(2020) 48 *Australian Bar Review* 243-248

Book Review

A History of Australian Tort Law 1901–1945: England's Obedient Servant? by Mark Lunney (Cambridge University Press, 2018) 308 pp, ISBN 978-1-108-42331-1.

> Popular history has Churchill declaring that 'History will be kind to me, for I intend to write it'. That appears to be apocryphal, a misquotation, but no-one really cares — it is difficult to dislodge popular history, especially when it is so straightforward.[1]

Quibbles from Churchill enthusiasts aside,[2] Mark Aronson's characteristically insightful observation about the difficulty of dislodging plausible popular history aptly introduces a review of Mark Lunney's most recent book, *A History of Australian Tort Law 1901–1945: England's Obedient Servant?* The subtitle reflects Lunney's main thesis, which is that tort law as applied in Australia in the first half of the 20th century diverged from English law.

The idea that Australian tort law was indistinguishable from that of England and Wales seems natural when appeals lay as of right to the Privy Council.[3] After all, that was a less elastic appellate structure than the modern appeal by way of special leave to the High Court, from which derives the notion of a 'single common law' of Australia. The idea of uniformity in the first half of the 20th century is reinforced by standard undergraduate fare such as Dixon CJ's refusal to adhere to pronouncements of the House of Lords in *Parker v The Queen*,[4] followed by the cessation of Privy Council appeals and the enactment of the *Australia Act 1986* (Cth). There was also the absence of Australian texts. The period covered by Lunney's book predated Fleming's pioneering *Law of Torts*,[5] while those works that existed (notably, Salmond)[6] disguised any colonial or dominion divergence.[7] No doubt there

1 Mark Aronson, 'Retreating to the History of Judicial Review?' (2019) 47(2) *Federal Law Review* 179, 183.

2 Aronson notes that Churchill's 1948 statement to the House of Commons, a week before despatching the final corrections to the first volume of his history of the Second World War, was in slightly different form: *Parliamentary Debates*, House of Commons, 23 January 1948, vol 446, col 557. But there are numerous memoirs to similar effect (see HL Stewart, *Sir Winston Churchill — As Writer and Speaker* (Sidgwick and Jackson, 1954) 102), and even if recollections are unreliable, there is no doubting the force of a draft cable to Stalin dated 31 January 1944 (PREM 3/396/11 f 320): 'I agree we had better leave the past to history but remember if I live long enough I may be one of the historians'. See David Reynolds, *In Command of History: Churchill Fighting and Writing the Second World War* (Allen Lane, 2004) 38, 90, 545.

3 See *David Syme & Co Ltd v Lloyd* (1985) 1 NSWLR 416, 425, 428, railing against the misnomer of appeals by way of 'leave'.

4 (1963) 111 CLR 610, 632–3. The High Court's astonishing defiance of the Privy Council's decision in *Webb v Outrim* [1907] AC 81 — an appeal from the Supreme Court of Victoria — in *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087 is often overlooked.

5 First edition: JG Fleming, *The Law of Torts* (Lawbook, 1957). Fleming spent the first 15 years of his life in Germany, but much of his work on the first edition of his book was done in Canberra. See Mark Lunney, 'Legal Émigrés and the Development of Australian Tort Law' (2012) 36(2) *Melbourne University Law Review* 494; and Peter Cane, 'Fleming on Torts: A Short Intellectual History' (1998) 6(3) *Torts Law Journal* 216, describing his book as 'truly international' (at 217), which is entirely fair, but the coverage included a distinctively Australian law of torts.

6 Salmond's 1907 *Law of Torts* was written during and immediately after his term as Professor at the

is a measure of truth in the uniformity of the common law; after all, English law was received in Australia, and the English and Irish influx of lawyers in the 19th century led to something more remarkable: the mirroring of pre-Judicature separate jurisdictions and procedure in the colonial supreme courts.[8] Yet Lunney contends that the law as applied in Australia contained understated and under-appreciated elements of dynamism and innovation. He demonstrates that decades before a 'single common law of Australia' was conceived, and notwithstanding s 80 of the *Judiciary Act 1903* (Cth) requiring courts exercising federal jurisdiction to apply the 'common law of England', Australian courts and legislatures were altering the law of tort in order to suit local conditions.

