove them is evident.

As a case study of the way the introduction of statute might affect common law standards, we consider an aspect of the Australian legislative reforms of negligence in 2002 and 2003, the treatment of the test for professional

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negligence. In New South Wales, this is s 50 of the Civil Liability Act 2002 (NSW). The statutory interpretation of this provision (and its equivalents elsewhere in Australia) is an example of the problems created by the blurring of the distinction between the elements of a cause of action and defences. Section 50 is ostensibly part of the standard of care or breach stage of the cause of action, but the courts have held as a matter of statutory interpretation that it is a defence. In our view, this constitutes a blurring of the distinction which may negatively impact the clarity of the reasoning process judges are required to go through in determining liability.

It is trite law that to establish a cause of action in negligence one must establish a duty owed by the plaintiff to the defendant, a breach of that duty by the defendant and harm caused to the plaintiff by the breach, which is not too remote. Since *Donoghue v Stevenson* there has been an emphasis on the duty of care as a unifying principle for parties who had no other relationship. We often date the nominate tort of negligence from this time, but Ibbetson argues that by the nineteenth century:

> From a structural point of view, the developed nineteenth century tort of negligence had three elements: an antecedent duty to take care owed by the defendant to the plaintiff (often status-based), a breach of this duty; and resultant loss to the plaintiff ...

This cause of action was well recognised as a form of the action on the case, which was one of the historical forms of action. Historically the forms of action created the structure of the law. For example, the development of the forms of action in trespass and case affected the structure of tort law. Although they were abolished in 1852 they continued (and perhaps continue) to have some influence over the newer ‘causes of action’ which we use today. The requirement for establishing causation of loss in the nineteenth century formulation of negligence was directly related to the fact that the form of action lay in case. The ongoing distinction between trespass and causes of action derived from the action on the case in modern tort law, particularly in Australia, affects which elements are required in our causes of action, so that negligence and nuisance, as actions in case, require proof of harm as an element of the cause of action and trespass does not. This also contributes to specifying what is a defence and what is an element of the cause of action.

One of the problems that has to be faced in discussing defences is the continuing confusion about what is a defence and what is not. A real discussion of the meaning of defences in tort law is only now beginning. Ibbetson notes that after the Judicature Acts, the earlier understanding of...

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1 Civil Liability Act 2003 (Qld) s 22; Civil Liability Act 1936 (SA) s 41; Civil Liability Act 2002 (Tas) s 22; Wrongs Act 1958 (Vic) s 59; Civil Liability Act 2002 (WA) s 5PB (applies only to health care professionals). No equivalent provision exists in the Northern Territory or the Australian Capital Territory.

2 [1932] AC 562; [1932] All ER Rep 1; (1932) 101 LJPC 119; (1932) 147 LT 281.

3 P Winfield, ‘Duty in Tortious Negligence’ (1934) 41 *Columbia L Rev*.


5 Abolished by Uniform Procedure Act 1852 (UK).


defences in terms of special pleas fell away and the differences between denials and defences became fuzzier. Despite this it is quite clear that the distinction between the elements of the causes of action and the defences is fundamental. In negligence the elements of the cause of action are very well established. In the Australian context there is no doubt about this. Even Fleming, who adds to the four elements of the cause of action (duty, breach, causation and remoteness) the ‘element’ of ‘[t]he absence of any conduct by the injured party prejudicial to his recovering in full for the loss he has suffered’, goes on to say that ‘[t]his involves a consideration of two specific defences, contributory negligence and voluntary assumption of risk’. He thus maintains the distinction between the tort and the defences which we consider is vital for the common law. We argue that the treatment of s 5O as a defence is problematic and discuss whether the court’s characterisation is misguided. We offer our own definition of a defence and suggest that as a matter of statutory interpretation the distinction between cause of action and defence should not be discarded without clear expression of Parliament’s intention.

Section 5O and its background

In Australia, where jury trials for negligence cases have become very rare, judges have increasingly taken over the role of determining whether the duty had been breached and had caused the harm. This increased their power, which already included the determination of whether a duty existed and whether causation was too remote. Perhaps in part as a response to the late twentieth century judges’ perceived power over liability and propensity to rule in favour of the plaintiff, in Australia the Civil Liability Act regimes of 2002 and following were introduced. Some changes occurred before and some after the Ipp Report was produced by the Eminent Persons Panel. The terms of reference of the Ipp Report included a requirement to:

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9 See K Barker, P Cane, M Lunney and F Trindade, The Law of Torts in Australia, 5th ed, OUP 2012, p 418: ‘The tort consists of three elements (all of which must be established for a successful negligence claims): a duty to take reasonable care owed at the time of the act of negligence by the defendant to the plaintiff; negligent conduct on the part of the defendant; and damage suffered by the plaintiff as a result of that negligence, which is not too remote’. Other texts give similar accounts of the cause of action.
11 Civil juries have been abolished in South Australia: Juries Act 1927 (SA) s 5. In other jurisdictions, parties have a prima facie right to a civil jury unless the court orders otherwise (Victoria) or have a right to a civil trial only if the court orders it.
12 There was some evidence that this pro-plaintiff stance existed, but it had been reversed by the mid-1990s, although this does not seem to have been noticed by the proponents of the civil liability reforms. See H Luntz, ‘Torts Turnaround Downunder’ (2001) 1 Oxford Uni Commonwealth LJ 95.
(d) develop and evaluate options for a requirement that the standard of care in professional negligence matters (including medical negligence) accords with the generally accepted practice of the relevant profession at the time of the negligent act or omission.\(^\text{14}\)

On the basis that personal injury law was ‘unaffordable and unsustainable’,\(^\text{15}\) the panel was requested to ‘[i]nquire into the application, effectiveness and operation of common law principles applied in negligence to limit liability arising from personal injury or death . . .’. Notable here is the assumption that the law (as it then stood) was unsustainable and should be limited, and that the panel was not asked to inquire into the law of negligence and its sustainability; rather, the panel was asked to inquire into the principles that could be used to limit liability.

The civil liability legislation significantly limited liability in a range of ways and capped damages so that the ability to sue for personal injury at least was seriously curtailed.\(^\text{16}\) The legislation neither codified nor abolished the common law, however. Rather, it operated against the background of the common law in a piecemeal way. The NSW Civil Liability Act has provisions which modify the common law, provisions which merely restate the common law (for example, the material on inherent risk), and new regimes which have no relationship to the common law (for example, the recreational activities and dangerous recreational activities sections). The Second Reading speeches make it clear that the object was to reduce liability but there is little to go on beyond this in determining what the Act’s specific provisions are intended to do.

