

JOHN G FLEMING: ‘A SENSE OF FLUIDITY’

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I first came across Fleming in a preliminary meeting with my tort tutor. We were being told which textbook to purchase. “Well, I suppose you should get Winfield and Jolowicz” he said, mournfully. A pause. We waited. ‘The best book is Fleming’. Another pause. ‘But that’s Australian... sort of.’ We all bought Winfield. But the sense that Fleming was both uncategorisable and not for children was enticing enough to make some of us seek him out later.

I think the tutor’s advice was right. Fleming is not a beginner’s book – the analysis is too compressed, too dense to be immediately accessible – and the book’s multi-jurisdictional approach (spanning across the common law world) is problematic for students destined to be examined in only the law of one jurisdiction. In truth first year undergraduates were not the target readership.² But there is also a deeper, structural sense in which Fleming should not be the first writer one reads. That is because his work as a whole (not just the torts treatise) is essentially agonistic. To understand Fleming, it is necessary to understand what he is struggling against, what he is reacting to. Of course, finding oneself at odds with accepted thinking is hardly unusual for a scholar of any significance, but with Fleming the agonism was both structural and defining; it went much further, and ran far deeper, than a mere departure from orthodoxy. In his iconoclastic vision, venerable legal institutions ranging from the doctrine of precedent to the law faculties of certain universities, were unceremoniously toppled from their plinths, and the attitudes of complacency and deference to authority which sustained them were held up to mockery. Sometimes the antagonist is large and self-evident; sometimes it is more elusive, and has to be pieced together from close readings and silences in the texts. On occasion the struggle even seems to have been to come to terms with Fleming’s own past and education. As will be seen, the essentially confrontational nature of many of Fleming’s book reviews and case notes makes these shorter pieces (which are often overshadowed by his torts treatise) particularly illuminating of his animating concerns.

LIFE AND WORK

‘Born in Berlin, John Gunther Fleming went to school at Brentwood in Essex before going up to read jurisprudence at Brasenose College, Oxford’. This was how the *Times* summarised Fleming’s early life.³ It was both strictly accurate and, to the extent that it encouraged readers to infer a British childhood, entirely misleading: Fleming was born Alfred Gunther Kochmann, the son of Wilhelm Kochmann, a successful banker. He grew up in Berlin until, in 1935 at the

¹ Professor of Laws, UCL. I very gratefully acknowledge the comments of Anthony Julius, Mark Lunney and participants at the Scholars of Tort Law workshop on an earlier version.

² P Cane, ‘Fleming on torts: a short intellectual history’ (1998) 6 TLJ 216, 222.

³ ‘John Fleming’ *The Times* (London, 4 October 1997) 25.

age of fifteen, he was sent to school in England. Within a year he had obtained the qualifications needed for admission to Oxford. By the age of nineteen, he had gained a first-class honours degree in jurisprudence.⁴ He stayed on at Oxford, despite a short period of internment as an enemy alien, to read for the BCL, but left before taking his degree in order to join up. Distinguished military service took him to Italy, North Africa and Austria. In 1943 he changed his name to John Gunther Fleming. Following demobilization he was called to the Bar and appointed to a lectureship at King's College London; at the same time he began work on his doctoral thesis under the supervision of Professor GC Cheshire in Oxford.⁵

The thesis was on matrimonial causes in private international law, and this, along with issues in succession and equity formed the subject-matter of his earliest publications.⁶ He became a British citizen in 1947, received his doctorate in 1948 and, the following year, emigrated to Australia, taking up a lectureship at Canberra University College.⁷ His arrival in Australia coincided with a change in his academic interests: he began to write about obligations, initially the law of contract, but then, beginning in 1952 with an arresting article on 'The Action Per Quod Servitium Amisit', on tort.⁸ Fleming's earlier publications had been heavily analytical in a rather conventional way; the work on tort, by contrast, was radical, original and probed at the very basis of tort liability. After 1956, when Fleming delivered his inaugural lecture as the Robert Garran Professor of Law at Canberra, tort was his exclusive academic focus.

His academic interests might have been settled, but his professional life was not – not quite. From at least the early 1950s he had been an admirer of American legal theorists – particularly the realists and Roscoe Pound.⁹ A visiting professorship at Berkeley in 1958 proved that the admiration was mutual. Both Fleming and Berkeley would have liked him to join them immediately, but the United States government policy on such recruitments imposed a two-year hiatus. Eventually, in 1961, Fleming took up the post at Berkeley which he held until his retirement. The torts treatise, first published in 1957 when he was still at Canberra, went through a further eight editions under his sole authorship, and he was a prolific contributor to legal journals. In 1972 his involvement with journals took on a different dimension when he became Editor-in-Chief of the *American Journal of Comparative Law*. He would hold this post until 1985. By the end of his career he had been hailed as 'the doyen of living tort writers'.¹⁰

⁴ 'University News' *The Times* (London, 13 July 1939) 18; he took a couple of days later – 'University News' *The Times* (London, 17 July 1939) 8.

⁵ M Lunney, 'Legal Emigrés and the Development of Australian Tort Law' (2012) 36 *Melbourne University Law Review* 494, 507-508.

⁶ 'John Gunther Fleming A Bibliography of his Publications 1947-1998' in P Cane and J Stapleton (ed), *The Law of Obligations Essays in Celebration of John Fleming* (Clarendon 1999) 411.

⁷ A copy of the naturalisation certificate, dated 15 May 1947, is held at the National Archives HO 334/179/26583. A definitive account and analysis of Fleming's Australian period is offered by M Lunney, 'Fleming's *Law of Tort*: Australian-made or foreign import? Australia's role in making the "king" of torts' (2013) 36 *Australian Bar Review* 39.

⁸ JG Fleming, 'The Action Per Quod Servitium Amisit' (1952) 26 *Australian Law Journal* 122.

⁹ JG Fleming, review of Roscoe Pound, *Justice According to Law* (1953) 69 *LQR* 271.

¹⁰ *Hunter v Canary Wharf Ltd* [1997] AC 655, 717 (Lord Cooke).

His successor as Editor-in-Chief at the *AJCL* concluded a short tribute to Fleming, written to mark his death in 1997, as follows:¹¹

We have lost a courageous, feisty, plain-spoken, and deeply learned man, one whom the tragedies and cataclysms of this century marked but did not press down, a scholar and a bon vivant, an excellent critic and an equally excellent colleague and friend.

