Scholars of Tort Law

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Pioneers, Consolidators and Iconoclasts: The Story of Tort Scholarship

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I. INTRODUCTION

COMMON LAW SCHOLARSHIP is overwhelmingly focused on judicial decisions, with the result that the writings of even highly influential legal scholars have, by comparison, rarely been the subjects of scrutiny in their own right. This represents a serious gap in our understanding of the common law and its development. The purpose of the current volume is to begin the process of redressing this imbalance, by considering the role played by leading scholars of tort law from across the common law world in the development of the subject.1 The focus of the contributions is on the nature of the work produced by each of the scholars in question, important influences on them and the influence which they in turn had on thinking about tort law.

The process of subjecting tort law scholarship to sustained analysis provides new insights into the intellectual development of tort law and reveals the central role played by scholars in this regard. The book also serves to emphasise the importance of legal scholarship to the development of the common law more generally. As Patrick Atiyah – one of the scholars whose work is considered in this collection – wrote in 1987:

[L]egal theory, and the work of academics, has in truth played a much larger role in the development of our law than has generally been acknowledged, and … a great many fields of our law have been profoundly influenced by academic writing and

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1 Although we are not aware of any previous projects of this kind in the common law world, we note the recent publication in English translation of a major collection of essays on 37 scholars who were influential in the development of German private law in the twentieth century: S Grundmann and K Riesenhuber (eds), German Private Law Scholarship in the 20th Century (Cambridge, Intersentia, 2018).
theory … [T]here is a more general case for thinking that legal writing, and particularly academic writing, is in the long perspective of history, an important part of the law itself … [I]t seems certain that we have greatly underestimated the influence of academics on the development of the law in the past.\(^2\)

Furthermore, as Susan Bartie has argued,\(^3\) the study of our predecessors is of considerable potential benefit to the enterprise of legal scholarship itself. As well as contextualising earlier work of relevance to present controversies, studies of past scholars can serve as a challenge to current notions of academic standing, and ‘may sow the seeds of a stronger intellectual tradition’ by encouraging ‘scholars to recognise their potential and the possibilities that this engenders’.\(^4\)

Several preliminary observations are in order. One is that the collection is limited to the common law world.\(^5\) In the tort context, it will be seen that the intellectual connections within that world are strong. Beyond it, they inevitably weaken. Those weaker connections are important, and much studied by comparative lawyers, but our enterprise is deliberately a different one from theirs.\(^6\) Another point is that we included in the project only scholars who were deceased or, if alive, no longer research active.\(^7\) While the echoes of the former English convention against judicial citation of living scholars are unfortunate, we proceeded in this way because we considered it important that the contribution of each scholar be assessed in the light of the entirety of his work. Finally, these limitations resulted in a lack of diversity in the scholars under scrutiny, to which the possessive pronoun used in the previous sentence attests. It should be emphasised that once the decision was made to restrict the field in these ways, the lack of diversity was inevitable. We were therefore faced with the options of abandoning the endeavour, or producing a volume that would highlight the extent to which common law tort scholarship was, until recent decades, almost entirely the preserve of men. While we stand by the choice we made between those alternatives, we recognise that others may take a different view. In any event, we regret the absence of women’s voices in the story that is told in this book.

Opinions may also differ on our choice of scholars. We should start by making it clear that we did not unilaterally decide which scholars should be


\(^3\) S Bartie, ‘Histories of Legal Scholars: The Power of Possibility’ (2014) 34 LS 305.

\(^4\) ibid 327.

\(^5\) Although Peter Cane’s more general chapter in this volume (P Cane, ‘Law, Fact and Process in Common Law Tort Scholarship’) engages with the civil law tradition at some length.

\(^6\) We should mention here that two of the scholars under consideration – John Fleming and Tony Weir – were also comparative lawyers of great distinction. The extent to which their comparative work influenced their tort scholarship is an interesting issue, which we unfortunately do not have the space to address.

\(^7\) The only scholar who was alive at the time when the collection was planned, Patrick Atiyah, sadly passed away on 30 March 2018.
discussed; that decision was made in close consultation with the contributors. And while we would readily accept that in some instances the reputation and influence of a scholar essentially compelled his inclusion, in other instances a case could of course be made for X rather than Y and so on. We make two points in anticipation of such objections. One is that it seemed important to us that our contributors be given the freedom to write about the scholar (or, in one case, scholars) in whom they themselves were interested. And the other is that, since there is no objective criterion by which the importance of a legal scholar can be measured, such objections can always be put forward, no matter which choices have been made. We are in any case satisfied that the selection of scholars studied in this volume is effective in demonstrating the influences that tort scholars had on their discipline and on each other, especially when supplemented by previous work on the intellectual history of the subject that has highlighted the contributions of some – though by no means all – of the more significant tort scholars not considered here.\(^8\)

One other important preliminary point that we wish to make about this project is that when assessing and analysing past scholarly work in a particular field it is of course difficult, if not impossible, to set aside one’s own views on the area in question. It was therefore inevitable that our contributors – all of them scholars of contemporary tort law – would be tempted to use their discussion of past scholarship to fight the intellectual battles of the present. We leave it to the reader to decide to what extent they succeeded in resisting that temptation (or, indeed, whether they sought to resist it at all). Nevertheless, we wish to emphasise at the outset the supreme importance of avoiding anachronism, and of evaluating the contributions of the scholars under consideration in the light of the existing tort scholarship in their day, and the intellectual culture in which they worked. It hardly needs to be said that a perception or understanding which may seem obvious to us now would not always have seemed so. And it follows that in assessing the contributions of our predecessors a degree of humility is appropriate, not least in the hope that those who follow us will in turn prove merciful when faced with the missteps and mistakes of our own era.

The discussion that follows in this overview chapter divides the scholars considered in this volume into three categories: *pioneers* (Cooley, Holmes and Pollock); *consolidators* (Salmond, Bohlen, Winfield, Prosser and Fleming) and *iconoclasts* (Green, James, Atiyah and Weir). Any such taxonomy is naturally problematic, and we employ it – and its constituent categories – only in the

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loosest of senses, and with appropriate circumspection. We also recognise that while, in our view at least, some of the scholars fit relatively easily into one or other of these categories (say, Prosser and Green), in other cases the classification of a scholar is less obvious (say, Salmond and Fleming). Nevertheless, we hope to show that the threefold taxonomy is revealing, and that it can be used to identify commonalities between the scholars within each category, and recurrent distinctions between the different categories of scholar. Furthermore, in the final part of the chapter, we supplement the discussion of the three categories of scholar with some thematic observations about tort scholarship more generally.

The framing of our discussion by reference to three categories of scholar gives rise to a difficulty that should be acknowledged at the outset. This is that, although naturally the pioneers came first, the other two categories are not chronologically distinct, with the result that consolidators were influenced by iconoclasts and vice versa. It follows that while we discuss the scholars in each category in date of birth order (the criterion used to order the other chapters in the volume), in some cases the treatment of a particular scholar must inevitably anticipate material in a later part of the chapter.

II. PIONEERS

A. The Origins of the Subject

The scope of this volume rests on an important distinction between the study of causes of action, cases and so on that are now treated as part of tort law, and ‘tort law’ as a subject of study in its own right. This is because we consciously chose to limit the project to consideration of scholars of tort law as a subject, and not to include in it writers whose work pre-dated the recognition of tort as a distinct legal category. (That is why there is no chapter in this book on, for example, Bracton, nor on Blackstone.) And it raises the question of when ‘tort law’ as such was first the subject of scholarly attention.\(^9\)

Happily, there is a general consensus that the recognition of tort as a distinct legal category dates back to the second half of the nineteenth century.\(^10\) Indeed the evidence to this effect is overwhelming. The first significant\(^11\) English-language work on the subject was published in 1859 by the American Francis Hilliard,\(^12\) and this was followed a year later by Thomas Addison’s *Treatise on*

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\(^9\) Regarding the origins of tort law as a subject, see generally, White, *Tort Law in America: An Intellectual History* (n 8) ch 1.

\(^10\) See, eg, ibid 3 (‘Torts was not considered a discrete branch of law until the late nineteenth century’); and Atiyah, *Pragmatism and Theory in English Law* (n 2) 176.

\(^11\) Percy Winfield identifies one earlier English work, from 1720, but little more seems to be known of it: see PH Winfield, *The Province of the Law of Tort* (Cambridge, CUP, 1931) 8.

the Law of Torts in England. Other American treatises followed Hilliard’s, and the first case book on the subject was published in 1874. A flurry of books on tort were also published in England towards the close of the nineteenth century. The subject’s arrival was also proclaimed by the curricula of the universities: the first torts class was taught at Harvard in 1870, and tort made its first appearance as an examination paper in Cambridge in 1890, and in Oxford in 1905.

Nor is the explanation for the timing of tort’s recognition as a distinct category in common law systems hard to find. The forms of action ‘had militated against abstraction to principle’, and their demise ‘cleared the way for more systematic exposition and analysis of decisional law with, at most, only subsidiary reference to the process and procedures that produced it’. In England, the final nail in the coffin of the formulary system was the Judicature Act 1875, but that legislation marked the culmination of a long process of decline, one mirrored in developments on the other side of the Atlantic. From the collapse of the writ system emerged a reimagined legal landscape, populated by new categories, or subjects, such as contract and tort. And while the cases were the bricks and mortar of the new superstructure, its architects were the scholars who wrote the books that both created and reflected the nascent taxonomy. The dawn of the modern expository tradition went hand in hand with the advent of common law scholarship as a profession, of the schools of the common law in which the new professionals worked and of the scholarly journals in which they published. It is in this context that the contribution of the pioneers of tort scholarship must be evaluated.

B. Cooley and Holmes

John Goldberg and Benjamin Zipursky (chapter 2) identify Thomas McIntyre Cooley and Oliver Wendell Holmes Jr as pioneers of the serious scholarly study of tort law in the US, and investigate why, in their view, Holmes’s legacy has been so much more prominent than Cooley’s. Holmes stands out among the scholars considered in this collection for never having written a book specifically on
tort – his influential theory of tort law (the first put forward by an Anglophone writer 22) is instead to be found in periodical writings 23 and lectures III and IV of The Common Law. 24 But despite this, some of his theoretical insights have resonated into the modern era: the idea of tort law as striking a balance between security and freedom, the objective approach to fault, and the threefold division of tortious liability into liability for intentional conduct, liability for negligence and strict liability, a classification that has dominated, in particular, American thinking about tort law ever since.

As the foregoing suggests, Holmes’s focus was almost entirely on defendants (and potential defendants). The centrality of the defendant to Holmes’s conception of tort law laid the intellectual foundation for much that followed, including the rise of the fault principle, which soon came to dominate tort law throughout the common law world, and, in more recent times, the resurgence of deterrence-based theories under the guise of ‘economic analysis’. By contrast, Holmes had relatively little to say about plaintiffs. As Atiyah pointed out, there was ‘absolutely no hint in The Common Law that Holmes identified the possible importance, for instance, of the distinctions between bodily injury, property damage and pecuniary loss’, since to have done so would have ‘run counter to his fundamental objective of restating the principles of tort law by reference to the nature of the defendant’s conduct’. 25 Underpinning Holmes’s theory was a ‘moral vision’, albeit one that rested not on the ‘personal morality of each individual’ but on the standards of the community at large. 26 Hence the persistent focus on the question of whether the defendant’s conduct conformed to an objective standard of behaviour, whether set by the legislature, the judge or the jury.

