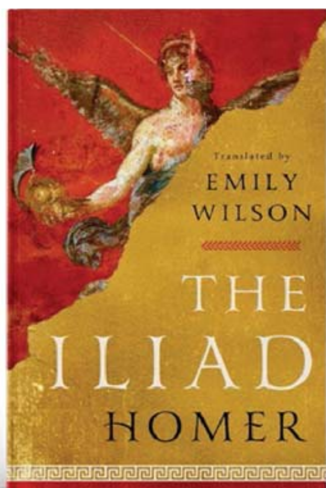
The Iliad

By Homer, translated by Emily Wilson (WW Norton & Co, 2023)



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In part II of this two-part book review, Emily Wilson's translation of *The Iliad* (2023) is reviewed. Part I, in *Bar News* Autumn 2024 edition, reviewed Wilson's translation of *The Odyssey* (2017).

Emily Wilson's translation of *The Iliad* (2023) is a poem of sound and fury that chronicles the glory, tragedy and futility of war. Though a chronological prequel to *The Odyssey* (2017), covering the 10th and final year of the Greeks' siege of Troy, by dint of its ambitious scope and adventurous complexity it reads much more like a sequel. 'Tell me about a complicated man' is how the story of Odysseus' long journey home began. 'Goddess, sing of the cataclysmic wrath' opens *The Iliad*.

As with *The Odyssey*, Wilson has adapted *The Iliad* to follow the rhythmic cadence of the iambic pentameter. But, unlike her preceding translation, which matched the line count of the Homeric script, Wilson admits, in a translator's note that blends commentary with confession about the writing process, 'after many drafts and experiments, I reali[s]ed that I needed to use more lines than the original'.

This extension in length is felt, but rarely adversely. Whereas *The Odyssey* told the story of the titular individual and those in his immediate orbit, *The Iliad* tells the story of a place – a legendary city then known to the Greeks as Troia or Ilios – and its fall. It is on this land that Greek heroes Agamemnon and Achilles do battle against Trojan protagonists Hector and Paris. It is a conflict prompted by the off-page kidnapping of Helen, the wife of Menelaus (the brother of Agamemnon) by Paris (the brother of Hector) and concluded, not by the demise of Troy via a wooden horse left at its gates, but by the killing of principals on each side.

Each side leads large armies containing dozens of patronymic units – fathers, sons, and brothers – with their own stories, many of which are told through brief scenes of combat. Above and behind these forces loom the Olympian gods: Hera, Athena and an ambivalent Zeus, favour the Greeks, while Ares, Aphrodite and the impassioned Apollo support the Trojans.

It is amidst the thunderous roar of battle, the fretful quietude of each party's encampments, and the heavenly but querulous realm of the deathless gods that the plot is progressed. Characters deliver long speeches to each other between montages of fighting (as Wilson observes: 'almost half the poem consists of direct speech'). But the conflict is also internecine. Achilles, the Greeks' finest warrior, admonishes Agamemnon, their leader, in Book 1 ('The Quarrel'): 'Cannibal king, you eat your people up! You are a leader of nonentities!' *The Iliad* is packed with this kind of trash-talk.

There are also moments of levity. An early confrontation between Glaucus, of the Trojan side, and Diomedes, on the Greek side, is exemplary of this. On meeting, the two introduce themselves, chat amiably about their lineages and priors, realise through their forebears that their families are friendly with each other's, agree to desist from attacking the other, and ultimately decide to 'exchange our arms and armour with each other, so that other men will know that we are proud to be each other's guest-friends through our fathers'. The humour in scenes like these is simultaneously dry and broad. The skewering of social norms and the tension between hostility of war and the hospitality of the aristocracy sometimes feel like a Key and Peele skit, or an episode of *Seinfeld*, but with swords and sandals.

Like *The Odyssey*, there is much from *The Iliad* for the antipodean barrister of the 21st century. A leader would do well to encourage their juniors in the manner that Nestor of Gerenia, an older commander of the Greek forces, speaks of the troops under his command: 'This is the privilege of age. My juniors / confident in their strength, will be the ones / to hold and hurl the spears.'