The Ipp Report included five recommendations concerning professional negligence standards. The recommendation of most interest here is recommendation 3. It is the source of s 5O:

_Treatment by a medical practitioner — standard of care

Recommendation 3

In the Proposed Act, the test for determining the standard of care in cases in which a medical practitioner is alleged to have been negligent in providing treatment to a patient should be:

A medical practitioner is not negligent if the treatment provided was in accordance with an opinion widely held by a significant number of respected practitioners in the field, unless the court considers that the opinion was irrational.

The fact that no jurisdiction enacted the Ipp recommendations in their entirety, means that the use of the Ipp Report to assist with statutory interpretation is often problematic; however, in the case of s 5O there is a clear connection between the recommendations and the provisions:

Section 5O of the Civil Liability Act 2002 (NSW) provides:

5O Standard of care for professionals

\(^\text{14}\) Ibid, p 37.
\(^\text{15}\) Ibid, Terms of Reference.
(1) A person practising a profession (‘a professional’) does not incur a liability in negligence arising from the provision of a professional service if it is established that the professional acted in a manner that (at the time the service was provided) was widely accepted in Australia by peer professional opinion as competent professional practice.

(2) However, peer professional opinion cannot be relied on for the purposes of this section if the court considers that the opinion is irrational.

(3) The fact that there are differing peer professional opinions widely accepted in Australia concerning a matter does not prevent any one or more (or all) of those opinions being relied on for the purposes of this section.

(4) Peer professional opinion does not have to be universally accepted to be considered widely accepted.

Equivalent provisions exist in all other jurisdictions except the Northern Territory and the Australian Capital Territory. Following this provision, s 5P states that s 5O does not apply to the failure to warn. Thus the legislation distinguishes between diagnosis and treatment (to which s 5O applies) and warnings.

In this article we do not propose to discuss the vagaries of the meaning of the various elements of s 5O, that is, the meaning of ‘professional’, ‘widely accepted’, ‘competent professional practice’, ‘in Australia’, etc. This has been thoroughly done by Professor Carolyn Sappideen. Rather, we want to focus on its structural position in relation to the elements of the cause of action in negligence.

As discussed above, at common law, negligence arises when the three elements of duty, breach and causation have been satisfied. The Civil Liability Acts have not altered this; and indeed the Acts cannot be read in the absence of the common law understanding of negligence. Once the elements of negligence are satisfied, then defences may arise and be considered. This is the standard procedure, which has the advantage of allowing the judge to consider all the elements of the cause of action comprehensively, thus determining whether the plaintiff has proved his or her case, before turning to the question of whether liability is defeated by a defence.

Section 5O ostensibly applies to the question of the standard of care for
breach. The standard test for medical negligence in England was the Bolam\textsuperscript{22} test which took the view that a doctor was not to be regarded as negligent if he or she was acting in the way that complied with a practice accepted as proper by a responsible body of medical opinion. This meant, in practice, that even if there were evidence that other experts did not agree that this was proper, where there were experts who regarded it as proper, even if they were in a minority, the court would not intervene. Note that the Bolam test was not regarded as a defence. It was clearly part of the cause of action.

The Bolam test was rejected most decisively by the High Court in Rogers v Whitaker\textsuperscript{23} so that the question of the standard of care of the health professional was determined in Australia by the standard question for breach by professionals: ‘Did the defendant meet the standard of care of an ordinary skilled medical practitioner professing to have that special skill?’ Where the specific issue was the failure to warn, as in Rogers v Whitaker itself (and indeed in Bolam), the High Court held that an ordinary skilled medical practitioner has a duty to warn a patient of material risks inherent in medical treatment. They held that a risk is material if a reasonable person in the patient’s position would think it significant and the failure to warn in such a situation was a breach of that duty. Later cases confirmed this view.\textsuperscript{24} This determination was also clearly a matter of breach as an element of the cause of action in negligence.

There was enormous concern from the medical profession about the court’s approach in Rogers v Whitaker because of the insistence in that case that the court, rather than the profession, would determine the relevant standard.\textsuperscript{25} In determining the standard, Gleeson CJ observed in Rosenberg v Percival that:

the relevance of professional practice and opinion was not denied; what was denied was its conclusiveness. In many cases, professional practice and opinion will be the primary, and in some cases it may be the only, basis upon which a court may reasonably act. But, in an action brought by a patient, the responsibility for deciding the content of the doctor’s duty of care rests with the court, not with his or her professional colleagues.\textsuperscript{26}

\textsuperscript{22}Bolam v Friern Hospital Management Committee [1957] 1 WLR 582; (1957) 1 BMLR 1; [1957] 2 All ER 118. This was restated in Sidaway v Governors of Bethlem Royal Hospital [1985] AC 871 at 881; [1985] 1 All ER 643; [1985] 2 WLR 480 in which it was said, ‘In short, the law imposes the duty of care; but the standard of care is a matter of medical judgment’.

\textsuperscript{23} (1992) 175 CLR 479; 109 ALR 625; 67 ALJR 47; BC9202689.

\textsuperscript{24} Rosenberg v Percival (2001) 205 CLR 434; 178 ALR 577; [2001] HCA 18; BC200101435. Note that the UK Supreme Court has also recently embraced this view: Montgomery v Lanarkshire Health Board [2015] UKSC 11; [2015] 2 All ER 1031; [2015] 2 WLR 768.

\textsuperscript{25} The terms of reference of the Panel for the Review of the Law of Negligence (panel), above n 13, reflected the political importance of dealing with the medical insurance issues quickly, particularly in New South Wales in which the failed United Medical Protection was the dominant insurer and where the Health Care Liability Act 2001 (NSW) had made it illegal to practice medicine without insurance.

The medical profession’s concern was exacerbated when in \textit{Naxakis v Western General Hospital},\textsuperscript{27} it became clear that this also applied to cases of diagnosis and treatment.

Later, in England, the \textit{Bolam} test was modified in \textit{Bolitho v City and Hackney Health Authority}\textsuperscript{28} by adding to it the view that the court could reject expert medical opinion if it considered that opinion illogical or irrational. This is the test which has now been incorporated into s 5O and its equivalents. It is ironic, therefore, that the UK Supreme Court has recently rejected the \textit{Bolam/Sidaway/Bolitho} test, at least in regard to warnings.\textsuperscript{29}

The \textit{Ipp Report} noted that ‘there is a significant body of opinion, especially among the medical profession, in favour of reinstating the \textit{Bolam} rule in its original form’,\textsuperscript{30} but it also noted that a problem with the \textit{Bolam} rule is that it may give too much weight to an outlying body of professional opinion. They referred to two instances where the influence of ‘so-called “rogue” experts’\textsuperscript{31} had proved problematic in this context. The first is mentioned in \textit{Bolitho} in which Lord Browne-Wilkinson referred to \textit{Hucks v Cole},\textsuperscript{32} where a doctor failed to prescribe penicillin in a situation where the patient had symptoms which were likely to lead to puerperal fever. A number of leading experts said they would not have prescribed penicillin, but the court took the view that this was negligent. The second is the well-known example of the ‘unfortunate experiment’ in New Zealand where women with positive Pap smears were deliberately not treated in order to determine whether they would later develop carcinoma of the cervix. Many medical practitioners were involved. Many women died. This is a very rare sort of case, but one where the irrationality qualification could well be used.\textsuperscript{33} Under a strict reading of the \textit{Bolam} principle, this was not negligent. These examples show why the panel was not willing to return to the \textit{Bolam} principle without the irrationality modification.

