Review Essay

Pioneers, Consolidators and Iconoclasts of Tort Law

Scholars of Tort Law by James Goudkamp and Donal Nolan (eds) (2019), Hart Publishing, 424 pp, ISBN 9781509910595

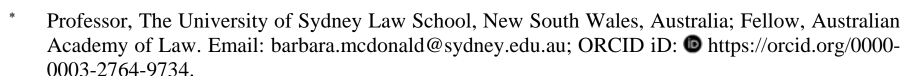
Barbara McDonald*

Abstract

This essay reviews *Scholars of Tort Law*, a collection of essays edited and introduced by James Goudkamp and Donal Nolan. Twelve leading contemporary tort law scholars have written about the work and influence of leading tort scholars in the United States, England and the British Commonwealth working in the late 19th and 20th centuries during the formative period of tort law as a discrete field of legal scholarship. Essentially historical, the essays nevertheless discuss theories and contrasting approaches to tort law that remain just as relevant to legal educators and scholars of tort law today.

I Introduction: The Role and Impact of Tort Scholars

Scholars of Tort Law,[1] edited and introduced by James Goudkamp and Donal Nolan, is a collection of essays by leading contemporary tort scholars about 12 famous earlier tort scholars from the common law world of the United States ('US'), England and the British Commonwealth, spanning the late 19th and 20th centuries.[2] Peter Cane provides a concluding chapter on the changing role of tort scholars in the common law from *Glanvill*[3] to today, contrasting the role of jurists



* Professor, The University of Sydney Law School, New South Wales, Australia; Fellow, Australian Academy of Law. Email: barbara.mcdonald@sydney.edu.au; ORCID iD: https://orcid.org/0000-0003-2764-9734.

1 James Goudkamp and Donal Nolan (eds), *Scholars of Tort Law* (Hart Publishing, 2019) ('*Scholars of Tort Law*').

2 While the absence of any French or German scholars is notable, a number of chapters refer to the influence of, or engagement with, European tort scholars. For example, Giliker's chapter on Tony Weir discusses his important comparative scholarship: Paula Giliker, 'Mr Tony Weir (1936–2011)' in *Scholars of Tort Law* (n 1) ch 12.

3 *Treatise on the Laws and Customs of the Kingdom of England Commonly Called Glanvill* [trans of *Tractatus de Legibus et Consuetudinibus Regni Angliae* (1187–89)].

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in civil law countries and critically analysing a number of theories of tort law.[4] The book provides the reader with fascinating accounts of influential tort scholarship, with insights that both humanise the authors whose work is already familiar and demystify work that may seem too voluminous or daunting to tackle.

The work of the selected scholars spans the founding theories and changing realities of tort: beginning in the 19th century (when tort law came into its own as a separate field of study in law, as distinctive and as multi-contextual as other fields) and through to the late 20th and early 21st centuries (when tort law was assailed by statutory reform and, in many jurisdictions, replaced or supplemented by compensation schemes).[5] A common theme running through the volume is the tension between particular overarching theories of tort law and the various instances and details of tort liability found in the case law. Whether the case law is the source of the theory or must rather conform to a pre-determined theory depends on the approach of the scholar. Either way, theory and reality are not always aligned.

As such, the book invites broader reflection on the role of legal scholarship. It is axiomatic in a common law system that the law has been created and developed by the decisions of judges over centuries, unless and until supplemented or supplanted by statutes, themselves in turn interpreted and applied by judges. Thus, for students of law, litigants, practitioners, prosecutors, and judges alike, the fundamental tasks and functions of identifying, applying and analysing the law all have as their primary source the case law reports or the statute books, now databases, or a combination of the two.

Yet all of these functions would be near impossible to perform, or to perform properly, consistently and efficiently, without the law being recorded, characterised, categorised, organised, explained and analysed by reference to subject matter, context and principle. It is the legal scholars — drawn from practice, the judiciary, or the academy — who have provided this vital foundation. This essential role of legal scholarship deserves recognition. But legal scholars have also done so much more. As Patrick Atiyah wrote, ‘it seems certain that we have greatly underestimated the influence of academics on the development of the law in the past’.[6]

In *Scholars of Tort Law*, Goudkamp and Nolan note that following the quashing of the writ system by the *Judicature Act 1875*, there

> emerged a reimagined legal landscape, populated by new categories, or subjects, such as contract and tort. And while the cases were the bricks and

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4 Peter Cane, ‘Law, Fact and Process in Common Law Tort Scholarship’ in *Scholars of Tort Law* (n 1) ch 13.

5 The modern tort scholar cannot concentrate on the common law to the exclusion of statutes: see, eg, Mark Leeming, *The Statutory Foundations of Negligence* (Federation Press, 2019); TT Arvind and Jenny Steele (eds), *Tort Law and the Legislature: Common Law, Statute and the Dynamics of Legal Change* (Hart Publishing, 2013).

6 PS Atiyah, *Pragmatism and Theory in English Law* (Stevens and Sons, 1897) 180, quoted in James Goudkamp and Donal Nolan, ‘Pioneers, Consolidators and Iconoclasts: The Story of Tort Scholarship’ in *Scholars of Tort Law* (n 1) ch 1, 2.