LEGAL FORMALISM: BIPOLARITY

Much of the force and originality of Fleming's work flowed from emphasising his opposition to legal formalism. At the time Fleming was developing his intellectual position on tort, legal formalism was perhaps not so much a distinctive philosophical position (although it had roots in the work of John Austin) as an all-pervasive assumption that the form, and, in particular, the formal limits of tort law were both essential and unchangeable attributes. Fleming's work engaged vigorously with two manifestations of legal formalism: the bipolar nature of decision-making in tort cases and the boundary between tort and other legal categories.

Fleming's response to the inherently binary, bipolar nature of judicial decision-making in tort was to problematize it. He was fascinated by situations where the inevitable basic form of litigation – claimant versus defendant – obscured or concealed the underlying issue. He had an abiding interest in the “collateral source” rule, that is to say, the rule that determined whether benefits received by a claimant from a source other than the defendant's payment of damages should reduce the defendant's liability, writing two major articles on the topic.¹² One of his earliest pieces on tort explored a similar theme, using an Australian High Court decision that had refused to confine actions for loss of services to domestic contexts as the point of departure in a search for the rationale for allowing such claims generally.¹³ Fleming found that rationale in the importance of having a legal mechanism for the recovery of costs incurred by an employer in providing benefits (such as medical care) to an employee injured by the defendant. As Fleming was quick to point out, the problem was tripartite: a rule permitting the employer to recover from the tortfeasor needed to be complemented by a rule preventing the tortfeasor from also being liable for the value of those benefits to the victim/employee.

In the loss of services situation an exclusive focus on the accident victim and tortfeasor thus risked overlooking the position as between different parties in another case arising from the same event. The problem of bipolarity here was essentially a problem of co-ordination of legal rules. But the critique of bipolarity also applied and was, in some ways, more powerful, when the third party was nebulous or its interests were not backed by a legal right. For example, in his searching analysis of remedies for defamation, Fleming drew attention to how badly the

¹¹ R Buxbaum, 'John G Fleming 1919-1997' (1997) 45 *AJCL* 645.

¹² John G Fleming, 'The Collateral Source Rule and Loss Allocation in Tort Law' (1966) 54 *California Law Review* 1478; John G Fleming, 'The Collateral Source Rule and Contract Damages' (1983) 71 *California Law Review* 56.

¹³ John G Fleming, 'Action for Loss of Services' (1959) 22 *MLR* 682.

conventional remedy of damages served the public interest in the correction of falsehoods.¹⁴ He advocated the ‘widest possible deployment’ of the remedies of right to reply and retraction in order to ‘help to break the traditional deadlock faced by the law of defamation between the individual’s interest in his reputation and the general concern in the free flow of accurate information’.¹⁵ No single individual stood for this ‘general concern’, but there was a powerful argument for law to be tailored to its needs.

Perhaps Fleming’s most eloquent articulation of this critique of bipolarity came in his acerbic article on the availability of damages for lost years in personal injury claims.¹⁶ The basic legal question was simple: could a claimant whose life expectancy had been reduced by a tortiously suffered injury recover damages to reflect the earnings that he would have received had he lived for his pre-accident lifespan? The English Court of Appeal had recently held that such claims were not available. Fleming took issue with the Court of Appeal’s reasoning on its own terms (see below), but was even more exercised by what he saw as a general failure to engage with the fundamental underlying question, which he identified as ‘the distribution of compensation among the various interests, including those of dependants, who are liable to suffer prejudice presently and in the future as the result of an accident.’¹⁷ The point was that if a claimant received compensation for the earnings that he would have received in the years he had now lost, the claimant’s dependants’ claims for loss of dependency would be correspondingly reduced, and often extinguished altogether. The dependants’ position would turn on what testamentary provision the tort victim had made for them and the size of his estate, rather than being based on a fatal accident claim. As Fleming put it, the key question in the ‘lost years’ cases was whether the fatal accidents legislation should be seen as providing protection to dependants before the tort victim’s death; in other words, ‘is the statute content to let [the dependants] remain dependent upon [the tort victim’s] unfettered discretion regarding their future welfare or does it purport to intervene after his injury and abridge his management for the sake of safeguarding their interests against the risk of his wasting their patrimony?’¹⁸ Focusing on the position as between the tortfeasor and tort victim almost guaranteed that the position of dependants, for whom so much was at stake, would be overlooked. In the article’s conclusion Fleming drew a general lesson – ‘this complex situation, like so many others involving multiple party interests is singularly taxing to a system of law which is primarily geared to the adversary process.’¹⁹

Fleming’s analyses of the collateral source rule, the continued availability of the action for loss of services, remedies for defamation and damages for lost years demonstrated how focusing on the two parties before the court could distort and inhibit the development of appropriate tort doctrines. But the emphasis on the parties and the individual decision could also be unfortunate

¹⁴ John G Fleming, ‘Retraction and Reply: Alternative Remedies for Defamation’ (1978) 12 *University of British Columbia Law Review* 15, 16.

¹⁵ *ibid* 30.

¹⁶ John G Fleming, ‘The Lost Years: A Problem in the Computation and Distribution of Damages’ (1962) 50 *California Law Review* 598.

¹⁷ *ibid* 598.

¹⁸ *ibid* 607.

¹⁹ *ibid* 618.

for a broader reason, in that it tended to distract attention from the fact that the individual decision was part of a system. Innovations that were ostensibly unobjectionable in an individual case could have alarming systemic implications, which Fleming was alert to. Perhaps the most egregious example – certainly, I suspect that Fleming would have thought it was the most egregious – was the campaign by Melvin Belli, a high-profile personal injury plaintiffs’ attorney, to increase the quantum of personal injury awards. His *Ready for the Plaintiff* inspired one of Fleming’s most devastating reviews, the tone of which can be gathered from its final short paragraph: ‘Mr Belli is a dangerous man, and this is a dangerous book, particularly in the hands of the less discriminating reader. I hope it will not be read by many.’²⁰

Fleming identified many shortcomings, in content, in style and in taste, but his most telling point was to highlight Belli’s failure even to *recognise* the inevitable systemic consequences of his proposals. ‘Perhaps the most serious weakness in the author’s thesis’, Fleming wrote,

is his failure to address himself to the fundamental question whether our society can afford at the same time to compensate all (or all deserving) casualties of motor traffic and other high-accident producing activities and still maintain or even increase the level of awards for which he is so ardently pressing. The problem is not solved by asking the silly rhetoric question whether the particular accident victim would have been prepared to sacrifice his leg for \$200,000 or any other sum.²¹

Here, vividly, was a demonstration of how focusing on the individual parties to litigation missed the point.

