# Torts Tomorrow - A tribute to John Fleming. Comparativism, Realism and the Economic Factor - Fleming`s Legacies

**Justice Kirby Collection**

**Date**: 30 June 1998
**Author**:
**Type**: test
**Publisher**: **Publisher** - Was the paper published?

TORTS TOMORROW - A TRIBUTE TO JOHN FLEMING COMPARATIVISM, REALISM AND THE ECONOMIC FACTOR - FLEMING'S LEGACIES*

The Hon Justice M D Kirby AC CMG**

MAN OF INFLUENCE

Kipling, that somewhat out of fashion poet, in a loving tribute to his teachers, declared that such "men of little showing" deserved blessing and praise:1

"For their work continueth,
And their work continueth,
Broad and deep continueth,
Great beyond their knowing!"

So it is with great law teachers. In the law, they must usually wait for decades before their teaching and writing finds its way, through the minds and pens of their pupils, into the decisions of the highest appellate courts. An illustration of this thesis in Australasia, lies in the legal realism of Professor Julius Stone2. He taught jurisprudence in universities in Auckland and Sydney from the 1940s to the 1970s. John Fleming is in the same category. I was not his pupil at the Canberra University College and the Australian National University, where he helped to establish the Law Faculty. But his arrival on the Australian scene coincided with my legal education and that of most of the current generation of Australia's judges. The first edition of his influential book The Law of Torts, in 1957, was neatly timed for my instruction to the subject at the Sydney Law School, in 1959, by the brilliant and cerebral W L Morison. Thenceforth, for me, and for generations of Australian law students, practitioners and judges, "Fleming on Torts" became the standard text. His book stamped on me an approach to the subject which I have not been able to shake off and which I have no desire to escape. It is the conceptual framework that has influenced my approach to this highly practical field of the law. I am not alone. The same could be said of thousands of lawyers in Australia, New Zealand, the Pacific Islands, Canada, the United States and even England.

In practice as a solicitor and barrister, in my work in the Australian Law Reform Commission and later as an appellate judge I constantly had resort to Fleming's text. This could be safely done because of the high regard in which it was held by Australian courts and practitioners. The succeeding editions kept the law up to date. By stating the law in a practical context, the book had a great appeal to a busy practitioner. By stating it in a conceptual way, it was

specially useful to a law reformer and judge concerned to find the solution to the immediate question in a way harmonious to the great mosaic of common and statutory law.

Little wonder that, in his lifetime, Fleming attracted unstinting praise. Lord Cooke of Thorndon, formerly President of the New Zealand Court of Appeal, described him as "the doyen of living tort writers"3. Scholarly reviews of the later editions of his Law of Torts competed with each other to heap praise upon the book and upon him. The sixth edition was called a "formidable contribution to torts law scholarship"4. In the seventh edition he was described as "the master of the subject"5. He was praised for his "remarkable breadth of scholarship spanning the entire common law world"6. Of that edition it was said "Each chapter from start to finish [gives] the reader a firm grasp of the province of the law of torts and ... a more profound understanding of the black-letter rudiments of the subject"7, thereby distinguishing his text from other leading works on the topic. His technical coverage was praised as "vast and impressive" by an experienced Australian barrister, now judge8. His views were called "constructive and far sighted", both as to the nature of the law of torts and to the way it was developing9. No wonder he was regarded as the "leading scholar in [his] field"10.

IN THE HIGH COURT OF AUSTRALIA

Against this background of academic and professional appreciation, it is hardly surprising that Fleming's writing, both in The Law of Torts and in other works, came to have an unequalled influence on the opinions of the Justices of the High Court of Australia writing, as they often must, upon problems of tort law.

It is rare to find a torts case of significance in the High Court in the past thirty or so years which does not refer to, and draw upon, Fleming's expressed opinions. The large number of instances where Fleming's views have been cited, discoverable with the aid of computer analysis, is the more remarkable because, until recently, the High Court of Australia adhered to a traditional approach to academic opinions. If the Court did not always require that the scholar die before his or her opinions could be cited (on the off-chance that they might be changed during the course of a busy lifetime) it was usual to confine references to academic opinion to a notation of those cases in which the scholar's views had earlier been adopted by judicial authority. Until then they were not clothed in the garments of respectability thought necessary for high judicial citation. It is perhaps one of the legacies of scholars such as Stone and Fleming that they weaned a generation of Australian lawyers from this fancy to which it cannot be expected that Antipodean courts will ever return. The citation of Fleming's opinion was regarded as authority enough to cite it - even where the judge went on to disagree or to reach a different opinion. Such was the respect for him.

Sometimes Fleming's sharp criticisms of earlier authority of the High Court of Australia lingered for decades, only to take their toll when the generation of judges, taught from his book, came to the fore. An instance is the chequered history in Australia of the holding in

# Torts Tomorrow - A tribute to John Fleming. Comparativism, Realism and the Economic Factor - Fleming`s Legacies

**Justice Kirby Collection**

Beaudesert Shire Council v Smith11. The Court on that occasion was constituted by Justices Taylor, Menzies and Owen. It propounded a new doctrine. Although it acknowledged that the local authority (appellant) was not liable to the plaintiff, whether under the statute or in negligence or for public or private nuisance, it held that it was liable in an action on the case. The foundation for the Court's opinion was that the local authority had intentionally performed a positive act forbidden by law which inevitably caused damage to the plaintiff by preventing the continued exercise of his legal rights. Fleming regarded the holding as pure heresy. He could hardly wait for his fourth edition in 1971 to denounce it12. He described it as a "spurious principle, destitute of all authority". He maintained his rage over succeeding editions, distressed that the High Court of Australia would so deface the precious treasure of his discipline. In the eighth edition, he cautioned that the Beaudesert principle would, if not corrected, lead to liability on the part of an indeterminate class of persons13. He was joined by other critics, judicial and academic.

