Labour and upon Employers' Associations contain no references to the case studies, yet those same case studies do help to an understanding of trade union and employers' association activities.

Yet Professor Walker has accomplished his aims. He has "increased our understanding of industrial relations in Australia" and he has contributed "to our knowledge of industrial relations processes generally".

F. T. De VYVER*

The Law of Torts, by J. G. Fleming, M.A., D. Phil. Sydney, The Law Book Co. of Australasia Pty. Ltd., 1957, xxxix and 779 pp. (£4/4/- in Australia).

The common law has been described as a seamless web. In some of its reaches, at least, it might better be classed as a tangled skein and this is surely true of that fascinating area known as the law of torts. It is scarcely surprising that here the law affords a bewildering array of doctrinal rules, expressed rationales and tacit assumptions. An endless variety of controversies from street fights to traffic mishaps to trade wars, conflicting land uses, character assassination and beyond all crowd together into the tort classification. To deal with a vast area of modern man's social friction the law of torts relies largely on rules that are rooted in history and shaped by the court procedure of earlier days; on rules that are frequently based on inarticulate and perhaps contradictory premises concerning the function of the law in this area. All of this is discouraging in the extreme to anyone contemplating a text on the subject — if it is one subject. Nonetheless, text-writers are made of relatively stern stuff and several, albeit infrequent, attempts have been made to capture the law of tort in one volume.

The texts of Salmond and Winfield through their many editions have won very wide acceptance. For the most part these standards limit themselves to a statement of what the English courts have done in various classes of tort cases usually formulated in terms of general rules and exceptions thereto. The organisation adopted in these texts offers an initial and extended treatment of such general matters as parties, capacity and remedies, followed by examination of the substantive tort doctrines as expounded in the leading cases with more recent cases evaluated largely in terms of their consistency with the older decisions. Though this sequence of materials has found small favour with English tort law teachers there can be little doubt that the disinclination of these texts to look much beyond the bounds of the decided cases (and the English cases at that for the most part) has had a real impact on successive generations of law students, practitioners and judges.

None can deny the utility of texts constructed on the Salmond-Winfield model but there are other ways of writing very useful and stimulating text-books. A little more than a year ago there appeared the first new English text on torts in twenty years. In that text[1] Professor Street dispensed with the preliminary general material and launched at once into the substantive law of torts, somewhat reorganised as to sequence with an orderly progression related to the nature of the plaintiff's interest invaded and the kind of harm suffered. His was a book of substance, a valuable addition to torts textbooks and in some respects it was a bold departure. Nonetheless, and perhaps because of the constraint of tradition the Street text is also limited for the most part to recounting in skilful style what the English courts have done in tort cases.

By way of contrast legal texts in the United States, at least those of standing,

* Professor of Economics, Chairman of Department of Economics, Duke University, Durham, N.C., U.S.A.

[1] H. Street, *The Law of Torts* (1955).

have characteristically attempted not only to report the course of judicial decisions but to point the way for improvement. How this has come about, why the American text reflects a certain sense of mission about the future of the law is doubtless the product of several influences. A multiplicity of independent jurisdictions offer a never ending demonstration that the common law in the United States, at least, is man made. Nor, under the dominant view there, is it made by judges alone. Successive generations of law students, who become law teachers, practitioners and judges, have been taught to question and to pass their own value judgments on the law itself as an instrument of social control. Finally, from the one group of the profession in the United States which probably devotes the largest share of time to this task of reviewing the courts, the law professors, come most of the text-writers. It is not too surprising then in light of these factors and others that American texts like Wigmore on *Evidence*, Williston on *Contracts* and Prosser on *Torts* are written in part as tracts on law reform and do in fact exert a powerful influence on the course of common law development. Such treatises, moreover, on occasion are of greater value to the profession than texts limited to an attempted recital of the law as it is.

Whether a text can serve this function in a country which thinks of itself as a single jurisdiction at one with the common law of England and a country where there may not be wide belief in the regenerative power of the common law is an interesting question. Like Leacock's famous horseman who galloped furiously in all directions and consequently might profit from guidance, the law of torts would seem a most suitable trial vehicle. As an American visitor last year it seemed appropriate to suggest that a text in this field might be written in this country "to illumine as well as to mark the path of the law".[2] That statement evidenced no gift of prophecy for a book so designed was then in page proof and has since been published.

Fleming on Torts is an excellent text covering the traditional subject in a fashion that is at once distinctive in its utilisation of Australian materials and in its reflection of modern tort law thinking from other sectors of the common law world. Since my own immersion in the English-Australian law of torts extended for only a season this assessment may not be as significant as the expressed judgments to the same effect by Professors Robert Baker of Tasmania and Norval Morris of Melbourne when we joined forces to discuss this text last August before the meeting of the Australian Universities Law Schools Association in Canberra. Though we managed to find, as members of the legal profession usually can, matters on which our judgment differed we did agree on the merit of the book.

