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## Introduction

### I

Any title containing dates immediately raises questions: Why start *there*? Why stop *then*? When the answer is not immediately obvious – the start and end of a monarch’s reign, say, or a war – there may be little consolation in the reader’s discovering that the contents of such books almost always break their titles’ implicit promises to confine themselves to events between certain dates. So it might be as well to come clean right at the very start, and admit that nothing special or symbolic happened in either 1900 or 1950 that will serve as the beginning and end points of this book. Indeed, in a discipline like law where so much turns on interpreting what has happened in the past, a pedantically strict attitude to start dates is always likely to create more problems than it solves. As readers may have guessed from the suspiciously round numbers in the title, this is a book about the history of tort law that focuses on the first half of the twentieth century, but has no hesitation in straying slightly outside the period where the subject matter calls for it.

The focus on the first half of the twentieth century has been inspired by two interrelated factors. The first is that the period includes several defining moments in the history of tort law, moments where structures were established or directions set. Such moments, naturally, have not gone unremarked by writers on contemporary tort law, but they have received little historical attention because, quite simply, English legal history scholarship has tended to run out by the end of the nineteenth century. Indeed, not the least important of the many reasons for which the recent *Oxford History of the Laws of England* volumes stand out is that they venture into the last century, by taking the story up to the outbreak of the First World War.<sup>1</sup> This relative neglect forms the second reason for

<sup>1</sup> W. Cornish *et al.*, *The Oxford History of the Laws of England*, Volumes XI, XII and XIII (Oxford University Press, 2010).

this book's focus on the early twentieth century, for otherwise there is the danger of losing sight of the true significance of the period, falling as it does between traditional historical coverage and the primary focus of contemporary writers.<sup>2</sup>

It might, perhaps, be suggested that articles, textbooks and other forms of legal scholarship on current law provide an adequate account of what is worth remembering about the period, and it is worth pausing for a moment to address this potential objection to a work concerned with relatively recent legal history. We might begin by reflecting that periodical literature written with its eye on current controversies is unlikely to provide a balanced historical account: it may *use* history, but does not aspire to *be* history. Indeed, there is no obligation on writers about contemporary law to provide any historical account, and those who do might be suspected of wanting the past to control the present if they give too much weight to historical factors. Textbook writers might, at first glance, appear to be in a different position: for them, we might feel, historical exposition need not form part of an argument; it can have a legitimate part to play in giving a sense of historical sweep. Of course, even if we should take this argument at face value (and I would contest it), the history to be gathered from contemporary textbooks would be incomplete. It would be both self-indulgent and eccentric to favour the hard-pressed student reader with a detailed account of the defence of common employment (abolished 1948),<sup>3</sup> for example, or the torts of seduction and enticement (abolished 1970).<sup>4</sup> These topics, by contrast, have leading roles to play in this book. But even for topics where a historical introduction is relevant, and appropriate, such an introduction is serving a purpose that cannot help but control an author's choices: it is explaining how we got to where we are today, and the temptation is to slide into what Herbert Butterfield famously called 'The Whig interpretation of history', that is, an interpretation that identifies an inevitable progression towards current, enlightened values as history unfolds.<sup>5</sup> The common law's commitments to the doctrine of precedent, and to the declaratory theory of law, encourage

<sup>2</sup> S. Collini, 'Introduction' in C. Snow, *The Two Cultures* (Cambridge University Press, 1993) at ix encapsulates the point, when he describes C. P. Snow's 1959 lecture on the two cultures as beginning to 'fall into a murky limbo, no longer accurately recalled as part of living contemporary culture but not yet beginning to benefit from patient historical reconstruction'.

<sup>3</sup> Law Reform (Personal Injuries) Act 1948 s. 1.

<sup>4</sup> Law Reform (Miscellaneous Provisions) Act 1970 s. 5.

<sup>5</sup> H. Butterfield, *The Whig Interpretation of History* (London, G. Bell and Sons, 1931).

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writers of all kinds (including judges) to be complicit in such Whiggish interpretations. The historian's standpoint relieves him or her of the need to explain the past in terms of the present, and replaces it with an obligation to deal patiently and sensitively with legal developments in their own time and social context. Such a historical approach may well lead to the identification of certain events as important, despite them having been forgotten (for whatever reason) by later lawyers; more intriguingly, it may also lead to the construction of rival significances where events remain in legal consciousness, but for reasons that have changed over time. To take the simplest example, what the judges hearing a case, and the commentators writing about it immediately afterwards, thought it had decided may be wildly different from what the case has come to stand for. The point about these rival significances is not that the original interpretation is 'right' and the later one 'wrong' (or vice versa). The point is to register the change.