Compared with Holmes’s relatively abstract and, in its way, revolutionary theory, Cooley’s treatment of tort in his treatise of 1880 was more granular, and represented less of a break from earlier modes of thought. 27 Whereas Holmes organised the subject around different types of conduct, and focused attention firmly on the position of the defendant, Cooley’s classification of wrongs centred on the interest of the plaintiff affected by that conduct. This was closer to the formulary system and (as befitted the compiler of an American edition of the Commentaries 28) to Blackstone’s thinking. As for the substance of what

27 TM Cooley, A Treatise on the Law of Torts, or, the Wrongs Which Arise Independent of Contract (Chicago, IL, Callaghan, 1879).
was going on in tort cases, Holmes’s starting point was that *losses* should lie where they fell unless there was a good enough reason to shift them, while Cooley conceived of such cases as involving redress for *wrongs*. This tension between a ‘loss view’ and a ‘rights/wrongs view’ of the subject continues to divide tort lawyers to this day.\(^{29}\) Goldberg and Zipursky argue that the two men’s very different approaches to the new subject reflected their divergent thinking about law in general. Holmes, they say, was concerned with the identification through ‘inductive and empirical analysis [of] law’s general principles’, while Cooley considered that legal insight came ‘from immersing oneself in the details of doctrine, understood to reflect inherited wisdom and, more importantly, ordinary morality’.\(^{30}\) As is so often the case, these differences of mindset manifested themselves not only in the substance of the two scholars’ writings on tort, but also in the form that those writings took.

### C. Pollock

Sir Frederick Pollock is generally considered to be the pioneer of the serious scholarly study of tort in England.\(^{31}\) Along with his treatise on contract, his 1887 treatise on tort\(^ {32}\) was described after his death as having ‘inaugurated a new era in the literature of English law’,\(^ {33}\) while Pollock himself has been said to signal ‘the beginning of a change from one juristic era to another’.\(^ {34}\) In assessing his legacy as a tort scholar, it is important to emphasise the novelty of the enterprise that he was undertaking. For not only was Pollock writing *about* tort, he was in a very real sense *creating* it as a category within English legal thought.\(^ {35}\) As his intellectual biographer, Neil Duxbury, says:

> [Pollock’s] treatise on torts was both a study of principles and an effort to establish a body of law – to show, that is, that there really is a unified Law of Torts rather than just a haphazard collection of rules about different kinds of torts.\(^ {36}\)

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\(^{30}\) Goldberg and Zipursky, ch 2 of this volume, p 47.

\(^{31}\) The earlier treatise by Addison was described by William Holdsworth as ‘not a wholly satisfactory book when it was first published’, since it merely collected the relevant decisions and did not ‘bring out clearly the underlying principles’ (WS Holdsworth, *A History of English Law* (London, Methuen & Co, 1965) vol XV, 300). Holdsworth points out that later editors of the work accepted this, and credited Pollock and the authors of *Clerk and Lindsell* with the first proper elucidation of this branch of English law. See also CHS Fifoot, *Judge and Jurist in the Reign of Victoria* (London, Stevens & Sons, 1959) 47 (Addison ‘made no attempt to generalise’).


\(^{33}\) Lord Wright, ‘In Memoriam: Sir Frederick Pollock’ (1937) 53 LQR 151, 162. Fifoot (*Judge and Jurist in the Reign of Victoria* (n 31) 52) described the treatise as ‘the first English book devoted to a scholarly and systematic examination of torts’.

\(^{34}\) Duxbury, *Frederick Pollock and the English Juristic Tradition* (n 16) 280.

\(^{35}\) For the equivalent claim about Holmes in the American context, see TC Grey, ‘Accidental Torts’ (2001) 54 Vanderbilt Law Review 1225, 1227.

\(^{36}\) Duxbury, *Frederick Pollock and the English Juristic Tradition* (n 16) 225.
The nature of the challenge that Pollock set himself in his treatise is apparent from the opening page, where he says that he has sought to ‘fix the contents and boundaries of the subject’.37 In the spirit of legal science,38 he sought also to create ‘a formal, logical system of rules, teased out of the historical material of the common law’.39 These were not easy tasks. The demise of the forms of action meant that substantive doctrine could now replace the older learning focused on process and procedure, but where was the doctrine to come from? Pollock turned to Blackstone, and to the US. His intellectual debt to Holmes is well-documented, but it seems that Cooley was also a major influence on his thinking,40 and while Pollock’s overall schema has been described by Duxbury as ‘an amalgamation of Blackstone, Cooley, and Holmes’,41 its threefold foundation seems closer to Cooley’s approach than to Holmes’s. Pollock also departed from Holmes in basing the law of torts firmly on a moral foundation. Then again, Pollock’s inductive methodology was more Holmesian, and less grounded in the detail of the positive law than Cooley’s. Like Holmes, Pollock saw the function of the jurist as identifying the principles that could be inferred from the case law, and these were set at a very high level of abstraction. Indeed, Pollock even discerned in the vast mass of decided cases one overarching general principle of tort liability, that it was a wrong ‘to do wilful harm to one’s neighbour without lawful justification or excuse’,42 a principle which – as Robert Stevens demonstrates in his chapter on Pollock (chapter 3) – was highly tendentious when first put forward, and impossible to reconcile with important decisions of the courts in the years that followed its promulgation. Pollock also emulated Holmes by downplaying strict liability and promoting the fault principle.

Pollock was, as all scholars are, a creature of his time, and his approach to the task of systematising the law of tort was in keeping with the tradition of the treatise writers of the late nineteenth century, as encapsulated in this quotation from Brian Simpson:

>[T]he treatise writers of the nineteenth century, insofar as they consciously embraced a theory of law, inherited and claimed to express the belief that private law consisted essentially of a latent scheme of principles whose workings could be seen in and illustrated by the decisions of the courts, where they were developed and applied. The text writer sought to expound these principles in a rational, coherent manner, as was appropriate to a science.43

37 Pollock, The Law of Torts (n 32) 1.
39 M Lobban and J Moses, ‘Introduction’ in Lobban and Moses (eds), The Impact of Ideas on Legal Development (n 38) 10.
40 Duxbury, Frederick Pollock and the English Juristic Tradition (n 16) 237.
41 Ibid 239.
At the same time, however, Pollock was also a pragmatist in the English tradition, whose view of the common law was that it was reasonable rather than rational.\textsuperscript{44} Hence his scepticism about ‘fashionable economic theories’ that were not grounded in the raw material of the common law itself,\textsuperscript{45} and his view that the reconciliation of ‘the just freedom of new kinds of collective action with the ancient and just independence of the individual citizen’ would be founded, not on theoretical insights from other disciplines but from ‘knowledge of the world, and on broad considerations of policy’, or in other words what he called ‘[n]atural law’.\textsuperscript{46} This grounded approach, which elevates common sense and tradition over rationality and theory, was also discernible in the work of Pollock’s successors – men like Salmond and Winfield – and remains characteristic of much English tort scholarship to this day.

D. Pioneers in General

Whatever the perceived merits or demerits of their writings, Cooley, Holmes and Pollock clearly deserve a place in the pantheon of tort scholarship. As Simpson says, ‘in treatise writing, as in mountaineering, a special significance is rightly accorded to those who achieve first and thereby demonstrate that the feat is in fact possible’.\textsuperscript{47} According to G Edward White, the contribution of these and other pioneers was to isolate Torts as a distinct field of study, to supply that field with an overarching theoretical perspective, and to transform its existing rules and maxims into doctrines consistent, where possible, with that perspective.\textsuperscript{48}

The result was that by the start of the twentieth century, tort jurisprudence had developed a ‘discernible philosophical identity’.\textsuperscript{49} As that summation of their achievement suggests, a central characteristic of the two most influential

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  \item \textit{Pioneers, Consolidators and Iconoclasts.} in America: An Intellectual History (n 8) 34 (‘The aim of the great scientific treatises was to produce, out of the chaos of a constantly growing body of case law, syntheses that made [the field of study] orderly and manageable’).
  \item \textsuperscript{44} See Duxbury, \textit{Frederick Pollock and the English Juristic Tradition} (n 16) 231 (‘[t]o claim, as Pollock did, that the common law is founded on reason is not the same as claiming that it is rational, or even potentially rational’). On the tension between rationality and irrationality in the common law’s intellectual tradition, see D Sugarman, ‘Legal Theory, the Common Law Mind and the Making of the Textbook Tradition’ in W Twining (ed), \textit{Legal Theory and the Common Law} (Oxford, Basil Blackwell, 1986).
  \item \textsuperscript{45} F Pollock, \textit{The Genius of the Common Law} (New York, Columbia UP, 1912) 108.
  \item \textsuperscript{46} F Pollock, \textit{The Expansion of the Common Law} (London, Stevens & Sons, 1904) 131–32.
  \item \textsuperscript{47} Simpson, ‘The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature’ (n 43) 652.
  \item \textsuperscript{48} White, \textit{Tort Law in America: An Intellectual History} (n 8) 38.
  \item \textsuperscript{49} ibid 39.
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of our three pioneers – Holmes and Pollock – was their attachment to broad principles: no liability without fault, as judged by an objective standard; general liability for harm done wilfully without justification, etc. ‘[T]he thrust of their methodology’, White says of them and their contemporaries, was ‘toward … generalized intellectual frameworks’.\(^5\) Another prominent feature of the work of the pioneers is their interest in classification, with all favouring one or other tripartite division of the subject.\(^5\) While later writers could afford to take a more relaxed approach to taxonomical questions\(^5\) and to focus their energy on the substance of the law, the pioneers had no choice but to take it seriously, since one of their central tasks was to map the new legal landscape. Conversely, however, Holmes and Pollock appear not to have felt constrained, as some of their scholarly descendants were, by the demands of established audiences of students and practitioners (indeed, the pioneers seem not to have been particularly concerned about their ‘audience’ at all). As a result their writings are less tied to authority than those of the twentieth-century consolidators, such as Percy Winfield and William Prosser.\(^5\) This attitude towards case law is exemplified by Pollock’s stubborn refusal to abandon his general liability principle in the teeth of inconsistent authority at the highest level. The tension between the supposedly universal and timeless principles set out in his treatise and the messy dynamism of the case law points to a dilemma faced by many of the early conceptuallists, which was the capacity of the principles they claimed to discern in the cases to adapt as the case law developed.\(^5\) Pollock for one never resolved that dilemma, with the result that his treatise aged rapidly, and survived its author by only a couple of decades.

Whereas the influence of later scholars is often thought to be observable in specific aspects of the modern law, and their impact traceable to particular moments in the law’s development, in the case of the pioneers it seems to operate on a broader plane. Rather than being associated with, say, the move from fault-based liability to strict liability for defective products, the legacy of the pioneers instead lies deeper down, in the assumptions that drove the law’s subsequent development and the presuppositions that underlay later scholarship. As Atiyah wrote of Holmes, he ‘helped to shape the way in which lawyers viewed

\(^5\) ibid 68.
\(^5\) See WL Prosser, *Handbook of the Law of Torts* (St Paul, MN, West Publishing, 1941) 34 (‘[b]y some odd coincidence, the classifications [of the law of torts] usually have gone by threes’).
\(^5\) For a prominent example of a tripartite classification to rival that of Holmes, see JH Wigmore, ‘The Tripartite Division of Torts’ (1894) 8 Harvard Law Review 200.
\(^5\) Prosser, for example, remarked that apart from ‘mere convenience in discussion’, there was ‘of course no inherent merit’ in any of the classifications that had been promulgated (Prosser, *Handbook of the Law of Torts* (n 51)).
\(^5\) Of Holmes, it has been said that ‘his boldest claims’ about tort were ‘unaccompanied by extensive documentation’ (GE White, *Justice Oliver Wendell Holmes: Law and the Inner Self* (New York, OUP, 1993) 163). Similarly, Pollock’s general liability principle ‘was not to be found in any express authority’ (Cornish et al, *The Oxford History of the Laws of England: Volume XII* (n 22) 891).
\(^5\) See White, *Tort Law in America: An Intellectual History* (n 8) 74.
the law of torts’. The complete dominance of Holmes’s threefold classification in subsequent American tort scholarship – which can be contrasted with the range of approaches found in the Commonwealth – is a good example of this kind of influence, as is the constraining effect that Holmes’s writings had on the theoretical parameters within which his successors operated. Holmes’s thinking has also been said to have paved the way for legal realism, a movement of huge significance for common law tort scholarship, and similar claims have been made about Holmes and the rise of economic analysis of law, the dominant approach to tort scholarship in the US in recent decades, if less influential than realism beyond American shores.

As for Pollock, although his general liability principle has not survived into the modern era, its progeny may have done. One apparent legacy of Pollock’s principle, for example, is the tendency of many English and Commonwealth scholars to refer to the ‘law of tort’, a designation less often used in the US; another is the idea of a tort of negligence, and the decision of the House of Lords in Donoghue v Stevenson that confirmed its existence. Pollock’s influence may also be observable in modern thinking about the place of the law of tort within private law. Of particular interest here is his insistence on the clear separation between tort and property, as when he wrote – in connection with the obstruction of light – of ‘the risk of digressing from the law of Torts into the law of Easements’. Although the implication that tort and property are mutually exclusive categories is a troublesome one, the separation between the two is now deeply embedded in the common law mindset.

III. CONSOLIDATORS

A. Salmond

Sir John Salmond could easily be classified as a pioneer rather than a consolidator. His famous textbook on the law of torts was published in 1907, still
relatively early in the short life of the subject. And he also shared one of the characteristics of the pioneers discussed previously, in that he was not a career academic. After writing his textbook, Salmond spent the remainder of his life in legal practice in New Zealand, first as Solicitor-General and later as a judge of the Supreme Court. Nevertheless, Salmond’s categorisation as a consolidator seems to us to be justified. After all, his textbook post-dated the most important tort works of the three pioneers by two decades or more, and the task that he faced was very different from theirs, since by the time of its writing tort already had an established position in the thinking of common lawyers and in the curricula of the leading Anglophone universities. We shall also see that there are clear similarities between Salmond’s approach to that task and the approaches of later consolidators, such as Winfield and Prosser.

Salmond is a typical consolidator in being associated with a leading text on the law of tort, but unusual in not having published a great deal else on the subject. His reputation as a tort scholar therefore rests almost entirely on that work, and the extent of that reputation is a testament to its significance. If Pollock’s book had been a treatise in the nineteenth-century mould, Salmond’s was a twentieth-century ‘textbook’, and a highly successful one at that: it dominated the market for three decades, was hugely influential in the courts, and under a series of editors ran to 21 editions, the last of them published more than 70 years after Salmond’s death. In part, the success of the book was down to the lack of serious competition, but that was certainly not the whole story. As Mark Lunney emphasises in his chapter on Salmond (chapter 4), a key reason for the book’s popularity was that the author kept his intended audience of students and practitioners in mind, and gave them the work of ‘practical utility’ that they each, in their own ways, wanted.

Two further points should be made about Salmond’s tort scholarship. One is that, although he was an adoptive New Zealander, nobody reading his book would have had any inkling of this. It was a thoroughly ‘English’ treatment of the subject, even though its author lived on the other side of the world. And the other point is that although Salmond was influenced by Holmes and Pollock, and shared their preference for fault-based liability, his basic approach to the law of torts departed fundamentally from theirs. For while Holmes and Pollock had been concerned to try to distil from the body of the case law a small number of overarching principles, Salmond preferred – doubtless with one eye on his readership – to stay close to the cases and to shy

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62 Cooley and Holmes spent the bulk of their careers on the bench, and while Pollock did hold the Chair of Jurisprudence at Oxford for much of his life, his centre of operations was legal London, and he operated in a sort of shadowland between the academy and profession.

63 See Salmond, The Law of Torts (n 61) v.

64 See P Mitchell, A History of Tort Law 1900–1950 (Cambridge, CUP, 2015) 19 (‘it is fortunate that Salmond signed off the preface to the first edition ‘Wellington, New Zealand’, as it would have been otherwise impossible to tell whether the book had been written in Northamptonshire or North Island’).
away from generalisations. Far from the law of torts instantiating a general principle that it was wrongful intentionally or negligently to cause harm to others without justification or excuse, as Pollock maintained, Salmond wrote in the second edition of his book that it consisted of ‘a number of specific rules prohibiting certain kinds of harmful activity, and leaving all the residue outside the sphere of legal responsibility’, an ‘anti-reductionist’ approach reminiscent of Cooley.

As a result, Salmond and his legacy served as a counterweight to Pollock’s influence in the first half of the twentieth century. That this is so is particularly apparent from the so-called ‘tort or torts’ debate that raged among English tort scholars in the early decades of the twentieth century, and which amounted to an (ultimately unsuccessful) attempt by Pollock and his protégé Winfield to defend the general liability principle against a critique which was spearheaded by Salmond, and based on the incompatibility between the principle and the positive law. The triumph of Salmond’s take on the subject was only partial, however, for his refusal to acknowledge negligence as a stand-alone cause of action put him on the wrong side of history, as the decision in Donoghue v Stevenson demonstrated. Indeed, the rise of negligence suggests that in the end the ‘tort or torts’ debate – understood as a contest between generality and particularity – played out to a draw, with the particularised nominate torts ultimately coming to co-exist with a more generalised fault-based liability principle in the form of the ‘über-tort’ of negligence. Although his impact was most obvious at the fine-grained level at which he preferred to operate, Salmond’s effective articulation of particularism gives his work a broader significance in the history of English tort scholarship.

B. Bohlen

Christopher Robinette describes Francis Bohlen as ‘the dominant torts figure in the United States in the first several decades of the twentieth century’. Like Salmond, Bohlen avoided generalisation and abstraction: his particular talent, it has been said, ‘was to focus his brilliant mind on a particularly confused, discrete area of tort law and come up with a creative theory to clarify and resolve the problem’. Hence his reputation was built not on the back of a grand theory but on a popular student casebook, a raft of law review articles on a

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66 See Goldberg and Zipursky, ch 2 of this volume, p 54.
67 For a summary of the debate, see Mitchell, A History of Tort Law 1900–1950 (n 64) ch 2.
68 Stevens, Torts and Rights (n 29) 295.
69 Robinette, ch 8 of this volume, p 236.
70 Kelley, ‘The First Restatement of Torts: Reform by Descriptive Theory’ (n 56) 124.
71 FH Bohlen, Cases on Torts (Indianapolis, IN, Bobbs-Merrill, 1915) and subsequent editions.
diversity of topics\textsuperscript{72} and above all on his role as the reporter for the first \textit{Restatement of Torts}.\textsuperscript{73} It is that final role that justifies Bohlen’s categorisation as a consolidator. The American Law Institute (ALI) had been established in 1923 with the avowed aim of bringing order and predictability to American law by distilling the voluminous case law of the multiplicity of state jurisdictions into sets of black-letter propositions on particular subjects, supported by extensive commentary and notes.\textsuperscript{74} Although the reporters produced the drafts of these ‘Restatements’, they had to be agreed by the membership of the ALI – a diverse group of judges, practitioners and academics – with the result that the final text was not the work of a single scholar but embodied the ‘composite thought’\textsuperscript{75} of the Institute. In the case of tort, the process took well over a decade, and the result was described by Prosser as ‘the most complete and thorough consideration’ that tort law had ever received.\textsuperscript{76} Furthermore, as Michael Green points out in his chapter on Bohlen (chapter 5),\textsuperscript{77} the torts \textit{Restatements} have been the most influential \textit{Restatements} of all.

Typically for a consolidator, Bohlen was a pragmatist, who charted a difficult course between the conceptual purity of the ‘scientific’ approach to tort and the doctrine-scepticism of the increasingly influential legal realists. In White’s words:

\begin{quote}
[Bohlen] remained unconvinced that a Realist theoretical perspective should fully supplant the perspective developed by nineteenth-century conceptualists … [but at the same time he] believed in the primacy of social change, in the necessity of tort doctrines to accommodate themselves to changed conditions, in the futility of static classification systems, and in the value, in an increasingly interdependent universe, of elite policymakers serving as an active force on behalf of progress.\textsuperscript{78}
\end{quote}

Bohlen’s age, background and personality militated against his conversion to the realist cause, and may in part explain the mutual antipathy between Bohlen and the realist tort scholar Leon Green. But Bohlen’s conceptualism was sufficiently progressive and flexible to enable him to maintain his scholarly standing and influence amid the realist maelstrom of the 1930s. As Michael Green says, he ‘successfully negotiated the transition away from legal formalism’.\textsuperscript{79} That same flexibility also served Bohlen well in his job of \textit{Restatement} reporter, where compromises were required for consensus to be built around an agreed
final text. Bohlen’s ability to strike a workable compromise between doctrinal and functional approaches served as an inspiration for later North American scholars, such as Fowler Harper, Prosser and the Canadian Cecil Wright, all of whom were heavily influenced by Bohlen and his work. As for his broader legacy, the Restatement and its successors came to symbolise an American doctrinalist tradition in tort law scholarship that survived in the face of the realist and post-realist critique of conceptual analysis. Although not always accorded sufficient recognition by the American legal academy, the gravitas and sophistication of this tradition was much admired elsewhere, and helped to maintain the intellectual connection not only with the Commonwealth, but with the more conceptualist civil law systems as well.

C. Winfield

The most significant of the scholars of English tort law to follow Salmond was Sir Percy Winfield; indeed, Donal Nolan argues in his chapter on Winfield (chapter 6) that he is arguably the most successful such scholar in the subject’s history. If Winfield’s vision of tort law was closer to Pollock’s, his approach to scholarship was more reminiscent of Salmond’s. Although he wrote many influential articles, and a significant monograph on the place of tort within the legal landscape, Winfield is best remembered, like Salmond, for a work aimed at students and practitioners, his 1937 Text-Book of the Law of Tort. Furthermore, Winfield was keen – as Salmond had been – to keep his intended audiences on board, and similarly mindful of the need to stick closely to the decided cases.

Winfield’s pragmatism ran deeper than Pollock’s, and extended to all aspects of his scholarly activity. Hence while Pollock had stubbornly stuck to his general liability principle through thick and thin, Winfield demonstrated more flexibility, and eventually conceded ground to those, such as Salmond, who argued that the principle was inconsistent with the cases. Similarly, while Pollock had perceived the law of tort as concerned with the enforcement of moral duties, Winfield believed that the common law reflected the ethics and the morality of the community it served, and not some ‘ideal ethical standard’. Winfield’s tort scholarship was, above all, animated by the simple but powerful idea that the law should meet the needs of the community it served. While Pollock’s principles had seemed both eternal and universal, Winfield readily accepted that the law of tort should evolve in response to new social phenomena or changes in popular attitudes, and that legal rules might need to be tailored to better fit different common law communities,

80 Winfield, The Province of the Law of Tort (n 11).
with different cultural norms. This made him (like Bohlen) simultaneously both a conservative and a progressive.

Two other features of Winfield’s scholarship that Nolan highlights are his deep historical learning, and his intellectual open-mindedness. Winfield was perhaps the last Commonwealth tort scholar who managed seamlessly to blend historical analysis with exposition of the current law in a manner that would scarcely be possible today. As for his open-mindedness, at a time when American and English legal scholarship were rapidly growing apart, Winfield sought valiantly to bridge the gap, publishing in American journals, and consistently drawing the attention of his English and colonial readers to developments in the US, such as Bohlen’s Restatement. There were, however, some matters in respect of which Winfield was immune to transatlantic influence. While fully cognisant of the work of realist tort scholars such as Leon Green and Fleming James, Winfield seems to have been entirely unmoved by their arguments for a more functional, policy-oriented tort law. Although progressive in his attitudes, at heart Winfield was a conservative with a deep respect for the common law and its doctrinal framework, and the editions of his textbook that he authored betray not even a hint of the realist-inspired revolution that had taken American tort scholarship by storm during his lifetime. But despite the fact that changing fashions had made such an approach seem outmoded by the time of his death in 1953, Winfield’s textbook has nevertheless survived into the present century, a fitting testament to the enduring quality and influence of his scholarship.

D. Prosser

If Winfield is perhaps the most influential twentieth-century English tort scholar, then in the US the equivalent accolade must surely be bestowed on William Prosser. Like Bohlen, Prosser wrote a popular casebook (indeed the most popular, even today), a considerable number of high-profile articles on discrete topics, and was a reporter for a torts Restatement (the second, which was completed by John Wade after Prosser’s resignation in 1970). But to top all of that Prosser also authored four editions of by far the most influential book in the history of American tort law, his Handbook of the Law of Torts.

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83 See White, Tort Law in America: An Intellectual History (n 8) 83.
86 Restatement (Second) of Torts (Philadelphia, PA, American Law Institute, 1977).
87 Prosser, Handbook of the Law of Torts (n 51) and three subsequent editions. In a survey conducted at the end of the last century, the fifth edition of Prosser’s work (WP Keeton et al,
Not bad for a man who had scored a measly 59 in Torts before dropping out of Harvard Law School.\(^{88}\) A consummate consolidator blessed with a photographic memory,\(^{89}\) Prosser’s reputation and scholarly impact derived not from original thinking, but from his ‘combining an unusual gift of synthesis with high literary artistry and, perhaps most important of all, an unflagging perception of contemporary legal values’.\(^{90}\) The result was that he managed to pull off the challenging feat of reducing ‘tort law to manageable proportions while not underemphasizing its diversity and capacity for change’.\(^{91}\)

When evaluating Prosser’s legacy the sheer scale of his scholarly undertakings should be borne in mind. Although the second Restatement was built on the foundations of the first, in tort terms a great deal of water had gone over a great many dams\(^{92}\) in the decades between the two, and its four volumes included nearly one thousand black-letter provisions. As for the Handbook, in a spoof review of the first edition Prosser attributed to Warren Seavey – the chair of the meeting of the fictional ‘National Union of Torts Scholars’ (‘more popularly known by its initials’\(^{93}\)) at which the book was discussed – the telling observation that the title of the book, which ran to over 1,300 pages, was ‘something of a misnomer, as the book was not very well adapted to carrying in the hand without imminent peril to the feet’.\(^{94}\) By the third edition Prosser was citing no fewer than 22,000 cases.\(^{95}\) To consolidate mid-twentieth-century American tort law was no walk in the park.

Like other consolidators, Prosser thought carefully about his audiences.\(^{96}\) Since the Handbook was supposed to be a work for students, its author kept the main text reasonably succinct, but he consciously extended the appeal of the work to judges and practitioners through the voluminous footnotes, which probably account for more than half of the work’s length.\(^{97}\) A superb writer, with an engaging and accessible style, Prosser was the ‘master synthesizer of

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91 White, *Tort Law in America: An Intellectual History* (n 8) 113.


94 ibid.

95 Fleming, ‘Prosser on Torts (3rd edition)’ (n 90) 1070.

96 Indeed, by the time that he wrote his Handbook, it seems that Prosser had become a student of the genre (see CJ Robinette, ‘The Prosser Notebook: Classroom as Biography and Intellectual History’ [2010] *University of Illinois Law Review* 577, 595).

American tort law’, who excelled at ‘joining the dots’ so as to provide his readers with clear and precise doctrinal overviews of topics that had hitherto defied lucid exposition. And another explanation for his success was his talent for spotting trends, and responding to them in such a way as to reinforce and intensify them, a quality that gave him the appearance of a mover and shaker, and one in tune with the times.

More than anything else, however, the roots of Prosser’s success lay in his ability to strike a balance between conceptual and functional approaches, by fusing doctrine with policy to produce rules that were (in his words) ‘sufficiently flexible to allow for the particular circumstances, and yet so rigid that lawyers may predict what the decision may be, and men may guide their conduct by that prediction’. Prosser was too wedded to doctrine and the traditional superstructure of private law to be described as a realist, but his methodology was ‘congenial to realism’, and he shared with Leon Green a desire to demystify and where possible simplify the subject. He also acknowledged the role of social policy in tort law, and was – as Robinette explains in his chapter on Prosser (chapter 7) – broadly pro-plaintiff, but his detached attitude was worlds away from the zealous instrumentalism of Fleming James. For James, liability insurance was the central driver for the development of accident law; for Prosser it was no more than a makeweight. This ‘consensus’ approach was in keeping with the ‘dominant thrust of post-war legal thought’, namely ‘derivative and incorporative’, and tending towards the modification rather than the rejection of previous assumptions. For present-day conceptualists, this makes Prosser an ambivalent figure. Was his influence a malign one, sanitising and popularising realism so as to embed it into mainstream tort law and scholarship? Or was his the finger in the dyke, preserving the viability of doctrinal analysis by doing just enough to adapt it to the new thinking, and hence enabling its survival? Perhaps there can never be a clear answer to that question, but either way the magnitude of Prosser’s influence is not in doubt.

99 For discussion of Prosser’s style, see Abraham and White, ‘Prosser and his Influence’ (n 89) 46–49.
100 The classic three examples of this phenomenon are the move to strict products liability, the division of the vague right of privacy into four separate causes of action, and the recognition of the tort of intentional infliction of emotional distress (for details, see Robinette, ‘The Prosser Letters: 1917–1948’ (n 83) 1145). For a critical appraisal of Prosser’s role in the development of strict product liability, see GL Priest, ‘The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law’ (1985) 14 Journal of Legal Studies 461.
101 Prosser, Handbook of the Law of Torts (n 51) 18.
102 White, Tort Law in America: An Intellectual History (n 8) 135.
103 Hence Prosser’s treatment of both duty and proximate cause in negligence closely mirrored Green’s: see ibid 260–61.
104 Ibid 140.
105 For support for this interpretation, see ibid ch 5, and also Abraham and White, ‘Prosser and his Influence’ (n 89).
E. Fleming

Moving from Prosser to John Fleming, we need cross not an ocean but only a corridor, since the two men were colleagues in Berkeley in the early 1960s. But if Prosser was American through and through, for Fleming southern California was the end of a long road. Born in Germany, a schoolboy, student and young academic in England, and then a pioneering figure in the post-war Australian legal academy, Fleming’s globe-trotting was echoed in the jurisdictional ambiguity of his tort scholarship – the ‘law of everywhere and nowhere’ – and in his eminence as a comparative lawyer. To pigeon-hole Fleming is impossible, but despite an agonistic streak emphasised by Paul Mitchell in his chapter on Fleming, he seems to us to be most appropriately classified as a consolidator, if in some respects an unusual one.

Like Salmond, Winfield and Prosser, Fleming’s reputation as a tort scholar owes much to a single book, his magisterial *The Law of Torts*, first published in 1957 and running to nine editions under his pen. Although Fleming also published two shorter books on tort law, and many influential articles, book chapters and case notes, his name is inextricably associated with that remarkable work, which Basil Markesinis described as ‘his classic textbook (or, more accurately, short treatise)’. The self-correction is telling, for *The Law of Torts* was not a textbook in the traditional vein; as Cane points out in his intellectual history of the work, it was a book ‘about tort law, not a book of tort law’.

Along with its cross-jurisdictional nature – albeit with Australian law as its ‘point d’appui’ – this made the book unsuitable for students and practitioners of a less ambitious bent. In Mitchell’s words, it was ‘not for children’. Instead the natural audiences for the book were other scholars, and the appellate judiciary, with Fleming operating ‘as a sort of amicus curiae’ for the Commonwealth’s higher courts, making his ‘knowledge and expertise … widely available to judges through his writings’.

The result was that Fleming was an unusual consolidator, consciously liberating himself from the need to placate the traditional readerships of tort texts, and exploiting the freedom this gave him to present what he saw as the ‘best law’ to an elite international caste of jurists and judges more in need of ideas than exposition. At the same time, there is a similarity here with

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106 See Lunney, ‘Legal Émigrés and the Development of Australian Tort Law’ (n 8).
107 Mitchell, ch 10 of this volume.
112 Mitchell, ch 10 of this volume, p 289.
113 Cane, ‘Fleming on Torts: A Short Intellectual History’ (n 110) 232.
114 ibid passim.
Prosser, Fleming’s ‘intellectual hero’. For where Prosser tried to glean general propositions from the mass of precedent produced by the multitude of US jurisdictions, Fleming sought to weave the cases of a number of leading jurisdictions into a tapestry of Commonwealth tort law. And in both instances the multi-jurisdictional nature of their work weakened the binds of precedent, giving them more scope to steer the law in the direction they thought appropriate. To pull this off required mastery of the art of synthesis, but here Fleming was more than a match for Prosser. A combination of encyclopaedic knowledge and a unique style – an uncanny ability to say as much as possible in as few words as possible – enabled him to write a ‘highly compact book’, a multiple-jurisdiction treatise of a similar length to the single-jurisdiction textbooks of Salmond and Winfield.

Like Salmond, writing about English law in New Zealand, Fleming had an ‘ambivalent sense of place’, updating a work on Australian tort law from the far side of the Pacific. This ambivalence ran deep. On the one hand, Fleming was truly a scholar of ‘Commonwealth’ tort law, equally at ease with the tort law of all the major Commonwealth jurisdictions, and beloved of apex courts in Australia, Canada, New Zealand and the UK. On the other hand, it is important to remember that Fleming spent the bulk of his career in the US, and that he was profoundly influenced by the leading American figures of the previous generation, including Green, James and Prosser, whose works were referenced liberally in The Law of Torts. A realist at heart, Fleming had a ‘presentist’ mindset, was sceptical of concepts and verbal formulae, and believed in the role of tort law as a response to social problems generated by modern conditions. He was also, as Mitchell explains, a critic of the bipolar

115 ibid 221. See, eg, Fleming’s laudatory review of the third edition of Prosser on Torts, cited above, text to n 90.
116 Statutes were a problem for Fleming’s approach, as Cane points out (Cane, ‘Fleming on Torts: A Short Intellectual History’ (n 110) 235–36). It is therefore fitting that the last edition of The Law of Torts written by Fleming was published in 1998, just before the Australian legislatures passed a raft of civil liability legislation (see, eg, the Civil Liability Act 2002 (NSW)) that both transformed and fragmented Australian tort law.
117 For the metaphor, see Cane, ‘Fleming on Torts: A Short Intellectual History’ (n 110) 217.
118 See ibid 239.
119 See Mitchell, A History of Tort Law 1900–1950 (n 64) 19 (discussing Salmond).
120 According to Michael Kirby, ‘Fleming’s writing … came to have an unequalled influence on the opinions of the Justices of the High Court of Australia writing, as they often must, upon problems of tort law’ (MD Kirby, ‘Comparativism, Realism and the Economic Factors: Fleming’s Legacies’ in NJ Mullany and AM Linden (eds), Torts Tomorrow: A Tribute to John Fleming (Sydney, LBC Information Services, 1998) 2).
121 On ‘presentism’, see White, Tort Law in America: An Intellectual History (n 8) 65–67.
123 For particularly clear evidence of this, see Fleming, An Introduction to the Law of Torts (n 108) ch 1 (‘The Task of Tort Law’). The title of Fleming’s monograph on The American Tort Process (n 108) is also a nod to the realist emphasis on the processes from which legal outcomes emerged.
Pioneers, Consolidators and Iconoclasts

focus of traditional tort law, who was fascinated by the third-party interests in tort suits that had been emphasised by Green.\textsuperscript{124} Though in some respects intellectually detached from his adoptive home (and of greater influence beyond its borders than within them\textsuperscript{125}), Fleming is therefore a central figure in the overall history of common law tort scholarship, a connecting thread – as Winfield had been – between the US and the Commonwealth at a time when the gulf between the two was wider than ever before.