LEGAL FORMALISM: CATEGORIES

A second manifestation of legal formalism against which Fleming positioned himself was the deference to legal categories, in particular the distinctions between different torts and the distinction between tort and other legal areas (such as contract). A readiness to think across the boundaries between different torts can already be seen in his earliest publication on tort, ‘The Action Per Quod Servitium Amisit’.²² Here an argument about the way that changing social conditions can lend new significance to old legal forms moves from a close analysis of the action for seduction to a reflection on the developing law of duty of care in negligence. The article saw itself as addressing the modern structure of tort liability, not just one specific tort.

When it came to the relationship between tort and other legal categories, Fleming was positively enthusiastic about transgressing boundaries. He praised the infusion of ‘public values’ which Canadian tort law had experienced as the result of the indirect effect of the

²⁰ John G Fleming, review of Melvin M Belli, *Ready for the Plaintiff* (1958) 46 California Law Review 137, 138.

²¹ *ibid* 138.

²² John G Fleming, ‘The Action Per Quod Servitium Amisit’ (1952) 26 Australian Law Journal 122.

Charter of Rights and Freedoms,²³ and argued for a more fluid border between contract and tort. On this latter point, his deep knowledge of German law allowed him to make an eloquent and paradoxical contribution. The demarcation between contract and tort in English law was particularly problematic when tort was invoked to provide a remedy which the law of contract seemed to have deliberately withheld. Thus, in *Hedley Byrne & Co Ltd v Heller & Partners Ltd*²⁴, for instance, no consideration had been given for a promise to supply a banker's reference; in *Ross v Caunters*²⁵ and *White v Jones*²⁶ a solicitor had breached his contract with his client but all the loss had fallen on the client's legatees, who had no relationship of privity with the solicitor. In both cases tort remedies had been recognised (although the detailed facts of *Hedley Byrne* prevented the claim from succeeding). Fleming pointed out the contrast with German law, where similar problems had been solved by modifying the application of the relevant contractual doctrines.²⁷ Ironically, as Fleming also pointed out, German law had been driven to use contractual solutions for difficulties created within delict²⁸ – there is a sense in his writings that he regarded these kinds of ad hoc borrowings as unavoidable.

However, that was not to endorse the indiscriminate use of whatever legal materials lay to hand in order to create a claim. One of the cases which gained Fleming's highest praise was the Supreme Court of Canada's decision in *London Drugs Ltd v Kuene & Nagel*²⁹. There the claimant had contracted for storage of a valuable transformer on terms that limited the warehouse company's liability to \$40. The transformer was damaged by the company's employees' carelessness. The claimant sued the employees personally, in negligence, hoping thereby to circumvent the limitation clause. The Supreme Court denied the claim for a variety of reasons. The majority allowed the employees to avail themselves of the limitation clause – an essentially contractual solution. Fleming was not entirely convinced by this line of reasoning; he was more taken with the analysis of McLachlin J, which held that the duty of care owed by the employees was modified by the contractual matrix. But it was his overall characterisation of the case that really catches the reader's eye. The Supreme Court, he observed, 'has thus once again... demonstrated its independence and inventiveness of thought in the field of civil liability, untrammelled by the orthodoxies of yesteryear, in order to reach a decision congruent with its, and our, sense of today's realities.'³⁰

'The orthodoxies of yesteryear' here are the doctrine of privity of contract and the idea of contract and tort as separate domains. What was so important to Fleming was that these legal platitudes were not mistaken for absolute truths. As he had put it in 1957, 'It cannot be too

²³ John G Fleming, 'Libel and Constitutional Free Speech' in P Cane and J Stapleton (ed), *Essays for Patrick Atiyah* (Clarendon 1991) 333, 335.

²⁴ [1964] AC 465.

²⁵ [1980] Ch 297.

²⁶ [1995] 2 AC 207 (CA and HL).

²⁷ John G Fleming, 'Comparative Law of Torts' (1984) 4 OJLS 235; John G Fleming, 'The Solicitor and the Disappointed Beneficiary' (1993) 109 LQR 344.

²⁸ John Fleming, 'Tort in a Contractual Matrix' (1993) 5 Canterbury Law Review 269, 279.

²⁹ [1992] 3 SCR 299.

³⁰ John G Fleming, 'Employee's Tort in a Contractual Matrix: New Approaches in Canada' (1993) 13 OJLS 430, 435.

often reiterated that legal concepts are means, not ends'³¹; the ends the categories served were decisions 'congruent with... our sense of today's realities.' If the legal propositions conflicted with the appropriate decision, it was the legal propositions that should yield.

In taking this approach to legal categories, and making them subservient to other ends, Fleming was departing from the more traditional view, which accorded the categories greater priority. As I mentioned earlier, legal formalism of this kind was not particularly associated with one individual writer – it was an all-pervasive general attitude. However, some writers committed themselves to more extreme forms of it than others; at the end furthest from Fleming one could find the views of those like P A Landon, whose definition of tort was 'a breach of duty which would have been remediable before 1852 by one of the writs of trespass, case, and detinue.'³² 1852 was crucial, because that was the date of the Common Law Procedure Act, which had abolished the requirement to plead cases using the forms of action. It was a vision of tort law that unashamedly delighted in 'the orthodoxies of yesteryear'.

Landon would have taught Fleming in Oxford. He had put forward his definition of tort in an article published in 1931, and there is no reason to think that he would not have used it in his lectures.³³ It is tempting to wonder whether Landon's ultra-conservative approach is not at least partly responsible for the fact that Fleming did not turn his attention to torts until over a decade after having attended Landon's lectures. Certainly it is easy to imagine the young Fleming emerging from the lecture theatre feeling that other subjects had more to offer him. But, even when he came to write his torts treatise, Fleming had not forgotten his old lecturer. Footnote 1 on page 1 of Chapter 1 set out three definitions of tort: Winfield's, Salmond's and Landon's. Winfield's was introduced as 'The best-known definition'. Salmond's was offered without comment. Here is what Fleming said about Landon's: 'There is some subtle humour, for those with a bent for antiquarian curiosities, in the proposal by Mr Landon... to define tort as "a breach of duty which would have been remediable before 1852 by one of the writs of trespass, case and detinue."³⁴ One of the hallmarks of agonistic writers is their propensity to engage in what Harold Bloom calls 'misreading' of their predecessors, in order to assert and create their own place in the tradition.³⁵ To recharacterise Landon's definition as comedy – as, quite literally, a joke – is a perfect example of such a misreading. It was not the only aspect of his Oxford experience that Fleming would come to define himself against.