## II

These general arguments for twentieth-century legal history justify the genre, but do not mandate that the work must take a particular form. One possibility would be to treat legal ideas in their own organising categories, which would generate a series of chapters with titles like 'Negligence', 'Defamation', 'Damages for Personal Injury', and so on. As readers may already have noticed, that strategy has not been pursued here. Instead, the book is divided into two parts. The first part (the longest) examines how tort ideas developed in particular contexts, beginning with an exploration of different writers' attempts to define and structure their subject. The focus then moves to tort's responsiveness to dramatic social upheaval, in the form of wartime conditions, before considering how tort rules applied to women and children during the first half of the twentieth century. Part I concludes with three chapters on particular kinds of activities where tort developments were especially notable: the media (that is, newspapers and radio broadcasting), driving and (manual) work. In each of the chapters in Part I, apart from the very first one, the material is very deliberately drawn from across the tort spectrum, in order to set alongside each other rules and ideas that would traditionally not be found in close proximity. The aim in doing so is to develop a picture of how tort saw the world: what assumptions were being made about the roles of those to whom its doctrines were applied, and what contribution did tort conceive of itself as making to social life?

Part II focuses on the creation and activities of the Law Revision Committee. Its scope is, therefore, narrower than Part I, but its subject matter is no less significant, for the Law Revision Committee was the first state body to be created that had ongoing responsibility for the reform of private law. The Committee was particularly active in torts, producing reports on the rule that a tort claim died with the claimant, a husband's liability for his wife's torts, joint tortfeasance and contributory negligence. Its recommendations on each of these topics were all translated into legislation. How the Committee created its reports, and how its recommendations progressed into statutes, is a fascinating story in itself, but it also casts light on larger questions, such as co-operation between civil servants, judges and academics, and the relationship between tort and politics in one specific historical milieu.

The aims of the book have informed both its methodology and coverage. It is a book that is especially concerned with assumptions, attitudes and self-understandings, which are rarely made explicit, and may even be unconscious. They can, however, be revealed by paying very close attention to the linguistic features of the texts, and the following pages are, therefore, much concerned with questions about choice of language, tone and register. The texts to which particular attention is paid are those judgments, law review articles, law reform reports, letters and passages from textbooks that cast the most light on the ideas, assumptions and attitudes animating developments in the area concerned. The coverage of tort doctrines does not aim to be comprehensive. Rather, the emphasis has been deliberately given to themes and materials that have traditionally received little or no historical treatment.

There is one case, in particular, whose failure to feature may raise eyebrows: *Donoghue v. Stevenson*<sup>6</sup> seems an obvious, perhaps even the obvious candidate for a starring role in a treatment of tort history in the first half of the twentieth century. But it turns out that *Donoghue v. Stevenson* is a peculiar, and compelling, example of a case that has come to stand for something very different to what it was originally thought to represent. Today, of course, it is known for Lord Atkin's articulation of the neighbour principle as the unifying explanation for when duties of care are owed in negligence. That foundational status, however, was only acquired after the principle had been taken up by judges in the 1960s and 1970s.<sup>7</sup> In

<sup>6</sup> [1932] AC 562.

<sup>7</sup> On the reception of *Donoghue v. Stevenson*, see D. Ibbetson, *A Historical Introduction to the Law of Obligations* (Oxford University Press, 1999) 190–5. On the broader significance

the 1930s the response was less enthusiastic. Commentators appreciated that Lord Atkin's speech was significant, but tended to see it, in the context of the case as a whole, as playing out an ongoing and unresolved conflict about the structure of negligence liability.<sup>8</sup> They, at least, regarded it as potentially significant. For judges, by contrast, *Donoghue v. Stevenson* was initially seen as a valuable decision on manufacturers' duties to the ultimate consumers of their products. To the extent that they regarded it as containing a 'principle', that principle was articulated in strikingly narrow terms, as being confined to the supply of products where there was no opportunity to detect that the product was defective.<sup>9</sup> Attempts to draw a more ambitious message from the case, which would have resulted in the recognition of duties of care in a broader range of situations, were unsuccessful.<sup>10</sup> The case's iconic status was all in the future.

