

LEGAL ÉMIGRÉS AND THE DEVELOPMENT OF AUSTRALIAN TORT LAW

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[The intellectual history of Australian private law remains largely unwritten because Australia was seen as merely following the law as laid down in England. This article challenges the traditional paradigm by considering the influence of a number of legal émigrés who came to Australia immediately after the Second World War. Concentrating on the law of tort, the article considers how two of these émigrés — Wolfgang Friedmann at The University of Melbourne and John Fleming at Canberra University College — were at the forefront of a new breed of tort scholarship, not based on English traditions, that contributed to the increasing intellectualisation of the Australian legal academy.]

CONTENTS

I	Introduction.....	494
II	The Australian Academy before the Second World War.....	495
III	The Creation of an Australian Legal Academy.....	499
IV	Legal Émigrés and the Law of Tort.....	500
V	Conclusion.....	519

I INTRODUCTION

The history of Australian private law remains one of the great gaps in Australian legal history. Little detailed research has been undertaken which explores the content of private law in this country or that content's relationship with the law of England on which it was ostensibly based. Nor have any studies considered why any changes which may have occurred took place. Legal historians have ignored the possibility that wider historical changes may have

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influenced the development of private law because private law itself has not been thought a worthy subject of historical study.

This article considers one aspect of this heretofore forgotten history. It considers the extent to which academic thinking about private law in this country was influenced by a new breed of member of the Australian legal academy after the Second World War. It does not aim to be comprehensive in its treatment of such persons. Rather, the aim is to demonstrate that any history of Australian private law should consider not only legal doctrine as expressed in judicial decisions (although it must certainly include such analysis) but also the increasing sophistication of legal discourse in Australian law schools. This is not to suggest that judicial decisions were immediately affected by the new academic approach to tort law but neither is it to deny it had any impact at all; the nature of this relationship awaits further research. For present purposes the more modest ambition is to demonstrate that the broader intellectual discussion of law was influenced by the composition of the Australian legal academy. Put simply, we should not be surprised if we find that changes in thinking about Australian law can be explained in part by reference to changes in the academy.¹

II THE AUSTRALIAN ACADEMY BEFORE THE SECOND WORLD WAR

Any change made by incomers to the Australian legal academy after the Second World War can only be understood by reference to the function and composition of the academy prior to that time. A number of structural features characterise this earlier period. First, there were only a small number of law schools. In 1939, the six state universities all had law schools, although Queensland and Western Australia commenced teaching law only towards the end of that period.² More importantly, the purpose of university law schools

¹ In terms of diffusion theory, a study of members of the legal academy is a focus on the agency of change: see William Twining, 'Diffusion of Law: A Global Perspective' (2004) 49 *Journal of Legal Pluralism & Unofficial Law* 1, 22. See also William Twining, 'Social Science and Diffusion of Law' (2005) 32 *Journal of Law and Society* 203.

² The University of Western Australia, Faculty of Law was founded in 1927. The Faculty of Law at the University of Queensland was created when the University itself was created in 1910 but did not commence teaching law students until 1936. For a history of the T C Beirne School of Law at the University of Queensland, see Michael White, Ryan Gawrych and Kay Saunders, *T C Beirne School of Law: 70th Anniversary* (T C Beirne School of Law, University of Queensland, 2006). Note also that, since its creation in 1930, Canberra University College offered law subjects which were credited towards The University of Melbourne LLB although formal lectures were not consistently provided. For a brief overview of Australian legal educa-

was seen as producing practicing lawyers.³ This had two consequences. First, the majority of the staff in the law schools were members of the profession who taught on a part-time basis (usually to part-time students). The figures are truly staggering: only one Australian law school had more than two full-time staff members by the beginning of the Second World War — Sydney — where the third was a full-time tutor.⁴ The predominance of part-time staff from the profession meant that Australian law schools were not a fertile ground for the creation of an intellectually dynamic culture and many within and without the profession saw legal education at universities merely as a proxy for professional accreditation.⁵ Second, some of the very few permanent members of Australian law schools had close links to the profession. The best known example is Professor John Peden who was the Dean of the Law Faculty at the University of Sydney between 1910 and 1941. Bruce Kercher notes that, during Peden's period as Dean, 60 per cent of the lecturers were later appointed to the Bench, a path in practice open only to those who practiced.⁶ The relative isolation of Australian law schools left little choice other than to rely on one's former students to provide tuition and the Sydney experience was replicated in other law schools.⁷

Not all of the permanent staff had as close an association with the profession as Peden but the reliance on part-time staff from practice necessarily

tion before the Second World War, see Dennis Pearce, Enid Campbell and Don Harding, *Australian Law Schools: A Discipline Assessment for the Commonwealth Tertiary Education Commission* (Australian Government Publishing Service, 1987) vol 1, 1-4 [1.3]-[1.9].

³ See Michael Chesterman and David Weisbrot, 'Legal Scholarship in Australia' (1987) 50 *Modern Law Review* 709, 710-14.

⁴ Sir Thomas Bavin (ed), *The Jubilee Book of the Law School of the University of Sydney 1890-1940* (Halstead Press, 1940) 22. Melbourne had two, with George Paton being appointed to a Chair in 1931 alongside Kenneth Bailey (Geoff Sawyer was appointed in 1940). The other law schools varied between one and two full-time appointments. The predominance of part-time teachers at Adelaide Law School is well documented by Victor Allen Edgeloe, 'The Adelaide Law School: 1883-1983' (1983) 9 *Adelaide Law Review* 1, 38-42. These figures indicate that the reliance on part-time teachers was reduced but far from eliminated in the first 20 years after the Second World War.

⁵ And in some jurisdictions, such as Victoria, the only road to professional accreditation: see Ruth Campbell, *A History of the Melbourne Law School: 1857 to 1973* (Faculty of Law, University of Melbourne, 1977) ch 3; John Waugh, *First Principles: The Melbourne Law School 1857-2007* (Miegunyah Press, 2007) chs 1-3.

⁶ Bruce Kercher, *An Unruly Child: A History of Law in Australia* (Allen & Unwin, 1995) 165.

⁷ See Edgeloe, above n 4, 19-20, which details among other things the contribution of Adelaide Law School graduates to the teaching of law.

limited the way in which the law degree as a whole could be taught.⁸ A good example is William Jethro Brown, an important academic in the early Australian academy. Brown was the first Professor of Law at the University of Tasmania at the end of the 19th century and, after a stint in England and Wales, was later appointed Professor of Law at Adelaide Law School in 1906, a position he held until 1916. Brown published widely throughout his academic life and by the time of his return to Australia was a recognised scholar.⁹ Brown's scholarship extended to legal education and he advocated a range of ideas that would find favour (even if remaining controversial) in a later period: the use of legal studies to prepare graduates for a range of studies beyond the practice of law, full-time study for law students to allow adequate intellectual engagement with legal material, and greater time for staff to specialise and research to improve the overall educational experience.¹⁰ But in a law school where finances were tight (as they frequently were in Australia) and he was the only full-time staff member it was impossible to achieve such high-level reform of legal studies.¹¹ Moreover, the vast majority of the full-time academic staff had studied in England. This did not mean that they were not qualified for the positions they held but it did shape their thinking about the nature of legal scholarship in two important ways. First, it helped to

⁸ The Tasmanian example is particularly striking: see Richard Davis, *100 Years: A Centenary History of the Faculty of Law, University of Tasmania 1893–1993* (The University of Tasmania Law School, 1993) chs 2–3.

⁹ He had published a pamphlet in favour of federation that had previously been read to the Australasian Association for the Advancement of Science: see W Jethro Brown, *Why Federate? A Paper Read before the Australian Association for the Advancement of Science* (Angus and Robertson, 1898), and a book, W Jethro Brown, *The New Democracy: A Political Study* (Macmillan and Co, 1899), in which he enthused, among other things, about the upcoming Australian federation. He also published an annotated edition of some of John Austin's lectures, W Jethro Brown, *The Austinian Theory of Law — Being an Edition of Lectures I, V, and VI of Austin's 'Jurisprudence', and of Austin's 'Essay on the Uses of the Study of Jurisprudence' with Critical Notes and Excursus* (John Murray, 1906).