It is in this way that the allegory of war illuminates the practices and principles of the legal profession and the contest of litigation. The similes of battle did not inspire me in thoughts of the adversarial process, but the scenes antecedent and adjacent to the conflict reminded me of the Bar. It is gauche, for good reason, to boast openly about 'winning' a case.[1] *The Iliad* reminds us that the triumphs of individuals are the work of higher powers.

Sometimes this is literal, as when Apollo redirects Teucer's arrow, aimed at Hector, to pierce and slay another. At other times, it is indirect, as when Poseidon takes mortal form to rally the Greek troops through speech and inspire a successful counter-offensive against a dominant Trojan push. This is not to say that individual effort and skill are absent from the resolution of a case; rather, it is to acknowledge that the race does not always go to the swift nor the battle to the strong, but that time and chance happen to all.[2]

The Iliad is not without its flaws. Its scope and complexity, and consequent length, is, at times, bogged down by the cataloguing of ships and moments of combat repetitiously compared to a lion attacking deer on a plain. These moments are thankfully broken up by sections such as Diomedes' and Odysseus' stealth mission in Book 10 ('Espionage by Night'), Hera's seduction of Zeus to lull him into slumber in Book 14 ('An Afternoon Nap'), and Achilles' impromptu facilitation of sporting contests for the Greeks in Book 23 ('Funeral Games').

Wilson's translation of Homer reminds us that interminable conflict of our working days can involve glory, tragedy and futility – sometimes all at once. But it is the deeply human moments, and our place within a universe much larger than Philip Street, that provide our days with colour, joy and depth. BN

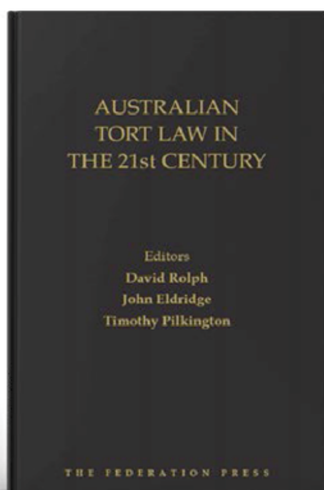
ENDNOTES

1 Editor's note: It has been observed that this affliction increases with seniority. As Cicero says in *De senectute*: 'There is no need of my speaking of myself, though that is an old man's habit, and is conceded as a privilege of age' before immediately observing 'Do you not know how very often Homer introduces Nestor as talking largely of his own merits?'.

2 The Bible, Ecclesiastes 9:11.

Australian Tort Law in the 21st Century

By David Rolph, John Eldridge and Timothy Pilkington (eds) (The Federation Press, 2024)



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It has been said that formal separation of the common law of Australia from the common law of England may be dated with precision to the abolition of appeals to the Privy Council from all Australian Courts.[1] However, as Mark Lunney has convincingly demonstrated,[2] a distinctly Australian law of torts emerged in the first half of the 20th century, partly as a result of local legislative reform but also as a result of Australian judicial divergence from English case law.

This collection of essays about Australian tort law in the 21st century begins in the 19th century with an essay by Mark Leeming, 'Colonial Innovation in the Australian Law of Torts' (ch 1). As Paul Finn once wrote, an understanding of legal history 'has uncommon importance in the coherent development of legal principles'.[3] In this chapter, Leeming returns to a topic which he has dealt with elsewhere at length[4], namely the interaction between statute and judge-made law, and considers the enactment of 'claims against government' legislation as an illustration of the contribution made by colonial legislatures to a distinctively 'Australian' law of torts.

A number of the essays are somewhat less 'Australian' in focus than the title of the collection might indicate. Professor Dyson's essay, 'Intention in Tort: Where it comes from and where it's going' (ch 2), discusses the role of intention in tort law, predominantly by reference to non-Australian authority. James Goudkamp's essay, 'New Torts' (ch 3), is a similarly non-Australian review of the circumstances in which new torts come to be identified (although the brief section on so-called 'dead torts' has a distinctly Australian flavour).

