REVIEW: *SCHOLARS OF TORT LAW* (HART PUBLISHING, 2019)

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Review of *Scholars of Tort Law* (James Goudkamp and Donal Nolan (eds), Hart Publishing, 2019, ISBN 978-1-50991-057-1)

This volume brings together some accounts of significant tort scholars. It is an intriguing collection in that it does what I consider to be the best form of intellectual biography, including elements of the life that contributed to the intellectual context of the scholar while focusing on the impact and structure of their work. This is a transatlantic common law volume focusing on United States ('US') and United Kingdom ('UK') scholars, but Sir John Salmond and John Fleming introduce some (slightly) antipodean flavour.

As Chapter One, written by the editors, recognises, it is extremely difficult to measure the scholarly impact of any one scholar in tort law. Are we to measure the number of books sold? The number of citations by courts? The influence on students? This latter seems to be out. So a judgment has to be made by taking into account a whole range of factors and coming to judgment. Goudkamp and Nolan suggest that their collection includes pioneers, consolidators and iconoclasts, and also that it shows the ebb and flow of connection between the common law countries.

Benjamin Zipursky and John Goldberg discuss Thomas Cooley and Oliver Wendell Holmes in Chapter Two. Cooley is less well known to those outside the US than Holmes, and it is interesting to see that Cooley was a proponent of the 'wrongs-and-redress' view of torts which seems an early progenitor of Zipursky and Goldberg's civil recourse theory.[1] This contrasts with Holmes' loss-based account. Both seem to have had a strong positivist view that law and morals had to be separated. Why Holmes is so much better known, when he actually does not reflect the law of the time as well as Cooley is an interesting question.[2]

As is usual for Robert Stevens, he takes us on a hilarious romp through his views. In this chapter, his subject is Sir Frederick Pollock. It is an entertaining

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1 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 James Goudkamp and Donal Nolan (eds), *Scholars of Tort Law* (Hart Publishing, 2019) 43, 44.

2 Ibid 58.

read. It begins, 'Nobody reads Pollock anymore. Nor should they'.[3] There is less of the scholar's life in this chapter than in other chapters, although Stevens describes it as 'a great life well lived in the law' as an editor, writer, and academic who spent little time actually in academe.[4] Stevens' focus is on what Pollock got wrong – he was merely 'descriptive', he was 'a truly terrible writer'.[5] It is hard to see from Stevens' account why Pollock would ever have been seen to be influential, and yet Stevens argues that his influence has been both 'profound and … malign'.[6] Pollock emphasised negligence and Stevens refers to *Donoghue v Stevenson*[7] as 'that most trivial of famous cases'[8] and calls the development of negligence as the dominant tort 'a mistake'.[9] Pollock differed from Holmes and Cooley in that he saw torts as a form of enforced morality and from Salmond in that he attempted to put all tort law under one principle, and, according to Stevens, if this meant he had to ignore authority, he did.[10] There is not room in this review to discuss the chapter further, but suffice it to say that it is very much about Stevens' views.

Mark Lunney's chapter on Sir John Salmond is next, which is fitting, as Pollock and Salmond opposed each other as to whether we should talk about tort or torts. Salmond is unique, I think, as a real 'colonial' who, as a New Zealander – although he was British born and moved to New Zealand at the age of 13 – had to (or felt he had to) convince the British that he was to be taken seriously as a legal scholar. Salmond's influence was largely through his text *Law of Torts* which came out first in New Zealand in 1907, but under the imprint of a London firm.[11] It was 'effectively self-published'.[12] Salmond wrote the first six editions, but it continued to be published for 70 years after he died. Lunney writes that 'Salmond's ability to capture the law in a series of relatively short paragraphs was masterly' and Lunney notes that no less than 150 passages had been judicially approved.[13] The success of the book in the courts was significant, with American courts being the first non-New Zealand courts to cite him in judgments.

Salmond's career was as an academic for a while, but he became Solicitor-General of New Zealand in 1910 and judge of the Supreme Court of New Zealand in 1920. He died in 1924.