At common law, the \textit{Bolam}, \textit{Bolitho} and \textit{Rogers v Whitaker} tests are all clearly part of the elements of the cause of action in negligence. This is because the tests were used to establish the relevant standard of care in order to then determine if the standard had been breached. As always, the plaintiff had to prove that that standard of care had been breached.

But courts have construed s 5O and its equivalents as a defence.

\textsuperscript{27} (1999) 197 CLR 269; 162 ALR 540; [1999] HCA 22; BC9902258.
\textsuperscript{29} \textit{Montgomery v Lanarkshire Health Board} [2015] UKSC 11; [2015] 2 All ER 1031; [2015] 2 WLR 768.
\textsuperscript{30} \textit{Ipp Report}, above n 13, at [3.5].
\textsuperscript{31} Ibid, at [3.8].
\textsuperscript{32} [1993] 4 Med LR 393.
Construing s 5O

The construction of statutes in Australia requires the court to consider the ordinary meaning of the words within their context and in light of the purpose of parliament in enacting the legislation,34 the text remaining central to the process.35

The purpose of the statute generally was to benefit defendants or, more particularly, to discourage plaintiffs.36 When the Bill was introduced into the NSW Parliament the Premier said:

We cannot go on like this. I heard reports from the local government representatives that I spoke to yesterday and from the community representatives that they know of three generations of one family living off compensation claims; that they have stories of repeat claimants; that tripping over a defective pavement is a common syndrome. As people tell stories that they put money down on the lawyer’s table and got a return from a judge dressed in Santa Claus gear, the practice will spread. People will think, ‘Why not take your chances?’ Lawyers advertise in the print media, ‘Come to us. If you lose, we won’t charge you.’ . . . This is ambulance chasing to the nth degree. Local government cannot carry the cost of it; society cannot carry the cost of it; surf clubs, show societies and sporting organisations cannot carry the cost of it. It is a national problem. According to media reports on the weekend, equestrian events in Queensland are in trouble'.37 . . .

We will address the test for professional negligence, including medical negligence. It should not be sufficient for a plaintiff to show that there was some other possible way the procedure could have been performed that might not have caused the plaintiff’s injury. Rather, if the doctor or other professional acted reasonably in the circumstances, then the plaintiff must fail.38

Ostensibly, s 5O looks as if it is relevant to the element of breach because the section is headed ‘Standard of care for professionals’. As noted above, the legislation cannot be read in the absence of the common law, and the question of whether there has been negligence is clearly part of the establishing of breach of duty, which is for the plaintiff to do. However, s 5O has been characterised by the courts as a defence.39 It is our argument that s 5O should

36 For example, there are many provisions designed to limit liability and some new regimes in the legislation which make it very difficult for plaintiffs to sue. A clear illustration of this direction is Div 5 of the Civil Liability Act 2002 (NSW), which removes liability for harm suffered from obvious risks of dangerous recreational activities, amongst other things. The Second Reading speeches in NSW Parliament make this clear — they are all about the protection of pony clubs, local councils, other public authorities, medical practitioners, etc and the mantra ‘personal responsibility’ was aimed at plaintiffs taking care of themselves rather than defendants taking care to prevent harm to others. See Hansard, NSW Parliament Legislative Assembly 23 October 2002, Second Reading Speech for the Civil Liability Amendment (Personal Responsibility) Bill, Mr Bob Carr, Premier, p 5764.
38 Hansard, NSW Parliament, 7 May 2002, Legislative Assembly, p 1588.
be characterised as part of the defence argument, rather than as a defence, and that characterising it as a defence is problematic.

In *Dobler v Halverson*, the plaintiff was a young man who had been taken to his local general practitioner (GP) several times when he had unexplained sudden fits of unconsciousness. The GP referred him to a neurologist who could find nothing wrong. Eventually, after one of these episodes, the plaintiff was admitted to hospital, under the care of the GP. At no stage did the GP order an echocardiogram. Evidence was given that the usual practice in such a situation, and indeed a practice which was not expensive or difficult, was to give an echocardiogram, and that if that had been done, a proper diagnosis would have been made which would have prevented the plaintiff’s serious brain damage.

At first instance, Chief Justice at Common Law McClellan found for the plaintiff and awarded damages. The judge had determined the standard of care by reference to *Rogers v Whitaker*, that is, that the standard of care required was not that determined by a body of medical practitioners, but the standard required by the law, although the practice of responsible medical practitioners might be relevant and in some cases decisive. He further held that s 5O was a defence.

Ultimately, McClellan CJ at CL held that he was not satisfied Dr Dobler had established that his behaviour was widely accepted in Australia by peer professional opinion as competent professional practice. Thus, s 5O did not assist him. He considered the arguments between the parties as to the status of s 5O in this way:

Conflicting submissions were made as to the effect of s 5O. The defendant argued that the section (which is titled ‘Standard of care for professionals’) sets the standard of care to be applied in all professional negligence cases. On this view, in order to establish negligence the plaintiff must prove that the provision of professional service by the defendant was not widely accepted in Australia by peer professional opinion as competent professional practice. The plaintiff submitted that s 5O is more properly characterised as a special defence that applies in professional negligence cases. Accordingly, the standard of care is still the standard that was endorsed in *Rogers v Whitaker*, but if a defendant is found to be negligent under this standard he or she can avoid liability if they can establish that they acted in a manner which was widely accepted in Australia by peer professional opinion as competent professional practice . . .

In my view the section is intended to operate as a defence. The section is expressed so that ‘a person practising a profession . . . does not incur a liability in negligence’ if a certain state of affairs can be ‘established.’ The italicised words go to the issue of liability, not to the issue of negligence, although in my view this is of little consequence. There is force in the plaintiff’s submission that the fact that

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BC200909477; *Indigo Mist Pty Ltd v Palmer* [2012] NSWCA 239; BC201206227; *Wingecarribee Shire Council v Lehman Bros Australia (in liq)* (2012) 301 ALR 1; [2012] FCA 1028; BC201207287.


41 *Halverson v Dobler* [2006] NSWSC 1307; BC200609964.

42 The same view was taken of the slight wording differences between the NSW ‘does not incur a liability in negligence’ and Victorian provisions (‘is not negligent’) by Macaulay J in *Brakoulis v Karunaharan* [2012] VSC 272; BC201204385 at [56].
the test is expressed in the negative indicates that Parliament did not intend to effect a more radical change in the standard of care to be applied in professional negligence cases.