> mortar of the new superstructure, its architects were the scholars who wrote the books that both created and reflected the nascent taxonomy.[7]

Not all of the scholars in this book were, or were solely, academics: Oliver Wendell Holmes Jr wrote *The Common Law*[8] in 1881 while still a practitioner, before being appointed a Justice of the Supreme Court of the United States where he held office for 30 years; Sir John Salmond moved from the academy to become Solicitor-General of New Zealand and later a judge.

It may seem somewhat immodest and self-serving for legal scholars to trumpet their own or their predecessors' contribution to the development of the law, and there may be some who feel that academic influence is overstated. However, the role and influence of academics is recognised both explicitly by the courts who cite them and implicitly by those who do not, but nevertheless take advantage of academic writing and commentary.[9] It is not rare for an academic to recognise a certain argument or treatment in counsels' submissions or a judgment that bears an uncanny resemblance to the way he or she discussed the issue in a lecture or laboured over an article. While Atiyah was writing about the impact of academic writing on the law itself, by direct influence on judicial approaches and decisions and through submissions and advocacy on statutory law reform, there can be no doubt of the indirect influence of academics and scholars on generations of students who go on to become lawyers, judges, parliamentarians and policymakers, imbued with the structure of the law and the fundamental principles to which they have been exposed. Sometimes, it is the enthusiasm and skill of the academic that inspires a lifelong interest in a particular subject, even influencing the direction of a lawyer's career. Tort law, usually taught in the first year of law studies, is a good place to start.[10]

Percy Winfield, addressing the Society of the Public Teachers of Law as President in 1930, stated that '[t]he highest aim of legal education ought to be the inculcation of broad principles and of sound methods of thinking.'[11] Scholars, judges and lawmakers may still struggle to identify or pin down the role of tort law in society, and this book provides lessons from a long history of legal debate, against the background of ongoing legislative change to deal with societal needs and transformative pressures. As such, the themes discussed in these essays remain

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7 Goudkamp and Nolan (n 6) 5. See also Cane on the impact of the Judicature reforms on the functions of scholars and jurists: Cane (n 4) 377–8.

8 OW Holmes, Jr, *The Common Law* (Belknap Press, first published 1881, 2009 ed), discussed in John CP Goldberg and Benjamin C Zipursky, 'Thomas McIntyre Cooley (1824–1898) and Oliver Wendell Holmes (1841–1935): The Arc of American Tort Theory' in *Scholars of Tort Law* (n 1) ch 2, 53ff.

9 On the judicial use and citation of academic writing, see Chief Justice Susan Kiefel, 'The Academy and the Courts: What Do They Mean to Each Other Today?' (Speech, Australian Academy of Law Patron's Address, 31 October 2019) <https://www.hcourt.gov.au/publications/speeches/current/speeches-by-justice-kiefel>.

10 The generational influence at Yale of Leon Green on Fleming James and James on Guido Calabresi is surely a good example: see Guido Calabresi, 'Professor Fleming James Jr (1904–1981)' in *Scholars of Tort Law* (n 1) ch 9.

11 Quoted by Donal Nolan, 'Professor Sir Percy Winfield (1878–1953)' in *Scholars of Tort Law* (n 1) ch 6, 190.

as relevant to scholarly and policy debates today as when the original scholars discussed them.

II Choosing and Characterising Scholars

In the first chapter of *Scholars of Tort Law*, Goudkamp and Nolan provide a cohesive, thoughtful and illuminating overview of selected tort scholarship across more than 150 years. More than an introduction, it is well worth reading on its own. They place the 12 torts scholars into three categories ('Pioneers', 'Consolidators' and 'Iconoclasts'), although they note that some scholars could easily fit in more than one category.[12]

- The Pioneers were Thomas McIntyre Cooley (1824–1898), Oliver Wendell Holmes Jr (1841–1935) and Professor Sir Frederick Pollock (1845–1937).
- The Consolidators were Professor Sir John Salmond (1862–1924), Professor Francis Hermann Bohlen (1868–1942), Professor Sir Percy Winfield (1878–1953), Professor William Lloyd Prosser (1898–1972) and Professor John G Fleming (1919–1997).
- The Iconoclasts were Professor Leon Green (1888–1979), Professor Fleming James Jr (1904–1981), Professor Patrick Atiyah (1931–2018) and Tony Weir (1936–2011).

The contributors are themselves leading tort scholars of current generations, each with such mastery of the field that they are able to stand back and identify the distinctive contribution and influence of their particular subject at different points in time. Notably, one thing Goudkamp and Nolan do not attempt to do is to characterise the authors of each chapter into their descriptors, though the reader will quickly be able to discern who among them might be described as modern-day pioneers, consolidators or, especially, iconoclasts. Not all of the contributors resisted the temptation to 'use their discussion of past scholarship to fight the intellectual battles of the present'.[13] Goudkamp and Nolan also note that the choice of the subject scholar was largely left to the contributor. One might wonder at the omission of Benjamin Cardozo from the American cast of tort scholars, although his work is discussed in the chapter by Goldberg and Zipursky on Cooley and Holmes.[14] The book already runs to 400 pages and it does not profess to be an encyclopedia of tort scholarship.

