Using the wider common law as a baseline to defend subversion by statute

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This paper considers the tension that can exist between traditional common law reasoning about and in 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? This paper considers some of the structural features of the law of negligence as they are being impacted by statute; and the different ways in which statutes may do this. An example is the idea of a defence. The common law idea of a defence is distinguishable from a defence argument. A defence exists where the burden of proof shifts. Is it more than this? When does the structural creation of the elements of a tort recognised by the wider common law matter? To what extent should the traditional pattern of duty, breach and causation of harm as establishing a cause of action which a defence then counters be regarded as sacrosanct? When the political aim of a statute operates to create a particular orientation – in the case of NSW a defendant-oriented set of provisions- can or should the general pattern of the tort be maintained against the inclusion of a definition of breach which becomes treated as a defence? The NSW Civil liability Act s 5O defines professional negligence in such a way that the courts have held the provision to be a defence. Is this a problem in the context of the traditional approach to the elements of a cause of action and defences? Is an emphasis on these elements merely a leftover from the forms of action which should now be discarded as artificial? Or is there a value in the use of the broad common law acceptance of these structures which should be held to in the face of such statutory changes, even if only to remind ourselves that the definitions matter in a residual common law which, ghostlike, remains to be used to remind the legislature that there was a reason for the definitions.