The defendant’s argument that s 5O forms part of the definition of negligence in actions against professionals is based for the most part on the fact that the section is titled ‘standard of care for professionals.’ Under the Interpretation Act 1987 (NSW), section headings are not to be taken as constituting part of the Act in which they appear (s 35(2)). They are extrinsic materials to which a court may have regard (s 34(2)(a)). However, I am satisfied that it is not necessary to resort to extrinsic material in this case. In any event the section heading must give way to the clear words of the section.43

McClellan CJ at CL decided that this was a defence, not just a matter of putting an evidential burden on the defendant. It is not clear what he meant by a defence here, but he seems to have thought it included a liability defeating rule combined with a shift in the burden of proof. Below we will consider what the meaning of a defence is. Part of our argument is that there is some confusion about the meaning of a defence and that this has contributed to the problem in construing s 5O. In our view s 5O is merely a restatement of the Bolam/Bolitho test setting out the standard of care which the defendant has to reach. Did the judge taken the correct approach in interpreting this provision? His Honour considered the text but did not give explicit consideration to the purpose of the statute, which the High Court and the Interpretation Act have said should be preferred.44 Although the parties had referred to the second reading speech and the explanatory memorandum, the judge did not focus entirely on the words of the section. In our view, the context he considered should have included the wider structures of the common law.

The defendant appealed to the Court of Appeal.

The NSW Court of Appeal, in a judgment delivered by Giles JA, with whom Ipp and Basten JJA agreed, said that the real importance of s 5O lay in deciding who determined the standard of care. He pointed out that if s 5O did not exist the court would determine the standard of care on the basis of all the evidence presented and that the aim of s 5O was to modify this process. Where the defendant can establish that his conduct accorded with what is ‘widely accepted’ ‘as competent professional practice’ the court is obliged to apply that standard as the relevant standard of care (unless of course, it is irrational).45 Giles JA went on to say that the section in effect operates as a defence since the onus of proving that the defendant’s conduct was consistent with widely accepted professional opinion lay on the defendant, rather than the plaintiff having to prove that it was not so consistent:

In this sense, s 5O provides a defence. The plaintiff will usually call his expert evidence to the effect that the defendant’s conduct fell short of acceptable professional practice, and will invite the court to determine the standard of care in accordance with that evidence.

43 Halverson v Dobler [2006] NSWSC 1307; BC200609964 at [180]–[183].
45 Section 5O (2).
He will not be concerned to identify and negate a different professional practice favourable to the defendant, and s 5O does not require that he do so. The defendant has the interest in calling expert evidence to establish that he acted according to professional practice widely accepted by peer professional opinion, which if accepted will (subject to rationality) mean that he escapes liability . . . To require the plaintiff to establish the negative would significantly distort the language of s 5O(1) and would not be consistent with the reference in s 5O(2) to reliance on peer professional opinion for the purposes of the section — the plaintiff does not rely on it in order to negate a liability in negligence.46

However, we would submit that this is arguable, because the plaintiff was clearly required to establish that the defendant did not meet the standard of proof and bore the onus of doing so. To characterise the section as all about what the defendant has to prove is misguided. The plaintiff has to prove that the standard of care has not been met. The defendant will seek to argue that he or she has met the standard. It may well be, and usually is, a battle between expert witnesses, but it is not only about the defendant’s proof. In Bolam and Bolitho, the plaintiff did also have to establish the negative and they always have. The words of s 5O do not have to import a shift in the onus of proof. As Giles JA noted himself, ‘[t]he reasonable care and skill required of the appellant was governed by the common law as modified by s 5O . . . ’ (emphasis added). The relevant common law was the standard of ordinary care and skill required of the ordinary skilled medical practitioner, and it was for the plaintiff to establish that the defendant had not reached that standard. Even in Bolitho, which s 5O in substance replicates, it was not thought that the test was a defence. It can be argued that the decision that s 5O is a defence fails to take proper account of the common law and the fact that the statute is merely a modification of the common law rather than a replacement of it. The modification merely tells the court how to consider the evidence. It is not clear that it is necessarily a liability–defeating rule, nor that the onus of proof has been shifted. The better view would be that this modification of the standard of care merely directs the judge on weight and creates a defence argument that would not be available otherwise.

Giles JA noted that the decision at first instance did not turn on the onus of proof, which he seemed to see as central to the definition of a defence. This is an important point because in a situation where the evidence seemed clear it may have been easier to construe the provision as a defence which failed, rather than a defence argument which failed.

This was not the only time s 5O had been said by the NSW Supreme Court to at least ‘look like’ a defence. In Walker v Sydney Western Area Health Service,47 it was said:

Section 5O is framed in such a way as to suggest that the onus of proving that a professional acted in a manner that was widely accepted by peer professional opinion as competent professional practice lies upon the person against whom the action is brought, or the allegation made.48

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46 Dobler v Halverson (2007) 70 NSWLR 151; [2007] NSWCA 335; BC200710215 at [60]–[61].
This view was followed in Victoria and has been accepted and applied in New South Wales and in the Federal Court.49 In *Sydney South West Area Health Service v MD*,50 Allsop P agreed with Hodgson JA that s 5O needs to be pleaded by the defendant. 'It transfers, to a degree, the onus of proof. It transforms what would otherwise be relevant evidence as to negligence to be weighed by a judge in the familiar calculus into evidence that may be determinative of the appeal.'51 If s 5O was a defence so also should *Bolam/Bolitho* have been, but in our view s 5O does not necessarily even suggest the onus of proof had been shifted. Section 5G may be contrasted with it. It provides:

> [in determining liability for negligence, a person who suffers harm is presumed to have been aware of the risk of harm if it was an obvious risk, unless the person proves on the balance of probabilities that he or she was not aware of the risk.]

This is a much clearer statement that the onus of proof has been reversed than we find in s 5O.

In *Brakoulias v Karunaharan*,52 Macaulay J considered the equivalent of s 5O, s 59 of the Wrongs Act 1958 (Vic). The case concerned a woman who suffered a cardiac arrest allegedly because of a weight loss drug prescribed for her by her general practitioner. The cardiac arrest deprived her of oxygen for 26 minutes, causing significant long-term injuries. In the view of Macaulay J, the conclusion in *Dobler v Halverson* was that the equivalent NSW provision was a defence. Macaulay J outlined three possible approaches to the interpretation of s 59 — the exclusive standard approach (that is, s 59 had completely superseded *Rogers v Whitaker*), the evidentiary burden approach (that is, the test in *Rogers v Whitaker* still applies, unless the defendant adduces evidence of a peer professional opinion and this sets the standard which the plaintiff must prove the defendant failed to meet) or the defence approach. The latter is what Macaulay J characterised as the *Dobler v Halverson* approach so that the plaintiff makes out the prima facie case on the negligence standard (*Rogers v Whitaker*) but then the burden shifts to the defendant to prove that his or her practice met the standard of competent professional practice. Again the exact meaning of defence was not explicated.