As explained by Goudkamp and Nolan, tort law as a distinct legal category and subject for study dates back only to the second half of the 19th century.[15] American Francis Hilliard and English Thomas Addison published the first treatises on the law of torts in 1859 and 1860 respectively. The first torts class was taught at Harvard in 1870, but it was not until 1890 that 'Tort' was examined at

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12 Goudkamp and Nolan (n 6) 4.
13 Ibid 3.
14 Goldberg and Zipursky (n 8).
15 Goudkamp and Nolan (n 6) 4.

Cambridge, and 1905 at Oxford.[16] It is in this historical period that the three Pioneers worked. Scholarly journals also appeared in this period, such as the *Law Quarterly Review* in 1885 and the *Harvard Law Review* in 1887, providing a route to a wide audience for legal scholarship, although Goudkamp and Nolan note that the Pioneers were necessarily less constrained in seeking a positive reception from their audience than later scholars, who presumably had to fit in or break a mould of existing theory or doctrine.

III Three Pioneers

Frederick Pollock, it is said, persisted with a general theory of liability despite the courts' failure to adopt it. His influence can be seen in statements of general principle such as those advanced in *Heaven v Pender*[17] in 1883 and finally reformulated in *Donoghue v Stevenson*[18] in 1932.[19] Robert Stevens, in typical style, dismisses Pollock as not worth reading at all.[20] Pollock's work, it is said, is descriptive and therefore outdated; Pollock was a 'truly terrible writer'; he was 'not very good'.[21] But worse was Pollock's malign influence on the law, leading to chaos and confusion that has lived on in modern textbooks.[22] Critical to this negative assessment was Pollock's adoption of the tripartite division of the law of torts formulated by Oliver Wendell Holmes Jr in an 1873 article, a 'division … based upon degrees of moral culpability, not the individual rights the violation of which constitutes a civil wrong'.[23] Pollock's alleged analytical and normative errors are dissected, and his work confined to history.

On both sides of the Atlantic, it was the Pioneers who identified tort law as a distinct field, provided it with 'an overarching theoretical perspective', and transformed rules into doctrines and principles.[24] Mapping the new landscape, Oliver Wendell Holmes Jr advanced objective notions of fault and the tripartite classification of torts — intentional conduct, negligence and strict liability — that completely dominated later American tort scholarship[25] and have had a pervasive influence throughout the common law world. While Holmes' classification rested on the defendant's role and liability for *losses*, by contrast, Cooley, the first Pioneer, approached the subject from the perspective of the plaintiff's interests. He was concerned with appropriate redress for *wrongs*, for interferences with *rights*, influenced by William Blackstone's *Commentaries*, which Cooley had edited for

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16 Ibid 5.
17 *Heaven v Pender* [1883] 11 QBD 503 (CA).
18 *Donoghue v Stevenson* [1932] AC 562.
19 Goudkamp and Nolan (n 6) 11.
20 Robert Stevens, 'Professor Sir Frederick Pollock (1845–1937): Jurist as Mayfly' in *Scholars of Tort Law* (n 1) ch 3, 75.
21 Ibid 76.
22 Ibid.
23 Ibid 79.
24 Goudkamp and Nolan (n 6) 9, quoting GE White, *Tort Law in America: An Intellectual History* (Oxford University Press, expanded ed, 2003) 38.
25 Goudkamp and Nolan (n 6) 11.

an American publisher in 1871.[26] Goldberg and Zipursky in their chapter on Cooley and Holmes note how influential Cooley's treatise was on Cardozo's tort judgments. The influence of these early Pioneers — and those who went before and after them — did not peter out: 'Our civil recourse theory of tort is a direct descendant of the work of Blackstone, Cooley and Cardozo'.[27] As Goudkamp and Nolan point out, the tension between a loss-caused-by-fault approach and a wrongs-to-rights approach is still familiar to 21st century torts scholars.[28]

IV Five Consolidators

The Consolidators built on the frameworks posited by the Pioneers, but with their functions overlapping considerably. One of these is Salmond, surely the one and only legal scholar to have a legal test named after him, as first set out in his textbook.[29] This was the 'Salmond test' for whether an employee has acted in the course of employment for the purposes of attributing vicarious liability to his or her employer.[30] Salmond was only an academic for a short period, moving from a chair at the University of Adelaide to foundation Professor of Law at what was to become Victoria University, Wellington, New Zealand, before going into public service as Solicitor-General for New Zealand, then judge. Salmond's influence nevertheless rested on his textbook written in 1907 in that early period of his career, a work of 'practical utility'[31] for students and practitioners alike, which ran to 21 editions until at least 70 years after his death.[32] Rather than take a generalised or theoretical approach, it took a 'torts', rather than a 'tort', approach, perhaps more comprehensible and digestible to students. Goudkamp and Nolan note that, after *Donoghue v Stevenson*, 'his refusal to acknowledge negligence as a stand-alone cause of action put him on the wrong side of history',[33] but he earned his place nonetheless, particularly given the editors' previous warning[34] that scholars must be evaluated not only for their legacy, but for their influence in the historical context in which they were writing. In any event, the 'Salmond test' is itself a useful legacy and one whose utility has generally persisted, only recently and partially giving way in the context of the 21st century problem of how to hold an employer vicariously liable for the criminal conduct of an employee in assaulting a vulnerable person in the employer's institutional care: conduct that is diametrically opposed to the employee's duties.[35] Mark Lunney draws interesting contrasts