PRECEDENT

³¹ J G Fleming, 'Vicarious Liability for Breach of Statutory Duty' (1957) 20 MLR 655, 656.

³² PA Landon, 'The Province of the Law of Tort' (1931) 8 Bell Yard 19, 20. For the context, and a sense of the debate to which Landon was contributing see P Mitchell, *A History of Tort Law 1900-1950* (CUP 2015) ch 2, esp 26-29.

³³ FH Lawson, *The Oxford Law School 1850-1965* (Clarendon 1968) 131 describes Landon as 'an excellent lecturer, especially on the law of torts, exciting the opposition of his best hearers by his attachment to past orthodoxies'.

³⁴ J Fleming, *The Law of Torts* (Law Book Co of Australasia 1957) 1.

³⁵ H Bloom, *The Anxiety of Influence* (2nd edn, OUP 1997) 5.

There is a close link between legal formalism and precedent: a commitment to traditional legal categories tends to go hand-in-hand with a deferential attitude towards earlier judicial pronouncements. So it is not entirely surprising to discover that Fleming, with his sceptical attitude to legal formalism, had a corresponding wariness about precedent. As with Fleming's approach to legal formalism, it is illuminating first to identify his antagonists, and then to trace the emergence of his own position.

Some of Fleming's wittiest and most cutting commentary was inspired by excessive deference to precedent. He observed of the Court of Appeal's reasoning in *Oliver v Ashman*³⁶, for example, that it manifested 'the typically English concern with inconclusive dicta in earlier cases... [which] was strongly reminiscent of such necromantic rites as the viewing of chicken gizzards by the ancient Roman augurs and the still extant English practice of foretelling the future from random patterns of tea leaves.'³⁷ There is a kind of subdued pun here, playing on *ratio decidendi/obiter dictum* and rational/irrational, which enables Fleming to (mis)characterise the Court of Appeal's judgment as irrational. The truth was that the Court of Appeal's decision manifested a commitment to a kind of rationality that Fleming thought both misguided and inferior to his own analytical approach. But, rather than presenting his analysis as a rival, alternative rationality, his bracketing of the Court of Appeal's reasoning with augury and tasseography allows him to claim that his is the first valid analysis of the problem. The urge to claim priority is another hallmark of agonistic writing.³⁸

Fleming's move to Australia also made him alive to a different dimension of excessive deference – the habit of Australian courts to follow English decisions. His 1953 review of G W Paton's *The Commonwealth of Australia; The Development of Its Laws and Constitution* regretted that work's lack of 'a sensitive discussion of the present-day Australian tragedy of choosing the easy path to imitation, often a generation behind the English prototype, rather than consistently adopting an attitude of independent valuation.'³⁹ Conversely, six years later, he would salute – in an English journal – a decision of the High Court of Australia as 'providing further evidence of the High Court's growing spirit of independence towards the English judiciary, born of increasing confidence and perhaps even a consciousness of superiority.'⁴⁰

Fleming's attitude could partly be explained by his conviction that English courts' decisions were often not worth deferring to: he would allude, for instance, to English courts' 'intrepidity for sacrificing common sense to the inexorable demands of a spurious logic which has contributed so much to forfeiture of their erstwhile leadership of the common law.'⁴¹ But his position also had deeper roots. The review of Paton complained of the absence of 'an appraisal of judicial quality and achievement along lines familiar in American writing'.⁴² The sentence

³⁶ [1962] 2 QB 210.

³⁷ John G Fleming, 'The Lost Years: A Problem in the Computation and Distribution of Damages' (1962) 50 *California Law Review* 598, 601 n11.

³⁸ Bloom (n 35).

³⁹ JG Fleming, review of GW Paton (ed), *The Commonwealth of Australia* (1953) 69 *LQR* 123, 124.

⁴⁰ John G Fleming, 'Action for Loss of Services' (1959) 22 *MLR* 682, 683. The case was *Commissioner for Railways (NSW) v Scott* (1959) 33 *ALJR* 126.

⁴¹ John G Fleming, 'The Lost Years' (n 37) 612.

⁴² Fleming, review of Paton (n 39) 124.

from his note on the Australian High Court case quoted above continued by saying that the decision ‘opens a window upon the extent to which the judicial attitude to *stare decisis* is influenced by the individual judge’s strength of conviction regarding the substantive issue in the case before him.’⁴³ This was precisely the kind of issue on which American legal writers were eloquent.

Fleming was well-versed in the American legal writing of the period. His warm review of Roscoe Pound’s *Justice According to Law* hailed Pound as ‘the outstanding jurist of our time’⁴⁴, and was only tempered by two reservations. First, he identified that Pound had nothing new to say in the work under review – ‘all that is found in this little book has been stated before by him, particularly in his *Social Control Through Law*.’⁴⁵ Only a reviewer with extensive knowledge of Pound’s oeuvre could have made that point. Second, Fleming felt that Pound judged the realists too harshly: ‘though the so-called realists are prone to spoil their case by exaggeration and over-emphasis, they have undoubtedly contributed insights into the administration of the law which deserve a fairer appraisal than their denigration as a “cult of the ugly”’.⁴⁶

Quite how much Fleming felt that the American realist school could bring to the understanding of precedent could be seen in a review he wrote of two tort casebooks – one by W L Morison, the second by Cecil A Wright.⁴⁷ The point of the review was to confront Morison’s traditional, orthodox work with Wright’s radically different approach as a way of highlighting ‘the divergence of teaching techniques between the North American casebook method [exemplified by Wright] and the traditional pattern of instruction followed in most British and Australian law schools [typified by Morison].’⁴⁸ It was a contest between Morison’s ‘conservatism’ and Wright’s ‘spirit of adventure’⁴⁹; readers will perhaps not need to be told whom Fleming declared the winner.