### III

It is, I hope, now becoming clear what this book is about. But it may also be helpful to conclude this introduction by explaining *whom* it is about. The English law of tort was – and continues to be – formed from judicial decisions, academic writings and legislation. The headings of the first two categories indicate their personnel. Those judges who contributed to the development of tort law began their judicial careers in the High Court.<sup>11</sup> They were predominantly drawn from the ranks of successful barristers, in a process where open competition was conspicuous by its absence. Promotion to the appellate courts, where there was far greater potential to develop the law, was similarly veiled, being in the prime minister's gift. There were some notable exceptions, where high judicial office was

of the case, see generally J. Thomson (ed.), *The Juridical Review: Donoghue v. Stevenson: The Paisley Papers* (Edinburgh, W. Green, 2013).

<sup>8</sup> W. Stallybrass, 'Landon v. Winfield: An Intervention' (1932) 10 *Bell Yard* 18, 20–1; W. Stallybrass, *The Law of Torts: A Treatise on the English Civil Law of Liability for Civil Injuries by Sir John Salmond*, 8th edn (London, Sweet & Maxwell, 1934) x–xi: 'a decision which may prove to have raised at least as many problems as it has settled'. Strikingly, the House of Lords' decision that Stallybrass identified as 'epoch-making' was *Lochgelly Iron and Coal Co v. M'Mullan* [1934] AC 1 (see page viii of the Preface to the eighth edition of *Salmond*). The *Lochgelly* case is discussed in Chapter 8.

<sup>9</sup> *Dransfield v. British Insulated Cables Ltd* [1937] 4 All ER 382, 386–7.

<sup>10</sup> E.g. *Searle v. Wallbank* [1947] AC 341, discussed in Chapter 7.

<sup>11</sup> Judicial appointments between 1850 and 2000 are explained in P. Mitchell, 'The impact of institutions and professions on fault liability in England' in P. Mitchell (ed.), *The Impact of Institutions and Professions on Legal Development* (Cambridge University Press, 2012) 14, 15–17.

conferred on politicians, perhaps as an expression of gratitude for their loyalty, or as compensation for disappointed political expectations. But the judges were a body with an overwhelmingly homogeneous profile of professional formation and, consequentially, age. Harold Laski calculated the average age of new appointees to the High Court between 1832 and 1906 as 53, and there was no change in the system in the following half-century.<sup>12</sup> Appellate judges were, on average, older – there was no statutory retirement age<sup>13</sup> – and this has led Brian Simpson to describe the English judiciary as ‘gerontocratic’.<sup>14</sup> While this was literally true, it would be both unkind and unfair to the judges concerned to allow it to be implied that their performances were affected by mental frailty. There were, of course, disputes between appellate judges about how the law should develop, and some of the legal analyses produced on these occasions were more compelling than others. But there is no sign, in the materials examined in this book, of judicial careers outliving mental competence. One final, and perhaps rather obvious point should be made: all the judges whose work is discussed in this book were men. This was, perhaps, inevitable since the first woman to be called to the Bar was Ivy Williams, in 1922, and most judges had something like thirty years’ experience at the Bar before their appointment to the bench.<sup>15</sup> More strikingly, women appeared as counsel in significant tort cases with extreme rarity: a woman barrister’s name comes as a surprise, almost a shock, when reading the law reports of this era.

Some judges’ names, on the other hand, become deeply familiar. It is not possible to get very far into this book without becoming immersed in the work of Lord Wright, Scrutton LJ and McCardie J, for instance. Part of the explanation for the prominence of particular names is a mere function of numbers: there were only three divisions of the Court of Appeal (consisting of three judges each), and nine Lords of Appeal in Ordinary to hear House of Lords cases, during the period.<sup>16</sup> As a matter of raw probability, the same names could be expected to turn up reasonably frequently. But

<sup>12</sup> H. Laski, ‘The Technique of Judicial Appointment’ in *Studies in Law and Politics* (London, George Allen & Unwin, 1932) 163, 172.

<sup>13</sup> A statutory retirement age was introduced in Judicial Pensions Act 1959 s. 2.

<sup>14</sup> A. W. B. Simpson, ‘The Common Law and Legal Theory’ in *Legal Theory and Legal History: Essays on the Common Law* (London and Ronceverte: Hambledon Press, 1987) 359, 377.