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26 William Blackstone and Thomas M Cooley (ed), *Commentaries on the Laws of England* (Callaghan and Co, 1871).
27 Goldberg and Zipursky (n 8) 57
28 Goudkamp and Nolan (n 6) 7.
29 JW Salmond, *The Law of Torts: A Treatise on the English Law of Liability for Civil Injuries* (Stevens and Haynes, 1907).
30 Cited, for example, in *New South Wales v Lepore* (2003) 212 CLR 511, 536 [42] (Gleeson CJ).
31 Goudkamp and Nolan (n 6) 12, quoting Salmond (n 29) v.
32 Mark Lunney, 'Professor Sir John Salmond (1862–1924): An Englishman Abroad' in *Scholars of Tort Law* (n 1) ch 4, 104.
33 Goudkamp and Nolan (n 6) 13.
34 Ibid 3.
35 See *Prince Alfred College Inc v ADC* and English and Canadian authorities cited therein: (2016) 258 CLR 134, 153–4 [58]–[62].

between Salmond's rights-based analysis in his earlier 1902 work, *Jurisprudence*,[36] and the practical approach he took in the *Law of Torts*,[37] then proceeding to analyse Salmond's work on bases of liability. He concludes that though Salmond was a writer in a relatively remote and small former British dominion, he wrote a book for the common law world and succeeded in having a rare influence for a scholar on the actual practice of law.[38]

The second scholar identified as a Consolidator was Francis Bohlen, editor of student casebooks and author of leading and still influential journal articles, but most notable as the Reporter for the first *Restatement of Torts* for the American Law Institute ('ALI') established in 1923. Writing in 1924, Benjamin Cardozo anticipated that a *Restatement* would be 'something less than a code and something more than a treatise'.[39] Bohlen generally brought clarity to issues marked by confusion, particularly where there was conflicting authority across the various States. The absence of a single final court of appeal on issues of the common law or of the interpretation of state legislation puts the US in particular need of an authoritative source, setting out the law, such as can be identified in the various states, for the ordinary and professional reader. Though, strictly speaking, only a secondary source, by the time it had gone through the decade-long debate and approval process by the distinguished members of the ALI, the *Restatement* was probably as authoritative in the 20th century as *Blackstone's Commentaries* had been in the late 18th century. Bohlen, a pragmatist, accepted that established doctrine had to meet social change. Times were changing in academia too, and Bohlen was able, Goudkamp and Nolan say, to strike a workable compromise between the doctrinal approach and realist or functional approaches, inspiring later torts scholars such as Prosser.[40] However, the first *Restatement* is unsurprisingly not perfect in today's eyes and with the undoubted benefit of hindsight.[41] The imperfections in its treatment of some issues left a legacy that perpetuated confusion. No better choice could have been made than the respectful but plain-speaking Michael Green, a Reporter of the *Restatement (Third) of Torts*, to comment on Bohlen's immediate and lasting influence on the case law. Green concisely analyses Bohlen's *Restatement* on the risk-benefit approach to determining negligence, on factual cause and the confusion introduced by the 'substantial factor' test, and on legal (rather than 'proximate') cause. With respect to the last, he writes that Bohlen failed to explain legal cause in terms of the *scope* of liability, and that if he had brought greater clarity, it would have avoided confusion and incoherence as 'courts and treatises used a variety of plausible-sounding verbal articulations that turned out to be mostly nonsense'.[42] Green's scathing assessment is a salutary lesson to scholars who may lose perspective about their own complex taxonomies and theories.

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36 John W Salmond, *Jurisprudence or the Theory of the Law* (Stevens and Haynes, 1902).

37 Salmond (n 29).

38 Lunney (n 32) 132.

39 Goudkamp and Nolan (n 6) 36, quoting Benjamin N Cardozo, *The Growth of the Law* (Yale University Press, 1924) 9.

40 Goudkamp and Nolan (n 6) 15.

41 Michael D Green, 'Professor Francis Hermann Bohlen (1868–1942)' in *Scholars of Tort Law* (n 1) 163.

42 Ibid 162.

Percy Winfield, described by Nolan as the most influential torts scholar of the 20th century,[43] is also classed as a Consolidator. Apart from describing Winfield's work, including its contemporaneous reception, Nolan identifies what made Winfield so influential: as pragmatist, rationalist, historian, comparativist and, last, as linguistic stylist both in his lectures and writings. The more discursive *The Province of the Law of Tort*,[44] published in 1931, its theoretical approach novel at that time in England, has maintained its place in history, even if the courts, proceeding cautiously, did not adopt Winfield's wide general theory of liability for loss caused to another in the absence of a lawful excuse.[45] His 1937 textbook was fundamental reading not just in England, but also in British Commonwealth countries such as Australia.[46] Winfield was not as conservative as some judges in his views of how causes of action could extend to new situations and was often well ahead of his time. He is described as simultaneously conservative, with deep respect for the doctrinal framework of the common law as set out by judges, and progressive, intellectually open-minded as to different approaches across the Atlantic, but above all believing that law should respond to community attitudes, mores and new social conditions[47]. One example was his article 'Privacy' in the *Law Quarterly Review*[48] cited by the dissenting judges, Rich and Evatt JJ, in support of upholding a nuisance claim in *Victoria Park Racing v Taylor*.[49] It is still persuasive for an expanded common law protection of privacy in Australia today. If Winfield was disapproving of the invasion of the Balham dentist's privacy by snooping neighbours, what would he be thinking of today's webcams and other remote surveillance mechanisms and the lag in common law protections?