Morison’s book followed the familiar format of extracting passages from judgments, a strategy which Fleming immediately objected to:⁵⁰

the material is pre-digested and in that process loses most of its nourishing quality, because the student is spared that essential, if arduous, task of analysing legal problems and evaluating the judicial reaction to them for himself. It hardly needs a reminder that, since much of the life-blood of the legal process is already drained away through the filter of law reporting (see Llewellyn, *The Bramble Bush*, and Frank, *Courts on Trial*), this further process of distillation produces a degree of

⁴³ Fleming, “Action for Loss” (n 40) 683-684.

⁴⁴ JG Fleming, review of Georgio del Vecchio, *Justice*; Roscoe Pound, *Justice According to Law*; Max Hamburger, *Morals and Law* (1953) 69 LQR 271, 273.

⁴⁵ Fleming, review of Pound (n 44) 273.

⁴⁶ *ibid*.

⁴⁷ JG Fleming, review of WL Morison, *Cases on Torts* and Cecil A Wright, *Cases on the Law of Torts* (1956-1958) 2 Sydney Law Review 212.

⁴⁸ *ibid*.

⁴⁹ *ibid* 214.

⁵⁰ *ibid* 213.

abstraction which cannot fail to distort seriously a realistic perception of law in operation...

As Fleming explained, the underlying problem here was the kind of legal education for which such casebooks were created, which was founded on assertions of general principle in lectures and textbooks: 'A casebook suited to this pattern of education inevitably reflects its preoccupation with so-called *leading* cases, singling out for attention the *ipse dixit* of the highest appellate courts whilst underplaying the uncertainties of the legal process, and thereby perpetuating the make-believe of jural generalisations.'⁵¹

Wright's book came from a very different place: 'Refusing to regard law as an aggregate of static solutions clothed in oracular pronouncement, the stress is on the experimental nature of court reactions to the manifold social problems of our time.'⁵² Divergent rulings and dissents were included, 'with a view to stimulate questioning rather than submission.'⁵³ This radically different approach was underpinned by a vision of legal education that was a very long way from Morison's.⁵⁴

Rather than cramming the student's mind with detailed information of an abstract nature, the nature of education is to make him detect legal problems embedded in a hard crust of facts, to develop a critical faculty in the evaluation of fact situations and the judicial reaction to them, to approach case-reading not with a view to extracting theoretical information so much as to observe the court's method of tackling a concrete problem, to familiarize himself with the course of trial and appellate practice and appreciate the significance of proof on the outcome of litigation. For short, the emphasis is on case-study rather than study of abstract judicial opinions, on the Concrete rather than Generalization.

Fleming fully appreciated, and embraced, the fact that this emphasis on the concrete could be unsettling and even subversive. In a passage where metaphors of struggle could hardly have been more prominent, he commented that 'the more meticulous the attention given to a court's wrestling with a concrete problem, the more sceptical we grow of the mechanistic theory of judicial adjudication. It becomes more obvious that there are influential factors other than the mere application of verbal formulae which shape conclusions, that precedents are only guideposts or "starting points" of legal reasoning, that the "agony of decision" is constantly present.'⁵⁵

Fleming published this hugely important double review in the *Sydney Law Review* volume covering 1956 to 1958, and the date is surely significant. He was still the Robert Garran Professor of Law at Canberra University College (that is how he signed the review), but would be taking up a visiting professorship at Berkeley in 1957-1958 and then, ultimately, moving

⁵¹ *ibid.*

⁵² *ibid.*, 214.

⁵³ *ibid.*

⁵⁴ *ibid.*

⁵⁵ *ibid.*

there permanently.⁵⁶ The review seems to capture him on that threshold, both looking back at the constraining conservatism of Australian law schools and forwards to the more adventurous possibilities of the United States. Whatever the delays with his visa, he was already in California in spirit.

But while the review gives a powerful sense of a particular moment in Fleming's life, it also articulated beliefs to which he had been, and would continue to be, committed for his entire career. At the heart of these beliefs was a fundamental scepticism about judicial language. He shared the realists' conviction that judicial reasoning never provided a complete account of the true motivations for a decision. It followed, therefore, that the lavish attention given to judicial language in traditional casebooks was misplaced – nearly forty years after the double review he would praise the Supreme Court of Canada for an analysis of precedents 'paying more attention to the actual decision than what the court said in explanation.'⁵⁷

He practised what he preached. The foreword to the torts treatise drew attention to the relative sparsity of quotations from judges, and the commitment to an American-inspired approach to precedent was prominent enough to provoke the one notably negative review that the work received.⁵⁸ Perhaps the most interesting example of Fleming's commitment to legal realism in his own practice was his famous essay 'Remoteness and Duty: The Control Devices in Liability for Negligence'.⁵⁹ This piece, published about five years before the double review, took as its point of departure an envious glance at the United States, where,

during the last generation, at any rate, realistic comprehension of the functional operation of the devices employed in negligence has become almost a commonplace... By comparison, all too often our approach to the problems surrounding negligence liability cannot be regarded as other than immature.⁶⁰

Although Fleming was writing in a Canadian journal, while holding a position in Australia, 'our' here essentially meant English law. The central thrust of Fleming's critique was that there had been a general failure to articulate the central problem in negligence. That problem was how to limit liability; and the array of legal doctrines associated with negligence should be judged by their contribution to resolving it. Seen in this light, the current doctrines' greatest shortcoming was their failure to capture the underlying policy interests in play. Crucially, Fleming was not arguing that doctrinal flaws were leading to frequent unjust outcomes – on the contrary, 'in the largest number of negligence cases the decisions as such can meet the standards of an exacting critic.'⁶¹ The problem, rather, was that the judicial opinions

⁵⁶ For a vivid account of the protracted nature of the move, drawing on Fleming's correspondence, see M Lunney, 'Fleming's *Law of Torts*: Australian-made or foreign import? Australia's role in making the 'king' of torts' (2013) 36 Australian Bar Review 211, 224-227.

⁵⁷ John G Fleming, 'Employee's Tort in a Contractual Matrix: New Approaches in Canada' (1993) 13 OJLS 430, 439.

⁵⁸ E Coppel, review of J G Fleming, *The Law of Torts* (1957) 1 Melbourne University Law Review 272.