Ultimately, in Northern Territory of Australia v Mengel14 the High Court of Australia recanted. The majority referred with approval, and some readers might think appropriate contrition, to the comments by Fleming (and other scholars) critical of Beaudesert15. Heresy was extirpated. Integrity of principle was restored. One can imagine Fleming's quiet satisfaction in California when the news of this relief reached him.

In Burnie Port Authority v General Jones Pty Limited16, continuing a steady course of reconceptualising categories of liability in negligence17, the High Court of Australia held that the rule in Rylands v Fletcher18 should be seen for the purposes of the common law in Australia, as having been absorbed by the general principles of the law of negligence19. Central to the reasoning was the Court's opinion that the defences developed over time to the application of the rule in Rylands v Fletcher closely corresponded to the defences available in an action framed in negligence. This left little of the rationale of liability originally propounded in Rylands v Fletcher. That case was therefore to be seen as a historical staging-post, on the way to a more conceptual foundation for liability. The Court acknowledged that its opinion reflected an observation by Fleming expressed as far back as the first edition of The Law of Torts in 195720.

More recently, in Northern Sandblasting Pty Ltd v Harris21, the Court was concerned with the liability of a landlord to the child of a tenant seriously injured by electrocution. The landlord disclaimed liability on, among other grounds, the basis that it had engaged an independent subcontractor to repair the defective appliance. That contractor was a licensed electrician. The law reserved repairs of electrical appliances to persons so licensed. I will refer to this decision later. For the present it is sufficient to note the suggestions made, in the course of the reasoning, that the Court might need in the future to reconsider the liability of principals for the negligent acts and omissions of independent contractors22. In support of the need to do so, I called to notice Fleming's scepticism about the existence of a coherent theory for

liability and his reminders of the catalogue of exceptions to the general principle of exemption existing both in Australia and the United States23.

In another case, decided since I joined the High Court of Australia, the question arose whether a tortfeasor's liability to pay damages for gratuitous future care to be given to an injured plaintiff was reduced because the tortfeasor, rather than an unconnected third party, was likely to be the provider of such care. The Court was invited to take into cognisance the fact that the economic burden of providing the services would, at least in the case of motor vehicle injuries covered by compulsory third party insurance, be borne by different sources. The services would be provided by a relative. The verdict would be provided by the compulsory insurer as required by statute. Fleming, "whilst not unsympathetic to a realistic consideration of the impact of compulsory insurance"24 saw difficulties with the reasoning which took insurance into account25. In an opinion in which I participated, careful attention was paid to the views of Fleming, and the contrary views of other writers. On this occasion, his approach did not prevail26. It is enough to note that the Court felt obliged, exceptionally, to cite Fleming's opinion and to explain, at some little length, why it did not feel persuaded by it. I hope that Fleming, to whom the opinion was sent, was convinced by, or at least content with, our opinion. I must await the posthumous ninth edition to read his verdict.

There are countless other opinions of the High Court of Australia, past and recent, in which Fleming's views and comments have been referred to in the expression of the legal principles to be applied in Australia27. In particular, when resolving contentious or unsettled issues, a court must recognise that choices have to be made. Conclusions cannot be reached solely by analogous reasoning from past authority. In making its choices, the court will draw strength from the past authority. But it will also be influenced by considerations of legal principle and legal policy28. It is because of Fleming's practical and conceptual approach that his writing has such a great influence on a court such as the High Court of Australia when the judges are at the moment of choice.

Several reasons combine to explain John Fleming's influence on legal theory and decision-making in Australia. They include the very long time during which he wrote and explained the law of torts: associating his mind and pen with its intricacies. A further consideration, from the Australian point of view, was his advent on the scene at the very moment in legal history when the Australian courts began to shake off their exclusive institutional and intellectual captivity to the English judiciary, including those members sitting in the Privy Council. The appearance of a book which concerned itself, more than by way of exotic footnotes, with Australian decisions was one of the given objectives which Fleming expressed in the first edition of The Law of Torts. The succeeding editions traced the increasing independence of the Australian courts in this area.

This, then, is the context for Fleming's influence. But I want to suggest that three elements in his writing can be singled out to explain the power of his impact and why his influence is likely to continue. I refer to his commitment to comparative law; his attachment to legal

realism; and his insightful appreciation of the importance of economic considerations in the development of legal liability in tort.