Legal history may be presented in many ways. Once it was fashionable to write short lives of the holders of high judicial office.[9] John Bennett's sustained efforts have taken this tradition to an entirely different level, not to be found in any other Commonwealth country.[10] This modern form lends itself to a contextualised description of legal development.[11] Other writers whose work focuses on a single area of law have thereby illuminated much of the surrounding social and political history.[12] Another approach looks to intellectual history and the place of academic work. Recent work (to which Lunney has contributed) has focused upon the under-appreciated contribution — which is inadequately measured by citation statistics — of academic writing in tort law.[13]

Lunney's book takes a different approach again. Lunney's thesis is developed by a

---

University of Adelaide (John W Salmond, *The Law of Torts: A Treatise on the English Law of Liability for Civil Injuries* (Stevens and Haynes, 1907)). It is said that the book was printed in New Zealand, though published by Stevens and Haynes in London: RFV Heuston, 'Sir John Salmond' (1963) 2(1–3) *Adelaide Law Review* 220, 222.

7 One reviewer noted that 'it comes to us as an English law-book from the other side of the world' and criticised the absence of New Zealand decisions, 'some of which at least, might with advantage have been noticed": T Beven, 'Law of Torts (1907)' (1908) 24 *Law Quarterly Review* 84, cited in Lunney's essay on Salmond in James Goudkamp and Donal Nolan (eds), *Scholars of Tort Law* (Hart Publishing, 2019) 128.

8 See Mark Leeming, 'Fusion–Fission–Fusion: Pre-Judicature Equity Jurisdiction in New South Wales, 1824–1972' in John CP Goldberg, Henry E Smith and PG Turner (eds), *Equity and Law: Fusion and Fission* (Cambridge University Press, 2019) 118. For the influx of Irish lawyers, admitted pursuant to cl 10 of the *Charter of Justice*, see John Kennedy McLaughlin, 'The Immigration of Irish Lawyers to Australia in the Nineteenth Century: Causes and Consequences' (PhD Thesis, Monash University, 2019) chs 3–4, especially 108–18.

9 Lord Campbell's *The Lives of the Lord Chancellors and Keepers of the Great Seal of England* (John Murray, 1846) and *The Lives of the Chief Justices of England* (Lea and Blanchard, 1851) arguably represent the low-point of this tradition (adding 'a new sting to death' — see the review of Sir Theodore Martin's *A Life of Lord Lyndhurst* in *The Athenaeum* (22 December 1883) 807); far more insight is obtained from CHS Fifoot's slender *Judge and Jurist in the Reign of Victoria* (Stevens and Sons, 1959). The successor volumes to Campbell and Atlay's *The Victorian Chancellors* (Smith, Elder, 1906), RFV Heuston's two volumes *Lives of the Lord Chancellors 1885–1940* (Clarendon Press, 1964) and *Lives of the Lord Chancellors 1940–1970* (Oxford University Press, 1987) are in an entirely different category.

10 Contrast the position described in Philip Girard, 'Judging Lives: Judicial Biography From Hale To Holmes' (2003) 7(1) *Australian Journal of Legal History* 87, writing at almost precisely the time Bennett commenced his biographical works.

11 See, eg, Gerald Gunther, *Learned Hand: The Man and the Judge* (Oxford University Press, 2nd ed, 2011); and Philip Ayres, *Owen Dixon* (Melbourne University Press, 2007).

12 See by way of example Joshua Getzler, *A History of Water Rights at Common Law* (Oxford University Press, 2004); RW Kostal, *Law and English Railway Capitalism 1825–1875* (Clarendon Press, 1994); and Chantal Stebbings, *Legal Foundations of Tribunals in Nineteenth-Century England* (Cambridge University Press, 2009).

13 Goudkamp and Nolan (n 7). See also Neil Duxbury, *Frederick Pollock and the English Juristic Tradition* (Oxford University Press, 2004).

series of thematic chapters, each of which attends to particular decisions (and in some cases, local legislative developments). There are two chapters on defamation, three on negligence (liability for acts of third parties, nervous shock and highway authorities), and three on tortious conduct (concerning the military, the spreading of fire and noxious weeds, and dangerous recreational activities). Those topics are far from having been chosen randomly, and they represent areas in which the law continues to develop. The selective approach enables a nuanced, detailed account to be given, powerfully illustrating Lunney's theme. This is Braudelian history, replete with colourful details, including the attempts to draw a military analogy, for the purposes of the law of defamation, with the police in New South Wales during Lang's tempestuous premiership, and the numerous companies founded by AJ Hunting, the leading promoter of speedway racing, amongst many other commercial interests.