⁵⁹ (1953) 31 Canadian Bar Review 471.

⁶⁰ JG Fleming, 'Remoteness and Duty: The Control Devices in Liability for Negligence' (1953) 31 Canadian Bar Review 471, 472.

⁶¹ *ibid* 473.

accompanying those decisions ‘are all too often couched in phraseology which suppresses the vital ‘inarticulate major premise’ beneath a manipulation of verbal formulas.’⁶²

The middle sections of the article supported this thesis with compelling analyses of the use of remoteness of damage and duty of care as control devices. As he moved towards his conclusion Fleming indicated that only a modified duty of care test – one which took account, for instance, of the different policy factors relevant to recovery for psychiatric injury and purely economic loss – had the potential to be an adequate and coherent control device.⁶³ But the conclusion itself struck a rather more ambivalent note:⁶⁴

The conclusion I seek to commend is the relative unimportance of formalizing the structural analysis of negligence cases. The particular method adopted by the court is of as little consequence to the actual decision reached as the verbal formula through which it finds expression. Neither could be of substantial significance unless we were employing ‘self-determining words with fixed content, yielding their meaning to a process of inexorable reasoning.’ But, as we hardly need remind ourselves, the reality behind law-making through the judicial process lies elsewhere.

This sounds dismayingly like an admission of defeat, an acceptance that we can never truly access ‘the reality behind law-making through the judicial process’. In a sense it is the realist scepticism about judicial language taken to its logical (and extreme) conclusion. But, as a conclusion, it is hardly very satisfying: if we are to discard judges’ own explanations for their decisions as mere surplusage, we desperately need some kind of alternative explanatory framework to make sense of things. What could that framework look like? Fleming’s later writings would attempt to set it out.

TEMPORALITY

One of the most distinctive features of Fleming’s tort scholarship was its readiness to invoke a grand historical narrative about the law of negligence. As he explained in the preface to a special issue on contemporary roles of the law of tort in the *American Journal of Comparative Law* for 1970, there were three phases:⁶⁵

It was the task of the nineteenth century to create a law of compensation compatible with the requirements of the awakened giant of free enterprise. The age of negligence was born, and with it the vestiges of an older, stabler society, linked to notions of strict liability, were cast off. The last fifty years have been occupied with adjusting the law of torts to the phenomenon of liability insurance which destroyed

⁶² *ibid.*

⁶³ *ibid* 495.

⁶⁴ *ibid* 502. The quotation was from F Frankfurter, ‘Twenty Years of Mr Justice Holmes’ Constitutional Opinions’ (1923) 36 Harvard Law Review 909, 912.

⁶⁵ John G Fleming, ‘Contemporary Roles of the Law of Torts Introduction’ (1970) 18 American Journal of Comparative Law 1.

the assumption of individual responsibility and familiarized us with the reality of spreading or pooling losses among large sections of the community. But ere yet this revolution has run its full course, the next stage is already in the offing; the message, unmistakable for those who care to read, spells nothing short of the displacement of tortious liability by systems of direct compensation, public and private.

The sense of an inevitable acceleration towards accident compensation schemes as replacements for tort was amplified and elaborated in his 1973 article 'The decline and fall of the law of delict', where the imminent enactment of New Zealand's Accident Compensation Scheme was seen as bringing the future into the present day.⁶⁶ Significantly, in that later paper, Fleming emphasised the continuities between the second and third phases of tort's history: both were grounded in collectivism. The difference between them was that, while the collectivism of the New Zealand scheme was overt, the collectivism in asking who was best placed to bear the loss was implicit – a doctrine like vicarious liability, for example, was an instance of 'creeping collectivism' because it departed, subtly, from the tenet of individual responsibility.⁶⁷ Fleming's use of vicarious liability in this context also highlighted a rather different, and less attractive aspect, of his grand historical narrative: it was not historically accurate – vicarious liability in its recognisably modern form dated from the 1840s, arguably earlier. This was a clue to the fact that Fleming was not interested in the past for its own sake.

The historical narrative was so important to Fleming because it gave tort a purpose, one might even say a destiny, which intertwined tort's fate with wider social changes. For, in essence, Fleming was portraying negligence as first a symptom, then an attempt to mitigate the effects, of the industrial revolution. The social, economic, political and cultural significance of industrialisation was – and would continue to be – a central theme of scholarship in the humanities. Fleming only very rarely referred to specific works dealing with this theme – for example, when invoking Karl Renner's thesis that legal institutions could survive radical alterations in social conditions by making use of fictions⁶⁸ – but he was clearly aware of it. In particular, his historical narrative can be seen as implicitly engaging with, and responding to, Marx's analysis of the connection between the relations of production and their corresponding legal superstructure.

One of the central insights of Marxist analysis was to highlight that there was an inevitable interconnection between the material conditions of economic production and the social institutions (such as law) adopted by a community.⁶⁹ In some writers' analyses the connection proposed was a crudely direct one. Fleming, in the passage quoted above from his 1970 preface seemed to be positing such a direct causal link between industrialisation and the legal test for

⁶⁶ John G Fleming, 'The decline and fall of the law of delict' (1973) 6 *Comparative and International Law Journal of Southern Africa* 259.

⁶⁷ *ibid* 261.

⁶⁸ JG Fleming, 'The Action Per Quod Servitium Amisit' (1952) 26 *Australian Law Journal* 122, 122-123; John G Fleming, 'Action for Loss of Services' (1959) 22 *MLR* 682.

⁶⁹ The canonical text is K Marx, 'Preface to *A Contribution to the Critique of Political Economy*' available in R Tucker (ed), *The Marx-Engels Reader* 2nd ed (Norton 1978). For an excellent explanation of the issues see H Collins, *Marxism and Law* (OUP 1982) ch 2.

negligence. However, in earlier work, particularly his ‘The Role of Negligence in Modern Tort Law’, he had been more careful.⁷⁰ Here he criticised (unspecified) ‘economic determinists’ for claiming that the negligence standard had been produced by the industrial revolution; the truth, Fleming pointed out, was that it had been created by the Romans.⁷¹ But that was not to say that the industrial revolution was irrelevant: the fault doctrine thrived because it ‘responded adequately to the fundamental needs of a developing economy.’⁷² There was, in other words, a deep and mutually sustaining relationship between the conditions of production and the legal doctrine.