FLEMING THE COMPARATIVIST

It is unsurprising that Fleming should have adopted a comparativist approach to the law of torts. He was born in Germany in 1919. He went to England in his teens and fought for its cause in the Second World War. He was thirty when he migrated with his young family to Canberra. After a decade in Australia he moved to North America. Although based at the University of California, Berkeley, it was perhaps in Canada that he had his most profound impact in North America. Justice Allen Linden of the Federal Court of Canada, one of his former students, described his book on torts as "the bible for Canadian law students and judges for forty years"29. His itinerant life was reflected in his writing:

"Unlike any other volume on the subject, it weaves together the analysis of legal developments in Australia, Britain, Canada and the United States. This comparative law approach reflects Fleming's long and celebrated academic career on three continents"30.

At the time that Fleming arrived in Australia, such a catholic approach to legal authority was unusual, to say the least. Australian lawyers of the time did not commonly resort to the variety of judicial authority available within their own federation. Practitioners up to the 1980s tended to have on their shelves the authorised English reports (for the Privy Council, the House of Lords and the English Court of Appeal), the Commonwealth Law Reports (for the High Court of Australia) and the authorised reports for the Full Court of their own State. Rare indeed was the use of other common law authority. Even the comparatively extensive use in the earliest decades of the century of the opinions of the Supreme Court of the United States of America on constitutional questions faded away under the all-powerful influence of the one great source of comparative law stimulus which Australian lawyers acknowledged: the laws of England.

In the first edition of The Law of Torts, Fleming made his intention to adopt a globalised comparative approach to his subject perfectly plain31:

"In much of this [book] I have drawn heavily on the work of North American teachers, and anyone familiar with the vast literature will readily appreciate the immense debt which I owe to the inspiration of such an outstanding tort lawyer as Professor Fleming James Jr of Yale, Dean W Prosser and Professor A Ehrenzweig of Berkeley, California, and Dean C A Wright of Toronto, to mention only a few".

Perhaps this approach could not have occurred in an Australian-born academic of that time. We were still mesmerised by the conception of ourselves as part of the English legal continuity traced back to Magna Carta. We still saw ourselves as a sub-branch - minor at that - of the common law of England. It was possibly Fleming's German birth, British education

and migration to the new worlds that encouraged him to see his topic in a wider focus. In the third edition of his text he wrote32:

"[t]he relative detachment gained from viewing the 'British' scene from an outside vantage point and from devoting a goodly share of attention to American law could not but fail to leave their mark".

Because of his international connections and teaching experience, the course which his own life had taken and the still strong foundation of his topics in the common law, Fleming was determined to share with his readers the perspective of decisions on analogous problems in other common law countries, for the guidance which they might provide to antipodean judges and lawyers33:

"In general, I have not hesitated to draw on case-law from whatever common law jurisdiction, and the reader will find numerous citations and decisions from American, Canadian, Irish and Scottish courts whenever these seem to me to furnish a useful analogy or contrast ... I have also cited freely from articles in learned journals, both British and American, as this seems to me but a small tribute to pay to the many authors whose views have moulded so much of my own thinking".

If we look at the course which the stream of common law authority in tort has taken in Australia, particularly in the High Court, we can see the impact which Fleming, the comparativist, has had. There is now far greater citation of decisions of other common law countries. Indeed, this has now become standard practice. The practice is known to the courts of the Australian judiciary hierarchy and by the counsel who appear before them. Deriving ideas and analogies from other jurisdictions is now a commonplace34. So is the citation of academic opinion (although not without some rear guard resistance in certain quarters35).

Fleming cannot be credited as the sole progenitor of this enlargement of the source materials for the development of legal principle in Australia. As I have said, his arrival in Canberra coincided with the first moves which were afoot towards total legal independence. These did not really gather momentum until the decade after he had left Australia. It was not until 1963 that the High Court of Australia felt itself able expressly to reject a holding of the House of Lords on a matter of basic common law principle36. In 1968 the separate development of Australian law, and specifically of Australian torts law, was explained by Chief Justice Barwick in Mutual Life and Citizens Assurance Co Ltd v Evatt37:

"The Court's task ... is to declare the common law in this respect for Australia. There are indicative decisions in the courts of England; these are to be regarded and respected. With the aid of these and of any decisions of courts of other countries which follow the common law and of its understanding of the common law, its history and its developments, the Court's task is to express what is the law on this subject as appropriate to current times in Australia. This will not necessarily be identical with the common law of England ... though it will always

be preferable if substantial divergence between the two can be avoided ... [W]here no authority binds or current of acceptable decision compels, it is not enough, or indeed apposite, to say that the function of the Court in general is to declare what the law is and not to decide what it ought to be."

Complete intellectual freedom was not secured until the successive abolition of appeals from the High Court itself38 and from other Australian courts39 to the Privy Council in London. But Fleming's eclectic approach to legal ideas, and his willingness to draw upon a wide variety of common law (and civil law) source materials made his writings, and particularly The Law of Torts at once a reflection of the growing legal nationalism of courts in Australia and a stimulus to the process which the larger forces of history had set in train.