Lunney discusses some of his doctrinal views. One of the most influential has been his test for scope of employment in vicarious liability: '[an] act was within the course of employment if (apart from express authorisation) it was a wrongful

3 Robert Stevens, 'Professor Sir Frederick Pollock (1845–1937): Jurist as Mayfly' in James Goudkamp and Donal Nolan (eds), *Scholars of Tort Law* (Hart Publishing, 2019) 75, 75.
4 Ibid 78.
5 Ibid 75.
6 Ibid 76.
7 [1932] AC 562.
8 Goldberg and Zipursky (n 1) 85.
9 Ibid 89.
10 Ibid 82, 84.
11 See John Salmond, *The Law of Torts* (Stevens and Haynes, 1907).
12 Mark Lunney, 'Professor Sir John Salmond (1862–1924): An Englishman Abroad' in James Goudkamp and Donal Nolan (eds), *Scholars of Tort Law* (Hart Publishing, 2019) 103, 104.
13 Ibid 119.

and unauthorised *mode* of doing some act authorised by the master'.[14] This is a very characteristic example of Salmond's ability 'to capture an essence from a morass of single examples' which also partly accounts for his text's popularity with students and the judiciary.[15] To me, the most interesting part of the chapter is the section on the fact that Salmond was not in England when he wrote his text. Lunney argues that Salmond showed less awareness of the issues raised by the need to apply common law throughout the Empire than Pollock did in developing an Indian Civil Code. Salmond's text did not cite New Zealand decisions. Lunney argues that Salmond was in a cleft stick in respect of this – if the private law was supposed to be the same all over the Empire then citing New Zealand examples would just be adding them gratuitously to the propositions already stated. There may be an element of cultural cringe in this, but, as Lunney has noted in his *History of Tort Law in Australia 1901–1945,*[16] antipodean common lawyers were more likely to see the common law as a project shared across the Empire than a project in which British lawyers ruled and antipodean lawyers followed.

Chapter Five concerns Francis Bohlen, the Reporter for the first *Restatement of Torts* ('*Restatement*'), so we are returning to the US. Much of this chapter is taken up by the discussion of the tests for breach and causation in negligence and Bohlen's role in their development. Michael Green gives him credit for playing a critical role in Learned Hand's test for the standard of care in *United States v Carroll Towing Co*,[17] so beloved of law and economics scholars in the US. Bohlen used 'legal cause' rather than 'proximate cause'.[18] In his work on intentional torts, this included both factual cause and scope of liability. In the *Restatement* in negligence his legal cause included the conduct being a substantial factor in bringing about the harm, and he did not use scope of liability, but a test that there was 'no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in the harm'.[19] Green argues that this was a mistake which led to continuing confusion in tort law, because it was allowed to continue by Prosser in the *Restatement (Second) of Torts* ('*Restatement (Second)*').

Donal Nolan's excellent chapter on Sir Percy Winfield follows. As Nolan says, he was arguably the most influential English tort scholar.[20] He continues to be regularly cited by courts, read by students and legal practitioners. Winfield was a career academic with a broad reach, but his torts scholarship is the focus of the chapter. Nolan divides it into three parts – articles on tort and its history, the monograph on *The Province of the Law of Tort*[21] and *A Text-Book of the Law of*

14 Ibid 125.
15 Ibid.
16 See Mark Lunney, *History of Tort Law in Australia 1901–1945* (Cambridge University Press, 2017) 14–15.
17 159 F 2d 169 (2nd Cir, 1947).
18 Michael D Green, 'Professor Francis Hermann Bohlen (1868–1942)' in James Goudkamp and Donal Nolan (eds), *Scholars of Tort Law* (Hart Publishing, 2019) 133, 152.
19 Ibid 153, quoting American Law Institute, *Restatement of Torts* (1934) § 431.
20 Donal Nolan, 'Professor Sir Percy Winfield (1878–1953)' in James Goudkamp and Donal Nolan (eds), *Scholars of Tort Law* (Hart Publishing, 2019) 165, 165.
21 (Cambridge University Press, 1931).