Subsequent chapters, however, return to an Australian focus. Ellen Rock's 'Government Liability and the Will of Parliament' (ch 4) is a survey of recent cases considering the scope of government liability in tort. There are then essays addressing particular elements of liability in negligence: Gemma Turton's 'Factual Causation: The Sensible Decline of Common Sense and the Mystery of the "Exceptional Case"' (ch 5) and Barbara McDonald's 'Scope of Liability and Remoteness of Damage: A Final Limit on Responsibility for Negligence in Australia' (ch 6). Each address different aspects of the statutory reforms to the law of causation. Jodi Gardner's '"A Risk by Any Other Name": Rejecting *volenti* in Australian Tort Law' (ch 8) surveys the case law in relation to assumption of risk and analyses the relationship between the doctrine of *volenti* at common law and the statutory defences enacted as part of the Ipp reforms.

One difficulty with a collection of essays such as this is that in situating a particular doctrine within its historical development as a springboard for saying something meaningful about its future, either the historical context or the prognostication as to its future (or both) inevitably suffer. This is illustrated by Warren Swain's 'Vicarious Liability: *Antiaris toxicaria* in Australia'[5] (ch 8), which provides an historical survey of the development of the law of vicarious liability that is altogether too brief, and does not leave room to provide anything other than a cursory summary of the recent 21st-century case law, merely noting, without really exploring, the tensions between the recent decisions of the House of Lords, the Supreme Court of the United Kingdom (curiously referred to as the English Supreme Court), and the High Court of Australia. Apart from noting the latter's recent consideration of vicarious liability in *CCIG Investments Pty Ltd v Schokman* [2023] HCA 21, there is no discussion of the challenge issued by Edelman and Steward JJ in that case to reconceptualise vicarious liability.

A more satisfactory balance is arrived at in Carolyn Sappideen's excellent survey of the interaction between torts law and the contract of employment: 'Tort and Employment: Reflections on Changing Ideas of Responsibility and the Adaptability of Torts Law' (ch 9) and in Prue Vines' discussion of blameworthiness in the law of negligence: 'Negligence, Morality and Apologies: Assessing Responsibility in the Real World' (ch 10).

The collection concludes with an essay by Stephen Puttick and David Winterton, which analyses the High Court's relatively recent decision in *Arsalan v Rixon* [2021] HCA 40: 'Repairing the Compensatory Principle in Negligence: "Loss of Amenity" and the Justifiable Scope of Damages Liability' (ch 11) and a discussion by David Rolph on the increase in litigation in Australia involving injurious falsehood: 'Injurious Falsehood: A Tort Resurgent' (ch 12).

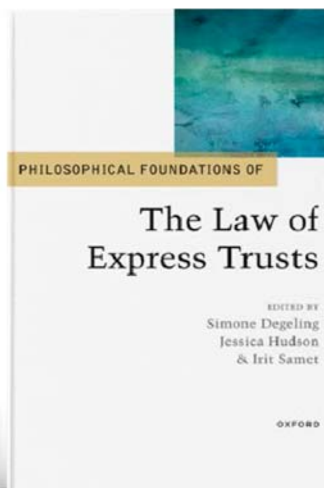
Overall, this collection of essays provides a useful starting point for a more detailed consideration of each of the topics they individually consider. Their historical analysis is sufficient to provide the context for the discussion, but one will mostly want to delve into the footnotes for a more detailed treatment of that history. They usefully ask many questions about the future, paving the way for future authors (and practitioners and judges) to more boldly and comprehensively develop the law of tort (or torts) in the future. BN

ENDNOTES

1. See S Gageler's review, '*Australian Contract Law in the 21st Century*. Edited by John Eldridge and Timothy Pilkington (The Federation Press, 2021)' [2022] *Cambridge Law Journal* 197.
2. M Lunney, *A History of Australian Tort Law 1901–1945: England's Obedient Servant?* (Cambridge University Press, 2018).
3. PD Finn, 'Foreword' in JT Gleeson, RCA Higgins and JA Watson (eds), *Historical Foundations of Australian Law Volume I* (The Federation Press, 2013).
4. M Leeming, *The Statutory Foundations of Negligence* (The Federation Press, 2019); M Leeming, *Common Law, Equity and Statute* (The Federation Press, 2023)
5. *Antiaris toxicaria* is the scientific name for the Upas tree, traditionally used to make poison darts. Its use in the title is a reference to Thomas Baty's description of 'the poisonous properties of vicarious liability'. BN

Philosophical Foundations of the Law of Express Trusts

By Simone Degeling, Jessica Hudson & Irit Samet (eds) (Oxford University Press, 2023)



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This edited collection is a welcome addition to the Oxford University Press *Philosophical Foundations* series in what the editors describe as an 'under-theorised' area of the law. The suggestion of theory ought not scare off the practising profession. The work contains many interesting chapters that attempt to bridge the divide between doctrine and theory, and the philosophical interplay between property and trusts as bodies of rules is a thread that runs through many of the chapters and helps to draw this diverse collection together.