F. Consolidators in General

Some clear similarities are observable in the tort scholars we have classified as consolidators. With the exception of Salmond (in many ways a transitional figure), they were all career academics. All but Bohlen are associated with canonical texts, so much so that the scholar and the book became quite literally synonymous: Salmond, Winfield, Prosser, Fleming. Their scholarly methodologies were also constant, a point that White makes about Prosser\textsuperscript{126} but which is clearly true also of, say, Winfield, who consistently blended historical analysis with exposition of the current law and suggestions for reform. The role of the consolidator is a time-consuming one, and another theme of the chapters on these scholars is their remarkable work ethic: Winfield’s long days in the Squire Law Library in Cambridge; Prosser labouring through the Minnesota night on his \textit{magnum opus}, the light in his office ‘giving way only to dawn’.\textsuperscript{127}

Three further similarities should be highlighted. First, the consolidators were audience-focused, since they had to keep their readerly constituencies happy. For traditional textbook (or ‘hornbook’) writers such as Salmond, Winfield and Prosser, this meant students of course, but also (as all three understood) legal practitioners. Bohlen and Fleming may have had a different audience, to some extent – the success of both the \textit{Restatement} and \textit{The Law of Torts} was closely bound up with their appeal to judges, particularly appellate judges\textsuperscript{128} – but they were nevertheless driven by the same desire to give that audience what it wanted

\textsuperscript{125} That said, Fleming’s impact in the US should not be under-estimated. Although, surprisingly, he is not mentioned in White, \textit{Tort Law in America: An Intellectual History} (n 8), James Goudkamp’s citation analysis in his chapter in this volume shows that Fleming is cited far more often in American law reviews than any other twentieth-century Commonwealth tort scholar (Goudkamp, ch 11 of this volume, Table 11.2). Fleming’s influence on American courts (particularly the Supreme Court of his home state of California) was also considerable.
\textsuperscript{126} White, \textit{Tort Law in America: An Intellectual History} (n 8) 177.
\textsuperscript{128} The question of Fleming’s intended audience is a difficult one, and it may have changed over time, as he realised how appealing his style of scholarship was to the appellate judiciary. At the time of the first edition of \textit{The Law of Torts} he seems to have had the more traditional student/practitioner audiences in mind: see Lunney, ‘Legal Émigrés and the Development of Australian Tort Law’ (n 8) 517.
(and in Bohlen’s case by the more pressing need to get his drafts through the ALI’s approval process). The need to keep their audiences on board also had a conservative effect on the consolidators, discouraging them from adopting new language or new taxonomies that might alienate their readerships.\textsuperscript{129}

The second similarity is closely linked to the first. One senses when reading about the consolidators that all were, in their different ways, treading what Nolan calls ‘an intellectual tightrope’.\textsuperscript{130} Salmond was faced with a tension between principled and practical exposition (or ‘prescription and description’),\textsuperscript{131} Bohlen with the challenge of finding a via media between legal science and legal realism, and Prosser with the need to satisfy the competing demands of doctrinalism and functionalism. And while Winfield was a scientifically-minded progressive operating in a deeply conservative – and at times even reactionary – academic culture, Fleming ‘was tentatively testing how far he could go’\textsuperscript{132} in seeking to persuade traditionally minded Commonwealth tort lawyers to think about their subject in new ways.

Finally, a characteristic of the consolidators that differentiates them from the pioneers is their practical mindset and their scepticism of theory. Nolan argues that Winfield’s pragmatism and the fact that he kept his ‘feet on the ground’ is central to understanding his scholarly success, and the same traits are visible in the other consolidators, all of whose scholarship was rooted not in ideas but in the detail of the case law. Robinette makes the point, for example, that Prosser was profoundly anti-theoretical and deprecated the other-worldliness of legal academics oblivious to the fact that ‘a lot of low-browed individuals are shaking their fists under each other’s noses down in the District Court’.\textsuperscript{133} Similarly, Cane argues that Fleming was not interested in ‘large issues’, and that he ‘wanted to influence and persuade at the level of what to do about tort law, not at the level of how to think about it’.\textsuperscript{134} Like Winfield and Prosser, Fleming was in other words an activist scholar,\textsuperscript{135} more interested in bringing about legal change than in changing lawyers’ thinking. The consolidators also tended to take a no-nonsense approach to the overall organisation of the subject, and did not get hung up on matters of taxonomy.\textsuperscript{136}

\textsuperscript{129}See, eg, Winfield, \textit{The Province of the Law of Tort} (n 11) 32; Prosser, \textit{Handbook of the Law of Torts} (n 51) 35; and Fleming, \textit{The Law of Torts} (n 111) 16.

\textsuperscript{130}See Nolan, ch 6 of this volume, p 187.

\textsuperscript{131}See Lunney, ch 4 of this volume, pp 127, 131.

\textsuperscript{132}See M Lunney, ‘Legal Émigré s and the Development of Australian Tort Law’ (n 8) 518.

\textsuperscript{133}See Robinette, ‘The Prosser Letters: 1917–1948’ (n 85) 1179, quoting a letter from Prosser to his mother shortly after he began working as an academic in 1930.

\textsuperscript{134}See Cane, ‘Fleming on Torts: A Short Intellectual History’ (n 110) 234.

\textsuperscript{135}Ibid 229.

\textsuperscript{136}See, eg, Prosser, \textit{Handbook of the Law of Torts} (n 51) 34–35. See also Nolan, ch 6 of this volume, pp 180–81, discussing Winfield; and Cane’s comment that Fleming seems to have had ‘very little interest in the overall structure of the subject’ (Cane, ‘Fleming on Torts: A Short Intellectual History’ (n 110) 233).
The practical attitude of the consolidators may explain why they tended to be derivative, rather than original, thinkers, and why they were at their best not on more abstract or general questions but when struggling with more specific problems arising in particular areas, what Cane calls ‘the fine-grain of tort law’. As a result, their influence came not – as with, say, Holmes – from a handful of ‘big ideas’, but from the accumulated impact of their writings on a host of different topics, ranging across the entirety of the subject. It is perhaps this, above all, that explains the extraordinary success of the consolidators and the continuing significance of their scholarship.

IV. ICONOCLASTS

A. Green

Leon Green’s classification as an iconoclast is unlikely to be contested. Green’s work is characterised by a radicalism quite unlike anything previously seen in common law tort scholarship. A realist, Green rejected the legal scientists’ elevation of tort doctrine into a discrete, eternal and self-sufficient system of norms, instead arguing that tort law should be responsive to changing social realities and that tort lawyers should switch their focus from doctrine, concepts and verbal formulae to process, the facts of the case and the policies driving the law’s development. And ‘unlike Bohlen, who believed that broad principles underlay tort law … Green rejected the view that there was a unified body of tort law’.

Legal realism is easily caricatured, and Jenny Steele’s sympathetic portrait of Green in this volume (chapter 7) serves as a powerful corrective to perspectives that gloss over the complexities of the realist approach. In particular, Steele is anxious to emphasise that Green’s iconoclasm was far from nihilistic. His relentless assaults on the superstructure built by the nineteenth-century pioneers were instead motivated by his profound faith in the power of the common law to regenerate itself in the face of new societal challenges, a power that could be freely exercised, he believed, only if the restraining chains of legal formalism were smashed to pieces.

Realism can be understood as a product of the American pragmatic tradition, and the practical streak that runs through Green’s scholarship – the emphasis on the particular rather than the abstract, and on the ‘law in action’ rather than the ‘law in books’ – reflected his early career as a trial lawyer in Texas. Green’s pragmatism was also apparent in his decision to abandon classificatory orthodoxy in his casebook and instead organise it around ‘functional’

137 Cane, ‘Fleming on Torts: A Short Intellectual History’ (n 110) 238.
138 Brown, ‘Cecil A Wright and the Foundations of Canadian Tort Law Scholarship’ (n 8) 187.
categories of social circumstance, such as ‘automobile traffic’ and ‘manufacturers and dealers’, and in his avowed aim of demystifying and simplifying tort law and its doctrines, as exemplified by his campaign to rid negligence law of what he saw as the smokescreen of ‘proximate cause’. It is observable, too, in his seminal work on the role of the jury in the American tort process, and on the impact of the judge/jury relation on the development of doctrines such as the duty of care.

Green’s granular, fact-sensitive approach was antithetical to grand designs, and as Steele says, ‘[he] had no blueprint for the development of the law’. In this latter respect, he is a very different figure from James, another realist, but one driven by the single goal of making tort law a more effective mechanism for spreading accident losses. A true common lawyer, Green was instead ‘convinced of the factual integrity and autonomy’ of the individual case, and of the ability of the judges to reach the right decision if left to their own devices. Of all the scholars whose work is discussed in this book, Green was probably the most sceptical of the legal academic project as initiated by the pioneers and carried forward by the consolidators. That scepticism is apparent in his disdain for Bohlen’s Restatement, which he perceived as a usurpation of the tasks that rightfully belonged to the participants in the legal process. But despite his antipathy to academic theorising, the influence of Green and other realists on subsequent tort scholarship was immense. By the late twentieth century an approach to tort law that was revolutionary half a century earlier had become entirely orthodox, and not only in America but across the Commonwealth as well.

B. James

If Green was a methodological subversive, the radicalism of Fleming James – ‘the dominant [American] tort scholar of the 1940s and 1950s in terms of the volume, scope, and influence of his ideas’ – was directed more at the substance of the law. As Guido Calabresi explains in his chapter on James (chapter 10), his project was a simple one: to transform tort law into as effective a mechanism at spreading losses as it was possible for it to be.

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140 See Steele, ch 7 of this volume, p 204.
141 ibid p 205 fn 11.
142 White, *Tort Law in America: An Intellectual History* (n 8) 75.
145 In this, the two men epitomised two distinct strands in realist thought: on these two strands, see White, *Tort Law in America: An Intellectual History* (n 8) 71.
James’s ‘radical single-mindedness’ in pursuing that goal is striking, and Calabresi speculates that it may be connected to his background as the son of a Protestant missionary. As to why James set himself the goal that he did, the explanation for that seems tolerably clear: James’s early career as a defence lawyer for the New Haven Railroad during the Great Depression. Having seen first-hand the devastating personal consequences of accidents in a society that lacked a proper system of social insurance, James became convinced that only tort law was capable of alleviating the plight of accident victims and their families, and that the more effective tort was at loss-spreading, the greater its beneficial impact would be. Regardless of one’s feelings about his tort scholarship, it is hard not to admire James’s humanitarian impulse, and the dedication to which it drove him.

It is worth pausing here to emphasise the degree to which James’s way of thinking about tort law – which came to dominate tort scholarship from the 1950s onwards – was a product of a particular characteristic of early twentieth-century progressive thought, namely the ‘discovery’ of new social problems, coupled with ‘a confidence in the possibility of their being solved by governmental institutions’. There was, after all, nothing new about accidental personal injury and death – even if exaggeration of the novelty of the issue as a by-product of the ‘machine age’ and so forth was a leitmotif of modernist tort scholars such as Fleming. What had changed was the perception of it as a problem to be solved by a process of ‘social engineering’. Here, the contrast with the ethos of the nineteenth-century pioneers, who had not conceived of tort actions primarily in terms of compensation – recall Holmes’s emphasis on defendants – was indeed stark. As White says, the conception of tort law as a compensation system was ‘a distinctly twentieth-century phenomenon, brought about by an altered view of the social consequences of injuries’.