<sup>15</sup> H. Fox, ‘Williams, Ivy’ in *Oxford Dictionary of National Biography* (online edition).

<sup>16</sup> Lord Justice Cohen, ‘Jurisdiction, Practice and Procedure of the Court of Appeal’ (1951–1953) 11 *CLJ* 3, 5; Lord Morton, ‘Address’ (1949) 32 *Yearbook of the Canadian Bar Association* 107, 114.

this can be only part of the explanation for the peculiar prominence of particular judges. The other part of the explanation must surely involve a more qualitative assessment of how individual judges interpreted their judicial roles.<sup>17</sup> Differences in judicial attitudes to fundamental questions, such as the constraints of precedent, or the need for the common law to reflect social changes, were particularly likely to come to the surface, and to be played out, in certain kinds of tort cases: the sheer range and diversity of tort principles gave them the potential to intersect with an extraordinarily wide variety of social questions. Understanding how, exactly, different judges responded to the challenges raised by such intersections is central to this book's theme.

If the number of appellate judges was small, the number of academic writers contributing to the development of tort was yet smaller. Over the course of the period, the number of teachers had increased, but, as L. C. B. Gower pointed out in 1950 in a devastating critique, legal education remained unimaginative and unambitious.<sup>18</sup> Gower was particularly scathing about the absence of theory and the prominence of learning by rote. He does not seem to have been overstating the position – even a student as intellectually curious as the future distinguished solicitor and poet Roy Fuller found nothing memorable about the lectures he attended while qualifying as a solicitor.<sup>19</sup> A nice illustration of the intellectual tepidity of even the more reputable university law schools is provided by the foundation of the *Cambridge Law Journal* in the 1920s. The idea was first put forward by H. A. Hollond, a Cambridge don who had been much impressed by the *Harvard Law Review* on a visit to the United States.<sup>20</sup> But, as A. L. Goodhart later recalled, the prospects for the *Cambridge Law Journal* were initially 'extremely dim', since it was thought that the *Law Quarterly Review* satisfied any English demand for scholarly publishing on law.<sup>21</sup> Early issues of the *Cambridge Law Journal* might have seemed to confirm that pessimism, containing, as they did, elements of an in-house magazine for the Cambridge Law Faculty. Gower was urging law

<sup>17</sup> See Mitchell, 'The impact of institutions and professions on fault liability in England', 25–7 (dealing with a slightly later period).

<sup>18</sup> L. Gower, 'English Legal Training' (1950) 13 *MLR* 137.

<sup>19</sup> R. Fuller, *Souvenirs* (London, London Magazine Editions, 1980) 143. The only memorable incident seems to have occurred when the lecturer was provoked by seeing a copy of D. H. Lawrence's *Nettles* on Fuller's desk.

<sup>20</sup> H. Hollond, 'Arthur Lehman Goodhart' (1964) *CLJ* 1; H. Hollond, 'The Origin of the Law Journal: Introductory Note' (1972B) *CLJ* 3.

<sup>21</sup> A. Goodhart, 'The Origin of the Journal' (1972B) *CLJ* 4, 5. See also A. Goodhart, 'Henry Arthur Hollond: 1884 to 1974' (1975) 34 *CLJ* 1.



academics to be altogether more outward-looking, to be open to theory, and to take a more energetic attitude to law reform. His readers may well not have appreciated it, for he paid little attention to legal literature, but, in tort at least, there were works that already lived up to these demands, whose writers would have endorsed Gower's position.

The doyen of tort scholars was a man who would not have welcomed being described as an academic, and who had an unsatisfactory relationship with legal education.<sup>22</sup> Frederick Pollock managed to occupy a unique position, which placed him outside both the practising and academic sections of the legal profession but which, paradoxically, also allowed him, and his writings, to exercise a profound influence over the profession as a whole.<sup>23</sup> The influence of his successors was more limited – partly because they were competing with Pollock, or among themselves – but the importance of their work should not be underestimated. Two writers particularly stand out in this group: P. H. Winfield, and Wolfgang Friedmann. Winfield took his degree and spent his entire academic career in Cambridge, eventually becoming the first Rouse Ball Professor of English Law.<sup>24</sup> In addition to an extraordinary array of articles and essays on tort topics, both contemporary and historical, he produced major books on the subject. *The Province of the Law of Tort* was based on a course of lectures delivered as the Tagore Professor at the University of Calcutta, and advanced a distinctive thesis about the foundations and scope of tortious liability.<sup>25</sup> *A Text-Book of the Law of Tort* was, at first glance, a more conventional work, but it too put forward some important arguments about liability in general, as well as illuminating more specific developments.<sup>26</sup>