During my service as an appellate judge (and indeed before, in my work in institutional law reform) I have seen an enormous change come over the attitude of the Australian judiciary and legal profession to legal ideas originating outside England. I say this without a hint of Anglophobia. I agree with Justice Huntley that our link to the English law saved antipodean lawyers from provincialism and mediocrity40. But now we have a wider source for legal concepts. It is stimulated by the demands of the highest courts of the common law countries themselves. In this, these courts are merely responding to the dynamic of globalism which derives from technological and economic developments affecting the world more generally. Sir Anthony Mason was clearly right in his observation41:

"The emerging trend towards a convergence of different national versions of the common law is in part referable to the regard paid by courts and legislatures to solutions to legal problems operating elsewhere in the world. Comparative law was once considered the province of academics. But now it is important that the focus of practitioners also should extend beyond the domestic boundaries and embrace an awareness of developments in other legal systems."

Sir Anthony Mason noted how many academic lawyers had "deserted the groves of Academe for the topless towers of the Central Business District"42. Fleming never made that move. His consistent theme as an academic comparatavist stimulated and contributed to the rise and rise of comparative law in the courts. It is interesting to observe how the movement has even now caught up the English courts, and specifically the House of Lords43. Sometimes their Lordships have been led to an acceptance of errors in their own reasoning by a consideration of authority from elsewhere in the common law, including Australia44. It is futile to speculate on what might have happened to the Privy Council and to institutional links if a similar open-mindedness and sharing of the judicial treasure, had been adopted in Whitehall in the years immediately after the Second World War. But at that time, when Fleming migrated to Australia, the mood was not right for a two-way street. It is not too much to say that it is scholars like Fleming and the lawyers whom they have influenced, who have, belatedly, widened the source material of the global common law and enhanced the role of comparative law analysis within it.

# Torts Tomorrow - A tribute to John Fleming. Comparativism, Realism and the Economic Factor - Fleming`s Legacies

**Justice Kirby Collection**

FLEMING THE REALIST

In the preface of the first edition of The Law of Torts, John Fleming set out to undertake45:

"an altogether fresh approach, both in point of substance and arrangement, with a view to presenting as realistic a description of the modern, mid-20th century operation of tort law as seems to be both possible and desirable in the interests of practitioner and student alike".

It was with this object in mind that Fleming paid particular attention to practical aspects of the operation of tort law such as the assessment of damages, the gradual shift towards statutory no fault compensation schemes and the impact of insurance. When setting out to write his magnum opus, Fleming's intention was46:

"To bridge the gulf which all too frequently exists between 'law in books' and 'law in actual operation'".

At the time of Fleming's arrival in Australia, this theme of realism must have seemed somewhat disharmonious to most legal scholars (although not to Julius Stone). These were the years of the declaratory theory of the judicial function and the thesis that "the Law" already existed in the books and had only to be found by a process of logical deduction of a semi-mechanical kind. It is clear that Fleming had little patience with this unrealistic doctrine, soon to be denounced by Lord Reid as a "fairytale"47. In the very first year after his arrival in Australia, he was writing in the Australian Law Journal an article tellingly headed "Substance and Procedure"48. Taking to task the House of Lords for its then recent decision in Hill v William Hill (Park Lane) Ltd49, he did not pull his punches in describing the case of Leroux v Brown50, there referred to, as "deplorable and much criticised"51. The article takes a passing shot at the great A V Dicey's book on Conflict of Laws, whose writ was then largely unquestioned throughout the Empire. Fleming described the new edition of that book as an "unfortunate legacy" which should have been "courageously abandoned". At the age of 31, Fleming rejected supine intellectual orthodoxy52.

To like effect was an article published as "A challenge to judicial technique"53 two years later. It concerned the action per quod servitium amisit. It followed the decision of the High Court of Australia in Attorney-General for New South Wales v Perpetual Trustee Co Ltd54. At that early stage in his study of Australian law, Fleming expressed, succinctly, an appeal to realism55:

"[T]he traditional devotion to precedent must be attenuated in order to permit legal rules to develop in correspondence with the changing attitudes of the community. It would be a matter for regret if a final authoritative pronouncement, at this stage in particular, should be interpreted as limiting or foreclosing the area for future experiments through judicial process".

# Torts Tomorrow - A tribute to John Fleming. Comparativism, Realism and the Economic Factor - Fleming`s Legacies

**Justice Kirby Collection**

Realism - legal realism - became one of the hallmarks of Fleming's writing. This was recognised by colleagues and commentators alike56:

"Professor Fleming's clear exposition of the substantive law is consistently inter-laced with comments or rhetorical questions concerning the balancing of competing interests and the social ends the law of torts are meant to serve. As he himself says, one cannot understand, let alone apply, a rule of law unless one understands the reason behind it".

Of his other important work The American Tort Process, the distinguished English jurist, Norman Marsh said57:

"[He] looked beyond the formal features of United States tort law to its interaction with the legal institutions, constitutional framework and professional practises which surround it".

Fleming thought that it was only by realism that lawyers could "assess ... their impact on the application and development of substantive doctrine"58. He denied that law was "occult, arcane [or] oracular"59 believing, rather, that it was directed to the resolution of social conflicts. He declared himself to be "more concerned with the effect of the operation of legal rules, with their aims and reasons, than with mechanistic problems of internal consistency of decisions within the framework of any given system of precedent"60. This recognition of the way law operates in society, and of the influence of policy and principle on the law's development, has had a marked effect on common law jurisprudence. Although his chosen discipline of the law of torts was a specially fertile field for a legal realist, Fleming's teaching was highly influential, with an impact going far beyond his chosen speciality.