Fleming’s analysis of tort’s second stage of development seems to have undergone its own period of change. In 1967 he argued that the pendulum had begun to swing against fault because of doubts about ‘its adequacy to cope with the problems posed by the highly technological society of our time’.⁷³ Legal doctrine was, again, being explained by direct reference to societal conditions. However, as Fleming continued his analysis, it became clear that he identified a crucial intermediary factor, without which changes in negligence would not have been possible: ‘By far the most pervasive catalyst of loss spreading has proved to be liability insurance; for it has made it possible to gear conventional rules of law, without any radical reform of those rules themselves, to the changing needs of a technological society...’.⁷⁴ In Fleming’s 1970 summary, quoted above, liability insurance has been promoted from intermediary to underlying cause. His more extended account, from 1973, showed that this was a deliberate move away from economic determinism:⁷⁵

Clearly the decision of the law to give its nod of approval to liability insurance was a critical turning-point in the annals of delictual liability. Implicit was the choice that abandoning the principle of individual responsibility was a price worth paying for the double benefit of at once safeguarding the defendant from the potentially ruinous consequences of an adverse judgment and assuring his victim of actual compensation instead merely of an empty verdict against a defendant who was more likely than not financially irresponsible.

Fleming’s sense of tort’s historical trajectory was not merely ornamental: it was a critical, evaluative tool to be deployed in his analyses of contemporary controversies. He used it in at least two distinctive ways. The first was to marginalise unhelpful precedents: these could often be seen as contingent on the (now altered) social conditions in which they had been decided. They should, in Fleming’s phrase, be seen as ‘no more than tentative experiments in technique’.⁷⁶ The second informed Fleming’s sense of the role of legal writers, and could be

⁷⁰ John G Fleming, ‘The Role of Negligence in Modern Tort Law’ (1967) 53 *Virginia Law Review* 815.

⁷¹ *ibid* 817. Fleming saw little point in the independent study of Roman law – John G Fleming, ‘Comparative Law of Torts’ (1984) 4 *OJLS* 235.

⁷² *ibid* 818.

⁷³ *ibid* 819.

⁷⁴ *ibid* 837.

⁷⁵ Fleming, ‘Decline and fall’ (n 66) 260.

⁷⁶ JG Fleming, ‘Remoteness and Duty: The Control Devices in Liability for Negligence’ (1953) 31 *Canadian Bar Review* 471, 476

seen particularly vividly in his appreciative review of *Prosser on Torts*.⁷⁷ One of the many aspects of the work that he admired was Prosser's 'conscious[ness] of his ability... to help along judicial change-in-the-making.'⁷⁸ The example Fleming particularly had in mind was Prosser's contribution to recent changes in the law of product liability, which had been inspired by an emphasis on 'maximum pressure for accident prevention, capacity to absorb and distribute losses, and the relative inability of the consumer to protect himself.'⁷⁹ 'In short', Fleming continued,

a new reasoning has emerged which is quite alien to the classical or conventional theories of civil responsibility on which most of us were nurtured in an earlier day, and one which possibly represents a drift towards collectivism which those less attuned to the temper of our times have reason to deplore as an aberration from the ancient verities of individualism, puritanism and maximum freedom from social responsibility. Yet this breakthrough in the area of products liability is but a symptom of a more general restlessness and change in orientation that osmotically, as it were, is insinuating itself throughout the whole of tort law, communicating a sense of fluidity in which precedents must justify themselves anew on their own independent merit.⁸⁰

The best kind of legal writer, who was attuned to the temper of his times, would respond to this restlessness and help to take the law where it needed to go – the writer had become a key agent of legal change.

This deep commitment to approaching the law with an eye to its future was not always straightforward. To the extent that the future was understood to mean the inevitable dominance of compensation systems, Fleming admitted that he found it difficult to commit wholeheartedly: '[my] preference for comprehensive accident compensation has not weaned [me] from a life-long addiction to the intellectual allures of traditional tort law' he once confessed.⁸¹ It might also be difficult to extricate oneself from the opposing gravitational force-fields of past, present and future, as Fleming found when writing about *Pigney v Pointers Transport Services Ltd*.⁸² In this case the English High Court had allowed full recovery in a claim for negligence where the accident victim had committed suicide as a result of depression brought on by the accident. Fleming was troubled. The claimant's deliberate act of self-harm seemed to break the chain of causation; furthermore, cases decided under the workmen's compensation scheme had denied recovery for the consequences of suicide. 'The policy underlying social welfare legislation', he continued, 'would, if anything, tend to favour rather more comprehensive protection than a system of loss allocation, like the common law, which is still largely geared to individualistic notions of fault and, despite the widespread incidence of indemnity insurance, continues to pretend that the defendant's purse is the sole source of all

⁷⁷ John G Fleming, review of *Prosser on Torts* (1964) 52 California Law Review 1068.

⁷⁸ *ibid.*

⁷⁹ *ibid.*

⁸⁰ *ibid* 1068-1069.

⁸¹ John G Fleming, 'Comparative Law of Torts' (1984) 4 OJLS 235, 236.

⁸² [1957] 1 WLR 1121.

compensation.⁸³ A footnote to this sentence added that ‘perhaps it should not be overlooked’ that the defendants in the case were ‘almost certainly covered by liability insurance.’⁸⁴

The case, and Fleming’s uncharacteristically conflicted analysis of it, highlighted the difficulty of writing to judicial change-in-the-making. He could not resist the temptation of pointing out how, viewed in its own orthodox legal terms, the judgment was unconvincing. But that criticism immediately deconstructed itself, because the notion of individual responsibility was a pretence, not only in general but also – almost certainly – in this particular case as well. The presence of insurance made the decision look a lot less objectionable; it also raised doubts about whether it had been right to deny recovery under the ‘social insurance’ of workmen’s compensation. One might have expected Fleming here to invoke a legal realist explanation – to stress what the court had done, not what it had said. But, on this occasion at least, he seemed reluctant to make that move, concluding his note with the rather conventional observation that ‘of all the progeny spawned by *Re Polemis*, Pilcher J’s decision is certainly the oddest.’⁸⁵

SELF-IDENTIFICATION

Fleming’s view of history profoundly shaped his work; the same is true of his personal history. On some aspects of it he could be outspoken. There are several contenders for the accolade of Fleming’s most devastating book review, but his savaging of P A Landon’s edition of *Pollock’s Law of Torts* has a compelling claim.⁸⁶ Landon had retained the text of the final edition written by Pollock (in 1929) and that decision, Fleming wrote, ‘lends the book an antiquarian flavour which in the Olympian atmosphere of Oxford might be regarded as a commendation but elsewhere could be diagnosed as a symptom of sterility.’⁸⁷ Where Landon had added new material it tended to reflect his ‘predilection’ for jargon, his ‘enthusiasm for diehard points of view’ and – perhaps most damningly – ‘prejudices’ rooted in ‘an unwillingness to recognise the social changes of our time’.⁸⁸ The portrayal of Oxford – where Fleming had been a student – and of Landon – who had taught him – bore eloquent witness to their influence on him.