Wolfgang Friedmann's career contrasted with Winfield's in almost every way. A German refugee from Nazi persecution, Friedmann arrived in London in the 1930s and found work teaching at University College. He was involved in the establishment of the *Modern Law Review*, and contributed a provocative article on 'Modern Trends in the Law of Torts' to its inaugural volume.<sup>27</sup> His work on tort was more sporadic than Winfield's,

<sup>22</sup> N. Duxbury, *Frederick Pollock and the English Juristic Tradition* (Oxford University Press, 2004) 41–64.

<sup>23</sup> N. Duxbury, *Jurists and Judges* (Oxford, Hart Publishing, 2001) 85–7; Duxbury, *Frederick Pollock*, chapter 5.

<sup>24</sup> S. Bailey, 'Winfield, Sir Percy Henry' in *Oxford Dictionary of National Biography* (online edition).

<sup>25</sup> P. Winfield, *The Province of the Law of Tort* (Cambridge University Press, 1931).

<sup>26</sup> P. Winfield, *A Text-Book of the Law of Tort* (London, Sweet & Maxwell, 1937).

<sup>27</sup> W. Friedmann, 'Modern Trends in the Law of Torts' (1937) 1 *MLR* 39.



and his academic career positively nomadic by comparison: he would leave London in the late 1940s for a chair in Melbourne, and, while in Australia, worked on *Law and Social Change in Contemporary Britain*, which featured an important critique of tort law.<sup>28</sup> From Melbourne he would soon move on to Toronto and, finally, to Columbia University in New York; in his later years, his interests turned more towards international law.<sup>29</sup> The contrast with Winfield was not confined to differences in career path. Winfield was very much writing within the common law tradition – he had a deep respect for, and intellectual interest in, the historical development of common law concepts, and tended to argue for legal changes that would reflect, or at least be consistent with, that development. Friedmann was not averse to historical arguments, but he evinced no affinity with the common law past; he tended to be more alert to, and impatient with, what he saw as tort's failure to reflect social relations. Between them, the two authors offered compelling criticisms from very different standpoints.

Judges and academics formed two mutually exclusive communities. Gower depicted an unhappy, unequal relationship – ‘nothing is more nauseating than the patronising air of mock humility usually affected by one of his Majesty's judges when addressing an academic gathering’<sup>30</sup> – which got the editor of the *Modern Law Review* (where the piece was published) in trouble with the Law Lords.<sup>31</sup> Gower's claims were not universally true – as Neil Duxbury has shown, both Pollock and A. L. Goodhart exercised a genuine influence across a range of judicial developments.<sup>32</sup> Furthermore, the creation of law reform committees, in particular the Law Revision Committee and the Committee on Defamation (chaired by Lord Porter), provided the opportunity for certain, carefully selected, judges and academics to work together, and there is no evidence of hostility or resentment in their dealings. Indeed, a close examination of the workings of these committees reveals a surprisingly pervasive academic influence. Conversely, it also turns out that members of

<sup>28</sup> W. Friedmann, *Law and Social Change in Contemporary Britain* (London, Stevens and Sons, 1951).

<sup>29</sup> J. Bell, ‘Wolfgang Friedmann (1907–1972), with an Excursus on Gustav Radbruch (1878–1949)’ in J. Beatson and R. Zimmermann (eds.), *Jurists Uprooted* (Oxford University Press, 2004) 517. Friedmann's contribution to Australian tort law is sensitively analysed in M. Lunney, ‘Legal Émigrés and the Development of Australian Tort Law’ (2012) 36 *Melbourne University Law Review* 494.

<sup>30</sup> Gower, ‘English Legal Training’, 198.

<sup>31</sup> L. Gower, ‘Looking Back’ (1978) 14 *JSPTL* ns 155.

<sup>32</sup> Duxbury, *Jurists and Judges*, 85–96.

both Houses of Parliament had a purely procedural function in statutory reforms in the 1930s and 1940s; they were (generally) content to accept the substantive choices made elsewhere. Who made those choices and how they arrived at them lies at the heart of this book's analysis of those reforms.