In deciding that the last was the proper approach, Macaulay J noted some of the matters already discussed — the *Ipp Report*’s casting of the issue as really about the question of who should decide the standard, the fact that the *Bolam* test had never been thought of as a defence (although it also was expressed in negative terms), and the fact that, although the *Ipp Report* did discuss the recommended provision as a defence, it did so in a sort of throw-away fashion — there was no discussion of the burden of proof and

51 Ibid, at [51]. Hodgson JA had emphasised that because s 5O modified the common law and provided a defence with the onus of proof on the defendant, it had to be pleaded, or at least the material facts which would go to s 5O should be pleaded: at [21], [23].
again the definition of defence was not considered.53 The fact that the *Ipp Report* did mention the word ‘defence’ was regarded as significant by Macaulay J, but the fact that the second reading speech did not was also significant.54 All of this suggested that s 59 could be expected to operate as an exclusive standard. Against this, in New South Wales the second reading speech said expressly that *Rogers v Whitaker* would continue to apply.

Macaulay J, however, concluded that a textual analysis of s 59 ‘bespeaks a defence’.55 Similarly to the reasoning of Giles JA in *Dobler*, he noted that the only person with an interest in establishing the peer professional opinion is the defendant, and only to get exculpation. He further noted that s 59 assumed a primary failure to meet the common law standard of care, but then provided a limitation or qualification of liability if certain conditions were met. This interpretation suggested that the common law standard of care continued to be relevant. He finally said that because the NSW and Victorian provisions arose out of the same issues and were directed at the same mischief, although some wording differences existed, he should follow the decision in the NSW Court of Appeal unless he thought it was plainly wrong, and he did not so think. Macaulay J then went on to discuss whether s 59 was a true defence or a mere evidentiary burden. By the latter he seemed to mean establishing a prima facie case or introducing the evidence. He rejected the latter view on the basis that the word ‘established’ in s 59(1) suggests something much greater than merely adducing or introducing evidence.56

Have these decisions construed the section properly? In *Project Blue Sky Inc v Australian Broadcasting Authority*, McHugh, Gummow, Kirby and Hayne JJ said:

Ordinarily . . . the legal meaning . . . will correspond with the grammatical meaning of the provision. But not always. The context of the words, the consequences of a literal or grammatical construction, the purpose of the statute and the canons of construction may require the words of a legislative provision to be read in a way which does not correspond with the literal or grammatical reading.57

The modern approach to statutory interpretation requires a purposive approach which considers the context first:

[context] in its widest sense . . . include[s] such things as the existing state of the law and the mischief which, by legitimate means . . . one may discern the statute was intended to remedy. Instances of general words in a statute being so constrained by their context are numerous.59

It is arguable that, although Giles JA and the judges following him considered the wider context of the statute, they did not consider the wider context of the patterns of the common law itself. Although it is quite clear that legislation can alter the common law, considerations such as the normal structures of
common law argument — that the cause of action is completed before defences are argued (which is argued below) — perhaps should have been given more force here where there was not a clear direction to regard this as a defence. The comparison with s 5G where the onus of proof is clearly reversed is telling.

Statutory interpretation and common law fundamentals

In our view, the interpretation of s 5O has suffered from a failure to take note of the role of the fundamental systemic structures of the common law. The argument that no especial clarity is now needed to alter the common law is said to be based on the preponderance of authority, but the High Court has not ruled on the point directly and there is authority to the contrary. While it is clear that parliament can overrule the common law, there are situations where certain fundamentals exist where a court will require that the parliament have clearly expressed the intention to change that fundamental requirement. As we will explain, it is quite clear that it is legitimate for courts to refer to statutory presumptions of common law rights and systems, and that this is a longstanding and continuing part of proper interpretation of statutes. In the Australian jurisprudence, this has been recognised almost from the beginning, drawing from the English cases. Potter v Minahan involved a man born in Australia who had gone to China for education and then on returning to Australia was denied entry by the use of a dictation test. The High Court, in holding that he was simply returning home said that ‘[i]t is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness’ (emphasis added). O’Connor J included ‘depart[ing] from the general system of law’ as a matter which needed express intention of ‘irresistible clearness’ (quoting Theobald on statutes). The general rule that Potter v Minahan referred to has been reaffirmed many times. In Saeed v Minister for Immigration and Citizenship, French CJ, Gummow, Hayne, Crennan and Kiefel JJ said:

In Coco v The Queen it was said, with respect to fundamental rights, that ‘[t]he courts should not impute to the legislature an intention to interfere with fundamental rights’. The same may be said as to the displacement of fundamental principles of the common law.

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61 (1908) 7 CLR 277, referring to Arthur v Bokenham (1708) 111 Mod 148 at 150 per Trevor J (emphasis added).
Fundamental rights which have been held should not be displaced without clear legislative intention include the effect of a verdict of acquittal, the privilege against self-incrimination and habeas corpus. While most are about substantive rights such as freedom of the person, some are about structures of the law itself, such as construing a code in the light of the law as it stood when the code came into force and maintaining the jurisdiction of superior courts. Statutory presumptions such as these are based on the implicit view that the legislation is enacted against a known background: ‘they are part of a known background against which Parliament legislates and of which it should be aware.’

The distinction between cause of action and defence can arguably be regarded as part of the general system of law that should be presumed to apply unless the statute has clearly expressed the intention to change it. What is required to change such a fundamental feature of the law is that parliament should use express words or necessary implication. In the language of McHugh, Gummow, Kirby and Hayne JJ, ‘the presumption [is] that, in the absence of unmistakable and unambiguous language, the legislature has not intended to interfere with basic rights, freedoms or immunities’. It is true that many of the cases which discuss the presumption refer to concrete elements of doctrine as the substance of the presumption — for example, the privilege against self-incrimination, legal professional privilege, infringements of personal liberty, changes to the law of trespass and many others. The presumption clearly extends to procedural fairness requirements.

We argue that the separation between cause of action and defence is a fundamental common law structure in that it is a significant part of the general

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64 R v Snow (1915) 20 CLR 315.
66 Re Bolton; Ex parte Beane (1987) 162 CLR 514; 70 ALR 225; [1987] HCA 12; BC8701765.
68 Ibid.
73 Re Bolton; Ex parte Beane (1987) 162 CLR 514 at 523 per Brennan J; 70 ALR 225; [1987] HCA 12; BC8701765.
75 Annetts v McCann (1990) 170 CLR 596 at 598; 97 ALR 177; [1990] HCA 57; BC9002899.
system of law and that the plaintiff who is attempting to vindicate his or her rights is clearly affected by allowing the elements of the cause of action to be infiltrated by a defence. In our view, the distinction between defences and the elements of the cause of action is one of the fundamental principles of the common law. The Civil Liability Act 2002 (NSW) does not expressly alter nor by necessary implication remove the fundamental part of the common law which is that distinction. In our view, without more directive language, s 5O should not have been construed as a defence.