It is because of legal writers such as Fleming, and the influence their insights have had upon generations of students who became the advocates and judges of the common law, that the fairytale of the declaratory theory of the judicial function has now at last been reverently laid to rest. The judiciary throughout the common law world has, in my view, responded to the "challenge to judicial technique" of which Fleming wrote in 1952. In saying this, I do not pretend that we have yet been able to substitute an entirely satisfactory doctrine to chart the limits of judicial inventiveness so as to escape the castigation of the critics of judicial "activism"61. Fleming's death is a serious loss of an enlightened scholar. It has occurred at a time when criticism of judicial technique has become a universal phenomenon as a result of the adoption by judges of the candour and realism which Fleming, with others, urged upon us62.

FLEMING AND THE ECONOMIC FACTOR

In 1992, in that favourite haunt of his the Law Quarterly Review63, Fleming commented on a decision in which I took part in the New South Wales Court of Appeal: Cekan v Haines64. In that decision65 I lamented "the failure of the common law to develop more than a general notion of the economic consequences of asserting the requirements of reasonable care". I described this as "one of the chief defects in the law of negligence as it has developed".

The case concerned damage to an intoxicated prisoner who had injured himself in a fall in a police cell. The question was whether the State was negligent in failing to alter the physical arrangements of the prison or the disposition of police personnel so as to allow continuous, or appropriately intermittent, surveillance of such prisoners. The Court of Appeal unanimously rejected the claim. In my opinion, I referred to countervailing considerations such as the respect of the legitimate privacy and other rights of prisoners66; the costs of implementing the regimes posited67; the marginal utility of surveillance as a means of preventing deliberate self-injury by prisoners68 and the experience in other similar countries69 as setting the desirable standard for Australia.

In his comments on the case, Fleming noted the early judicial attempts in the United States to formulate, in algebraic terms, the ratio between the probability of injury and the cost of prevention70. Such attempts concluded that the law demanded no more than cost justified precautions against accidents. Fleming recognised the difficulty of calculating the probability of risk with accuracy. But he correctly observed that, in medical negligence cases, statistical evidence would often be available71. He mentioned the less than wholly satisfactory distinction between "policy" and "operational" decisions of public authorities as a criterion for court intrusions into their expenditure of funds in accident prevention72. He recognised, as did the New South Wales Court of Appeal in Cekan, that decisions by courts in a particular case would necessarily have economic implications (possibly substantial) for the budgetary decisions of public authorities more generally73. Whilst not questioning the outcome of Cekan's case, he commented, with his customary sharpness74:

"It must ... remain a matter of concern reflected in current widespread agitation for prison reform that the courts on their part can do nothing to encourage the modernisation of antiquated facilities".

Fleming never lost sight of the role of the law, specifically of the law of torts, in setting society's standards and spreading risks in a morally acceptable way. Loss spreading was, from the start, one of the practical themes which his academic writing brought home to judges and practising lawyers. In An Introduction to the Law of Torts75 he wrote:

"This change of emphasis from loss-shifting to the loss-spreading function of tort law is bound to modify much of the conventional thought concerning the so-called attribution of legal responsibility".

This candid acknowledgment of the economic function of tort law clearly has consequences for the methodology of resolving borderline problems. The growth of the law and economics movement has not yet peaked76. The writings of Professor (now Chief Judge) Richard Posner77 continue to stimulate judicial and legal thinking in Australia78, in the United States79 and elsewhere. My early judicial adventures on this topic in the Court of Appeal80 are now continuing in the High Court of Australia. One of the considerations which led me to hold back from imposing a duty of care on the landlord in Harris81 was an economic one. To

the argument that the exceptional "special duties" of care should be expanded to the relationship of landlord and tenant, I accepted that some arguments favoured that course82:

"Imposing a non-delegable duty on landlords would help to encourage high standards of care in the provision of rented premises, the choice of reliable contractors to inspect regularly the safety of the premises and speedy attention to complaints about faults having a potential to cause harm. [It] would also fix the obligations on a readily identifiable person, being the person with the ultimate control of the premises and their safety. It would acknowledge that, for some activities, such as electrical repair, the landlord would of necessity be obliged to rely on contractors. But it would protect tenants as a generally vulnerable group from inadequate or negligent performance by contractors of their duties. Although there is a need for low-cost housing, the law should not condone the provision of such premises in an unsafe state. The commercial and contractual nature of the relationship should give rise, where necessary, to an obligation upon the landlord to carry the loss rather than to impose such a burden upon the more vulnerable tenant and the tenant's family and visitors".

In holding back from acceding to the argument, I went beyond an analysis of the presently established categories83:

"The result would still be the introduction of a new burden on landlords which, on legal authority accepted until the recent past, they would not reasonably have anticipated. Such a burden would necessarily have a retrospective operation. Given the wide range of persons who constitute landlords of the proposed class, it could be anticipated that some would not be insured. Even those insured might find their cover limited to established liability. ... This Court has no way of estimating the economic consequences of inventing a new category of 'special' duty. Nevertheless such consequences would clearly include the potential costs of imposing new duties of inspection; of withdrawing some low cost accommodation from the market; and of obtaining liability insurance to meet the relatively rare case that the insurance of a qualified contractor, engaged by the landlord, proved insufficient for the peculiar risk in a particular case".

The realistic approach to the ever-expanding duties imposed by the law of negligence requires an understanding by the courts of the algebraic formula to which Fleming made reference. It is part of the realism which he introduced into his treatment of the subject. This fact helps to explain why, in cases at the borderline, judges everywhere, including in the High Court of Australia, are referring to the cost, insurance and other implications of their decisions. They do so although the evidence rarely (or never) permits them anything approaching an accurate assessment84. Just as other law makers would not dream of now performing their functions in disregard of the economic factor, so courts in their function of declaring, clarifying and extending legal principle must take seriously the economic consequences of what they are doing.

Fleming illuminated this issue and deepened our understanding of it. He never missed a copy of The Economist85. He was interested in economics, as in all things practical. It is another tragedy of his death that it has taken from us a most insightful teacher whose guidance on this theme was much needed.

A GARLAND OF RESPECT

In late years I often corresponded with John Fleming. He never lost a fascination for Australia, its people and its laws. When he returned to Australia, I would arrange a luncheon with judicial colleagues so that he could be celebrated by them. We all recognised his impact on our law of torts and on our way of thinking. His influence on the decisions of the High Court of Australia and of the other appellate courts in this part of the world has been immeasurable. It will continue. I have tried to identify three reasons. Each is important to the future of the law of torts. Fleming was a comparativist. He was a realist. He recognised the social and economic implications of tort decisions.

It was good to see him celebrated by the senior judges of Australia. It is right that these essays should be written to the honour of his memory. But where was the Australian civil honour for him? Where was the garland of honorary degrees that such an influential scholar deserved? As usual, Australia waited until his passing to recognise the man who contributed so much to its intellectual life.

TORTS TOMORROW - A TRIBUTE TO JOHN FLEMING

COMPARATIVISM, REALISM AND THE ECONOMIC FACTOR -

FLEMING'S LEGACIES


The Hon Justice M D Kirby AC CMG



* I am indebted to Mr James Stellios, Senior Research Officer of the High Court of Australia, for materials and suggestions for this chapter.


** Justice of the High Court of Australia. One-time President of the New South Wales Court of Appeal and Chairman of the Australian Law Reform Commission.

1 R Kipling, "A School Song" in Prelude to "Stalky & Co." (Macmillan, London, 1899).
2 See M D Kirby, "Julius Stone - An Intellectual Life by Leonie Star" [Book Review] (1993) 67 ALJ 74.
3 Hunter v Canary Wharf Ltd [1997] AC 655 at 717.
4 P Heffey, "The Law of Torts (6th ed)" [Book Review] (1983) 57 Law Institute Journal (Vic) 724.
5 A Grubb, "The Law of Torts (7th ed)" [Book Review] (1988) 104 LQR 650 at 651.
6 Ibid at 651.
7 C Willett, "The Law of Torts (7th ed)" [Book Review] (1988) 22 Law Teacher 143 at 144.
8 R A Sundberg, "The Law of Torts (7th ed)" [Book Review] (1988) 62 ALJ 184 and "The Law of Torts (6th ed)" (1983) 57 ALJ 369.

9 M A Vennell, "The Law of Torts (6th ed)" [Book Review] (1983) 10 NZULR 406 at 408.
10 T Dugdale, "An Introduction to the Law of Torts (2nd ed)" [Book Review] (1986) 136 New LJ 855.
11 (1966) 120 CLR 145.
12 J G Fleming, The Law of Torts (4th ed, The Law Book Co Ltd, Sydney, 1971), p 615.
13 J G Fleming, The Law of Torts (8th ed, The Law Book Co Ltd, Sydney, 1992), p 702.
14 (1995) 185 CLR 307.
15 Ibid at 338.
16 (1994) 179 CLR 520 at 545.
17 See eg Australian Safeways Stores Pty Ltd v Zaluzna (1987) 162 CLR 479; Gala v Preston (1991) 172 CLR 243 at 252-253; cf Papantonakis v Australian Telecommunications Commission (1985) 156 CLR 7 and Romeo v Conservation Commission of the Northern Territory [1998] HCA 5 at 114-115.
18 (1866) LR 1 Ex 265 at 279-280; affd (1868) LR 3 HL 330. The comment by Professor Fleming in The Law of Torts (8th ed, The Law Book Co Ltd, Sydney, 1992), p 343 is cited in Burnie Port Authority v General Jones Pty Ltd (1994) 179 CLR at 545.
19 (1994) 179 CLR 520.
20 J G Fleming, The Law of Torts (1st ed, The Law Book Co Ltd, Sydney, 1957), p 325.
21 (1997) 188 CLR 313.
22 Ibid at 392.
23 J G Fleming, The Law of Torts (8th ed, The Law Book Co Ltd, Sydney, 1992), p 389.
24 Kars v Kars (1996) 187 CLR 354 at 376.
25 J G Fleming, "Damages Against the Helpful Tortfeasor" (1992) 66 ALJ 388 at 389.
26 Dawson J reached his conclusion without reference to insurance. See Kars v Kars (1996) 187 CLR 354 at 357-364; cf H Luntz, "Damages for Voluntary Services Provided by a Tortfeasor" (1997) 113 LQR 201 and S E Degeling "Kars v Kars: Balancing the Interests of Victims and Carers" (1997) 71 ALJ 882.
27 For recent examples see Mann v O'Neill (1997) 145 ALR 682 at 693 per McHugh J, at 722 per Kirby J; Hill v Van Erp (1997) 188 CLR 159 at 179-180 per Dawson J; Nominal Defendant v Gardikiotis (1996) 186 CLR 49 at 68 per Gummow J.
28 Oceanic Sun Line Special Shipping Co Inc v Fay (1988) 165 CLR 197 at 252 per Deane J.
29 A Linden quoted in S Sugarman, obituary, The Australian, 24 October 1997 at 17. For an important example of the use of Fleming's writing in Canada, see the decision of the Supreme Court of Canada in Farrell v Snell [1990] 2 SCR 311 at 317; (1990) 72 DLR (4th) 289 at 294 where Sopinka J, writing for the Court, relies on, and applies, the conclusions "admirably surveyed" in J G Fleming "Probabilistic Causation in Tort Law" (1989) 68 Can Bar Rev 661.
30 S Sugarman, obituary, The Australian, 24 October 1997 at 17.
31 J G Fleming, The Law of Torts (1st ed, The Law Book Co Ltd, Sydney, 1957), p iii.
32 J G Fleming, The Law of Torts (3rd ed, The Law Book Co Ltd, Sydney, 1965), p vi.
33 J G Fleming, The Law of Torts (1st ed, The Law Book Co Ltd, Sydney, 1957), p iv. In his writings outside The Law of Torts, Fleming frequently sampled ideas from other jurisdictions.