An initial chapter on historiography sets the scene. I am unaware of any more readable account of the conception of Australian law and Australian identity in the first half of the twentieth century. Law mirrors life; Lunney sheds insights on the nuanced reality that combined the pride of a new nation with a shared sense of a greater identity within the British Empire and Commonwealth. How the conflicting attitudes of nationalism and shared colonial heritage played out in a half century dominated by global war is, after all, a much more interesting question than the definition-begging inquiry of when the Commonwealth of Australia became a 'nation'.[14] The theme underlies some of Dixon's judgments and diplomatic work, which included convincing United States opinion that Australia — whose soldiers fought in the 'Australian Imperial Force' — had its own identity, separate from Britain, which was worth protecting.[15]

I think Lunney makes out a powerful case for his thesis. The details are too long for this review; readers may decide for themselves, although Griffith emerges as an important early innovator, emphasising the Australian context when developing common law rules.[16] But irrespective of one's acceptance of the book's main claim, the following points may be made.

First and foremost, the book is eminently readable. The coverage is steeped in contemporary materials, especially newspaper reports. It perfectly fits Cambridge University Press' 'Law in Context' series, a series started according to one of its founding editors because George Weidenfeld was told that 'the law publishing scene was so dull and unadventurous that he could hardly fail to make a difference'.[17] Though it may be unfashionable in some circles to say so, law is influenced by and influences the society and culture within which it operates. Lunney's account is immersed in political and social history.

Secondly, the time frame is well chosen. The law of tort(s) was in a state of flux between 1900 and 1945.[18] The systematisations of Pollock and Salmond were in contest. Even if the imperial march of the modern law of negligence had started (*Donoghue v*

14 Commentators variously suggest 1900 (Federation and Dominion status), 1919 (*Treaty of Versailles*), 1926 (Balfour Declaration), 1939 (enactment of *Statute of Westminster*), and 1942 (adoption of *Statute of Westminster*), 1986 (*Australia Act*).

15 Dixon's war diaries, presently unpublished, will shed light on this aspect of the man.

16 See, eg, *Miller v McKeon* (1905) 3 CLR 50 on government liability for highways, discussed at 149–52; and *Sparke v Osborne* (1908) 7 CLR 51 on occupiers' liability for spread of prickly pear, discussed at 213–33.

17 See William Twining, *Jurist in Context: A Memoir* (Cambridge University Press, 2019) 91.

18 See Paul Mitchell, *A History of Tort Law 1900–1950* (Cambridge University Press, 2015) ch 2 for the tort-or-torts controversy.

Stevenson[19] arrived in the 3rd decade), there were many sceptics, not least Dixon.[20] And the documentary materials available to be drawn on are rich. Lunney's work takes advantage of the easy availability of digitalised newspaper sources, including on counsel's submissions and jury directions. Indeed, the book has pictures. Newspaper coverage of the immediate aftermath of the balcony collapse on Bourke St in Melbourne *Hoyt's Pty Ltd v O'Connor*[21] and the flooded trench in Allens Parade in Bondi Junction in Sydney which gave rise to *Chester v Council of the Municipality of Waverley*[22] are eerily evocative. So too is the reportage of the early 'speedway' cases (anticipating what are now addressed by the civil liability legislation as 'dangerous recreational activities').[23] The work also shines from an engagement with primary judicial documents, including Isaac Isaacs' notebooks in the National Library of Australia.[24]

Local legislation is not neglected. The description of the political efforts of Abram Landa which led to the *Law Reform (Miscellaneous Provisions) Act 1944* (NSW) permitting claims for nervous shock — a subject of prime importance in the 21st century[25] — is one of the best available.[26] Another is the *Defamation (Amendment) Act 1909* (NSW), promptly reinstating the position established by the High Court in relation to an organisation's publication of a confidential report to a subscriber, shortly after the Privy Council had allowed an appeal and criticised the High Court's use of United States authorities.[27]

Thirdly, the principled and coherent development of the law of torts cannot proceed without an awareness of where it has come from. 'The point is not to look back to "an assumed golden age" but rather "to help us to see more clearly the shape of the law of to-day by seeing how it took shape".'[28] There are now many excellent Australian texts (something which did not exist a century ago) but a recurring weakness is an abbreviated approach to history. True it is that the 21st century civil liability legislation now dominates the tortious landscape, but this only reinforces the need to see where the law has been sourced. Those statutes present questions which can only sensibly be answered with an eye to nineteenth and

---

19 [1932] AC 562.