¹⁰ W Jethro Brown, 'The Purpose and Method of a Law School — Part I' (1902) 18 *Law Quarterly Review* 78; W Jethro Brown, 'The Purpose and Method of a Law School — Part II' (1902) 18 *Law Quarterly Review* 192. These articles, based on his inaugural lecture, were written in England but similar ideas were expressed after his return to Australia: W Jethro Brown, 'Law Schools and the Legal Profession' (1908) 6 *Commonwealth Law Review* 3. See also O M Roe, 'Jethro Brown: The First Teacher of Law and History in the University of Tasmania' (1977) 5 *University of Tasmania Law Review* 209; Enid Campbell, 'Preface: Occasional Address — Law Graduation Ceremony, University of Tasmania, 30 April 1993' (1993) 12 *University of Tasmania Law Review* 1.

¹¹ Alex Castles, Andrew Ligertwood and Peter Kelly (eds), *Law on North Terrace: The Adelaide University Law School [1883–1983]* (Faculty of Law, University of Adelaide, 1983) 22. See also Edgeloe, above n 4.

reinforce the conventional view that there was little difference in principle between English and Australian (or other dominion) law. In the tort context, this is well illustrated by John Salmond, Professor of Law at Adelaide Law School between 1897 and 1905. In 1907, Salmond published a text on the law of torts, largely written during his time in Adelaide.¹² It was extremely successful and continued through many editions, new editors taking over after his death. Salmond's text, however, was a text about the English law of tort. It was written, said Salmond, to help lawyers and students in an 'extensive and in some respects difficult and imperfectly developed department of *our* legal system.'¹³ It took later (English and Irish) editors to introduce some more comparative material.¹⁴ The commitment to English law also affected curriculum design: in Tasmania, for example, the quest by the incoming Dean Kenneth Shatwell in 1934 to introduce legal history and constitutional history into law studies was to introduce English legal and constitutional history.¹⁵

Academic commentators have generally regarded legal scholarship in Australia during this period negatively because of its close association with professional practice.¹⁶ In hindsight, this may be too harsh a conclusion. There is no doubt that it largely reflected law as a closed system, immune from influence from wider political, economic and social currents. But there were exceptions. Jethro Brown's principal biographer noted that if Brown's views were to bear a label 'it must be as a sympathizer with the American realists, of whom Holmes was the pioneer and Roscoe Pound the supreme theorist',¹⁷ a sympathy that explains his decision to commit to the progressive goals behind the contemporary conciliation and arbitration legislative reforms and become

¹² John W Salmond, *The Law of Torts: A Treatise on the English Law of Liability for Civil Injuries* (Stevens and Haynes, 1907).

¹³ *Ibid* preface (emphasis added). Like so many of his generation, that commitment carried a high personal cost when his son, a captain in the New Zealand army, was killed in France in July 1918.

¹⁴ W T S Stallybrass, *The Law of Torts: A Treatise on the English Law of Liability for Civil Injuries — By Sir John Salmond* (Sweet & Maxwell, 7th ed, 1928) who introduced more cases from the United States, and R F V Heuston, *Salmond on the Law of Torts* (Sweet & Maxwell, 11th ed, 1953) who considerably increased the number of Canadian, New Zealand, Australian and Irish cases.

¹⁵ Davis, above n 8, 29. See also the legal history course taught by W J V Windeyer at the University of Sydney, published as W J V Windeyer, *Lectures on Legal History* (Law Book, 1938), which is almost exclusively English legal history.

¹⁶ Chesterman and Weisbrot, above n 3, 710–24. Limited scholarship has also been linked to formal and doctrinal approaches to teaching: see Nickolas J James, 'A Brief History of Critique in Australian Legal Education' (2000) 24 *Melbourne University Law Review* 965, 966–7.

¹⁷ Roe, above n 10, 221.

President of the Industrial Court of South Australia in 1916.¹⁸ Moreover, even if Brown was a rarity among early Australian academics, anyone familiar with Salmond's texts on torts and jurisprudence would struggle to say that they were not scholarly within the particular 'empiricist tradition of English legal training, with its emphasis on pragmatic, inductive reasoning, and its lack of concern for sociological jurisprudence.'¹⁹

III THE CREATION OF AN AUSTRALIAN LEGAL ACADEMY

Significant changes to the Australian legal academy took place after the Second World War but this article focuses on one important agent of change: the type of academic staff who were employed in Australian law schools. This new breed of academic staff was not the result of the creation of a new type of law school; no new law schools were created in Australia between 1936 and 1960.²⁰ Nor should the extent of the change be exaggerated; Australian law schools did not change radically overnight. By the time of the creation of the new law school at Monash in 1964, there were still relatively few full-time academic staff and many of them had been educated, either at undergraduate or postgraduate level, at British, usually English, law schools.

But there were important exceptions to this generalisation about the academic staff of Australian law schools. Perhaps the first, and in one sense the most important, is very well-known. Professor Julius Stone was appointed to the Chair of Jurisprudence and Public International Law at the University of

¹⁸ Both before and after the appointment Brown continued to write on issues of importance to the social progressive movement — the role of legislation: W Jethro Brown, *The Underlying Principles of Modern Legislation* (John Murray, 1912); trusts/monopolies: W Jethro Brown, *The Prevention and Control of Monopolies* (John Murray, 1914); the results of cases he decided in the Industrial Court, published as articles in the Harvard and Yale Law Journals: see W Jethro Brown, 'Effect of an Increase in the Living Wage by a Court of Industrial Arbitration upon Vested Rights and Duties under Preexisting Awards' (1919) 32 *Harvard Law Review* 892; W Jethro Brown, 'The Judicial Regulation of Industrial Conditions' (1918) 27 *Yale Law Journal* 427; W Jethro Brown, 'Judicial Regulation of Rates of Wage for Women' (1919) 28 *Yale Law Journal* 236.

¹⁹ Chesterman and Weisbrot, above n 3, 713.

²⁰ In 1960, the Faculty of Law of the School of General Studies at the Australian National University in Canberra was created. Even this was not really a new law school as law had been offered, although not always taught, at Canberra University College from its inception in 1930 as part of degrees awarded by The University of Melbourne: see S G Foster and Margaret M Varghese, *The Making of the Australian National University 1946–1996* (ANU E Press, 2009) 145. The first genuinely new law school after the Second World War was at Monash University in 1964: see Peter Balmford, 'The Foundation of the Monash Law School' (1989) 15 *Monash University Law Review* 139.

Sydney in 1941. Although Stone was born and educated in England, he was a first-generation Englishman, his parents emigrating to England from Lithuania at the beginning of the 20th century.²¹ While Stone did study at Oxford, he also undertook a postgraduate degree at Leeds. More importantly, in the 1930s he had first studied and then taught at Harvard Law School where his scholarship was significantly influenced by Roscoe Pound's sociological jurisprudence.²² On his return to England he found it difficult to obtain an academic position, something his biographer attributes to anti-Jewish sentiment in Anglo-American law schools.²³ In 1938 he accepted the position of Professor and Dean at Auckland University College before he took up the position in Sydney. The controversy surrounding his appointment has been well documented and will not be rehearsed, but it seems clear that part of the reluctance to appoint Stone stemmed from the very different view of law he took to that of John Peden, the outgoing Dean. Without question, Stone's appointment was a seminal moment in the history of the Australian legal academy. In 1946, his *The Province and Function of Law* was a major work of scholarship rooted in a very different tradition of legal scholarship — broadly, sociological jurisprudence and legal realism — from that of his contemporaries in Australia and England.²⁴ Stone was also influential through teaching the next generation of Australian legal scholars, one of whom was W L Morison, author of the first Australian casebook on torts.²⁵ But Stone's influence was limited at Sydney because of the divide between the Department of Jurisprudence and International Law (which Stone headed), and the Department of Law (which was headed by the Dean of the Law School). This divide as well as the nature of his scholarship limited his direct influence on the development of private law in Australia. But after the Second World War a number of other émigrés played an important role in changing the nature of private law scholarship, in particular the scholarship of the law of tort.

IV LEGAL ÉMIGRÉS AND THE LAW OF TORT

Writing in 1940, Bernard Sugerma, Challis Lecturer (part-time) in the law of tort at the University of Sydney, wrote that '[d]ivergence of opinion between

²¹ Leonie Star, *Julius Stone: An Intellectual Life* (Oxford University Press, 1992) ch 1.

²² *Ibid* ch 2.

²³ *Ibid* 43.

²⁴ Julius Stone, *The Province and Function of Law: Law as Logic Justice and Social Control — A Study in Jurisprudence* (Associated General Publications, 1946).