Defining defences and causes of action

Howarth defines a defence as ‘strictly, an argument that the defendant raises and, if there are disputed facts, has to prove, which if successful means that the defendant wins the case’.76 This might be called a liability defeating definition of a defence. In a similar vein, in Clerk and Lindsell on Torts the introduction to ‘General Defences’ begins:

When a claimant fails to establish the primary elements of the particular tort of which he complains his action necessarily fails. He may however succeed in proving that prima facie a tort has been committed, only to be met with a defence by virtue of which the defendant argues that he is exculpated from liability in all the circumstances . . . This chapter is concerned with true defences the effect of which is to justify or excuse conduct which would otherwise be tortious.77

In Tort Law Defences,78 James Goudkamp argues that there has been no coherent notion of ‘defence’ in the past and that the word has encompassed a range of understandings including:

(i) the arguments of the defendant
(ii) ‘liability defeating rules that are external to the elements of a claimant’s action’;79
(iii) principles, such as apportionment, that diminish the plaintiff’s relief;
(iv) rules where the defendant carries the onus of proof; and
(v) the notion ‘that the absence of defences is the final element of certain torts’.80

Dyson, Goudkamp and Wilmot-Smith also express a similar view, that there is little consensus on what a ‘defence’ means.81

In our opinion (i) and (v) can be dismissed. The arguments of the defendant are not to be equated with a defence, and the idea that an absence of a defence is an element of a cause of action is absurd. Goudkamp agrees.82 Goudkamp regards (ii) as the definition of a defence and rejects all the rest. Where we disagree is in relation to (iii) and (iv). While Goudkamp has come to the best definition of a defence in the traditional common law sense, he may not have come to the definition best fitting the common law in action today nor in the

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79 Ibid, p 2.
80 Ibid, p 5.
82 Goudkamp, above n 78, pp 5–6.
common law’s interaction with modern statutory interventions. Our own understanding of a defence would encompass (ii), (iii) and (iv). In relation to (iii), our view is less purist than Goudkamp’s. We accept that a ‘defence’ such as contributory negligence, that was historically a defence within meaning (ii), could be modified so that it is still in play as a liability ‘defeating’ rule which requires the onus of proof to be on the defendant, but that only diminishes rather than entirely defeats the plaintiff’s relief. To explain further, the common law defence of contributory negligence is, at base, a liability-defeating rule. Its modern statutory modification could be read as a corrective to the harshness of the outcome that results if the liability has been defeated, but this modification goes to damages rather than liability and so we do not think this alters the essential nature of contributory negligence as a defence. Thus our understanding of a defence incorporates Goudkamp’s view of a defence as a liability-defeating rule outside the elements of the cause of action (category (ii) of Goudkamp’s taxonomy) and which also requires the defendant to bear the burden of proof (category (iv) of Goudkamp’s taxonomy). Thus, our basic understanding of the concept of a defence is of the rules which fit into the intersection of (ii), (iii) and (iv). In our view, to be a defence it is necessary to have both a liability defeating rule outside the cause of action and a shift in the onus of proof. We incorporate (iii) because we consider a relief-modifying rule not to be altering the essential nature of the defence, but this is not critical to our definition.

What is critical for us here is the fact that the elements going to establish liability must be distinguished from the elements of the defence. Separating these two out in negligence, if not in other torts, seems to us profoundly important. Dyson, Goudkamp and Wilmot-Smith’s argue that the most significant distinction is between definitions (the product of asking what a defence is or how to classify it) and consequences of defences (the product of asking what follows from classifying something as a defence).83 In our view, both are necessary and the consequences of defining a matter as a defence are vital for the processes of common law. We agree with Goudkamp that the distinction between the elements of the cause of action in torts on the one hand and defences on the other is necessary. Goudkamp gives several reasons.

First, it enhances procedural fairness since both sides bear some burden of proving some facts and the fact that some matters may be easier to prove for one side allows this to be a fair division of the burden of proof.84 As Cane argues, the interests of the party who does not bear the burden of proof are the better protected.85

Goudkamp’s second reason is that causes of action create obligations while defences do not. Defences only defeat obligations. This makes them categorically different from each other. For example, the cause of action in negligence sets up obligations which the plaintiff sues the defendant in respect of, and a defence then may defeat the obligations.

Third, the distinction between cause of action and defences promotes clarity

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83 A Dyson, J Goudkamp and F Wilmot-Smith, ‘Central Issues in the Law of Tort Defences’ in Dyson et al, above n 81.
84 Goudkamp, above n 78, p 37.
85 P Cane, Responsibility in Law and Morality, 2002, quoted in Goudkamp, above n 78, p 37.
and rationality (indeed, coherence) in judges’ reasoning processes. This seems to us to be the most significant point. As Goudkamp says, ‘it is a principle of tort law that judges should ascertain whether the claimant’s cause of action is complete before investigating the applicability of any defences’ and the reason for this is that it helps judges to think through all the elements of the tort to see if it is properly established, without having it blurred or confused by the elements of the defences. In our view, the judges’ discussion of s 50 fails to do this because they considered the defence argument while they were discussing breach. If s 50 is a defence, negligence including duty, breach and causation of damage should be clearly established before the defence is considered. If s 50 is supposed to be considered at the breach of duty stage, it is preferable to characterise it as an argument by the defence taking the form of a mere direction to the judge about how to consider the evidence about breach of duty.

Goudkamp says ‘[i]f foreign matter is allowed to intrude into the category of defences, attempts to come to grips with the role that defences play within tort law will be jeopardised’. Here, Goudkamp makes explicit his view that there is a significant and exhaustive distinction between torts and defences, that is, between the elements of the cause of action in torts and the defences to torts. He sees this as exhaustive because in his view all rules must fit into either one category or the other. He sees this as critical to emphasising that the process of having a cause of action separate from a defence is vital to ensuring coherent argument.

A further and deeper argument may be to take this beyond torts and to emphasise that the distinction between causes of action and defences is one of the norms of the common law system, part of Postema’s ‘intelligible normative space’ which is essential for the common law to operate. Balganesh and Parchomovsky have similarly argued that common law concepts are ‘operational legal device that the common law uses . . . to understand and compartmentalize aspects of a legal issue’. Such fundamental legal structures should not be interfered with in the absence of clear legislative direction.

In our view, the distinction between causes of action and defences is an example of a fundamental common law structure. One reason for arguing that the common law has a systemic approach to the distinction between causes of action and defences is that the history of the forms of action gives us some structural evidence for the origins of the causes of action as distinct from defences. We have already discussed the importance of the forms of action in developing trespass and case in tort, categories which continue to affect the requirements of the causes of action. Maitland’s remark of the forms of action, being dead but ‘still haunt[ing] us from their graves’ is apposite. The forms of action had a profound impact on the common law and its structures. The

86 Goudkamp, above n 78, p 40.
87 Ibid, p 46.
recognition that they helped to create some of the divisions of subject-matter, as for example with the development of trespass and case, is important. They also helped distinguish the idea of causes of action from defences within the forms of action. The fact that during the nineteenth century there was fuzziness about the definition of defences (which may continue today) does not alter the fact that the causes of action have clearly been distinct from defences. The pattern of establishing the causes of action and then turning to defences is deeply entrenched in the common law system.

The modern version of this is that three elements of duty, breach and causation of harm (which is not too remote) are required in order to establish the tort of negligence. These elements must be proved by the plaintiff, and once proved, establishes the cause of action. Attention then turns to the defendant and the defendant’s ability to establish defences which will avoid or diminish liability. This pattern is significant for maintaining coherence in the tort, and the separation of the defences and other matters is important to allow full exploration of the requirements of the cause of action followed by full exploration of the defences, if any. These ‘systemic’ aspects of the common law continue to assist with order and coherence in the common law, in a way which arguably allows completeness of arguments on particular points, thus allowing both stability and change, anchoring and structuring the normative arguments.91

There is, then, a sound doctrinal and structural justification for drawing a distinction between cause of action and defence. What is also clear, however, is that in s 5O of the Civil Liability Act 2002 (NSW) the distinction between cause of action and defence is not mentioned. This leads to a serious question as to whether judges interpreting the statute should presume that the distinction should be maintained92 when the drafting makes it unclear whether certain sections are referable to elements of the cause of action in negligence or to a defence.

We submit that there is value in the use of a presumption that the common law structure separating cause of action and defences should be maintained unless there is clear intention otherwise in the legislation. This would operate in the same way as the rules referred to in Potter v Minahan.93 Our view of s 5O is that it does not make this clear, but that it is clear from the second reading speech that the common law is not abolished by the Act, but continues to be relevant. ‘The bill modifies particular aspects of the common law. It does not establish a complete code.’94 In our view, the maintenance of the structural aspects of the common law, particularly the separation of cause of action and defence, is quite consistent with s 5O as it is expressed; while s 5G might be regarded as an example where the reversal of the onus of proof (one aspect of

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91 Balganesh and Parchomovsky, above n 89, at 1244, 1250, 1304.
92 For example, by analogy with the presumption that parliament does not interfere with fundamental rights (Potter v Minahan (1908) 7 CLR 277; He Kow Teh v R (1985) 157 CLR 523; 60 ALR 449; [1985] HCA 43; BC8501099) or the presumption against retrospectivity (Maxwell v Murphy (1957) 96 CLR 261; [1957] ALR 231; (1957) 31 ALJR 143; BC5700130).
93 See text above n 61.
94 Hansard, 23 October 2002, Legislative Assembly, Mr Carr, p 5764.
a defence) is clearly mandated and where the clear intention of Parliament must be followed.

Does the apparent characterisation by the courts of s 5O as a defence fit with Goudkamp’s arguments? Goudkamp wants to separate ‘true’ defences (which correspond to (ii) in his taxonomy) from rules that fall to the defendant to prove (which correspond to (iv) in his taxonomy). It is interesting to consider whether he would characterise s 5O as such a rule or a defence. In our view, Goudkamp would not characterise s 5O as a defence because it is not external to the cause of action. It is clear in the legislation that s 5O is a modification of the requirements for breach of duty so in Goudkamp’s terms that would not be a defence, even though it looks as if it has some liability-defeating elements.

A more significant consequence might be whether treating s 5O as a defence in the way the courts have dealt with it, actually disrupts the reasoning process usually undertaken in the establishment of the tort of negligence. If it is a defence, in our view, it should be liability-defeating, reverse the onus of proof and be outside the cause of action. As it is treated in the judgments, it reverses the onus of proof (although we would not construe it as doing so), is liability defeating, but is dealt with within the cause of action. In our view, s 5O should not have been construed as a defence and dealing with it as a defence while in the process of determining breach creates confusion and incoherence.

The definition of defence which we have used which requires a defence to be liability defeating (or diminishing), outside the cause of action and to reverse the onus of proof draws on the fact that a rule as to who bears the burden of proof on a particular issue indicates to whom the law gives protection on that issue. Thus, if a matter is an element in the cause of action, then the plaintiff must prove it and, at that point, the defendant is protected by the law or given greater protection. The reverse is true for defences. The fact that the onus of proof shifts is one of the reasons for insisting that a defence must be outside the cause of action. In our view, this separation is one of the most important issues allowing the proper ventilation of legal issues. Where defences are brought into the cause of action we argue that consideration of those issues may well be less thorough or coherent than if they remain separate. This is an important reason why we argue that in statutory interpretation there should not be a change to such fundamental common law structures unless parliament clearly indicates that that is intended.

The case of Roads and Traffic Authority of NSW v Dederer provides an example of such a disruption to the judicial reasoning process. Dederer was a 14-year-old boy who had dived off a bridge into the water and become a paraplegic as a result. Ipp JA in the Court of Appeal, held that where the Road Transport Authority (RTA) knew that children continually jumped off a bridge into water of variable depth and that signs on the bridge were ineffective in stopping this practice, the RTA owed a duty to those children.

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The High Court decided\(^7\) that the scope of the duty owed by the RTA was limited so that ‘the extent of the obligation owed by the RTA was that of a roads authority exercising reasonable care to see that the road is safe “for users exercising reasonable care for their own safety”’\(^8\).

Ipp has pointed out\(^9\) that Gummow J stated in \textit{Dederer} that ‘the expectation of reasonable care was not merely a “factual underpinning” but rather a legal aspect of the scope of the duty owed by the RTA’.\(^10\) This statement takes the question of reasonable care out of the realm of breach (where it is a matter for the trier of fact) and into the realm of duty (where a higher court can more easily overturn a lower court finding). But it goes further than that, because it actually takes the modified defence of contributory negligence, which is concerned about whether the plaintiff has failed to take reasonable care of his or her own safety, and moves it into the duty of care where it acts no longer like a modified defence, but like a complete one, ending the consideration of duty and therefore preventing the full consideration of the other elements of the cause of action. In Ipp’s view it:

converts the expectation that potential plaintiffs will exercise reasonable care for their own safety (which until \textit{Brodie}\(^11\) was simply a factor, in every case, to be taken into account in determining the reasonable response to a foreseeable risk of harm) into a rule of law that limits absolutely, (in the case of road authorities at least) the scope of the duty of care.\(^12\)

What has happened, in our view, in \textit{Dederer} is that the High Court has taken the requirements of the defence of contributory negligence and imported them into the duty of care. This has been done in the name of personal responsibility, which of course, was the mantra of the tort reform proposals and indeed was incorporated into the NSW Civil Liability Act.\(^13\) The High Court’s approach is of concern here particularly because of its location of the plaintiff’s protection of self wholly in the duty of care rather than in the defence of contributory negligence. This matters first because it creates incoherence in the discussion of the cause of action, as discussed above, and second because the defence of contributory negligence as it now applies (by statute which leaves no doubt)\(^14\) has the advantage of allowing the court to apportion damages in a way which may better reflect the balance of responsibility between defendant and plaintiff. At the same time, the onus of proof for establishing a duty of care and breach lies on the plaintiff. It is far preferable to have detailed consideration of the wrongs of the plaintiff in caring for him- or herself in relation to the (apportionable) defence of


\(^{9}\) D Ipp, ‘The Reach of the \textit{Dederer} Principle’ (2010) 18(2) TLJ 125.