20 See William Gummow, 'Sir Owen Dixon Today' in Susan Crennan and William Gummow (ed), *Jesting Pilate, and Other Papers and Addresses by the Rt Hon Sir Owen Dixon* (Federation Press, 2019) 48, 53: '[t]he writer has it on good authority that, privately, Dixon held in low regard Lord Atkin's reliance upon Biblical aphorism; he may have shared the scepticism of Professor Julius Stone regarding Atkin's formulation'.

21 (1928) 40 CLR 566.

22 (1939) 62 CLR 1.

23 Including *Watson v South Australian Trotting Club Inc* [1938] SASR 94; and *Sinclair v Cleary* [1946] St R Qd 74.

24 See, eg, the extended n 99 on 107 regarding the influence of Holmes on Isaac J's thinking.

25 See most recently *The Age Co Ltd v YZ* [2019] VSCA 313, dealing with *Hegarty v Queensland Ambulance Service* (2007) Aust Torts Reports 81-919; and *New South Wales v Briggs* (2016) 95 NSWLR 467.

26 See also Barbara McDonald, 'Justice Evatt and the Lost Child in Chester v Waverley Council (1939)' in Andrew Lynch (ed), *Great Australian Dissents* (Cambridge University Press, 2016) 58.

27 *Macintosh v Dun* (1908) 6 CLR 303, 307-8:

> There are direct authorities in the United States in favour of the conclusion at which the High Court has arrived. American authorities are, no doubt, entitled to the highest respect. But this is a question that must be decided by English law. In the dearth of English authority it seems to their Lordships that recourse must be had to the principle on which the law in England on this subject is founded. With the utmost deference to the learned Judges of the High Court, their Lordships are of opinion that the decision under appeal is not in accordance with that principle.

28 *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* (2014) 253 CLR 560, 605 [107] (Gageler J), quoting Windeyer J in *Coulls v Bagot's Executor and Trustee Co Ltd* (1967) 119 CLR 460, 496; and *A-G (Vic) v Commonwealth* (1962) 107 CLR 529, 595. And see, eg, *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 264 CLR 1, 24–5 [64]–[70].

twentieth century decisions. Once again, Sir Victor Windeyer made this point: 'reading about the past is often the surest path to understanding the present: the law on many subjects today cannot be usefully cast into a new mould, reformed, unless the way by which it took its present form be known'.[29] Windeyer's words are entirely apposite of the work required to accommodate the civil liability legislation. I know that I would have benefited from the decisions and context recounted in chapter 10 on sport and recreation when participating in *Goode v Angland*,[30] and I expect the same would have been true of leading counsel who argued that appeal. This book makes much of that far more accessible than it formerly was.

Finally, I regularly review research proposals and receive requests for advice about topics for honours or postgraduate theses. The lack of originality is remarkable. The student's instinct for the safety of numbers is misplaced when finding topics for original research. Some areas have been so overworked that even the best researcher will struggle to find something new to say. This book demonstrates the ready availability of worthwhile, under-studied, not to mention eminently publishable, areas of genuinely original research.

When introducing another modern work of Australian legal history, Paul Finn wrote that an understanding of that subject 'has uncommon importance in the coherent development of legal principles suited to our needs'.[31] Yet very few Australian lawyers are familiar with the innovative developments in Australian tort law in the first half of the 20th century — probably fewer than those who are familiar with minutiae of Churchill's life in the same period. Mark Lunney's eminently readable work will redress that. It deserves a wide readership.

Mark Leeming

Judge of Appeal,

Supreme Court of New South Wales

29 Sir Victor Windeyer, 'History in Law and Law in History' (1973) 11(1) *Alberta Law Review* 123, 137, reprinted in Bruce Debelle (ed), *Victor Windeyer's Legacy: Legal and Military Papers* (Federation Press, 2019) 132, 147.

30 (2017) 96 NSWLR 503.

31 PD Finn, 'Foreword' in Justin T Gleeson, Ruth CA Higgins and JA Watson, *Historical Foundations of Australian Law* (Federation Press, 2013) vol I, v.