Ben Macfarlane's chapter 'Trust, Property, and Rights' explores the extent to which concepts of 'property' assist in understanding trusts. Sceptical about the utility of viewing trust law through the lens of 'property', Macfarlane refers to the 'package of legal relations that constitute the rights held on trust' in order to explain both the nature of the trustee's obligations and the beneficiary's interest. The consequences of Macfarlane's argument are explained by reference to concrete examples like the trustee's 'right of exoneration', described in *Carter Holt Harvey Woodproducts Australia Pty Ltd v Commonwealth* (2019) 268 CLR 524 [31] as 'a power to use trust funds to discharge debts that were properly incurred by the trustee'. For Macfarlane, 'it is more pertinent to see the right of exoneration as a liberty' that reflects a limit on the scope of the duties owed by the trustee.

David Foster's chapter 'Historical Conceptions of the Express Trust, c 1600–1700' reveals a similar scepticism about the use of 'property' to explain trust relationships. The deeply historical account casts the debates about a beneficiary's interest as being either in rem or in personam as an incomplete relic of Austinian analytical jurisprudence. Foster explains the foundations of trust stemming from the 16th-century 'personal' conception of placing trust in a particular individual and, therefore, attaching to the trustee's conscience. For Forster, more modern property-based accounts are a distraction. Similarly to Macfarlane, Foster examines concepts, sometimes used unthinkingly, to reveal what they tell us about the content of trust law.

Hudson and Mitchell's chapter 'Justificanda' opens the collection with the ambitious project of justifying the law of trusts but with a methodology that is deeply devoted to doctrine. For Hudson and Mitchell, the trust is an institution that affords 'parties the power to redefine the trustee's authority as titleholder'. The authors acknowledge that account of 'what is a trust' may assist in future justificatory projects, which they posit may be by reference to autonomy or law and economics. But importantly, and in echoes of Macfarlane's chapter, a central conclusion is that trust law cannot be collapsed into property law. Rather, trust law explains the way people use, or are constrained in the use of, *other* sets of legal norms, including the title-conferring rules of property law.

Agreeing with the distinct place for trust law in any account of private law, Matthew Harding's chapter 'A Fresh Look at Purpose Trusts' argues that purpose trusts represent a distinctive autonomy-enhancing legal form that enables settlors to organise their affairs in a way that is not fully achievable using other legal forms. But in a challenge to orthodoxy, Harding questions the basis for the law's exclusive recognition of purpose trusts in the case of public or charitable trusts but not for private purposes. Harding questions accounts of trusts as jural relationships between trustee and beneficiaries, given that charitable trusts with no such relationship 'have been regarded as trusts for hundreds of years'.

One of the more overtly philosophical of the chapters is Hanoch Dagan and Irit Samet's chapter 'Express Trust: The Dark Horse of the Liberal Property Regime'. It serves as an (acknowledged) methodological counterpoint to Hudson and Mitchell and seeks to justify the law of trusts as autonomy enhancing. The justification is set against concerns, for example, that the use of trusts to put property beyond the reach of creditors cannot be justified as autonomy enhancing and undermines distributive and relational justice. Theirs is a jurisprudential account, with the consequences for the precise content of trust law – ie the answer to contentious questions of doctrine – left for others.