William Prosser was Winfield's equivalent across the Atlantic, but perhaps more than anyone else, he best deserves the title of Consolidator, particularly in the multi-jurisdictional United States of America. John Goldberg has described Prosser as 'the most important American tort scholar of the twentieth century'.[50] Prosser's casebook, now in its 14th edition,[51] ensures his continuing influence on academics and students alike, while his treatise, the *Handbook of the Law of Torts* was both monumental and highly readable. It ran to 1300 pages. The third edition cited 22,000 cases in lengthy footnotes accompanying concise text.[52] His Berkeley

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43 Goudkamp and Nolan (n 6) 16; Nolan (n 11) 165.

44 Percy H Winfield, *The Province of the Law of Tort* (Cambridge University Press, 1931).

45 Courts insisted instead on the necessity for the plaintiff to bring its case within a recognised cause of action, fatal for the plaintiff in *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor* (1937) 58 CLR 479 ('*Victoria Park Racing v Taylor*'), discussed by Mark Lunney, *A History of Australian Tort Law 1901–1945: England's Obedient Servant?* (Cambridge University Press, 2018) 270.

46 PH Winfield, *A Text-Book of the Law of Tort* (Sweet & Maxwell, 1937). See also Lunney (n 32) 28, citing the Dean of Melbourne Law School, GW Paton, saying the Australian law student could read Winfield or Salmond without embarrassment, in GW Paton (ed), *The British Commonwealth, The Development of its Laws and Constitutions; Vol 2 Australia* (Stevens and Sons, 1952) 22.

47 Goudkamp and Nolan (n 6) 15–16; Nolan (n 11) 189.

48 Percy H Winfield, 'Privacy' (1931) 47 *Law Quarterly Review* 23.

49 *Victoria Park Racing v Taylor* (n 45) 504 (Rich J), 520 (Evatt J).

50 Christopher J Robinette, 'Professor William Lloyd Prosser (1898–1972)' in *Scholars of Tort Law* (n 1) ch 8, 229.

51 Victor E Schwartz, Kathryn Kelly and David F Partlett, *Prosser, Wade and Schwartz's Torts, Cases and Materials* (West Academic, 14th ed, 2020).

52 William L Prosser, *Handbook of the Law of Torts* (West Publishing Co, 3rd ed, 1964).

colleague John Fleming described Prosser as 'combining an unusual gift for synthesis, with high literary artistry and … an unfailing perception of contemporary legal values'.[53] Prosser was clearly a model for Fleming because that description can equally be applied to Fleming's work, discussed below, as does the comment that Prosser was adept at spotting trends.[54] Prosser's ability to give a clear concise doctrinal overview made him another suitable Reporter for the next Torts *Restatement*,[55] a role he fulfilled for a while. Like Winfield, Prosser was concerned with an emerging 20th century issue, the law of privacy. Prosser was both influential and prescient when he consolidated existing law relating to privacy into a formulation of four privacy torts. Prosser's formulation is still the framework with which most modern analyses begin when assessing a country's legal protection of privacy. Prosser was certainly one tort scholar who can be seen as having a *direct* influence on the development of the law by his writing: on strict liability for products; on privacy; and on liability for intentional infliction of emotional distress.[56] However, Christopher Robinette goes further than these immediate influences and discusses how later so-called 'tort reform' has clawed back many of the advances in tort law as a means of compensation and vindication that Prosser supported.[57]

The final scholar identified as a Consolidator is John Fleming, although as the Goudkamp and Nolan point out, he could equally be seen as a Pioneer of legal scholarship in post-war Australia and, indeed, the British Commonwealth.[58] Writing from Berkeley for much of his later career, he was a truly comparative scholar, who could see the law against the backdrop of the very different social contexts of the various Commonwealth countries whose jurisprudence he cited. In his *The Law of Torts*, known eponymously as *Fleming*, which ran to nine editions in his lifetime, Fleming was the master of summing up a decade's development in a sentence or paragraph. It was no introduction to the subject, but rather a commentary upon it. As tort historian Paul Mitchell writes, *Fleming* was 'not for children'.[59] Its conciseness made the book suited only to the reader, whether student, academic or practitioner, who had already used a more descriptive or explanatory textbook to learn doctrine and work through case illustrations or statutory detail, and who needed this view of the law from a dispassionate distance. It was a book *about* tort law,[60] about where it had been, what movements it reflected and where it might or should go. Fleming could be biting in his disapproval, for example, dismissing in just a few words a tight allegiance to precedent in Australian courts in one context as a 'misplaced cult of historicism'.[61]

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[53] Goudkamp and Nolan (n 6) 17, quoting John G Fleming, 'Book Notes: Prosser on Torts (3rd ed)' (1964) 52(5) *California Law Review* 1068, 1068.