See for example, "Property Damage or Economic Loss" (1996) 4 Tort L Rev 177; "Tort in a Contractual Matrix" (1995) 3 Tort L Rev 12; "Once More, Tort Liability for Structural Defects" (1995) 111 LQR 362; "Assumption of Risk - California Style" (1993) 1 Tort L Rev 93; "Employee's Tort in a Contractual Matrix: New Approaches in Canada" (1993) 13 Oxford J Legal Stud 430; "Probabilistic Causation in Tort Law: A Postscript" (1991) 70 Can Bar Rev 136; "Is Wrongful Dismissal a Tort?" (1990) 106 LQR 8; "Mass Torts" [1988] Denning LJ 37; "Is There a Future for Tort?" (1984) 58 ALJ 131 and "The Impact of Inflation on Tort Compensation" 26 Am J Comp L 51 (1978).

34 English judges are also resorting more frequently to comparative law. See B S Karkesinis and N Nolte, "Some Comparative Reflections on the Right of Privacy of Public Figures in Public Places" in P Birks (ed) Privacy and Loyalty, (Clarendon Press, Oxford, 1997), p 113. For a remarkable example of the use of comparative law in Canada, see the opinion of Gonthier J in LaferriÏre v Lawson [1991] 1 SCR 541 where the French and Belgian law on loss of a chance are carefully analysed with due warning of the dangers in comparative analysis of mistaking foreign law for lack of full information or understanding.

35 See Hunter v Canary Wharf Ltd [1997] AC 655 at 694 where Lord Goff of Chieveley criticised the use of academic writings by Lord Cooke of Thorndon; cf D Cane, "What a Nuisance!" (1997) 113 LQR 515 at 518-519.

36 Parker v The Commonwealth (1963) 111 CLR 610 at 632-633 where the Court declined to follow Director of Public Prosecutions v Smith [1961] AC 290 (HL).

37 (1968) 122 CLR 556 at 563.

38 Privy Council (Appeals from the High Court) Act 1975 (Cth). The appeals provided by s 74 of the Australian Constitution remain but these are a dead letter. See Kirmani v Captain Cook Cruises Pty Ltd [No 2] (1985) 159 CLR 461.

39 Australia (Request and Consent) Act 1985 (Cth); Australia Act 1986 (Cth) s 11; Australia Acts (Request) Acts 1985 enacted by each State

40 F C Hutley, "The Legal Traditions of Australia as Contrasted to Those of the United States" (1991) 55 ALJ 63 at 69.

41 A F Mason, "Changing Law in a Changing Society" (1993) 67 ALJ 568 at 574.

42 Ibid.

43 Lord Oliver of Aylmerton, "Requiem for the Common Law?" (1993) 67 ALJ 675 at 685.

44 As when Anns v Merton London Borough Council [1978] AC 728 was over-ruled in Caparo Industries Plc v Dickman [1990] 2 AC 605 at 617-618. For recent discussion see Pyrenees Shire Council v Day [1998] HCA 3 at 247 and Romeo v Conservation Commission of the Northern Territory [1998] HCA 5 at 118-119. In Caparo the House of Lords followed Sutherland Shire Council v Heyman (1985) 157 CLR 424.

45 J G Fleming, The Law of Torts (1st ed, The Law Book Co Ltd, Sydney, 1957),p iii.

46 Ibid.

47 Lord Reid, "The Judge as Lawmaker" (1972) 12 Journal of the Society of Public Teachers of Law 22 at 25.

48 (1950) 23 ALJ 487.