²⁵ W L Morison, *Cases on Torts* (Law Book, 1955).

the courts here and in England is perhaps more to be expected in the law of torts than in other parts of the law.²⁶ Although Sugerman did not explain this comment any further, he certainly had reason to know; apart from lecturing at Sydney he was also the first Editor of the *Australian Law Journal* in 1927, a position he held until judicial appointment in 1946. Yet there was very little study of the law of tort that might explain any such differences, either social (how did tort law interact with other parts of society that achieved much the same thing?), geographic (could there be an Australian law of tort?), or intellectual (could the structure of tort law as identified by the textbook writers withstand scrutiny?). The remainder of this article will consider two of the most important of the legal émigrés who came to Australia post-1945 — Professor Wolfgang Friedmann at The University of Melbourne and Professor John Fleming at Canberra University College — who, during the first 20 years after the Second World War, considered these questions and in doing so changed the nature of the study of tort law in Australia.

This is not to say that they were the only émigrés to contribute to this change in thinking or that only émigrés were critically reflective of legal scholarship and legal education. From the beginning of the 1950s a lively debate was taking place about the role of the law school and legal education. As Australian legal academics began to travel to the United States, they were influenced by the model of legal education largely adopted there.²⁷ Moreover, visitors to Australia from both the United States and England were invited to comment on Australian legal education.²⁸ Although there were differences,

²⁶ Bavin, above n 4, 207.

²⁷ Examples of both enthusiasm for the American model and of travel to America to learn more is evident well before the Second World War. Jethro Brown strongly supported the case method of teaching, and another advocate of American approaches to legal education, Kenneth Bailey, Dean of Melbourne Law School between 1928–36 and 1938–42, travelled to America in 1937 on a Carnegie Foundation scholarship: for Bailey, see Waugh, above n 5, ch 3. But the numbers interested increased after the Second World War. For example, Geoff Sawyer received a Carnegie Travelling Fellowship in 1949: see Geoffrey Sawyer, 'Legal Education in the United States' (1950) 1 *University of Western Australia Annual Law Review* 398; Zelman Cowen, Dean of Melbourne Law School, was a visiting lecturer at the University of Chicago in 1949 and won a Fulbright Scholarship to Harvard in 1953; David Derham was a Carnegie Travelling Fellow in the United States in 1953–54; Julius Stone won a Carnegie Travelling Scholarship in 1949 and a Fulbright in 1955, and W L Morison was a Fulbright Scholar in 1957.

²⁸ Erwin N Griswold, 'Observations on Legal Education in Australia' (1952) 5 *Journal of Legal Education* 139 (Dean of Harvard Law School); Peter B Carter, 'Australian Legal Education: Miscellaneous Comments' (1955) 8 *Journal of Legal Education* 179 (Fellow and Dean of Wadham College, Oxford). The latter contribution prompted a spirited response from two of

there was also agreement that the development of Australian law schools required more full-time staff,²⁹ more full-time students, and more Australian materials to teach Australian students about Australian law. This change of thinking about the role of legal education and those who provided it did not produce immediate and widespread change in the legal academy as a whole. It did, however, provide the environment in which a new breed of Australian academic, and a new way of thinking about law generally, and tort law in particular, were able to flourish. The legal émigrés discussed in this article were the beneficiaries of this new environment which allowed them and their views to become extremely influential throughout Australia and the wider common law world.

Wolfgang Friedmann was born in 1907 and completed the first phase of his legal education in Germany by graduating with a PhD at the Berlin University in 1930.³⁰ He worked as an assessor in a German labour court (one judge of which was Otto Kahn-Freund, another émigré)³¹ before finding that his insistence on maintaining the independence of the court did not please his Nazi masters and he left Germany in 1934 for England.³² He was not a complete novice in the common law: his doctoral thesis had compared German and Anglo-American law on unjust enrichment and he gained some practical experience in a solicitor's office in England in 1931. But his initial time in England was not spent in law. He resided in a Quaker community settlement in Wellwyn Garden City in Hertfordshire where he worked as a labourer and taught German.³³ Encouraged by Otto Kahn-Freund (now in England), he continued his legal studies and obtained an LLM and was called to the Bar. He began lecturing at University College London in 1938. He

those who were influenced by American developments: Zelman Cowen and David Derham, 'Australian Legal Education: A Dissent' (1956) 9 *Journal of Legal Education* 53.

²⁹ Australian ambition was modest in this regard. At the 1948 meeting of the Australian Universities Law Schools Association it was agreed that each law school should have three full-time staff: see Hyman Tarlo, 'Law School in the Sixties: A Fragmented Memoir' (1985) 14 *University of Queensland Law Journal* 14, 15.

³⁰ John Bell, 'Wolfgang Friedmann (1907–1972): With an Excursus on Gustav Radbruch (1878–1949)' in Jack Beatson and Reinhard Zimmermann (eds), *Jurists Uprooted: German-Speaking Émigré Lawyers in Twentieth-Century Britain* (Oxford University Press, 2004) 517, 517.

³¹ Kahn-Freund made his name at the London School of Economics before taking up the Chair in Comparative Law at the University of Oxford late in his career: see Mark Freedland, 'Otto Kahn-Freund (1900–1979)' in Jack Beatson and Reinhard Zimmermann, *Jurists Uprooted: German-Speaking Émigré Lawyers in Twentieth-Century Britain* (Oxford University Press, 2004) 299.

³² Bell, above n 30, 517–18.

³³ *Ibid* 518.

served in the British Army during the war in intelligence and later in German reconstruction. After briefly returning to the University of London (where he was made a reader), he accepted the Chair in Public Law at The University of Melbourne in 1947.³⁴ He stayed at Melbourne for three years before moving to the University of Toronto for five years and then on to Columbia where he spent the remainder of this career, his life being tragically cut short when he was murdered just outside the gates of Columbia in 1972 when he attempted to repel an attack by muggers (which he did successfully once before in 1955).³⁵

Friedmann's time in Australia has received little attention, no doubt because he spent relatively little time here. Moreover, any assessment of him requires greater scope than simply the law of tort because Friedmann's greatest contributions were in international and comparative law. But his interest in comparative law informed his early interest in tort law and encouraged him in his view that all law, including tort law, was shaped fundamentally by forces outside the law. This is evident as early as 1938 in his first academic article, 'Modern Trends in the Law of Torts'.³⁶ Here Friedmann argued that recent developments in tort law were due to 'judicial law-making',³⁷ a controversial claim at a time when the declaratory theory of judicial decision-making held primacy. As controversial was his functional analysis of changes to the torts of nuisance, *Rylands v Fletcher*,³⁸ and negligence. Concerned that a purely analytical mode of reasoning made it virtually impossible to preserve coherent distinctions between these torts, Friedmann thought it was

more fruitful to investigate the sociological scope and function of the various actions, the social situation from which every one of them arises. Every legal notion and institution bears the stamp of the time in which it was created.³⁹

Drawing on the work of the American tort scholar and moderate legal realist Francis Bohlen, Friedmann described the non-natural use of land requirement of the *Rylands v Fletcher* action as follows:

Rylands v Fletcher was decided in a period of social development, when the predominance of a landed gentry was already on the wane, but the standard of

³⁴ Ibid.

³⁵ Ibid.

³⁶ W Friedmann, 'Modern Trends in the Law of Torts' (1937) 1 *Modern Law Review* 39.

³⁷ Ibid 39.

³⁸ [1868] LR 3 HL 330.

³⁹ Friedmann, 'Modern Trends in the Law of Torts', above n 36, 45.

social values as applied by the judges was still that of the vanishing society — a phenomenon only too familiar to the student of history and sociology. In this respect the rule in *Rylands v Fletcher* appears as a partial attempt to fix industrial development at a stage, when it was in full swing, and when any rule based on the state of affairs in 1867 — industry and technique more and more encroaching upon rural society — was bound either to become soon obsolete or to adapt its contents to new social facts.⁴⁰

The attempt to explain the structure and content of law as historically contingent formed an important core of Friedmann's work. While in Melbourne, Friedmann wrote an important article on the relationship between social insurance and tort liability. He recognised that judicial developments in the law of tort had meant that in many areas it operated as a form of social insurance for accidents associated with certain activities but that the introduction of the welfare state in the United Kingdom had seen a retreat by the judiciary.⁴¹ Again, legal development was seen in the context of contemporary economic and social changes. More broadly, Friedmann wrote much of his 1951 book, *Law and Social Change in Contemporary Britain*, while at Melbourne,⁴² Part I of which considers 'The Common Law in a Changing Society'.⁴³

Friedmann's influence went beyond the writing of learned articles and books. His view of law and legal development heavily influenced his teaching. Friedmann did not think the close relationship between the law schools and the profession was necessarily a bad thing because he believed a critical approach was a necessary component of the practicing lawyer.⁴⁴ In a speech in 1948 at the Third Annual Conference of the Australian Universities Law Schools Association, he stated his preference for the coupling of university and professional legal training 'provided that the legal profession is farsighted enough not to attempt to turn the university law school into a mere professional training institute, and that the university has the courage to resist any

⁴⁰ Ibid 51.