Tort[22]. There is more but these are the most significant. Winfield's scholarly career began with work on abuse of process but moved to negligence and other torts quickly. His historical articles are still well known and used. Nolan's chapter shows that Winfield's achievements as a scholar and researcher were largely made against a deeply conservative background of scholars who did not share his breadth of engagement, and many of whom did no research. He argued for change in the law, including for a tort of privacy, and constantly strove to put the law on a more rational footing. He was also unusual in the fact that as a UK scholar many of his articles were published in US and Canadian law journals and he engaged in comparative law writing. Nolan reminds us of his engaging style with examples from his textbook which was written when he was a mature scholar and therefore had a standing which allowed him to be pithy, for example, '[it] is the ill fate of public policy that, like a football, everybody kicks it although it is essential to the game' and '[common] employment, that galling pack upon the back of our law'.[23] Winfield's writings were often prescient, with reforms he advocated coming to pass many years later, and Nolan attributes his extraordinary success as a scholar partly to the 'basic foundation for his scholarly achievements, namely a profound and very broad knowledge of the common law and its history'.[24]

Leon Green's work is of great interest to contemporary tort scholars, partly because of his passion for empowering the courts. His fame as a realist, who saw law as a practical, useful discipline, still resonates. Jenny Steele sees his vision as 'close to apocalyptic'.[25] Her view of his prolific work highlights his objections to the *Restatement* as not based on specific groups of factually related cases. Steele is not convinced that he was the duty-sceptic he is sometimes painted as. He certainly objected to the collapse of duty into breach. His pragmatism caused him to require that there be limits to duty, and his interest in processes meant that he sometimes expressed his views about duty (or other matters) differently from more doctrinally-focused scholars. In fact he seems to have regarded duty as fundamental to all torts, and that duty had a bigger job to do than limit liability. The breadth of factors he considers brings to mind the Australian 'salient factors' test for duty of care in negligence,[26] although that is much more limited and opaque. She counters a number of charges against Green, for example rejecting Goldberg's view of Green as a 'cynical instrumentalist'.[27] 'Rather, he thought tort law had emerged as a socially useful means of protecting interests of individuals against the hurts created by everyday society'.[28] It could not protect against all accidental harm and therefore whether the law would protect in a particular situation always had to be decided. Steele's chapter is a subtly argued, deeply

22 (Sweet & Maxwell, 5th ed, 1950).
23 Nolan (n 20) 199.
24 Ibid 201.
25 Jenny Steele, 'Professor Leon Green (1888–1979): Word Magic and the Regenerative Power of Law' in James Goudkamp and Donal Nolan (eds), *Scholars of Tort Law* (Hart Publishing, 2019) 203, 207.
26 See *Sullivan v Moody; Thompson v Connon* (2001) 207 CLR 562, 579 [49].
27 Steele (n 25) 223.
28 Ibid.

scholarly one which is impossible to capture adequately in a paragraph. It is a masterly discussion of Green's work.

William Prosser is one of the best known names in international tort law. *Prosser on Torts*[29] and the *Restatement (Second)* are the best known parts of his legacy, but there is much more to him than that. In his chapter, Christopher Robinette reminds us of the number of times Prosser legitimated or introduced a new tort. His influence on US tort law has obviously been profound. In particular he strongly emphasised social policy of a utilitarian form, but Robinette notes that Prosser did not really see duty as the engine of this in negligence, although he certainly saw policy as one of the factors contributing to a final outcome of duty or no-duty.[30] Robinette says this approach continues to be the majority rule in duty cases in the US. Bohlen picked up the 'utility of the act' factor in breach in the *Restatement* from Prosser,[31] and Prosser's view of proximate cause has continued to be influential. He was not a theoretician: 'William Prosser hated "academic theory"' and preferred to simplify the law by creating general principles which could be applied by a tribunal.[32] Robinette argues that overall the results have been disappointing.[33]

By contrast, Guido Calabresi's chapter on Fleming James Jr ('Jimmy') is a very personal account of a fascinating scholar who was his teacher and friend. From a missionary background, Calabresi says James was 'brought up to believe that a mission in life was essential to being a decent person, and that furthering that mission was what life was all about',[34] although James was secular in his orientation. His missions concerned the poor, the workers, and as Calabresi says, this should have led him to seek totally centralised social insurance, but he also had a strong streak of concern about government control that appears to have held this back,[35] and he constantly focused on 'adequate care of the basic human needs of all our people' by the wide distribution of loss.[36] Calabresi suggests that he wrote articles 'reading the cases to move their meanings' and that this contributed to James' influence.[37] Calabresi also acknowledges James' influence on himself, particularly in relation to the public nature of some tort law, deterrence and the whole notion of bearing the costs of accidents. Calabresi, of course, is deserving of a chapter himself.

And now we come to John Fleming, to whose work I have a connection as editor and co-writer of the more current versions of his textbook. Paul Mitchell contributes this chapter and notes that 'his work as a whole … is essentially

29 William L Prosser, *Handbook of the Law of Torts* (West Publishing, 1941).

30 Christopher J Robinette, 'Professor William Lloyd Prosser (1898–1972)' in James Goudkamp and Donal Nolan (eds), *Scholars of Tort Law* (Hart Publishing, 2019) 229, 234.

31 Ibid 236.

32 Ibid 238.

33 Ibid 256.

34 Guido Calabresi, 'Professor Fleming James Jr (1904–1981)' in James Goudkamp and Donal Nolan (eds), *Scholars of Tort Law* (Hart Publishing, 2019) 259, 260.

35 Ibid 261.

36 Ibid 271.

37 Ibid 276.

agonistic'.[38] Fleming's major work, his treatise on torts, is different from many others in that it covers a wide range of jurisdictions, while ostensibly from an Australian perspective. His particular skill, somewhat like Salmond, was the ability to write a pithy and succinct account which is memorable and distinctive. Mitchell suggests that Fleming's German background may have affected his view of the doctrine of precedent, noting that he invoked a grand historical narrative of torts, which could sometimes be used to marginalise precedents he didn't like.[39] It is certainly true that Fleming would argue for 'the better view' quite forcefully; however, it is also notable how rarely Fleming referred to German law.

Patrick Atiyah also had an Australian connection, having a connection to the Australian National University similar to Fleming's. James Goudkamp's chapter on Atiyah notes that his writings on tort took him up to the 1990s. It is ironic to me that Atiyah's work on tort law, which was notably socio-legal, is given a chapter when women whose work on tort law in the same period was socio-legal in the feminist form, is not. Here I am thinking of scholars such Lucinda Finley, Joanne Conaghan, and Lesley Bender who wrote extensively on torts from a feminist perspective before the 1990s. It is true that Atiyah's work was groundbreaking, of course, and his three major works in tort law – *Vicarious Liability in the Law of Torts,*[40] *Accidents, Compensation and the Law,*[41] and *The Damages Lottery*[42] all had significant things to say about the operation of the law of torts and its impact on people and society. *The Damages Lottery* sought to change how tort law operated by directing its argument at lay people. Although Goudkamp notes that today's tort theorists take less note of Atiyah than they ought to,[43] it may be that the modern theorists will realise their mistake shortly.

Paula Giliker provides the chapter on Tony Weir. She observes his powerful work as tort lawyer, comparativist and translator, whose 'pointed remarks were fun to read' as Lord Rodger noted.[44] This ability to express himself and provoke reactions in the reader was part of the charm of his work, but as Weir said, it aimed to '[dispel] the aura of inevitability which the judgments themselves properly exhale'.[45] This trait was of fundamental importance in allowing him to critique longstanding rules, sometimes from a comparative standpoint. Giliker notes how good he was at case notes, an art sometimes despised today, but which in his hands allowed pointed, compelling arguments about the fundamental principles at issue. His translations were great because he was a comparativist, so did not fall into the trap of failing to understand the lawyer's need for context. His work as a translator alone would have merited a chapter in this book. Giliker does him justice, I think,

38 Paul Mitchell, 'Professor John G Fleming (1919–1997): "A Sense of Fluidity"' in James Goudkamp and Donal Nolan (eds), *Scholars of Tort Law* (Hart Publishing, 2019) 289, 289.

39 Ibid 304.

40 (Butterworths, 1967).

41 (Weidenfeld & Nicholson, 1980).

42 (Hart Publishing, 1997).

43 James Goudkamp, 'Professor Patrick Atiyah (1931–2018)' in James Goudkamp and Donal Nolan (eds), *Scholars of Tort Law* (Hart Publishing, 2019) 309, 334.

44 Paula Giliker, 'Mr Tony Weir (1936–2011)' in James Goudkamp and Donal Nolan (eds), *Scholars of Tort Law* (Hart Publishing, 2019) 337, 339.

45 Ibid.

in recognising the comparativist who was a Eurosceptic, the wit with the 'idiosyncratic response to academia'.[46] He is sadly missed.

The final chapter in the book, by Peter Cane, brings us up to date by constructing a common law model and a civil law model of legal scholarship. He argues that the difference between them lies in their way of constructing the relationship between law and fact. He briefly brings us the history of the common law from 'irrational' decision-making to jury trial to judge decision-making,[47] a process of keeping '"special facts" … out of the black box' to allow outcomes and procedure to be addressed separately.[48] The civil law from the revival of Roman law in the 11th and 12th centuries was a scholarly process done by academics, rather than a decision-making process done by judges. These models affected how legal scholarship was approached in both systems. In the common law system, which abolished the writs in the 19th century and most civil juries in the 20th century, the textbook or treatise system developed with, in torts, the work of Pollock and Salmond leading the way.[49] It was now possible to ignore procedure and write of substantive law with a great deal of freedom, before the hardening of the doctrine of precedent made it more difficult. Cane notes that in the late 20th century we saw the rise of the new area of law, restitution, which did not fall neatly into the contract/tort divide.[50] He notes that the difference in freedom of analysis in the common law as opposed to civil law scholarship is exemplified by this development. The rise of interest in 'coherence' in common law doctrine mirrors an older focus on coherence in civil law scholars. Cane's discussion reminds us that the taxonomic debates in tort law are not new, and that sometimes the theorists' position has been avoidance (for example, Holmes and Posner) rather than engagement, because engagement is left to judges. He argues that this continues to be true for the corrective justice and rights theorists who have no compunction in declaring a particular decision to be wrong.[51] He suggests that they are leaning towards a civil law model which gives scholars special prominence, but most of all, that what we see in our theorists is the revolving door of 'generality and particularity, stability and change … [they] can and must be managed but can never be finally resolved'.[52]

This is a valuable book which, in using the lives of torts scholars and their work, allows us to see the development of not only these scholars, but torts scholars and scholarship in general since the 19th century. All the scholars are male. This is striking, even if one takes into account the 19th century and early 20th century's almost exclusively male population of scholars. In their introduction, the editors acknowledge this and regret the absence of female scholars in the selection. Initially I was comfortable enough with that, with Winfield, Pollock, Salmond and

46 Ibid 356.
47 Peter Cane, 'Law, Fact and Process in Common Law Tort Scholarship' in James Goudkamp and Donal Nolan (eds), *Scholars of Tort Law* (Hart Publishing, 2019) 359, 364–5.
48 Ibid.
49 Ibid 374.
50 Ibid 376.
51 Ibid 381.
52 Ibid 388.

so on being clearly from the period when almost no women scholars were working in tort law; but that is not true of Atiyah or even John Fleming. Significant women scholars of tort law who might fruitfully have been included include Carol Harlow who was Atiyah's and Weir's slightly younger contemporary and did significant work on the crossover between administrative law and tort law, rather than tort law alone – which might be why she was excluded. It might be that other women scholars of the 1960s and 1970s wrote about tort law from a feminist perspective and therefore are classed as feminist scholars rather than torts scholars (for example, Martha Chamallas, Lucinda Finley etc) writing at the same time as Atiyah, Fleming and Weir. But I am fully aware that choosing the subject-scholars would always have been difficult.

Goudkamp and Nolan have pulled together an engaging set of chapters which take us deep into not only the scholarship involved, but also its evaluative criteria. The editors' characterisation of these scholars as a mixture of pioneers, consolidators and iconoclasts is accurate as well as enjoyable, and points to the variation in these personal approaches to scholarship and the extent to which each of these approaches, or indeed personality types, offers riches to tort scholarship that can continue to be mined by the current and future crop of torts students and scholars.