[54] Goudkamp and Nolan (n 6) 18.

[55] *Restatement Second, Torts* (American Law Institute, 1965).

[56] Robinette (n 50) 230.

[57] Ibid 231.

[58] Goudkamp and Nolan (n 6) 19–20.

[59] Paul Mitchell, 'Professor John G Fleming (1919–1997): "A Sense of Fluidity"' in *Scholars of Tort Law* (n 1) ch 10, 289.

[60] Goudkamp and Nolan (n 6) 19, quoting Peter Cane, 'Fleming on Torts: A Short Intellectual History' (1998) 6(3) *Torts Law Journal* 216, 228.

[61] JG Fleming, *The Law of Torts* (Lawbook, 9th ed, 1998) 27 on Australian courts: first, maintaining negligent trespass as a cause of action, rather than following the English approach of restricting

Despite this, his work was extensively cited by judges at the highest levels as the leading scholarly authority, an authority only strengthened by the multi-jurisdictional sources of his commentary. As Goudkamp and Nolan remark, Fleming presented: 'what he saw as the "best law" to an elite international caste of jurists and judges more in need of ideas then exposition'.[62]

From the background of his own mastery of history and comparative law, Mitchell analyses Fleming's opposition to legal formalism, to 'the orthodoxies of yesteryear',[63] such as a rigid demarcation between tort and contract, and to the rigid adherence to precedents from another age and place (usually England). Mitchell notes, by contrast, Fleming's opinionated, realist approach. One example was Fleming's double review of Australian Professor WL Morison's casebook on torts and that of American Cecil Wright.[64] This review was published just as Fleming was about to leave for Berkeley to join the New World in tort scholarship. Fleming contrasted what he saw as Morison's conservative concentration on legal reasoning in edited judgments, representing, to him, the wrong approach to legal education, with Wright's 'spirit of adventure',[65] placing court decisions in a wider context that showed how influences and factors outside the courtroom determined the outcome. '[Fleming] shared the realists' view that judicial reasoning never provided a complete account of the true motivations for a decision.'[66] Was it a fair assessment of Morison to imply, as Fleming did, that Morison was not interested in the broader context of judicial decision-making because he taught students about legal reasoning? Courts do, after all, have to deal with a legal problem by reference to legal principles contained in case law or statute. Many years later, the interest in tort law of this reviewer was first engaged in a small group class taught by Professor William Morison using the casebook method. Our first legal problem was modelled on Fuller's hypothetical 'Speluncean Explorers'[67] — incidentally a perfect example of the enduring influence of a leading scholar — which places judicial reasoning squarely in the context of the vagaries of human decision-making and ethics, if not external pragmatic factors. And, as Mitchell points out, while Fleming was a firm proponent of compensation schemes to replace the failure of tort law, he still confessed to 'a life-long addiction to the intellectual allures of traditional tort law'.[68]

Goudkamp and Nolan identify a constant methodology among the Consolidators: a sound historical analysis blended with an exposition of the current law and proposals for reform. They see three further similarities among the Consolidators: all wrote for their audience — either students and practitioners, or

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trespass to intentional wrongs; and second, leaving the onus of disproving fault in trespass cases on the defendant (except in highway cases). A similar approach in Canada shared the opprobrium: ibid.

[62] Goudkamp and Nolan (n 6) 19, citing Cane (n 60) 232.

[63] Mitchell (n 59) 295.

[64] JG Fleming, 'Book Reviews: *Cases on Torts*, selected and edited by WL Morison (Law Book, 1955) and *Cases on the Law of Torts* by Cecil A Wright (Butterworth, 1954)' (1956) 2(1) *Sydney Law Review* 212.

[65] Mitchell (n 59) 299, quoting Fleming (n 64) 214.

[66] Mitchell (n 59) 300.

[67] Lon L Fuller, 'The Case of the Speluncean Explorers' (1949) 62(4) *Harvard Law Review* 616.

[68] Mitchell (n 59) 305, quoting John G Fleming, 'Comparative Law of Torts' (1984) 4(2) *Oxford Journal of Legal Studies* 235, 236.

judges and other scholars; all treaded 'an intellectual tightrope'[69] between alternative academic approaches to tort law; and all were more interested in legal change than legal theory or taxonomy. Does that make them *derivative* rather than original thinkers, as the Goudkamp and Nolan suggest?[70] Perhaps so, but while they may not have been big thinkers with big ideas to change how we look at things, like the Iconoclasts who follow, one cannot help think that their contribution in making sense of the morass of human-made complexity that is the common law, not to mention the sometimes incomprehensible layers added by statute law, deserves recognition as law-making, albeit indirect (as Atiyah suggested in the quote above).[71] Their influence owed much to the felicity of their writing style, such as Salmond's ability to encapsulate doctrine into a neat verbal formula,[72] which in turn reflected more generally their ability to make some practicable order out of intellectual disorder.