⁴¹ W G Friedmann, 'Social Insurance and the Principles of Tort Liability' (1949) 63 *Harvard Law Review* 241.

⁴² W Friedmann, *Law and Social Change in Contemporary Britain* (Stevens & Sons, 1951) xii. The book is dedicated to 'that great University' (The University of Melbourne).

⁴³ Ibid. The chapter on tort law, 'Social Insurance and the Principles of Tort Liability' (at 73) is a reprint of the *Harvard Law Review* article: Friedmann, 'Social Insurance and the Principles of Tort Liability', above n 41.

⁴⁴ W Friedmann, 'Legal Theory and the Practical Lawyer' (1941) 5 *Modern Law Review* 103.

such tendency.⁴⁵ He put his beliefs into practice, writing the first textbook on Australian administrative law⁴⁶ and introducing the first comparative law course as part of the normal LLB syllabus.⁴⁷ It is not clear how these changes were received in practice. Friedmann's own assessment in 1949 was that the legal profession 'has seen no reason to regret the extensive teaching, in the university, of general Constitutional or Administrative Law, of Jurisprudence or Roman Law or Comparative Law',⁴⁸ but in her history of Melbourne Law School, Ruth Campbell notes that 'Friedmann was somewhat sensitive to the legal profession's criticism of his ideas as too venturesome'.⁴⁹ No doubt some of the scepticism was based on Friedmann's non-traditional background; as Sir Owen Dixon put it, the fact he was 'so German, so continental in his learning and [with] so little real knowledge of English law' made him a bold choice for the chair.⁵⁰ Whatever the profession thought, his ideas do not seem to have troubled his other colleagues, George Paton and Geoff Sawer, with whom he enjoyed good relations.⁵¹ Nor did he have reservations about the quality of the education provided at Melbourne; responding to criticisms made about Australian legal education by a visiting Oxford don in the mid-1950s, he was emboldened to say that none of the countries with which he was familiar — Germany, England, Canada and the United States — fused broader legal education with preparation for the practice of law better than

⁴⁵ W G Friedmann, 'Some Observations of Legal Education: In Australia, England and Germany (1948)' 1 *University of Western Australia Annual Law Review* 93, 93–4.

⁴⁶ W Friedmann, *Principles of Australian Administrative Law* (Melbourne University Press, 1950).

⁴⁷ W G Friedmann, 'The Teaching of Comparative Law: An Innovation at The University of Melbourne' (1948) 1 *University of Western Australia Annual Law Review* 90; W Friedmann, 'A Comparative Law Course at Melbourne University' (1949) 1 *Journal of the Society of Public Teachers of Law: New Series* 274.

⁴⁸ Friedmann, 'Some Observations of Legal Education', above n 45, 94.

⁴⁹ Campbell, above n 5, 154.

⁵⁰ Waugh, above n 5, 149.

⁵¹ Even though Paton and Friedmann had grounds for rivalry as they had both published (very different) texts on jurisprudence in the 1940s, Friedmann seems happy to have let Paton teach the jurisprudence course, and Paton read and commented on parts of the manuscript of *Law and Social Change in Contemporary Britain*: Friedmann, *Law and Social Change in Contemporary Britain*, above n 42, xi. It seems likely that Sawer was also influenced by Friedmann's approach to law. Although Sawer was (apparently) exposed to legal realism while studying at Melbourne in the 1930s: 'Geoff Sawer 1910–' (1980) 11 *Federal Law Review* 259, it is tempting to see Friedmann's influence in Sawer's later interest in law and the social sciences: see, eg, Geoffrey Sawer, *Law in Society* (Oxford University Press, 1965).

did Melbourne.⁵² If this was true, Friedmann had played his part in making it so. Friedmann's academic life was in no ivory tower and he engaged publicly with the issues of the day. His engagement was widespread: apart from his well-known opposition to Menzies' Anti-Communist Bill,⁵³ he could also be found lecturing on topics of public importance at regional centres.⁵⁴ His inaugural lecture in 1948, 'The Planned State and the Rule of Law',⁵⁵ discussed the importance of administrative law in balancing the increase in centralised bureaucratic power that the welfare state entailed with the rights of individual citizens, a matter of contemporary importance. More broadly, he was also seen as a learned contributor to debates on world affairs while at Melbourne⁵⁶ and his views on the key issues facing Australia in the future were considered sufficiently important to be published as he neared his departure from Australia.⁵⁷ This engagement was an article of faith for Friedmann. He had seen what happened when intellectuals 'retire into professional isolation, and ... sit on the fence'.⁵⁸ The notion that a Professor should remain 'utterly unpolluted by political controversy or participation in controversial public issues'⁵⁹ was anathema to him: 'A Professor of Public Law, for example, who

⁵² W Friedmann, 'Australian Legal Education: Further Observations' (1957) 9 *Journal of Legal Education* 495, 496, responding to Carter, above n 28.

⁵³ Waugh, above n 5, 152; W G Friedmann, 'On Leaving Melbourne: Two Views — Part II' (1950) 1 *Melbourne Graduate* 63, 64–6.

⁵⁴ For example, in August 1949 he gave a public lecture on 'The Rise of Power Politics' at Benalla High School: 'Public Lecture at High School', *Benalla Ensign* (Benalla), 19 August 1949, 6.

⁵⁵ W Friedmann, *The Planned State and the Rule of Law* (Melbourne University Press, 1948).

⁵⁶ His book, *The Allied Military Government of Germany* (Stevens & Sons, 1947) was reviewed by Professor A R Chisholm, Professor of French at The University of Melbourne: A R Chisholm, 'The German Problem', *The Argus* (Melbourne), 15 May 1948, 21. See also Friedmann's comments on the international ramifications of the early stages of the Korean War in W Friedmann, 'UN Intervention in Korea: International Law Applied to War', *The Argus* (Melbourne), 3 July 1950, 2; W Friedmann, 'How America Helped Reds? Formosa Could Be "Ammunition"', *The Argus* (Melbourne), 6 July 1950, 2; W Friedmann, 'Another "Boiling Kettle": Western Policy at the Crossroads', *The Argus* (Melbourne), 28 July 1950, 2; W Friedmann, 'Western Policy at the Crossroads: 2 — Balancing Strength is Way to Peace', *The Argus* (Melbourne), 7 August 1950, 2; W Friedmann, 'Formosa Threat to UN: Larger Asian War Might End Unity', *The Argus* (Melbourne), 21 August 1950, 2; W Friedmann, 'Where Do We Go from Korea: UN Must Face the Issue on China', *The Argus* (Melbourne), 2 October 1950, 2; W Friedmann, 'Call for Realistic Outlook: Preserve UN on a World Footing', *The Argus* (Melbourne), 26 October 1950, 2; W Friedmann, 'World Politics Leave Room for Peace', *The Argus* (Melbourne), 6 January 1951, 2.

⁵⁷ W Friedmann, 'What is Ahead of the Nation? Complex Problems Beset Australia', *The Argus* (Melbourne), 19 December 1950, 2.

⁵⁸ Friedmann, 'On Leaving Melbourne', above n 53, 65.

⁵⁹ *Ibid.*

should avoid taking any stand on vital issues of public law such as those raised by the Anti-Communist Bill, does not make sense to me, at least in a democratic community.⁶⁰ Whether everyone in the practising profession thought the same can be doubted but this would never have occurred to Friedmann. For him, the role of both the legal academic and the practitioner was too important for them to be mired in narrow and formalistic views of law.

It is clear that Friedmann's contributions went well beyond the law of tort; indeed his departure from Melbourne effectively ended his career as a private lawyer. But his work on tort while there formed part of his views about the nature of the academic discipline of law and how that discipline should be taught in universities.

His kind of scholarship also formed part of the changes that were beginning to take place in the Australian legal academy. His rigorously academic and systematic approach to legal explanation,⁶¹ a product as much of his German legal training as his English, was perfectly suited to the embryonic Australian legal academy where it would influence the tort scholarship of another émigré.