Fleming’s personal history also seems to have shaped his work in more subtle ways. His successor as editor-in-chief of the *American Journal of Comparative Law* described him (in a passage already quoted) as a man ‘whom the tragedies and cataclysms of this century marked but did not press down.’⁸⁹ One such marking related to Fleming’s own sense of identity. After leaving Germany he had, quite literally, to reinvent himself when Gunther Kochmann became John Fleming. There was, possibly, a pragmatic reason for this linked to his military service⁹⁰.

⁸³ John G Fleming, ‘Liability for Suicide’ (1957-1958) 31 *Australian Law Journal* 587, 589.

⁸⁴ *ibid.*

⁸⁵ *ibid.*

⁸⁶ JG Fleming, review of *Pollock’s Law of Torts* (1953-1955) 1 *Sydney Law Review* 282.

⁸⁷ *ibid.*

⁸⁸ *ibid.*, 283.

⁸⁹ R Buxbaum, ‘John G Fleming 1919-1997’ (1997) 45 *American Journal of Comparative Law* 645, 646.

⁹⁰ M Lunney, ‘Fleming’s *Law of Tort*: Australian-made or foreign import? Australia’s role in making the “king” of torts’ (2013) 36 *Australian Bar Review* 211, 214; M Lunney, ‘Legal Emigrés and the Development of Australian Tort Law’ (2012) 36 *Melbourne University Law Review* 494, 508 n 65.

But it was not, of course, merely a matter of changing his name – he changed his nationality, and assimilated in other ways. For example, in a review of Georgio del Vecchio’s *Justice* in the *Law Quarterly Review* he observed that the book was ‘in many respects representative of critical idealist philosophical thought of the twentieth century.’⁹¹ Which was not a good thing: ‘It might as well be frankly admitted that the idea of inter-subjective correlation as an a priori concept of justice derived from trans-subjective consciousness may prove not a little unpalatable for those of us in the Anglo-Saxon world who have not been sufficiently “conditioned” by a century or more of this type of obscurantist German epistemology.’⁹² This is the authentically weary tone of a pragmatic Englishman confronted with the excesses of Continental philosophy. Why was Fleming writing like this? Who did he want readers to think he was?

One answer is ‘not German, obviously’, and it is quite remarkable how little he gave away about his origins in his early work. On the rare occasions when a German source is alluded to – as with his citation of Renner in ‘The Action Per Quod Servitium Amisit’ – there is almost a feel of pantomime in his referring only to his compatriot Kahn-Freund’s *translation*. He did not review a German book until 1967, and seems only ever to have published one article in German (he published two in Italian). It is probably not a coincidence that the review was for the *American Journal of Comparative Law*, where an interest in German law was not out of place; but, even here, Fleming’s self-identification was striking. The book’s author, he observed, ‘takes his place besides the ever increasing phalanx of European writers who have fallen under the spell of our own common law methods.’⁹³ There is no sense that Fleming identified himself with those ‘European writers’: the demonstrative affectionate possessiveness of ‘our own’ speaks volumes for where he felt he belonged. Conversely, when reviewing another, less impressive, German work in the same journal, Fleming was unsparing:⁹⁴

True to the conventional German academic tradition the author, a professorial aspirant understandably concerned with his own professional survival, deploys more ingenuity in pursuing the will o’the wisp of theoretical subtleties (*Dogmatik*)... than in developing functionally valuable insights... [One of the book’s] flaw[s] is the pervasively naïve assumption... that the contemporary German institutional model yields criteria of universal *validity* (*vide* the constant appeal to ‘sachgerecht’, i.e. proper).

We have already seen that Fleming could be a devastating reviewer, but there seems to be a further factor in play here – perhaps it was the memory of a German system that had threatened more than merely his professional survival – and the tone is starting to veer towards contempt, both for the system and its products. At the same time we should note the implicit claims to linguistic and institutional expertise which create the platform for the criticisms – Fleming was,

⁹¹ JG Fleming, review of Georgio del Vecchio, *Justice* (1953) 69 LQR 271.

⁹² *ibid.*

⁹³ John G Fleming, review of W Frhr Marschall v Bieberstein, *Reflexschäden und Regressrechte* (1967) 15 *American Journal of Comparative Law* 579, 580.

⁹⁴ John G Fleming, review of Wolfgang Gitter, *Schadenausgleich im Arbeitsunfallrecht* (1971) 19 *American Journal of Comparative Law* 805, 805-806.

perhaps, starting to feel happier about acknowledging a Germanic element in his professional identity. In any event, from the early 1970s onwards his work overtly engages far more with German sources than it had done previously.

CONCLUSION

Twenty years after his death, some aspects of Fleming's work remain extraordinarily vivid, while others seem very remote. His analysis of duty of care may be over sixty years old, but retains an astonishing urgency and value; the importance of legal categories being means not ends has never been more compellingly articulated and illustrated. On the other hand, tort's inevitable replacement by compensation systems seems unlikely to happen anytime soon, and legal change inevitably makes commentaries on some aspects of earlier law feel rather stale. The torts treatise lives on, but I would suggest that it is not so much Fleming's specific analyses of particular points that we should value today as the priorities and attitudes that they exemplify. His work is a constant reminder of the importance - and rewards - of the kind of restlessness that had excited him when he glimpsed it in the background of Prosser's book on torts. Existing structures were there to be challenged and interrogated, not meekly accepted or deferred to; history could be a critical and potentially subversive tool, not just a daunting heap of constraining precedents. At his best, Fleming makes readers feel exactly what he had felt when he looked over Prosser's shoulder: an exhilarating sense of the possibilities and fluidity of tort.