Paul Miller's chapter cuts to the 'philosophical foundations' of what is (often) an assumed element of testamentary trusts – the freedom of disposition. Miller's chapters asks, how can we justify (morally) freedom of testamentary disposition? Miller adopts an overtly Aristotelian/Finnisian methodology by proposing a central or 'focal' meaning of testamentary freedom as a freedom to make legally effective *gifts* of property that take effect upon death animated by a bona fide donative intention. Through that focal account, Miller posits that testamentary dispositions are best viewed through the morally justifiable practice of gift giving and gift relationships, so that testamentary freedom is justified because it enables morally well-motivated choices that provide opportunity for the practice of virtue (eg by exercising the freedom in favour of those to whom one has a moral *duty* to act, like dependents). Miller's method recognises that certain dispositions may be legally valid but must be criticised as morally deviant from the central case, as not instantiating virtue or social goods – for example, spiteful disinheritance. Miller recognises that the justification offered in his chapter is a necessary first premise for later resolution of thorny policy questions like legislative reforms to the scope of freedom, or the appropriateness of inheritance tax.

Sinéad Agnew's chapter 'The Settlor's Conscience' demonstrates a keen interest in explaining doctrine. Agnew explores the extent to which the focus upon the settlor's conscience explains developments in the cases. Of interest is Agnew's engagement with the Court of Appeal's decision in

Pennington v Waine (No 1)[1] and the extent to which it could be seen as relaxing what is described as the rule in *Re Rose*[2] (a requirement for a donor to have done all within her power to divest herself of and transfer property before equity would assist a volunteer). The author observes a willingness in the cases to offer protection to putative donees and suggests that a '*conscience-based*' approach anchored in detrimental reliance may provide some guidance for the development of doctrine. The chapter raises, but does not resolve, the need to set some doctrinal parameters to any such approach.

Simone Degeling's chapter 'Administrators as Trustees of Australian Class Action Settlements' will also be of interest to practitioners. Examining the essential role that trusts play in settlement distribution schemes sanctioned by the court, Degeling's detailed chapter concludes that the institution of the trust ensures the settlement funds reach group members because the trust 'permits a particular structure of court supervised delegated decision-making and distribution' – the point being that trusts provide the elaborate legal architecture in which group members are afforded standing to enforce the terms of the settlement scheme and administrators are subject to the supervisory jurisdiction of the court, and if necessary, the protections afforded from an ability to seek judicial advice.

Simon Douglas' chapter offers a novel account of trusts as 'weak estates' by analogy with personhood, which is of particular interest in the peculiar context of English law and the numerous instances in which statutory developments have afforded trusts a degree of 'personhood'. Ann Mumford's chapter asks pertinent questions about the extent to which trust law can justify the evasion of tax in other jurisdictions.

True to its name, the work contains the foundational justifications and explanations of elements of trusts law that are worthwhile contributions to scholarship in their own right. But any reader will be interested to see what a number of the authors eventually construct on these foundations in later works that will have to grapple with the implications of their writings for contentious points of doctrine. BN

ENDNOTES

1 (2002)1 WLR 2075.
2 [1949] Ch 78.

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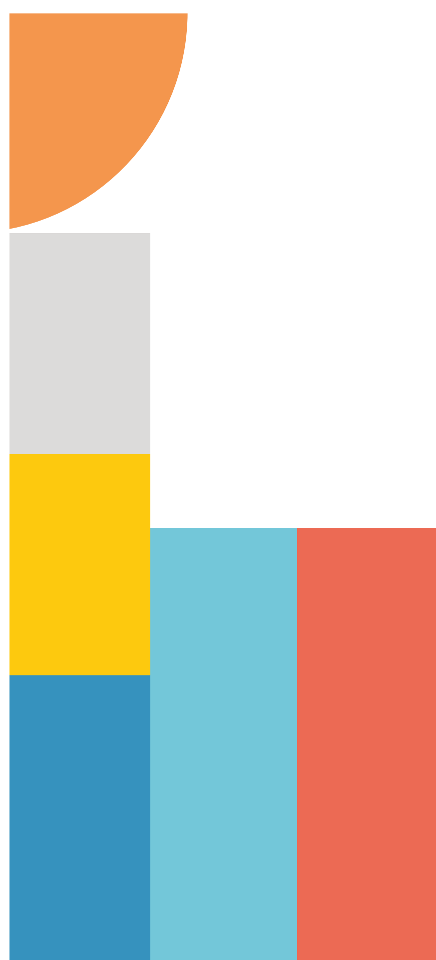

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