The central focus of James’s scholarship on the law’s capacity to effect positive social change lends it a different flavour from Green’s, but his iconoclasm was no less pronounced. Profoundly instrumentalist in outlook, James simply
brushed aside inconvenient doctrines if these reduced the utility of tort law as a loss-spreading mechanism. Hence it is that in James’s work we see the first serious challenge to the Holmesian ethos of tort law, and to the fault principle in particular.¹⁵¹ Since the purpose of tort law was to compensate the injured, not to deter, nor to admonish the blameworthy, the whole edifice of fault-based liability should be swept away. For James, the downside risk of this was low, since he did not consider that tort law contributed a great deal to accident prevention. In the context of accidental injury real fault (in the sense of moral culpability) was rare, and the deterrence potential of liability was very limited.¹⁵² Though James was less radical than Green when it came to questions of method,¹⁵³ the intellectual connections between the two men were strong.¹⁵⁴ Green had taught James at Yale, and the realist undermining of doctrine and concepts paved the way for an instrumentalism in which those doctrines could be manipulated – or, where necessary, dispensed with – so as to enable tort law better to perform its role as a mechanism of social engineering. Without the pioneering work of Green and other methodological realists, James’s doctrinal opportunism would have been inconceivable.¹⁵⁵

Since the loss-spreading potential of tort law derived from the usually significantly superior ability of defendants to absorb and pass on the costs of accidents, James’s scholarship is inextricably connected with the rise of liability insurance in the first half of the twentieth century, an association epitomised by his seminal 1948 article ‘Accident Liability Reconsidered: The Impact of Liability Insurance’.¹⁵⁶ His instrumentalist outlook also explains the centrality of policy in his writing, and the emphasis in his work on insights from other disciplines and reliance on non-legal materials to illuminate legal questions (his co-authored casebook with Harry Shulman was entitled Cases and Materials on Torts,¹⁵⁷ and included a wide range of such writings). In all these respects and others, James left a deep imprint on tort scholarship, readily observable up to the present day.

¹⁵¹ See Atiyah, ‘The Legacy of Holmes through English Eyes’ (n 25) 362 (arguing that the increasing association between tort and insurance – an association that James was of course instrumental in promoting – ‘has helped to destroy the fundamental theoretical structure of tort law that Holmes laboured to create’).
¹⁵³ See White, Tort Law in America: An Intellectual History (n 8) 89–90.
¹⁵⁷ H Shulman and F James, Cases and Materials on Torts (Chicago, IL, Foundation Press, 1942).
C. Atiyah

That imprint is particularly obvious in the tort writings of Patrick Atiyah. One of the foremost English jurists of the twentieth century, Atiyah’s interests and influence extended far beyond tort law to encompass contract law and theory, intellectual history, legal and moral philosophy and legal method. As a tort scholar, Atiyah’s reputation derives primarily from three sources: his weighty early monograph on vicarious liability; 158 Accidents, Compensation and the Law, his seminal study of the tort system and other accident compensation mechanisms; 159 and, right at the end of his career, The Damages Lottery, 160 a polemic against the operation of tort law in the personal injury context.

Atiyah’s iconoclasm is self-evident, 161 and it manifested itself both in his method and in the substance of his analysis. Whereas Green had organised his casebook on tort according to the factual context out of which the decision arose, in Accidents, Compensation and the Law Atiyah went one step further, and replaced tort itself as an organising category with a new one based on a social problem: compensation for loss caused by accidents. This new category overlapped with the old one, but much of tort law was missing – anything that did not relate to personal injury, for a start – and Atiyah’s holistic approach encompassed much more besides, including the everyday operation of the tort system, along with alternative compensation mechanisms such as social security, criminal injuries compensation and first-party insurance. Atiyah’s normative stance was also more radical than James’s, since while James believed in the capacity of tort law to adapt so as better to achieve the goal of loss-spreading, 162 Atiyah was an abolitionist who took the instrumentalist critique of the fault principle to its logical conclusion. Although the rise of liability insurance had transformed tort law from a system of interpersonal justice into an accident compensation mechanism, he argued, its inability to shake off its origins fatally undermined its ability to perform its modern role. The only solution was therefore to get rid of it entirely, at least in the case of negligently inflicted personal injury. As James Goudkamp points out in his chapter on Atiyah (chapter 11), he was perfectly consistent in holding to this position throughout his career. All that changed was his view as to what should replace tort law: in the 1970s, a no-fault compensation scheme, run by the government; in the 1990s, first-party

162 Even if he saw it as only a half-way house on the way to a comprehensive scheme of social insurance for accidents (see Calabresi, ch 9 of this volume, p 266).
insurance, a free-market solution. A political pragmatist, he simply tailored his analysis to the dominant ideology of the time.

Like Fleming, Atiyah was a Commonwealth tort scholar whose thinking owed a great deal to the American realists, most obviously Green and James – as Goudkamp demonstrates, his focus on the social impact of tort law is observable even in his early book on vicarious liability. But Atiyah’s tort scholarship was also rooted in the social conditions of post-war Britain, with its extensive welfare protection and universal healthcare. This meant that while realists like James had seen tort law as a potential solution to the social problem of accident costs (a form of ‘(decentralized) social insurance’), Atiyah saw it as an obstacle in the path of progress, a throwback that should be supplanted by its more efficient competitors as a compensation system. In this, Atiyah was very much a man of his time. By 1970, when Accidents, Compensation and the Law was published, tort law was widely perceived to be a dying subject in the Commonwealth. This perception operated on two levels. Most obviously, it was assumed that tort liability itself would be replaced – as indeed it substantially was in New Zealand – by no-fault compensation, at least in the personal injury cases that dominated the subject in practice. But the survival of the subject as a legal category was also endangered by the rise of the realist-inspired law-in-context movement, which sought to break up the old conceptual categories and to repackage their subject-matter under new headings in a reimagined pedagogical landscape. Hence in the case of tort, the intentional torts might go into a course on civil liberties, defamation into media law, nuisance into planning law and so on, with the rump of the subject dominated by negligence and essentially amounting to ‘accident law’. Since Atiyah’s tort scholarship can best be understood in terms of this two-pronged attack on tort itself – Accidents, Compensation and the Law was the first volume to be published in the famous ‘Law and Context’ series – he was in a sense the ultimate tort iconoclast. And even though the subject survived, Atiyah’s relentless assaults on it had shaken tort lawyers out of their complacency and forced them to seek to justify its continued existence in the modern age.

D. Weir

The continuities that are clearly visible in the intellectual progression from Green through James to Atiyah come to an abrupt halt when we switch our focus to Tony Weir. A common law conservative, Weir’s view of the subject is

164 Indeed, the point had been made by Fleming as early as 1958 (see JG Fleming, ‘Ready for the Plaintiff’ (1958) 46 California Law Review 137, 138 (review)).
much closer to that of early English doctrinalists, such as Pollock, Salmond and Winfield, than it is to that of the American realists and their Commonwealth disciples. And yet at the same time he was a profoundly iconoclastic scholar, a contrarian with a polemical style not dissimilar to that of Green and (latterly) of Atiyah.

One consequence of Weir’s contrarianism is that it is much easier to say what he was against than what he was for. And, as Paula Giliker shows in her chapter on Weir (chapter 12), he was against a lot of things: 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. Weir was also against the post-realist orthodoxy that saw tort cases in terms of competing interests and social policies, and against the push towards no-fault compensation in the 1970s. Like creating a photograph out of a negative, we can use Weir’s antipathies to build a picture of what he did believe in. He believed in the common law, which he thought threatened by creeping Europeanisation and misguided legislative reforms. And as a Scot working in England, and a renowned comparativist and translator, he believed in the importance of local difference and legal tradition, and loathed what he saw as the reductionism of projects seeking to harmonise European private law. He also believed in law as an autonomous discipline, decrying what he called the ‘trahison des clercs’ of those who would sell it out to economists or philosophers, and in the importance of principle, which he defended in the face of the dominance of policy analysis in contemporary tort discourse. Finally, he believed in individual responsibility, and that tort law should roughly accord with the common-sense perceptions of ordinary people. This gave Weir’s scholarship a populist, often pro-defendant edge, which was in stark contrast to the prevailing academic mindset in favour of expanding liability, and which found an intriguing parallel in Atiyah’s The Damages Lottery.

In addition to a wide range of original and insightful articles and book chapters on a cross-cutting array of topics, an introductory book in the Clarendon Law Series and a short volume on the Economic Torts, Weir published 10 editions of his Casebook on Tort, and over 50 case notes. Most of his notes

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168 ‘[A]n adult does not abdicate his senses – until he becomes an economist’ (T Weir, ‘Tort Law and Economic Interests’ [1991] CLJ 551, 553 (review)).  
170 Weir, A Casebook on Tort, 10th edn (n 166) 7.  
171 As epitomised by his note on Revill v Newbery [1996] QB 567 (CA), where a pensioner was found liable in negligence for accidentally shooting a man who was breaking into his allotment shed (see T Weir, ‘Swag for the Injured Burglar’ [1996] CLJ 182).  
were published in the *Cambridge Law Journal*, which until recently gave authors only a thousand words or so to summarise the decision and to comment on it. As Giliker demonstrates, Weir was from the start a master of this miniaturist form,\(^{175}\) capable of conveying to the reader more meaning in those few words than lesser writers could manage in articles of ten or twenty thousand. This ability was also apparent from his *Casebook*, as in this memorable synopsis of the House of Lords’ decision in *White v Jones*:\(^{176}\)

> While Lord Goff opted for a pocket of liability, regardless of principle, Lord Browne-Wilkinson produced a principle out of his pocket and Lord Mustill found the pocket irreconcilable with any principle.\(^{177}\)

The emphasis on case commentary in Weir’s tort scholarship may have limited his broader influence, but it also played to his strengths as a critic, capable of concisely conveying the essence of the decision while simultaneously delivering a razor-sharp evaluation of it in a series of often devastating one-liners. Of all the scholars considered in this collection, it is probably fair to say that Weir is the only one whose work is worth reading for its wit and brilliance (in both senses) alone.

### E. Iconoclasts in General

The iconoclasts are distinguishable from the consolidators in that they tend not to be associated with a single expository text, but to have established their reputations primarily through other scholarly forms, such as casebooks, monographs, articles and even (in Weir’s case) the humble case note. This is surely no accident. Whereas the textbook writer must tread carefully to attract and retain the broad readership essential to the success of the enterprise, the iconoclasts’ chosen modes of publication gave them a much freer rein. Furthermore, the textbook is by nature a conservative medium, requiring its author to present the entirety of the law in a comprehensive and systematic manner. In a monograph, or an article, it is much easier for an iconoclast to break away from established modes of thought, to pose fresh questions, or to approach issues from a radically new perspective. And since the primary audience for this kind of writing is other scholars, it is unsurprising that the influence of, say, Green was most immediately obvious in the work of later academics, even if in time – and with the aid

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\(^{176}\) *White v Jones* [1995] 2 AC 207 (HL).

\(^{177}\) Weir, *A Casebook on Tort*, 10th edn (n 166) 71.
of consolidators like Prosser and Fleming – it also passed into the consciousness of students and legal practitioners.\textsuperscript{178}

A second point to note about the iconoclasts is that far from treading a tightrope, as the consolidators did, they went out of their way to provoke and sometimes even to shock. On occasion, this meant adopting a polemical style in the hope of eliciting a reaction from the reader, as in much of the work of Green, some of the work of Weir\textsuperscript{179} and Atiyah’s \textit{The Damages Lottery} (an unusual work of legal scholarship in its being aimed at the general public\textsuperscript{180}). In her chapter on Green, Steele highlights Bohlen’s comment that in his writing, words are often used ‘not so much to define thoughts as to evoke emotional reactions’,\textsuperscript{181} and the telling comparison that Bohlen drew between Green’s book \textit{Judge and Jury} and modern art. And indeed, Steele’s description of Green’s language as ‘vibrant’ and ‘simple, direct, and colourful’\textsuperscript{182} brings to mind the work of the modernist painters of his time, reacting, as he was, against the staid conventions of an earlier age.

A third distinction between three of the iconoclasts – Green, James and Atiyah – and the consolidators is that their scholarship concentrated on one particular aspect of the law of tort, namely the cause of action for negligence, with particular reference to personal injury. As Carol Harlow has pointed out, such an approach tempts us ‘to equate negligence with civil liability and tort law with accident compensation’.\textsuperscript{183} This narrowing of the field of study was a consequence of the realists’ conception of tort law in terms of its potential as a solution to the social problem of accidents and their consequences. Intriguingly, however, a similar emphasis on negligence and accidents at the expense of the remainder of tort law is observable in the work of many contemporary North-American tort theorists, despite their rejection of the realist

\textsuperscript{178}George Priest has suggested (Priest, ‘The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law’ (n 100) 483) that James recognised the limitations of the law review article in directly effecting legal change, and that this may explain his switch of focus in the late 1940s to the preparation of his famous treatise, co-authored with Fowler Harper (see FV Harper and F James, \textit{The Law of Torts} (Boston, MA, Little Brown, 1956). Whether or not this is true, Priest argues (ibid 501) that the clothing of James’s loss distribution agenda in the authoritative form of a treatise contributed substantially to his influence in the American courts in the 1960s.