\(^{10}\) Ibid, at 127.

\(^{11}\) \textit{Brodie v Singleton Shire Council} (2001) 206 CLR 512; 180 ALR 145; [2001] HCA 29; BC200102755.

\(^{12}\) Ipp, above n 99, at 132.

\(^{13}\) Civil Liability (Personal Responsibility Amendment) Act 2002 (NSW).

\(^{14}\) Law Reform (Miscellaneous Provisions) Act 1965 (NSW) s 9 and equivalents.
contributory negligence (where the burden of proof falls logically on the defendant) than to have the scope of the duty reduced by this consideration as the Dederer principle appears to have it. The High Court’s treatment of this issue is an example of the mixing up of the cause of action and defences in a way that, we would argue, reduces the rationality of the process. It does this both by interfering with the time sequencing of the reasoning, and by putting the onus of proof concerning the behaviour of the plaintiff on the plaintiff rather than the defendant, when the proper and logical place for that burden should be on the defendant who is seeking to take advantage of it.

**Conclusion**

At common law, as we have argued, defences have traditionally been seen as separate from the cause of action and only spring into life after the elements of the cause of action have been established. In negligence, the question of whether the standard of care for negligence has been met has traditionally been a question treated as part of the question of breach, one of the three elements of the cause of action which have to be proved by the plaintiff. Bolam, Bolitho and Rogers v Whitaker all focused on the question of the relevant standard of care for professionals in the context of breach of the duty of care rather than as a defence to liability in negligence. The characterising of s 5O as a defence, we argue, interrupts the proper processes of reasoning that should be taking place in a negligence action. If it is a defence, it should be liability defeating, reverse the onus of proof and outside the cause of action.

Section 5O has been characterised as a defence, whether that was actually the intention of parliament or not; but it must operate at the stage of breach of duty within the establishment of the cause of action. This creates a situation where the plaintiff must establish duty and breach, then the defendant may have to establish s 5O, then the plaintiff must establish causation. If this is treated as a liability defeating rule with the burden of proof shifted it will change the logical structure of the cause of action. Such an operation of s 5O breaks the chain of reasoning. While in most situations the burden of proof is met by sufficient evidence and therefore the onus of proof is not determinative; the point of the burden of proof is to operate when the evidence is equivocal. Cases where the evidence is equivocal are difficult, and when that happens, the logic of the chain of reasoning may matter significantly. While it is true that courts may often treat a case in a less linear fashion than this, the structures of the common law should be retained so that difficult cases may be heard properly and logically.

The better view is that s 5O should be characterised not as a defence but instead as a denial of the breach element of the cause of action in negligence (category (i) of Goudkamp’s taxonomy). That is, s 5O allows the defendant to deny that they have breached the standard of care since there has been no failure to act reasonably.

If this view is accepted, then in accordance with Goudkamp’s argument, s 5O is not a ‘true’ defence and therefore the defendant would not need to wait until after the plaintiff has established all the elements of the tort but could instead argue s 5O at the time the court examines the standard of care question. Correspondingly, the court’s reasoning would not need to be contorted by dealing with a ‘defence’ at the same time as an element of the
tort, and the onus of proof would not shift. It would remain a question of whether the plaintiff had made out their case that the defendant had breached their duty of care. As Goudkamp states, ‘denials by the defendant that one or more elements of the tort that the claimant alleges was committed against him are mistaken for defences with alarming regularity’.105 We think this is one such example.

Section 5O makes (slightly more) explicit what is implicit in court procedure already in establishing the relevant standard of care. That is, both the plaintiff and the defendant adduce evidence about the applicable standard of care, which is then assessed by the court. Section 5O allows for the possibility that, in the case of professionals, more than one standard of care might be relevant. So long as the plaintiff fails to establish that there was a breach, possibly because of evidence of the defendant that their conduct was widely accepted by peer professional opinion as competent professional practice (and the opinion was not irrational) then the defendant has met one of these standards and cannot be said to have breached the standard of care. What is important, though, is that the court’s reasoning not be disrupted by a sudden reversal of the onus of proof during the determination of the plaintiff’s case. In our view, s 5O does not create this necessity; and it should not have been construed as a defence, but merely as part of the defendant’s argument, the onus not being reversed. If it must be construed as a defence then it should be determined after the cause of action is established. In either case, the structural requirements of the common law processes of reasoning from cause of action to defence should be respected and incorporated into the process of contextual statutory construction.

In this article, we have argued that the courts’ construction of s 5O as a defence is unfortunate. Our further contention is that the legislation did not expressly or by necessary implication direct that s 5O is a defence, and that therefore the presumption of statutory interpretation that the common law system of causes of action and defences remaining separate should not have been altered. We have argued also that there is good reason to maintain the separation between cause of action and defences. Although it is possible to see the issues in torts as a whole corpus of matters, of which some are for the plaintiff to prove and others are for the defendant to prove, this is incoherent and unhelpful for either party. The better view is that there is value in dealing with issues which make up the cause of action together, and then dealing with defences. This is partly because it is logical to set up the whole cause of action and then to argue a defence. This is the more so because there is some intrinsic worth in having the elements of the cause of action proved by the plaintiff (on whom lies the burden of proof) and then having the defence proved by the defendant (on whom lies that burden of proof). Mixing these up may lead to confusion and incoherence, while separating them is more likely to enhance the clarity of reasoning. When interpreting statutes that are making incursions into the common law and there is no clear direction to the contrary by the legislature, courts should be encouraged to consider the common law’s general systemic patterns of reasoning as a significant part of the legal system. Thus, matters such as the cause of action being separated from the defences

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105 Goudkamp, above n 78, p 27.
can be seen as part of the contextual background or system giving rise to a presumption that it should not be interfered with unless there is clear direction from Parliament. As more and more statutes appear and affect areas of law that until recently have been largely case based, presumptions based on the systemic aspects of the common law may be more and more necessary in order to maintain some level of coherence within our legal system.