The second émigré considered in this article is John Fleming. His full name — John Gunther Fleming — is an accurate hint that he shares a German background with Wolfgang Friedmann. Fleming (who changed his name by deed poll in October 1943) was born Gunther Alfred Kochmann in Berlin in July 1919, the son of a wealthy Jewish banker.⁶² Most of his high school education was at the Zehlendorf Gymnasium, an institution noted for its excellence in the humanities and run by an Anglophile headmaster.⁶³ For reasons that are unclear but which must be linked to the increasing impacts of the Nazi regime on his family, Kochmann spent his final year at school in England, as a boarder at the Brentwood School in Essex. After only one year he obtained sufficient Oxford School certificate passes to be admitted to

⁶⁰ Ibid 66.

⁶¹ Bell, above n 30, 519–20.

⁶² Information obtained from archives of Brasenose College, Oxford, kindly supplied by Mr John Davies.

⁶³ See Maurice Eggleshaw, *The History of Wallasey Grammar School* (M Eggleshaw with Wallasey Grammar School, 1970) 190–2. Wallasey Grammar School ran an exchange program with Zehlendorf Gymnasium. Given Kochmann's remarkable achievement of passing five subjects in an English school after only one year in England it is tempting to think that he must have had earlier visits to England such as the exchange but the records of the (now) Wallasey School relating to the exchange are incomplete.

Brasenose College, Oxford.⁶⁴ He completed his BA in Jurisprudence with First Class Honours in 1939, enrolling in the BCL which, in his own words, he completed without taking a degree. This may have been because in 1941 he joined the Royal Armoured Corps, in which unit he saw service in North Africa and Italy with the Eighth Army before being attached to the Intelligence Branch of the Control Commission for Austria.⁶⁵ He was demobilised in October 1945 and returned to England and Oxford where he commenced a PhD in 1946 under Professor G C Cheshire,⁶⁶ spending a year at Oxford full-time before taking up a post as a lecturer at King's College London.

In 1948 Fleming applied for the newly created position of lecturer of law at Canberra University College, citing concerns about his prospects for advancement in England.⁶⁷ Although law had been taught at the College previous to his arrival, all other staff were part-time. Given Fleming's later reputation as a world-class tort scholar, it is interesting to note that Fleming

⁶⁴ Information obtained from the records of the Brentwood School, Essex. My thanks to Nichola Bearman and Christine de Hamel of the Brentwood School for finding this information for me. Fleming's acceptance by Brasenose College may have been influenced by the presence of W T S Stallybrass who was a longstanding law fellow of the College. Although born in England, Stallybrass and his father had changed their names from Sonnenschein to Stallybrass in 1917 in light of the then prevalent anti-German sentiment. Together with his academic results — something the author of Stallybrass' entry in the *Dictionary of National Biography* says he valued highly — Fleming's personal circumstances may have resonated with the (now) Principal of Brasenose College when Fleming's application was considered in 1936. For more on Stallybrass, see H G Hanbury (rev H G Judge), 'Stallybrass, William Teulon Swan 1883–1948' in Lawrence Goldman (ed), *Oxford Dictionary of National Biography* (Oxford University Press, online ed, 2004).

⁶⁵ Letter of Application by Fleming for Lectureship at Canberra University College, 17 March 1948, Australian National University Archives (ANUA) 19/47/7298. Note that the magazine of the Old Brentwoods, *The Chronicle of the Society of Old Brentwoods* (Essex), April 1942 indicates that Kochmann had joined the Pioneer Corps and in other sources Fleming is said to have served in the Royal Tank Corps. In the absence of his military records (not yet open to public access), the best guess is that Fleming did indeed join the Pioneer Corps, as did many Germans who had fled to Britain before the war. Later in the war former members of the Pioneer Corps were transferred to established military units, such as the Royal Tank Corps, part of the Royal Armoured Corps. This would explain the references to different units when describing Fleming's military career as it would his change of name; German subjects fighting for Britain in front line combat units were advised to change their name to avoid being shot as traitors if they were captured. See generally Helen Fry, *The King's Most Loyal Enemy Aliens: Germans Who Fought for Britain in the Second World War* (Sutton Publishing, 2007).

⁶⁶ Coincidentally, Cheshire had been Julius Stone's tutor when Stone was an undergraduate at Exeter College, Oxford in the mid-1920s: Star, above n 21, 16.

⁶⁷ Report from Tom Owen, Registrar, Canberra University College, on Lectureship in Law, 17 July 1948, ANUA 19/47/7298.

came to Australia with no background expertise in that field. Fleming's doctorate was in matrimonial causes in private international law. At King's he taught Roman Law, Conflict of Laws, Land Law, Equity (including Trusts, Administration of Assets and Company Law) and also conducted seminars for postgraduate students in matrimonial causes;⁶⁸ in fact, almost everything else but the law of obligations in which he would later make his name. In 1950 Fleming became a senior lecturer (through the unusual process of his position as lecturer being abolished and the creation of a new position as senior lecturer to which he was appointed)⁶⁹ and he became the first holder of the Robert Garran Chair in Law in 1955. He remained at Canberra University College until just before its amalgamation with the Australian National University in the second half of 1960, moving to a Chair at the University of California, Berkeley where he remained for the rest of his career.

Unlike Friedmann, Fleming's academic studies in law were in English law but it is not unrealistic to also treat him as an émigré in the Friedmann mould. For a start, most of his schooling was undertaken in Germany. Moreover, it is plausible to trace his intellectual curiosity in comparative law — evidenced in his choice of private international law as his thesis area — to his dual background in England and Germany. And on a personal level, there is every reason to think that Friedmann actually did influence the thinking of the young Fleming. Given Fleming's inexperience and the small size of the Australian legal academic community, it is not far-fetched to look for the influence of the existing members of the academy on him. The foundation of the Australian Law Schools Association in 1946 provided a forum for regular meetings of law academics where matters of common interest could be discussed and academic papers read.⁷⁰ Fleming regularly attended these events⁷¹ as did Friedmann and Stone. Moreover, Fleming's private correspondence from a trip to North America in the mid-1950s refers to 'catching up' with the Friedmanns which suggests a reasonable level of familiarity.⁷² And it appears that the young John Fleming applied for the Chair

⁶⁸ Letter of Application by Fleming for Lectureship at Canberra University College, 17 March 1948, ANUA 19/47/7298.

⁶⁹ Letter from Tom Owen to John Fleming, 27 June 1950, ANUA 19/47/7298.

⁷⁰ G W Paton, 'Australian Universities Law Schools Association' (1946) 20 *Australian Law Journal* 99, 99–100.

⁷¹ Report to Council of Canberra University College on Fleming's Attendance at Conference of Australian Universities Law School's Association in Sydney, 11 September 1951, ANUA 43/14.

⁷² Letter from John Fleming to Professor H (Joe) Burton, Principal of Canberra University College, 28 January 1955, ANUA 19/47/7298. Fleming also listed Friedmann as his potential

of Jurisprudence at The University of Melbourne in 1951;⁷³ while Fleming was ambitious it is not unreasonable to assume that Friedmann was involved in the decision in some capacity, even if only to seek his advice on the wisdom of such a move. It would hardly be surprising for Fleming to look for guidance from an older academic who, like Fleming, was a German-born refugee looking for the better prospects Australia offered in the postwar world.

Fleming's academic development was also aided by the unusual situation of Canberra University College ('CUC'). CUC was not an autonomous institution; it taught courses that were accredited by The University of Melbourne and the degrees awarded were University of Melbourne degrees. There was, however, a considerable degree of autonomy afforded to academic staff at CUC. Writing in December 1948, the registrar of CUC assured Fleming that once The University of Melbourne was satisfied with the calibre of staff in any department, 'the Lecturer in charge takes a big part in setting the papers (in some subjects a separate paper is set for Canberra students by the Canberra lecturer) and often marks the papers of his own students'.⁷⁴ Although CUC staff were expected to travel to Melbourne 'two or three times a year' — something which, if it occurred, would have brought Fleming into more contact with Friedmann⁷⁵ — it seems that the delivery of the courses, as opposed to the syllabus, was almost entirely in the hands of CUC.⁷⁶ As the only full-time staff member this freedom gave Fleming the greatest opportunity for experimentation. It is not possible from the extant records to know for certain whether Fleming delivered the law of tort course at CUC at any particular time⁷⁷ but some clues can be obtained from looking at the prescribed text set for the torts course. When Fleming arrived at CUC, the prescribed text was either the latest edition of *Salmond's Law of Torts*, or

sponsor when he applied for a Carnegie Travelling Fellowship in 1953: Letter from J G Fleming to Director, British Dominions and Colonies Fund, Carnegie Corporation of New York, 3 November 1953, ANUA 19/47/7298.

⁷³ Letter from Tom Owen to Mr Johnston, Registrar of The University of Melbourne, 23 February 1951, ANUA 19/47/7298.

⁷⁴ Letter from Tom Owen to John Fleming, 20 December 1948, ANUA 19/47/7298.

⁷⁵ *Ibid.* There are no records to verify whether this did occur but it seems likely the association meant that there was some level of contact between Fleming and academic staff at Melbourne in comparison with other law schools.

⁷⁶ Foster and Varghese, above n 20, 145.

⁷⁷ The Annual Reports for CUC indicate that lectures in tort (or wrongs) were given in 1947, and then every year between 1948–60 with the exceptions of 1951, 1955 and 1958. The latter two years coincide with periods in which Fleming was away while in 1951 it seems there were no students enrolled in the law of tort.

Winfield's *A Text-Book of the Law of Tort*, with Pollock and Underhill set as reference texts.⁷⁸ These English texts were apparently supplemented by relevant Victorian statutes. Apart from updating for new English editions, the texts remain the same until 1953. In that year the English practitioner text, *Clerk and Lindsell on the Law of Torts* appears as a reference text⁷⁹ but more importantly, William Prosser's *Handbook of the Law of Tort*, an American publication, also appears.⁸⁰ In 1954, A G Davis' *The Law of Torts in New Zealand* makes an appearance as a recommended text.⁸¹ In 1956, there is a prescribed casebook for the first time: W L Morison's *Cases on Torts*, the first Australian casebook on the law of torts.⁸² And in 1957, Fleming's own book, *The Law of Torts* is prescribed,⁸³ along with a new casebook, Cecil Wright's *Cases on the Law of Torts* (a Canadian publication).⁸⁴ Fleming's text, and either the Morison or Wright casebook, remained prescribed until Fleming left in 1960, the change in casebook probably being attributable to Fleming's absence from Canberra (at Berkeley) in the second half of 1957 and first half of 1958.

It seems very likely that the changes in texts used for the CUC tort course reflect the development of John Fleming's tort thinking. Although he had a

⁷⁸ W T S Stallybrass, *Salmond's Law of Torts: A Treatise on the English Law of Liability for Civil Injuries* (Sweet & Maxwell, 10th ed, 1945); P H Winfield, *A Text-Book of the Law of Tort* (Sweet & Maxwell, 4th ed, 1948); P A Landon, *Pollock's Law of Torts: A Treatise on the Principles of Obligations Arising from Civil Wrongs in the Common Law* (Stevens & Sons, 14th ed, 1939); Ralph Sutton (ed), *Underhill's Law of Torts: A Summary of the Law of Torts or Wrongs Independent of Contract* (Butterworths, 15th ed, 1946). The reading list was not compiled with an excess of zeal; the cited editions of *Salmond*, *Pollock* and *Underhill* were all by new (and living!) authors.

⁷⁹ Harold Potter (ed), *Clerk and Lindsell on the Law of Torts* (Sweet & Maxwell, 10th ed, 1947) (not listed but published under the general editorship of Professor Harold Potter). Absent recognising his former Head of School at King's College London (who was also his academic referee) it is difficult to see why this reference was added.

⁸⁰ William L Prosser, *Handbook of the Law of Torts* (West Publishing, 1941).

⁸¹ A G Davis, *The Law of Torts in New Zealand* (Butterworth, 1951).

⁸² W L Morison, *Cases on Torts* (Law Book, 1955).

⁸³ John G Fleming, *The Law of Torts* (Law Book, 1957), incorrectly listed as *Law of Torts in Australia*. There was no reference to Australia in the title of the book.

⁸⁴ Cecil A Wright, *Cases on the Law of Torts* (Butterworth, 1954). On a trip to North America in 1955, Fleming writes of meeting Dean Cecil Wright 'whom I have for long admired greatly'. Although the first word of the next sentence is hard to decipher, it probably reads, cryptically, '[p]ersonal confrontation did not dim my high regard for him': see Letter from John Fleming to Professor H (Joe) Burton, Principal of CUC, 28 January 1955, ANUA 19/47/7298. On the influence of Wright on Canadian tort scholarship see R Blake Brown, 'Cecil A Wright and the Foundations of Canadian Tort Law Scholarship' (2001) 64 *Saskatchewan Law Review* 169.

healthy publication record, Fleming does not publish anything on tort law until as late as 1952, the year before the first changes begin to appear in the set texts for the torts course at CUC.⁸⁵ The breadth of texts mentioned reflected Fleming's increasingly sophisticated engagement with the law of tort. This is evidenced in his 1952 article,⁸⁶ which is instructive for at least two reasons. First, it again provides evidence that the intellectual influences on Fleming were quite different from those of traditional Australian law academics. The subtitle to the article, 'A Challenge to Judicial Technique' suggests that Fleming's thinking was partly influenced by Julius Stone's *The Province and Function of Law*,⁸⁷ in which Stone stressed both the scope of judicial creativity allowed through traditional notions of legal reasoning as well as the placement of law in the context of wider questions about balancing competing social interests. Fleming does cite Stone in the article,⁸⁸ but the theoretical inspiration for the piece seems to be Karl Renner, an Austrian politician and (at least broadly) a Marxist legal and social philosopher of the first half of the 20th century who had written extensively on law and social change.⁸⁹ His 1904 work, *The Institutions of Private Law and Their Social Functions* (which was added to in a second edition in 1929) was translated into English in 1949 with an introduction from Otto Kahn-Freund, Friedmann's former mentor and colleague.⁹⁰ Friedmann was also well aware of Renner's work, having discussed it in his legal theory text in the early 1940s.⁹¹ It seems plausible to suggest that Fleming's exposure to this genre of Germanic law and society literature was a result of his connection with Friedmann. The article contains only one American reference (to a case), something which would change as Fleming's intellectual curiosity in the law of torts expanded.

The second reason that the article is interesting lies in the way in which Fleming analysed the changing functions of the *per quod* torts in light of the tensions this created with other areas of tort law.⁹² In an era of expanded fault-

⁸⁵ See J G Fleming, 'The Action *Per Quod Servitium Amisit*: A Challenge to Judicial Technique' (1952) 26 *Australian Law Journal* 122.

⁸⁶ *Ibid.*

⁸⁷ Stone, above n 24.

⁸⁸ Fleming, 'The Action *Per Quod Servitium Amisit*', above n 85, 127.

⁸⁹ *Ibid* 122-3.

⁹⁰ Karl Renner, *The Institutions of Private Law and Their Social Functions* (Agnes Schwarzschild trans, Routledge & Keegan Paul, 1949) [trans of: *Die Rechtsinstitute des Privatrechts und Ihre Soziale Funktion* (first published 1904)].

⁹¹ W Friedmann, *Legal Theory* (Stevens & Sons, 1944) 228-9.

⁹² Fleming, 'The Action *Per Quod Servitium Amisit*', above n 85, 127.

based liability in the tort of negligence, why should carelessly-caused interference with a husband's domestic relations or an employer's economic interests in an employee be actionable in the *per quod* torts but not in negligence? It could be said that there was no duty of care in respect of these interests but this required a reasonably sophisticated understanding of the role of the duty of care. Fleming did not think this sophistication could be gained by seeing the duty of care as based on a simple test of foreseeability.⁹³

Fleming was not the first Australian academic to challenge foreseeability as the cornerstone of the duty of care; in 1948 W L Morison had written an article in the *Modern Law Review* arguing that foreseeability of itself did not determine whether a duty of care would be owed in the circumstances of the case.⁹⁴ In an exchange of letters between Morison and Fleming written in 1952, Fleming accepted Morison's basic premise but argued that it was 'an over-simplification to say that the only inquiry for the court is as to the existence of a duty-relationship without also having to define what that duty, if any, is.'⁹⁵ Here Fleming's argument is versed in the language of the American legal realists: the weighing of the plaintiff's interests that had been infringed against the utility of the defendant's conduct was an exercise of social engineering, and discussion of duty needed to be understood in that light.⁹⁶

This is not the place to go into great detail about the relationship between Fleming's tort scholarship while in Australia and his later work. In fact, Fleming published relatively little on tort law before his departure from Australia in 1960 — three articles, his inaugural lecture, two book reviews and his textbook on torts.⁹⁷ However, what is important for present purposes is not the volume of the work but its nature. In his Australian writing on tort,

⁹³ *Ibid.*

⁹⁴ W L Morison, 'A Re-Examination of the Duty of Care' (1948) 11 *Modern Law Review* 9. As the author acknowledged (at 9 n 1), the article is heavily influenced by Stone's deconstruction of legal reasoning and the doctrine of precedent in ch 7 of *The Province and Function of Law*: see Stone, above n 24.

⁹⁵ J G Fleming and W L Morison, 'Duty of Care and Standard of Care: Correspondence — J G Fleming and W L Morison' (1953) 1 *Sydney Law Review* 69, 69.

⁹⁶ *Ibid.*

⁹⁷ Fleming, 'The Action *Per Quod Servitium Amisit*', above n 85; J G Fleming, 'Remoteness and Duty: The Control Devices in Liability for Negligence' (1953) 31 *Canadian Bar Review* 471; John G Fleming, 'Action for Loss of Services' (1959) 22 *Modern Law Review* 682; J G Fleming, 'Accident Law and Social Insurance' (Speech delivered at Canberra University College, 3 October 1956); J G Fleming, 'Book Review: *Pollock's Law of Torts* by P A Landon' (1954) 1 *Sydney Law Review* 282; J G Fleming, 'Book Review: *Cases on Torts* by W L Morison and *Cases on the Law of Tort* by Cecil A Wright' (1956) 2 *Sydney Law Review* 212; Fleming, *The Law of Torts*, above n 83.

Fleming explores a number of contemporary non-English intellectual currents to critically analyse more conventional explanations of the law of tort in ways quite unfamiliar to most Australian academic lawyers. In his 1953 article, 'Remoteness and Duty: The Control Devices in Liability for Negligence',⁹⁸ Fleming criticised the rule-bound exposition of the law of tort in English textbooks (particularly *Salmond* and Winfield, the set texts in the CUC tort course when he arrived) and explicitly embraced a more functional explanation of tort law advocated by legal realists of the American academy, notably Leon Green and Charles Gregory.⁹⁹ Fleming argued that a duty analysis was the preferable method of limiting liability for negligent conduct compared to the *Polemis* remoteness rule,¹⁰⁰ which he argued could impose liability for damage irrespective of whether that damage was a risk associated with the defendant's conduct.¹⁰¹ To this end he was happy to stress the relativity of the duty concept: 'Duty, negligence and risk are terms of relation'.¹⁰² By limiting liability through identifying what risks a defendant's conduct created to what interests of a plaintiff, he admitted a 'bias in favour of the risk-duty approach as more consistent with the underlying theory of negligence'.¹⁰³ But the risk-duty approach was no mechanical formula to apply, as his criticism of foreseeability — which was an integral part of this approach — made clear. The question was ultimately how the boundaries of liability for inadvertent conduct should be set. Fleming seems to have thought that defining an 'area of potential danger'¹⁰⁴ was an intelligible approach to answering the question of what interests were deemed worthy of legal protection but he does not explain how.¹⁰⁵ This proto-functionalist approach was open to a criticism often levelled against legal realism: that it was easy to say that 'policy' should dictate the level of protection afforded by the law of negligence but much harder to say what that policy was. Leon Green had provided an answer but in 1953

⁹⁸ Fleming, 'Remoteness and Duty', above n 97.

⁹⁹ *Ibid.* See Leon Green, *Judge and Jury* (Vernon Law Book, 1930) ch 4; Charles O Gregory, 'Proximate Cause in Negligence — A Retreat from "Rationalization"' (1938) 6 *University of Chicago Law Review* 36. Note that (among others) Professor Friedmann, Dean Cecil Wright, and Dr W L Morison, writers who had in Fleming's eyes looked for a less rule-bound exposition of the law of tort, were excluded from this critique of writers on tort law.

¹⁰⁰ *Re Polemis and Furness, Withy and Co Ltd* [1921] 3 KB 560.

¹⁰¹ Fleming, 'Remoteness and Duty', above n 97, 482.

¹⁰² *Ibid.* 486.

¹⁰³ *Ibid.* 497.

¹⁰⁴ *Ibid.* 493.

¹⁰⁵ *Ibid.*

Fleming was not prepared to advocate the radical approach of jettisoning traditional legal concepts in favour of more explicit result-oriented factors.¹⁰⁶

Fleming wrote nothing substantial on the law of tort between his 1953 article and his *The Law of Torts* in 1957, but, after being appointed the first Robert Garran Professor of Law at CUC in 1955, he delivered his inaugural lecture in October 1956. The lecture, 'Accident Law and Social Insurance',¹⁰⁷ was largely reproduced in shortened form as the 'Introduction' to Fleming's text.¹⁰⁸ Unlike his earlier work, which had largely ignored the wider question of *what* policy goals the law of tort should achieve, Fleming's lecture set out the case for enterprise liability. Tort liability should provide a means for compensating accident victims by imposing liability on those actors involved in an activity the inevitable by-product of which was accidents causing loss to victims. 'If rules of law can be devised that will require each industry or those sponsoring a particular activity, like drivers of motor-cars, to bear collectively the burden of its own operating cost', he wrote, 'public policy will be better served than under a legal system which is content to leave the compensation of casualties to the fortuitous outcome of litigation based on outdated and unrealistic notions of fault'.¹⁰⁹ Enterprise liability was an important, perhaps the most important, intellectual current in tort law in the early 1950s. It had been adopted by a number of American legal realists, particularly Albert Ehrenzweig and Fleming James Jr,¹¹⁰ the writings of the latter being particu-

¹⁰⁶ Green, above n 99, chs 3–4. These factors were the administrative factor, the moral factor, the economic factor, the preventative factor, and the justice or 'capacity to bear loss' factor. More appealing to Fleming were Green's more recent thoughts when commenting on *Bourhill v Young* [1943] AC 92, where he again expressed his preference for duty language over remoteness of damage language but did not elaborate on how the limits of the duty should be established: see a letter written to the Editors of the *Canadian Bar Review* extracted in 'Case and Comment' (1943) 21 *Canadian Bar Review* 414, 417, cited in Fleming and Morison, 'Duty of Care and Standard of Care', above n 95, 70.

¹⁰⁷ Fleming, 'Accident Law and Social Insurance', above n 97.

¹⁰⁸ Fleming, *The Law of Torts*, above n 83, 1–16.

¹⁰⁹ Fleming, 'Accident Law and Social Insurance', above n 97, 7.

¹¹⁰ See, eg. Albert A Ehrenzweig, *Negligence without Fault: Trends toward an Enterprise Liability for Insurable Loss* (University of California Press, 1951); Fleming James Jr, 'Accident Liability: Some Wartime Developments' (1946) 55 *Yale Law Journal* 365; Fleming James Jr, 'Accident Liability Reconsidered: The Impact of Liability Insurance' (1948) 57 *Yale Law Journal* 549; Fleming James Jr, 'Social Insurance and Tort Liability: The Problem of Alternative Remedies' (1952) 27 *New York University Law Review* 537; Fleming James Jr and John V Thornton, 'The Impact of Insurance on the Law of Torts' (1950) 15 *Law and Contemporary Problems* 431; Fleming James Jr and John J Dickinson, 'Accident Proneness and Accident Law' (1950) 63 *Harvard Law Review* 769. On the role of enterprise liability in shaping US tort law see

larly influential on Fleming.¹¹¹ The same theme also underlay Friedmann's 1949 *Harvard Law Review* article.¹¹² Fleming was not the first Australian academic to write about enterprise liability,¹¹³ and he seems to have come to it relatively late.¹¹⁴ It may be no coincidence that, by 1956, Fleming had spent his first extended period of time in the United States in the second half of 1954 and first half of 1955, courtesy of a Carnegie Corporation Travelling Fellowship. From letters sent to Joe Burton it is clear that Fleming found this an intellectually exhilarating experience and no doubt contemporary academic discussions around the law of tort were at the forefront of that experience.¹¹⁵

One attraction of enterprise liability for Fleming may have been that it could operate as the functional imperative behind existing concepts of the law of negligence. Enterprise liability could provide the ideological template through which tort law, especially negligence, could adapt to changed social conditions. In Karl Renner's terms, it would allow the substratum of the legal norms to change without the legal norm itself changing. No liability without fault may have been the predominant postulate of justice of an earlier era to which the action for negligence gave legal form. But in the postwar era,

the temper of our time seems to favour the growth of social insurance, because mid-twentieth century man has become interested, less in acquisition and exploitation, than in the preservation of existing human and material resources.¹¹⁶

Anthony J Sebok, 'The Fall and Rise of Blame in American Tort Law' (2003) 68 *Brooklyn Law Review* 1031.

¹¹¹ Both the structure and content of the inaugural lecture and introduction are heavily influenced by James' 1948 article in the *Yale Law Review*: James, 'Accident Liability Reconsidered', above n 110, and the 1950 article in *Law and Contemporary Problems*: James and Thornton, above n 110.

¹¹² Friedmann, 'Social Insurance and the Principles of Tort Liability', above n 41.

¹¹³ See R W Baker, 'An Eclipse of Fault Liability?' (1954) 40 *Virginia Law Review* 273. Baker was a Professor and Head of the Faculty of Law at the University of Tasmania. This short but interesting article reviewed the extent to which ideas of enterprise liability had affected the formal rules of tort liability in England.

¹¹⁴ 'Fleming represents the 'new look' in the law of torts — at least in the countries in which the English, as distinguished from the American, common law obtains': Abraham Harari, *The Place of Negligence in the Law of Torts* (Law Book, 1962) 71.

¹¹⁵ See especially Letter from John Fleming to Professor H (Joe) Burton, 28 January 1955, ANUA 19/47/7298.

¹¹⁶ Fleming, 'Accident Law and Social Insurance', above n 97, 22.

The scope of the duty of care could be extended, fault found more easily, and traditional defences curtailed in order to achieve this social goal. Even if Fleming did not advocate the abolition of tort law as far as it related to accidental injury, for him the future lay in the collectivisation of accident losses ‘in which the courts cooperate with insurance companies to distribute the cost among those who participate in the benefits of the dangerous, and yet indispensable, enterprise or activity that has produced the loss’.¹¹⁷

The juxtaposition between function and doctrine in which the court was to cooperate formed the basis of Fleming’s claim that he was writing a ‘modern text on the Law of Torts with reference to the Australian context’.¹¹⁸ He described it as a text altogether fresh in approach

both in point of substance and arrangement, with a view to presenting as realistic a description of the modern, mid-twentieth century operation of tort law as seems to me both possible and desirable in the interest of practitioner and student alike.¹¹⁹

The reference to ‘the practitioner’ is instructive and not unique in the preface; indeed, it begins with the statement ‘[i]n offering this new textbook to the profession’.¹²⁰ It is tempting to see the structure of the text around fairly conventional headings as a concession to its intended audience. Any new text on the law of tort which was offered to the profession would vary from the conventional structure of tort law at its commercial peril and Fleming was aware that more radical approaches to structure — such as by the nature of the interest affected or harms suffered — cut too much across the traditional categories and terminology inherited from tort law’s history.¹²¹ In the end, Fleming’s exposition of Australian tort law was based on the structure of the *American Restatement of the Law of Torts*:¹²² he dealt first with torts of intention, then negligence and strict liability. Although he said this was for no

¹¹⁷ Ibid.

¹¹⁸ J G Fleming, Letter of Application for Robert Garran Chair, 19 February 1955, ANUA 19/47/7298 (the emphasis was indicated by underlining in the original).

¹¹⁹ Fleming, *The Law of Torts*, above n 83, iii.

¹²⁰ Ibid (emphasis added). Not all of the profession welcomed it however: see the review of the book by E G Coppel, ‘Book Review: *The Law of Torts* by J G Fleming’ (1957) 1 *Melbourne University Law Review* 272, 274: ‘It is unsafe to rely on this book as accurately stating the law applied in English or Australian courts. This is a decided disadvantage to both the students and the practitioners to whom the book is addressed’. See also Fleming’s reply at 274–5.

¹²¹ Fleming, *The Law of Torts*, above n 83, 16.

¹²² American Law Institute, *Restatement of the Law of Torts* (1934), cited in *ibid* 16.

other reason than that of convenience,¹²³ the thought behind the book as a whole suggests that the choice was more deliberate and that Fleming was tentatively testing how far he could go in putting forward new ways of categorising, and through categorisation modernising, the law of tort.

Fleming's great work deserves more space that can be devoted to it here¹²⁴ but for present purposes what is important was the integration of functional approaches to the law of tort into an explanation of more conventional doctrinal concepts. In some cases, this was through pure enterprise theory: the external standard of care was adopted because a subjective standard 'would inevitably entail a large-scale denial of compensation to accident victims which is incompatible with the modern policy of wide and effective distribution of accident losses.'¹²⁵ At other times, it was a more general assertion of the inter-relationship between law in practice and social context.¹²⁶ It was in this later sense that Fleming saw his work as a work about an Australian tort law: as he put it,

[o]ur own contribution, both legislative and judicial, has not been without significance, despite the self-imposed fetters in paying strict obeisance [sic] to English precedent which has inhibited much, but by no means all, judicial creative activity.¹²⁷

The enthusiasm for this approach is evident in the calendar of CUC for 1957 where the text is incorrectly named 'The Law of Torts in Australia.' The 'Australianness' of Fleming's text, however, was not at all parochial; as he notes, the text contains 'numerous citations of decisions from American, Canadian, Irish and Scottish courts whenever these seemed to me to furnish a useful analogy or contrast.'¹²⁸ In this way the common law of torts in Australia was explored and explained in its wider common law context. A brief example must suffice here to illustrate the point: Fleming's discussion of the law of nuisance as it related to natural conditions. After noting that the

¹²³ Fleming, *The Law of Torts*, above n 83, 16.

¹²⁴ For an analysis of the genesis of the first edition and the subsequent history of *The Law of Torts*, see Peter Cane, 'Fleming on Torts: A Short Intellectual History' (1998) 6 *Torts Law Journal* 216.

¹²⁵ Fleming, *The Law of Torts*, above n 83, 126–7.

¹²⁶ *Ibid* 138, where Fleming argues that the standard of care actually required in given circumstances varied 'in accordance with developing notions of social responsibility and other factors bearing on the allocation of risks' even though the principles applicable to determining the question have remained the same.

¹²⁷ *Ibid* iv.

¹²⁸ *Ibid*.

occupier was generally immune from liability for failing to act to remedy conditions of natural origin — a rule of English origin — Fleming comments that the suitability of the rule for a country like Australia, with ‘vast stretches of unimproved and semi-cultivated land’, could not be doubted.¹²⁹ But Fleming concludes with the observation that the rule is ill-suited to urban environments where the risks of inaction are greater and the burden of inspection less onerous.¹³⁰ This is supported by reference to a judgment from an American case.¹³¹

Although Fleming did not leave CUC for Berkeley until the second half of 1960, he had decided well before then that his future did not lie in Australia.¹³² The apex of his scholarship in Australia was his tort text. The genesis of that tort text was an intellectual curiosity born out of his exposure to different traditions of legal scholarship than that available in the contemporary Anglo-Australian legal academy.

V CONCLUSION

There are significant continuities between the postwar Australian law schools and their prewar counterparts. An important difference, however, was the influx of a number of legal academics whose scholarship was influenced by exposure to different ways of thinking about law. This article has focused on two of the earliest of such émigrés. The influence of such émigrés lay in the fact that they remained sufficiently within the traditional arenas of the common law to be able to influence them. Friedmann and Fleming spoke a legal language that Australian lawyers could understand, but they added degrees of sophistication that also challenged the conventional wisdom encapsulated in that language. They did this because they thought about law

¹²⁹ Ibid 414.

¹³⁰ Ibid.

¹³¹ *Chambers v Whelen*, 44 F 2d 340 (4th Cir, 1930), cited in *ibid*.

¹³² Berkeley wanted Fleming to stay after his visit under the US Government International Exchange Program ran out in the middle of 1958. The conditions of the exchange required that the visitor return home for a period of two years before being able to take a permanent appointment at the host institution. Although Berkeley sought to have this requirement waived, this was refused so that Fleming could not be granted a visa and he returned to Canberra. He resigned from CUC in October 1959 even though he was not to leave until 6 August 1960: see ANUA 19/47/7298. It is probable that both Berkeley and Fleming were prepared to wait out the two year period. On the International Exchange Programs, see J Manuel Espinosa, ‘International Interchange of Law Teachers and Students under the United States Government’s Educational Exchange Program’ (1956) 9 *Journal of Legal Education* 66.

in a fundamentally different way — as influenced by and influencing the wider society in which it operated. Their influence should not be overstated but nor should it be underestimated: the longstanding debate in this country about the extent to which the study of law at university should be academic or practical owes its longevity to new conceptions of law, which these scholars helped to introduce. However much we may tire of the debate, it is a debate that we only understand because of Friedmann, Fleming, Stone and the other pioneers of the new Australian legal academy.