In my case it might be thought that my good opinion of this text derives in part from the extent to which Professor Fleming has been influenced by American writing in the field of torts. He does acknowledge his indebtedness to the leading American tort writers and his book adopts the organisational pattern of the *Restatement of Torts*, substantially the pattern followed in the American text by Prosser and the modern English text by Street. Apart from a sixteen-page introduction of jurisprudential flavour which is probably best read at the end (if anyone ever reads a law book through), the progression is from intentional torts, to negligence, to strict liability and then through a progression of such tortfeasors as landowners who damage adjoining property and injure persons on their land, employers who injure their workmen, manufacturers and retailers who injure their customers, publishers who defame, deceivers, inadvertent executioners and cut-throat traders — just plain folks. The material which Salmond and Winfield offer in their initial chapters on capacity, remedies, general principles and the like is to be found, but

[2] W. N. Pedrick, Book Review "*The Law of Torts*" by H. Street (1956) 3 *W. A. Ann. L. Rev.* 566, 573.

mercifully distributed, throughout the text.

The text is an interesting reflection of the international character of the common law of torts. The focus of course is on the English and Australian cases but a fair number of leading decisions from the United States and Canada are covered. This has not been carried to excess. Indeed, the American cases noted for the most part are cases which either the High Court or the Privy Council has recognised as significant. At this point it may be appropriate to observe that the common law decisions of the forty-eight United States, of potential interest in this country in torts and other fields, are relatively unavailable here. This seems a pity and no textbook can adequately solve that problem. The cases themselves must be read for the text writers' review of the case may not always be adequate for the purpose at hand.

Although the Fleming text does reflect the international character of the common law of torts, it might well have been titled the Australian Law of Torts. To the practising profession in this country the emphasis given Australian decisions and Australian statutes would seem to make the book especially valuable since this service is not, and probably cannot be, adequately provided by an English text. No Australian working law library will be complete without Fleming. Perhaps Australians are not as fond as Americans of "home grown" common law but a text which assists in making the Australian materials available should be a useful working tool. After all, such factors as the growing intrusion of local statutory law and differences in mode of trial should generate to some extent at least a distinctive Australian law of torts quite without regard to whether the court of last resort is to be here or at "home".

Of course, not many of the Australian cases or the English cases either for that matter can be discussed at length. This is one of the problems of writing a one volume text on a subject as vast as torts. Frequently the cases can only be referenced in a footnote and full-scale evaluation must necessarily be left to more extended treatment in the law reviews. This pressing need to epitomize, to present the kernel of a decision in a line or a phrase inevitably means there will be some disagreement as to the import of some decisions. For my own part, and despite the contrary dictum of Lord Macmillan in *Donoghue's Case*,[3] I have no difficulty with the view that the *res ipsa loquitur* doctrine or something very much like it can operate in cases involving manufacturers' liability — as Fleming thinks indicated by *Grant* v. *Australian Knitting Mills Ltd.*[4] His treatment of *res ipsa loquitur* in medical malpractice cases, however, may give the impression that in this field the doctrine is not often to be used.[5] In one sense this may be true. There has been a most remarkable dearth of reported physician liability cases in Australia, indicating that perhaps surgeons here are not as prone as their brethren across the seas to leave mementos with their patients. When the sponge or surgical instrument is left behind, however, there is authority for the view that the *res ipsa* doctrine can be utilised and that is a view with considerable appeal.[6] But differences on this level are infrequent and probably of no real significance. The author offers his evaluation of the cases and they are in the library for all to read — made more accessible by this text.

It is fair to observe that the Fleming text was not written to simplify

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[3] (1932) A.C. 562.

[4] (1936) A.C. 85.

[5] At 268-299.

[6] The majority in *Mahon* v. *Osborne* (1939) 2 K.B. 14 approved application of the *res ipsa loquitur* doctrine in a "sponge" case. Scott, L.J. was in dissent on this point. See also *Cassidy* v. *Ministry of Health* (1951) 2 K.B. 343; *Roe* v. *Ministry of Health* (1954) 2 Q.B. 66. A decision declining to give continuing force to circumstantial evidence in the face of a satisfactory explanation in the particular case as in *Fish* v. *Kapur* (1948) 2 All E.R. 176 cannot be classed as a general rejection of the *res ipsa* doctrine in American "sponge" cases. See cases cited Note, 162 American Law Reports 1265; W. L. Prosser, *The Law of Torts* (2 ed. 1955), 210, 211.

the law of torts. No black letter rules with listed exceptions are offered. This should not dismay the practitioner who has probably learned to distrust the easy generalisation. The law student who longs to capture all of life, or at least that part of it known as the law of torts, within a few simple propositions will not find solace in Fleming. Unfortunately, tort problems as they are processed in the common law system are not always simple in terms of the competing choices available and this text does not gloss over the difficulties. By the same token, if the object of the course in torts is to develop in the students an understanding of the law process the Fleming text is well suited to that end. This past year in my own course at the University of Western Australia Law School, taught by the case system, a substantial number of the students used this text for collateral reading with benefit both to themselves and to the class sessions as well.

As a technical text reporting the course of pertinent decisions this is a substantial work. It is more than another technically competent text, however, for Professor Fleming has his own ideas about the course the courts should follow in future cases and he is not notably reticent about these matters. For his willingnes to expound in balanced fashion on "what ought to be" surely he is to be commended. This is not to say that I would always want the courts to follow Fleming without some reconnaissance work of their own. By way of example, in a short discussion of the apportionment statutes, he opines that attainment of predictability through fixed rules of law is "illusory and that sufficiently precise rules cannot be formulated to encompass the infinite variety of fact situations that require adjudication".[7] Is it wise, though, to leave outside the area of law, of general rules, this most critical function of determining the basis on which damages are to be apportioned? