

**Justice Julia Loneragan – Book launch**  
**4 April 2024**

Good evening to all – special guests, luminaries, illuminati, authors, torts aficionados and, if present incognito, the reasonable woman and reasonable man.

I am honoured to be launching this excellent book – *Australian Tort Law in the 21st Century* – edited by David Rolph, John Eldridge and Timothy Pilkington.

There is a little bit of the republican in me, and I love and embrace the concept of an autochthonous body of Australian Law of Torts, described by Leeming JA as “... not a monolith, but the continued existence and vitality of a body of jurisprudence, developed by Australian courts and legislatures for Australian conditions”.

Mind you, with the reversal by the High Court of Australia of my decision in *Tapp v Australian Bushmen’s Campdraft and Rodeo Association* [2022] HCA 11; 273 CLR 454 (a majority of 3 v 2 but who’s counting?) I did fleetingly think: Where is the Privy Council when you need them? Anyway, back to the task at hand.

The essays in this book provide a resounding “yes” in answer to the question posed by its editors: “is there a distinctively Australian law of torts?”

What does this look like? A bloke in boots, moleskin pants, checked shirt and sweat-stained Akubra, kelpie cattle-dog cross at his side, standing next to a dusty ute saying, “she’ll be right, mate”?

No. As demonstrated by this book, it is a subtle, humane and humanistic, rich tapestry of generous intellect, and occasionally labyrinthine analyses that demonstrate how, why and when people’s wrongs or mistakes should be the subject of a court-based or mediated solution and compensation.

Some might say with the introduction of civil liability statutes, the law of tort in Australia has become positively Byzantine or, at least, Baroque.

A senior colleague of mine who shall remain nameless but was a leader of the common law bar before his appointment many years ago confessed to me that he thought he understood torts whilst he was at the bar, but now, he’s not so sure.

Whilst he was being tongue in cheek, I understand what he meant. A lot has changed in the last 20 years, and as judges, we must apply the law *as it is* to the facts we are given. There is less room to think about what the law *should or could be* or how to present the angles.

Every chapter in this book provides a stimulating take on those angles.

Leeming JA's introductory chapter was his usual attractive combination of effortlessly erudite and relaxed.

Ellen Rock's superb chapter on Government Liability and the Will of Parliament already features extensively in a draft judgment of mine regarding a bushfire class action I have been hearing.

Matthew Dyson's chapter on Intention in Tort, interrogated the key matter so often glossed over: namely, what do we really mean by "intention".

The chapter on New Torts was fascinating, but I do hope it does not encourage too much lateral thinking and so a bigger workload for the Supreme Court, Mr Goudkamp. I particularly enjoyed that part of the chapter titled "Failed Torts". I was a personal contributor as junior counsel to failed torts in *Tabet v Gett* [2010] HCA 12; 240 CLR 537 when the High Court resoundingly rejected expanding liability to include "loss of chance of a better medical outcome". Please feel free to leave that out of the next edition, although can I say that I completely agree with your premise (at p 60 of the book) that the logic that novelty counts against recognition of a new tort is circular and totally unconvincing for all the reasons you cogently list. Maybe we needed you on the team in *Tabet v Gett*.

Dr Gemma Turton's chapter on Factual Causation and the Sensible Decline of Common Sense contains, ironically, much common sense, identifying the gaps and holes created by some of the current causation provisions in the (not uniform) civil liability legislation.

I wish every barrister practising in common law would read Barbara McDonald's chapter on Scope of Liability and Remoteness of Damage to stop the blank stares from some counsel when these concepts are raised as a matter to be considered and addressed by them.

Chapter 7 on Volenti by Jodi Gardner was a fascinating take down to the mat of this "so-called principle", as well as a nuanced analysis of the interpolations of the Ipp report and the civil liability legislation that followed.

The poison dart (Antiaris Toxicaria) that is Vicarious Liability was entertainingly covered by Warren Swain. It is indeed a poison dart and a nest of vipers and, worse still, messy and uncertain and hard to advise a client about given the width of matters to consider à la *Prince Alfred College Inc v ADC* [2016] HCA 37; 258 CLR 134, amongst other complex decisions.

Carolyn Sappideen is the reason why I practiced extensively in torts as both a solicitor and barrister. She won't remember this but as a callow 18-year-old student at Sydney University Law School, Carolyn provided crystal clarity to me which helped me not only pass the subject but grow to love it. Her clarity continues in Chapter 9 on Torts and Employment.

No book worth its salt can avoid a foray into morality – hence the issues discussed thoughtfully and comprehensively in Chapter 10 by Prue Vines. I have had first-hand experience of the role

apologies can have as a “rebalancing process” and the humanising weight it gives to the battlelines of a wrongdoing. It is in my opinion one of the few places where morality and law can and does in fact coalesce for good.

Chapter 11 “Loss of Amenity” by Stephen Puttick and David Winterton explores whether a car is just a car, the appeals in *Araslan v Rixon; Nguyen v Cassim* [2021] HCA 40; 274 CLR 606, High Court decision which has redolence on the wider question of the scope of damages liability. I had a lot of fun with these cases at the Local Court Magistrates’ Conference in 2022 where I was asked to speak about the decision. On a show of hands, a surprisingly high number of magistrates own prestige European cars.

Finally, against a backdrop of Trumpism and fake news, David Rolph writes entertainingly in Chapter 12 on Injurious Falsehood described as a “Tort Resurgent” (an alarming image!). The analysis is timely. This tort may be a neater, quicker, and dare I say more private approach than running a defamation case in the Federal Court – although to assert that might be putting to one side the role of personalities in litigation.

Anyway, to close: I congratulate the authors and editors on an immensely readable and interesting work which provides much to think about in this shape-shifting area of the law.