V Four Iconoclasts

This final category comprises the Iconoclasts. First, Leon Green, perhaps the most radical of the scholars collected in this book, who began his career as a trial lawyer in Texas, no doubt an experience in the 'real world' that would have informed his approach to tort law. His pragmatic and functional approach rejected the conventional way of teaching tort law as a body of law about wrongs and rights with underlying themes such as moral fault. Successively joining the law faculties at Texas, Yale, Northwestern, and again Texas, he organised his teaching and his casebook around functional categories, each with different policies driving the outcomes of the cases: workplace accidents; motor vehicle accidents; medical malpractice; dangerous products. At the same time he was convinced of the essential, constitutional, role of the jury in coming to the right decision in individual cases. Jenny Steele delves into Green's work on the duty concept in negligence as a question of law, distinct from the breach question, how that married with earlier work by Holmes and how it has been understood by later scholars.[73]

Fleming ('Jimmy') James Jr, a pupil of Green's at Yale Law School, is described as 'the dominant American tort lawyer of the 1940s and 1950s' by those who focused on ideas rather than doctrine.[74] He was driven by finding the best practical way for tort law to *spread* the burden of compensating victims of accidental injury. Guido Calabresi, in turn a pupil of James' at Yale, suggests in his chapter on James that James' missionary upbringing in Shanghai may have influenced him in this direction, albeit as a social democrat.[75] Added to this was an

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69 Goudkamp and Nolan (n 6) 22, quoting Nolan (n 11) 187.

70 Goudkamp and Nolan (n 6) 23.

71 See above n 6 and accompanying text.

72 Lunney (n 32) 125.

73 Jenny Steele, 'Professor Leon Green (1888–1979): Word Magic and the Regenerative Power of Law' in *Scholars of Tort Law* (n 1) ch 7.

74 Such as George L Priest, 'The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law' (1985) 14(3) *Journal of Legal Studies* 416, 470, quoted by Goudkamp and Nolan (n 6) 24.

75 Calabresi (n 10) 260.

early career working as a defence lawyer during the Great Depression of the early 1930s for a railroad company whose operations were typically a source of plentiful accidents. The misery and poverty cast upon families by the injury or death of the breadwinner was a social problem that had a solution other than government welfare or charitable support; namely, the law of tort. Goudkamp and Nolan point out that James' work was the 'first serious challenge' to the Holmesian ethos of tort law based on notions of fault.[76] Unpersuaded by notions that liability acted as a deterrent and contributed to accident prevention, James concentrated on the capacity of defendants to absorb and pass on losses. The most obvious way to spread losses, except in the case of organisations with a massive customer or taxpayer base, was by insurance: James is most famous for a seminal article in 1948 on the impact of liability insurance on compensation for accidental injury.[77] The work is as relevant today as in 1948. Calabresi, at 86 years of age, gives a very personal and readable account of 'Jimmy' James who was both his teacher and later mentor, then goes on to a detailed analysis of many of James' arguments on various aspects of tort law. He attempts to reconcile those arguments, sometimes with difficulty, with James' larger views on loss spreading. Far from being overly theoretical, the chapter illustrates how specific tort doctrines are grounded in the functions of the law of tort. More generally, it demonstrates the way a teacher can set the foundation for groundbreaking work by his former student, such as that later published by Calabresi in *The Cost of Accidents*.[78]

To the Commonwealth lawyer, the name of Patrick Atiyah readily stands out as an Iconoclast, as he provided new ways of thinking not just about the law, but about the social problems to which the law must respond — by statute or, in its absence, by the courts. Atiyah's legal interests were wide-ranging. Like the previous Iconoclasts, he was concerned mostly with personal injury when considering tort law. Atiyah first analysed tort law side-by-side with alternative compensation schemes. Then, in *The Damages Lottery*,[79] he advocated the abolition of tort law as the means, and fault as the basis, by which society provided compensation for accidental personal injury. James Goudkamp, in his chapter on Atiyah,[80] points out that Atiyah was consistent in his rejection of tort law as the appropriate mechanism for compensation. What changed, controversially, was his solution: first, a government run no-fault compensation system such as in New Zealand; second, for the main, first party insurance. His earlier view may have seen its model in the rise of welfare protection and the national health system in post-war Britain, social conditions so different then, as now, to those prevailing in the US. From the perspective of tort scholars and jurists, Atiyah saw no role for tort law as a unified subject: it could be broken up and studied in other subjects such as civil liberties (and, probably now, human rights law), land law and planning law, commercial law, personal property law, media law, employment law,

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76 Goudkamp and Nolan (n 6) 26.
77 Fleming James Jr, 'Accident Liability Reconsidered: The Impact of Liability Insurance' (1948) 57(4) *Yale Law Journal* 549.
78 Guido Calabresi, *The Costs of Accidents: A Legal and Economic Analysis* (Yale University Press, 1970).
79 PS Atiyah, *The Damages Lottery* (Hart Publishing, 1997).
80 James Goudkamp, 'Professor Patrick Atiyah (1931–2018)' in *Scholars of Tort Law* (n 1) ch 11.

medical law, and so on.[81] That tort law has survived and thrived in scholarship, as in practice, perhaps owes much to its expansion beyond personal injury into liability for pure economic loss and other interests such as the protection of autonomy and privacy — issues with which Atiyah was not concerned. This is no criticism: it is only when personal injury, loss of parental support and disability are properly dealt with by a society that it can move on to thinking about more sophisticated levels of financial or personal protection.