49 [1949] AC 530 at 578.
50 (1852) 12 CB 801.
51 Fleming, op cit n 48, at 487.
52 W Cook, Logical and Legal Bases of the Conflict of Laws (Harvard University Press, Cambridge, 1949), p 167.
53 (1952) 26 ALJ 122.
54 (1952) 85 CLR 237.
55 Fleming, op cit n53, at 129.
56 "The Law of Torts (6th ed)" [Book Review] (1983) 4 Auck U L Rev 430 at 432.
57 N S Marsh, "The American Tort Process: A Review Article" (1989) 38 International and Comparative Law Quarterly 636 at 647-648.
58 J G Fleming, The American Tort Process (Clarendon Press, Oxford, 1988),pp v-vi.
59 J G Fleming, The Law of Torts (3rd ed, The Law Book Co Ltd, Sydney, 1965),p v.
60 Ibid at vi.
61 M D Kirby, "Judicial Activism" (1997) 27 UWAL Rev 1 at 14ff; see also M D Kirby, "Attacks on Judges - A Universal Phenomenon", address to the American Bar Association, Maui, 5 January 1998 in ABA Judicature, forthcoming.
62 Sometimes the Court's realism went further than Fleming himself envisaged. See eg Kars v Kars (1996) 187 CLR 354 at 376 where the majority opinion (Toohey, McHugh, Gummow and Kirby JJ) went beyond Fleming's opinion expressed in criticism of Lynch v Lynch (1991) 25 NSWLR 411. See J G Fleming, "Damages Against the Helpful Tortfeasor" (1992) 66 ALJ 388; cf H Luntz, "Damages for Voluntary Services Provided by a Tortfeasor" (1997) 113 LQR 201.
63 J G Fleming, "The Economic Factor in Negligence" (1992) 108 LQR 9.
64 (1990) 21 NSWLR 296.
65 Ibid at 307.
66 Ibid at 305.
67 Ibid at 306-307.
68 Ibid at 307-308.
69 Ibid at 309-310.
70 United States v Carroll Towing Co 159 F 2d 169 at 173 (1947) per Learned Hand J. Fleming, whilst conceding that cost benefit analysis was inherent in the determination of negligence questions rejected the notion that negligence could be reduced to a purely economic notion. The reasonable person was "by no means a caricature cold-blooded, calculating Economic Man". See The Law of Torts, (7th ed, The Law Book Co Ltd, Sydney, 1987),pp 108-109.
71 Hotson v East Birkshire Area Health Authority [1987] AC 750 was referred to. See also Rogers v Whitaker (1992) 175 CLR 479. Evidence was given at the trial that the condition occurred "once in approximately 14,000 such procedures". See ibid at 482; cf Chappell v Hart noted E Milstein, "Causation in Medical Negligence - Recent Developments" (1997) 6 Aust Health Law Bulletin 21.
72 Sutherland Shire Council v Heyman (1985) 157 CLR 424 at 469. See also discussion in Romeo v Conservation Commission of the Northern Territory [1998] HCA 5 at 139-141; Just v

British Columbia (1989) 64 DLR (4th) 689 at 696, 708.
73 J G Fleming, "The Economic Factor in Negligence" (1992) 108 LQR 9 at 12. See also Stovin v Wise [1996] AC 923 at 933f, 954f. There is further discussion in Pyrenees Shire Council v Day [1998] HCA 3 at 247.
74 108 LQR 9 at 12.
75 J G Fleming, An Introduction to the Law of Torts (2nd ed, Clarendon Press, Oxford, 1985), p 8.
76 J A Hay, "The Past, Present and Future of Law and Economics" (1996) 3 Agenda No 1, 72; A F Mason, "Law and Economics" (1991) 17 Mon L R 167. But cf R A Epstein, "Law and Economics - Its Glorious Past and Cloudy Future" (1997) 64 University of Chicago Law Review 1167.
77 R A Posner, Economic Analysis of Law (3rd ed, Little, Brown and Co., Boston, 1986). See also R A Posner, "A Theory of Negligence" (1972) 1 Journal of Legal Studies 29.
78 M D Kirby, "Law and Economics. Is There Hope?" in M Richardson and G Hadfield (eds), The Second Wave of Law and Economics, 1988, The Federation Press, Sydney (forthcoming).
79 G Calabresi, The Costs of Accidents: Legal and Economic Analysis (Yale University Press, New Haven, 1970), pp 17-20; J J Donohue and I Ayres, "Posner's Symphony No 3: Thinking about the Unthinkable" (1987) 39 Stan L Rev 791; R C Ellickson, "Symposium on Post-Chicago Law and Economics" (1989) 65 Chicago-Kent Law Review 23.
80 See eg Johns v Release on Licence Board (1987) 9 NSWLR 103 at 113; Breen v Williams (1994) 35 NSWLR 522 at 546-549; Canellis v Slattery (1994) 33 NSWLR 104; CES v Superclinics (Australia) Pty Ltd (1995) 38 NSWLR 47 at 72-74.
81 (1997) 188 CLR 313.
82 Ibid at 398.
83 Ibid at 402.
84 See eg Pyrenees Shire Council v Day [1998] HCA 3 and Romeo v Conservation Commission of the Northern Territory [1998] HCA 5.
85 D Smith, "Obituary of Professor Fleming" (1997) 71 ALJ 1004 at 1005.
??

Footnote continues

3.