\textsuperscript{179}A notable instance is T Weir, ‘Governmental Liability in Tort’ [1989] \textit{Public Law} 40, an article that at times descends into a rant against a ‘wondrously unstoical and whingeing society’ (at 51).

\textsuperscript{180}See Goudkamp, ch 11 of this volume, pp 322–23. There is little evidence that the work in fact reached a wider readership, but this was not perhaps Atiyah’s fault. In the UK, ‘very few law books by academics, however well written, reach a general audience’ (W Twining et al, ‘The Role of Academics in the Legal System’ in M Tushnet and P Cane (eds), \textit{The Oxford Handbook of Legal Studies} (Oxford, OUP, 2005) 928).

\textsuperscript{181}F Bohlen, ‘Judge and Jury’ (1932) 80 \textit{University of Pennsylvania Law Review} 781, 781 (review).

\textsuperscript{182}Steele, ch 7 of this volume, p 207.

emphasis on social policy in favour of approaches based on interpersonal justice arguments.\textsuperscript{184} By contrast, as a conservative doctrinalist, sceptical of both policy and theory, Weir shared the consolidators’ interest in the entirety of the subject as traditionally conceived.\textsuperscript{185} Hence his book on the economic torts,\textsuperscript{186} which was certainly not a topic that was likely to have animated James, for example.

Having pointed out some differences between the iconoclasts and the consolidators, we should also highlight a similarity, which is their shared antipathy to theory. Both Green and James were, as we have seen, pragmatists in the American tradition, empiricists interested in the nuts and bolts of tort litigation in practice, dismissive of abstract principle, and ‘dubious about … appeals to moral values or norms’.\textsuperscript{187} Similarly, Goudkamp points out that although Atiyah was a distinguished theorist in the field of contract, he ‘shunned and, indeed, was derisory of’ the efforts to theorise tort law in economic or moral terms that began to emerge in the US from the 1970s onwards.\textsuperscript{188} As for Weir, theorising and philosophising about tort law was one of his pet hates, as he made abundantly clear in the preface to his introductory book on tort in the Clarendon Law Series:

The Dean of an American Law School once asked me over lunch ‘And what is your normative theory of tort?’ It was rather a poor lunch and, as I thought, a very stupid question. Tort is what is in the tort books, and the only thing holding it together is their binding … In any event, before producing a ‘normative theory’ or even discussing the purpose of ‘tort’, it is surely desirable to become familiar with what that ragbag actually contains: otherwise we shall be like adolescents spending all night discussing the meaning of life – before, perhaps instead of, experiencing it.\textsuperscript{189}

It was, at any rate, not a question that was likely to have been posed by Dean Green or Dean Prosser. While a connection can be made in this regard between the consolidators and the iconoclasts, it should not be pushed too hard. Although both types of scholar had a practical edge that reacted against abstract theorising, in other respects their pragmatisms were very different, since while the iconoclasts took a practical view of the law and its operation and impact, the pragmatism of the consolidators is most obvious in their approach to the scholarly enterprise itself. Bohlen’s flexibility, Winfield’s common sense and Prosser’s detachment contrast sharply with Green’s doggedness and the missionary zeal of James. (In this respect, Weir is again an exception, his instincts and approach reminiscent of his fellow Cantabrigian Winfield.)

\textsuperscript{184} A point made by Cane, ‘Fleming on Torts: A Short Intellectual History’ (n 110) 225.
\textsuperscript{185} Cf J Fleming, ‘Once More – Economic Loss’ (1992) 12 OJLS 558, 558 (referring to ‘traditional tort scholars accustomed to view the subject primarily through the lens of personal injuries’).
\textsuperscript{187} White, Tort Law in America: An Intellectual History (n 8) 69 (discussing realists in general). In Prosser’s spoof review of his own Handbook he attributed to James the comment that ‘a few more years in a law office would do the writer [ie, Prosser] the world of good’ (Prosser (n 93) 164).
\textsuperscript{188} Goudkamp, ch 11 of this volume, p 313.
\textsuperscript{189} Weir, An Introduction to Tort Law (n 172) ix.
V. PLACE, PUBLICATIONS AND PROSE

There is insufficient space for us to consider all the general themes that run through the essays in this collection, and we have in any case already touched upon a number of these, including pragmatism and theory, the question of scholarly audiences, and the complex relationship between the scholars under scrutiny and the constitution and conception of the subject they studied. Nevertheless, in this part of the chapter we wish to highlight three refrains that recur throughout the remainder of the book, namely the importance of place, of publications and of prose.

A. Place

It would not be difficult to write an entire chapter on the significance of place in common law tort scholarship. Here we must content ourselves with a few observations, mere signposts to aid the reader’s navigation.

In jurisdictional terms, the most important intellectual fault-line is unquestionably between the US and the rest, though the depth of the rift has varied over time. The scholarly world of the tort pioneers was immeasurably smaller than that of their successors, and the closeness of the connections that resulted is epitomised by the transatlantic friendship of Holmes and Pollock. In an early example of the profound influence of American tort scholars on their counterparts elsewhere – a persistent theme of this collection – Pollock dedicated his treatise to Holmes, writing in the letter of dedication that the book was an attempt ‘to turn to practical account’ the lessons of a visit to the Harvard Law School three years earlier. As Stevens points out, the substance of the treatise reflected Pollock’s affinity with the US, ‘with American cases interspersed with the English, on the assumption that the common law formed a seamless whole’.

That assumption, always questionable, began to wear very thin as the twentieth century wore on. Institutional variation increasingly drove a wedge between the US and the remainder of the common law world. Just as the realists were drawing attention to the importance of the jury in American tort law and process, the civil jury was in terminal decline elsewhere (with the exception of the Australian state of Victoria). Consequently, the division of tasks between judge and jury, so essential to an understanding of the dynamic of

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190 Pollock, The Law of Torts (n 32) vi.
191 Stevens, ch 3 of this volume, p 78.
192 On the decline of the civil jury in England, see D Ibbetson, A Historical Introduction to the Law of Obligations (Oxford, OUP, 1999) 188–91. Ibbetson argues that it was largely obsolete by the time Donoghue v Stevenson [1932] AC 562 (HL) was decided. Green’s Judge and Jury (Kansas City, MO, Vernon Lawbook Co, 1930) had been published in the US only shortly earlier.
American negligence law, lost most of its significance in other common law systems. Fleming, one of the few scholars equally at home with American and Commonwealth tort law, would later write of them that while ‘[t]he dish, so to speak, may consist of the same basic ingredients’, it was ‘metamorphosed by the manner of its cooking’. 193

In the 1930s and 1940s, scholars such as Winfield and Prosser struggled to maintain the connection between the two systems. Unusually for an English scholar of his (or, for that matter, any other) generation, Winfield published a good deal in American law reviews, and continually emphasised to his more insular contemporaries the value to be derived from American law and scholarship. As for Prosser, he began his torts class in Minnesota in 1938 with a survey of the English texts (describing Salmond as the best of the bunch), 194 and when his own Handbook appeared three years later, it was replete with references to English cases and the writings of English authors. Nevertheless, the gulf continued to widen in subsequent decades, though the influence of American thinking could clearly be seen in the work of Commonwealth scholars such as John Fleming in Australia, Cecil Wright in Canada and Harry Street in England. (Wright is a particularly interesting figure in this connection, profoundly influenced by Americans such as Bohlen, Green, Prosser and Roscoe Pound, and severely critical of what he saw as the deadening conservatism of English tort scholarship. 195)

Another story, that of England and her ‘legal satellites’, is if anything even more complex and multifaceted. Along with the English language, the common law has been one of the most enduring legacies of British colonialism. One consequence of this is that the deep structures of private law – including the law of tort – are surprisingly similar across the Commonwealth, from Antigua to Auckland, and from Mumbai to Mombasa. And the effects of Empire and its aftermath are everywhere observable in the history of tort scholarship. Pollock’s pioneering treatise, for example, arose out of a project to codify the law of tort in India, while Winfield’s monograph The Province of the Law of Tort was based on lectures he gave in Calcutta in 1930 (Pollock having lectured in the same series some 37 years previously). Furthermore, as Lunney emphasises, Salmond was ‘an Englishman abroad’, a scholar writing about English law for an English audience, but from the other side of the world, in Wellington, New Zealand.

In the post-war years, when the Empire had morphed into the Commonwealth, the connections stayed strong, even as the law itself began to fragment. 196

194 See Robinette, ‘The Prosser Notebook: Classroom as Biography and Intellectual History’ (n 96) 598.
195 See Brown, ‘Cecil A Wright and the Foundations of Canadian Tort Law Scholarship’ (n 8) passim.
196 For discussion see J Goudkamp and J Murphy, ‘Divergent Evolution in the Law of Torts: Jurisdictional Isolation, Jurisprudential Divergence and Explanatory Theories’ in A Robertson and
A key personality in that narrative is Fleming, who we have seen was truly a scholar of Commonwealth tort law from the 1950s through to the 1990s. The timing was no accident. Fleming’s endeavour would not have been a rewarding one in earlier times, when Britain’s dominance — epitomised by the Privy Council’s status as the ultimate appellate court of the colonies, coupled with the principle that the common law should be the same across the Empire — resulted in a high degree of legal uniformity. And in the present century the different jurisdictions have diverged to such an extent that the very idea of a ‘Commonwealth’ tort law is increasingly questionable. But in the second half of the twentieth century, the opportunity arose for a scholar to supplant the Privy Council’s traditional centripetal role — if only, this time, by persuasion — and Fleming was the perfect man for the job. The fact that his book, which purported to be about Australian law, should end up being be so influential in Canada was no coincidence.

Finally, place also had an effect both on the form that scholarship took and on the expository tradition itself. In the US, the use of the case method of instruction puts the casebook centre stage in pedagogical writings, whereas in England the textbook has traditionally reigned supreme. Furthermore, as we have seen, the American tort scholar concerned with description rather than prescription faced a distinctive challenge in the form of the multiple jurisdictions that combine to produce ‘American’ tort law. Meeting that challenge required a very particular skill set, and the resulting output was itself quite distinct from the single-jurisdiction texts produced by consolidators in England and elsewhere: ‘less dogmatic’ and more discursive in tone. The multi-jurisdictional nature of American expository scholarship also manifested itself in the large-scale treatise, a form with ‘no real parallel at all’ in the rest of the common law world. The only Commonwealth scholar to take and comprehensively implement an explicitly multi-jurisdictional approach was Fleming, whose unique work The Law of Torts, though notionally focused on Australian law, was really a study of tort law in several Commonwealth jurisdictions, and (for that and other reasons) fell somewhere between a textbook and a concise treatise.


197 In Trimble v Hill (1879) 5 App Cas 342 (PC), the Privy Council said (at 345) that ‘it is of the utmost importance that in all parts of the Empire where English law prevails, the interpretation of that law by the Courts should be as nearly as possible the same’.

198 For a premonition of this aspect of Fleming’s enterprise, see AT Denning, ‘Winfield on Tort’ [1955] CLJ 113, 113 (review), arguing that now that appeals to the Privy Council had largely been abolished, ‘the textbooks must provide the links to keep the [Commonwealth legal] system together’. This was just two years before the publication of Fleming’s The Law of Torts.