Tony Weir is the final Iconoclast in *Scholars of Tort Law*. Reading Goudkamp and Nolan's summing up, the reader might think that Weir should more aptly be described as a traditionalist. They also describe him as a conservative doctrinalist[82] and it may be that in his time, when tort scholars were embracing either pragmatism or normative or abstract theories, this swimming against the tide made him seem radical instead of deeply conservative. To Weir, searching for theory was like adolescents searching for the meaning of life instead of experiencing it.[83] He was against or cuttingly dismissive of many modern developments: 'the European Union, the European Court of Human Rights, the Law Commission, the "compensation culture", private law theory, economists and economic analysis of law, just for starters'.[84] Added to that list were no-fault compensation schemes, and any attempt to harmonise the law of different cultures. He believed in 'individual responsibility'. At the same time, he is described as 'often pro-defendant'. Presumably, as with others who espouse this notion, he placed individual responsibility for risks primarily on the plaintiff and lessened a defendant's responsibility for others. Weir was a prolific but concise writer on tort law, with a casebook published in ten editions, dozens of pithy case notes, and acerbic commentary such as this on *White v Jones*: 'While Lord Goff opted for a pocket of liability, regardless of principles, Lord Browne-Wilkinson produced a principle out of his pocket and Lord Mustill found the pocket irreconcilable with any principle.'[85]

As a commentator then, he may not have earned the recognition of direct development of the law that Atiyah identified as academic influence, but it seems that he did perform a role that is rarely acknowledged for legal scholars: that of holding the judiciary to account, not by reference to ill-understood slogans such as 'judicial activism', but by reference to logic, consistency, and coherence of legal principle. The fact that this was done with unusual 'wit and brilliance'[86], no matter often in the form of withering criticism, does not deflect from its impact. Paula Giliker writes an affectionate account of Weir's scholarship, ranging from his idiosyncratic, provocative case notes, to his casebook and lastly to his work as translator from French, German and Latin texts as a comparative tort lawyer. Giliker says, 'Where would comparative law scholarship be without Weir's

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[81] Goudkamp and Nolan (n 6) 28.
[82] Ibid 32.
[83] Ibid.
[84] Ibid 29, citing Giliker (n 2).
[85] Tony Weir, *A Casebook on Tort* (Sweet & Maxwell, 10th ed, 2004) 71, commenting on *White v Jones* [1995] 2 AC 207 (HL), quoted by Goudkamp and Nolan (n 6) 30.
[86] Goudkamp and Nolan (n 6) 30.

excellent translation of Zweigert and Kotz?'[87] We could go further and ask, 'Where would the study of tort law be without Weir's excellent translation?' There is no doubt that, although he was against modern trends towards harmonisations of law, Weir's knowledge of comparative law was encyclopaedic and contributed enormously to our knowledge and understanding of the law of other cultures.

What the Iconoclasts had in common was their use of journal articles and monographs, rather than textbooks, to promote their views. Their audience was other scholars, providing a model for the private law scholars of the late 20th and early 21st centuries, particularly in developing fields of law such as the law of restitution or unjust enrichment, which, like tort law in the late 19th century, has itself become a separate subject of study in universities, with its own overarching theories and themes to explain a wide range of disparate instances. Cane, in his overview chapter on legal scholarship,[88] notes the recent birth of a new substantive area of law during his lifetime, where the theoretical role of scholars such as Robert Goff, Gareth Jones and Peter Birks was pioneering, as well as consolidating and, to some (particularly some judges), iconoclastic. By contrast, the Iconoclasts discussed in *Scholars of Tort Law* were mostly deeply pragmatic, and shared a lack of interest in overarching, abstract theories.[89]

VI Conclusion

Scholars of Tort Law is a book for scholars, whether academics or students, and jurists. It is a book to delve into, whether the reader is interested in specific aspects of the law of torts or a more general analysis, and whether from a jurisprudential, doctrinal, historical or pragmatic viewpoint. The reader will test his or her own approach to legal education and scholarship: what is the role of the academic today when teaching tort law or writing about it? How has it changed from that of the scholar in earlier times? What continuing emphasis should be placed on competing theories of the common law when so much of tort law today involves 'tort reform' statutes and their judicial interpretation; that is, working out what the law *is* on a particular issue. Interpretation is an often-frustrating task that nevertheless should not replace the invaluable role of the tort scholar and educator in debating with the lawyers of both the present and the future what the law *should* be. It may reinforce the varied roles of academic scholars and the point of putting pen to paper. At the very least they are needed to make sense of the law as it stands, but perhaps also for a longer lasting role of having some influence on the future application and direction of the law. Certainly, this book will inspire modern tort scholars to aim high, whether as pioneers, consolidators, or iconoclasts.

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[87] Giliker (n 2) 355.
[88] Cane (n 4).
[89] Goudkamp and Nolan (n 6) 32.