200 Ibid. See also the discussion of American legal literature, and in particular the multi-volume treatise, in Atiyah, ‘American Tort Law in Crisis’ (n 146) 280–84.
B. Publications

The importance of a scholar’s chosen form or forms of publication should not be under-estimated. The most classical form employed by the legal scholar is the treatise, and we have seen how the arrival of common law scholarship as a significant phenomenon was inextricably linked to the publication of the great nineteenth-century treatises. Indeed, it is only when tort treatises began to be written that tort came to be seen as a legal subject in its own right. ‘Tort law’ and the tort treatise – the subject and its study – are thus literally inseparable. Once the subject had established its place in the common law imagination, it soon found its way into the curricula of the law schools, and this in turn created the demand for the student text: the textbook/hornbook and (particularly in the US) the casebook. This largely spelt the demise of the treatise, at least in England, where it was overtaken by the textbook as well as by the more detailed practitioners’ books, such as Clerk & Lindsell, which were typically lacking in the scientific ambitions of the earlier genre.

If the nineteenth-century treatise was a sort of ‘proto-code’, as Brian Simpson argued, then the closest we come to such a thing in twentieth-century tort scholarship is the American Restatement. Directed primarily at the courts – as opposed to students or legal practitioners – Benjamin Cardozo envisaged the Restatements as ‘something less than a code and something more than a treatise’. They were of course a distinctly American phenomenon, a response to the felt need for something to hold together – even if only loosely – the law of the multiple jurisdictions, and thereby to hold on to the idea of an American common law in the face of the federal courts’ unwillingness to perform this role. The unique mission of the Restatements conferred on them a unique status within the common law expository tradition, as what Nils Jansen calls ‘the main reference text[s] of the [American] ius commune’. As for the textbook, or hornbook, while many such works were (and are) largely devoid of scholarly ambition, the best of them came to achieve canonical status, and to establish the reputations of their authors in the tort pantheon. It was characteristic of the most successful examples of this form that they

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204 Cardozo, *The Growth of the Law* (n 74) 9. This was before any Restatement had actually been promulgated.
205 See Cane, ch 13 of this volume, p 370.
206 Jansen, *The Making of Legal Authority: Non-legislative Codifications in Historical and Comparative Perspective* (n 201) 56.
purported to provide a comprehensive exposition of the entirety of the subject, and that they not only appealed to their primary audience of students, but were extensively used by practitioners and judges as well. It was also characteristic of such works that they were carried on by other scholars after the deaths of their original authors, so that Salmond became Salmond & Heuston, Winfield became Winfield & Jolowicz, Prosser became Prosser & Keeton and so on. The duration of this form of scholarly immortality varied, and much depended not only on the adaptability of the Ur-text, but also on the skill of the subsequent editor or editors in ensuring the work’s continued utility.207 And the more idiosyncratic the original scholar, the less likely his work was to survive (it would, for example, be a brave soul who would seek to perpetuate Weir’s Casebook). Though the textbook route to scholarly stardom was a long and arduous one, the fruits of success were sweet. While the pioneers and iconoclasts may have had a greater impact on ‘deep thinking’ about the subject, it was the consolidators associated with the classic texts who became the closest a tort scholar can become to a ‘household name’, their works forever associated with their subject in the minds of successive generations of students and lawyers, and their citations ratcheting up year on year in the courts. The success and influence of those works provides compelling evidence for Jansen’s claim that the form of the publication ‘is an important factor contributing to its authority in legal discourse’.

Other forms of scholarship were of course also important. Casebooks coloured the perceptions of the countless students who passed through American law schools, and in Australia and Canada it was the arrival of casebooks, not textbooks, that signified the recognition of a distinctive, indigenous law of tort in the 1950s.209 In England, by contrast, casebooks historically played a subsidiary role, augmenting or supplementing the textbooks, and their impact was therefore more limited. Monographs tended not to be cited as much by the courts as treatises and textbooks, but the more practitioner-friendly ones, such as Atiyah’s Vicarious Liability in the Law of Torts, were an exception, while those directed at an academic audience were capable of shaping the thinking of later generations of scholars. As for law review articles, these sometimes fulfilled a similar role to that of the legal monograph – especially in the US, where the

207 See Nolan’s discussion of the likely reasons for the survival of Winfield’s textbook (Nolan, ch 6 of this volume, pp 181–82).
208 Jansen, The Making of Legal Authority: Non-legislative Codifications in Historical and Comparative Perspective (n 201) 108. See also Priest’s suggestion (Priest, ‘The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law’ (n 100)) that the clothing of Fleming James’s loss distribution agenda in the authoritative form of his co-authored treatise with Fowler Harper may have contributed substantially to the American courts’ adoption of strict products liability in the 1960s.
209 See CA Wright, Cases on the Law of Torts (Toronto, Butterworths, 1954) and WL Morison, Cases on Torts (Sydney, Law Book Co, 1955). The first work on tort law in New Zealand was, however, a textbook (AG Davis, The Law of Torts in New Zealand (Wellington, Butterworths, 1951)). Excepting Fleming’s The Law of Torts (not, as we have seen, a traditional textbook), the first textbooks on Australian and Canadian tort law did not appear until the 1970s.
latter was a relative rarity – but throughout the common law world much of the periodical literature had considerable wider influence, both on the courts and on the students whose reading lists it peppered. And even that most humble mode of legal academic publication, the case note, could affect perceptions or persuade a court to alter the path of the law’s development, particularly in the hands of a master of the form such as Pollock or Weir.

C. Prose

Readers of this collection will continually be reminded of the importance of a scholar’s prose. A scholar’s style of course reflects his or her personality, and even the nature of his or her scholarship – contrast, for example, Winfield’s use of homely metaphor with Green’s flights of verbal fancy. And yet perhaps the most important message about style that emerges from this book is its significance to scholarly success and influence. Legal scholars are after all writers, and, like a poet or novelist, the tools of their trade are the pen, the typewriter and the word-processor. Legal scholarship is ultimately words, and the choice of words matters. Style can be at least as important as substance.

The importance of style to scholarly accomplishment is particularly apparent in the case of the consolidators. A textbook writer, after all, needs to attract and retain readers in a competitive marketplace. As Lunney explains, Salmond’s ability to encapsulate a sophisticated idea in a neat verbal formula – as exemplified by the so-called ‘Salmond test’ in the law of vicarious liability – was a trait that endeared him to students, practitioners and judges. And Nolan also emphasises the importance of its attractive style in establishing Winfield’s textbook as the leader in its field, while what Fleming called his ‘felicity of style and humor’ is a consistent theme of the secondary scholarship that has been published about Prosser in recent decades. Similar praise has been heaped on the ‘clean, vigorous and searching’ writing of Fleming himself. Indeed, on any assessment, Fleming’s prose was highly distinctive, and was one way in which his work The Law of Torts stood apart.

Style was perhaps less central to the influence of the pioneers and the iconoclasts. The natural advantage of coming first ensured the pioneers their place in the history of the subject, even if (as in Pollock’s case) their writing left a lot to be desired. And even an early consolidator like Bohlen could get away with leaden prose: after all, his Restatement had no competitors. As for the iconoclasts, to the extent that their primary audience was other scholars, style

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210 See Lunney, ch 4 of this volume, p 125.
211 Fleming, ‘Prosser on Torts (3rd edition)’ (n 90) 1068.
212 See, eg, White, Tort Law in America: An Intellectual History (n 8) 156 (one of the explanations of Prosser’s success was that his writing ‘was clear, light, and eminently readable’).
may have mattered less than it did to consolidators whose success depended on their broader appeal. But the audiences for the iconoclasts’ work varied, and no matter how powerful the idea, the force and clarity of its expression mattered. Green was a consummate wordsmith, as Steele emphasises, and few legal scholars can match Weir’s sparkling prose and acerbic wit.

VI. CONCLUSION

It will, we think, be difficult after reading this book to escape the conclusion that scholars of tort law have played a significant role in the development of the subject since its arrival on the scene in the late nineteenth century. Each of the three categories of scholar we have identified has played a different part in the story of tort law. The pioneers established tort as a legal subject and at the same time set the intellectual parameters within which later scholarship was conducted. The consolidators synthesised the extensive case law on the subject, and wrote the canonical tort texts that shaped the thinking of generations of students and practitioners. And the iconoclasts successfully undermined the received thinking about tort law and transformed its intellectual foundations, with profound consequences for the scholarship and practice of tort law in the modern era.

We have emphasised throughout this chapter the difficulty of measuring scholarly influence in law. We are also acutely aware of the impossibility of distinguishing when a scholar’s thinking has shaped general attitudes, and when general attitudes are manifested in the scholar’s thinking. Nevertheless, we are convinced that Atiyah was right to argue that scholars have played a much greater role in the development of the common law than has generally been acknowledged. In many instances, scholarly influence is both specific and obvious, as with, for example, the American courts’ adoption of strict products liability in the 1960s. But ‘the impact of juristic speculation is subtle’, and most of the time scholarly influence is no doubt more general and less susceptible to direct observation. Time and again, we suspect, the writings of the tort scholars considered here, and of many others, were (in Lunney’s words) ‘read and used by students, practitioners and judges in learning, arguing and adjudicating on tort law’. And nor should it be forgotten that the influence of jurists

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214 See further White, Tort Law in America: An Intellectual History (n 8) xix.
215 As to the significance of legal scholarship in this development, see Priest, ‘The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law’ (n 100), who argues (at 517) that the true foundation for the strict liability standard [laid down in § 402A of the Restatement (Second) of Torts] was ‘the accumulated effect of thirty years of scholarship’.
216 Duxbury, Frederick Pollock and the English Juristic Tradition (n 16) 282.
217 Lunney, ch 4 of this volume, p 131. It goes without saying that the citation of scholarly works by judges is a wholly inadequate measure of their influence. As Duxbury points out, citations to a scholarly work ‘are not necessarily indicative of its influence, just as absence of citation to
can derive not only from their published writings, but also from their work for law reform bodies, their responses to law reform proposals, and their informal contacts with policy-makers and judges.

In his more general chapter on tort scholarship in this collection (chapter 13), Peter Cane echoes Leon Green’s scepticism about the role of the legal academic in the common law world. According to Cane, ‘under the common law model, “jurists” have no distinctive niche in the legal ecosystem’. Like Green, Cane focuses, as common lawyers are wont to do, mainly on the process of adjudication, and concludes from what he argues to be the marginal role of jurists in that process that theirs is a marginal role in the common law ecosystem more generally. Conversely, it can be argued that in the codeless world of the common law it is the scholar who must synthesise and order the multitude of precedents generated by the decisions of the courts, and who bears the primary responsibility for abstracting from those decisions more general principles and organising them into a system of norms understood to govern a particular topic or subject. As we have seen, this is a particularly important task in the US, where scholars are the only participants in the legal system capable of pulling together the threads of the many distinct jurisdictions into something resembling an American common law. Add to this the universal role of the jurist as expositor of the law to future generations of practitioners and judges, as well as the evidence from this collection and elsewhere that more academically-oriented scholarship is capable of affecting deep thinking – prevailing intellectual assumptions and attitudes – across the legal system, and there are strong grounds on which to contest the scepticism that continues to surround the common law scholar and his or her role.

One final thought is that in the century-and-a-half of its existence, tort law scholarship has undergone several paradigm shifts. In the early days of the
pioneers, tort law was closely connected to criminal law, with the focus primarily on defendants, and the central concern the culpability of their conduct. By the middle of the twentieth century, attention had shifted to claimants, and the desirability of spreading accident losses through stricter forms of liability, backed up by third-party insurance. Towards century’s end, however, defendant-focused approaches were once again in the ascendant, at least in the US, with the rise of deterrence-based theories based on economic analysis. At the same time, other theorists began to reject instrumentalist approaches, instead conceiving of tort law in terms of rights, wrongs and interpersonal justice, and arguing that the focus should not be on one party to the effective exclusion of the other, but on the interaction between the two. Contemporary debates across the common law world show that battle continues to rage between these very different conceptions of tort law. But no matter whose vision of the subject ultimately wins out, experience suggests that theirs is unlikely to be the final word. On the contrary, the story of tort scholarship looks set to continue its halting course for decades and centuries to come.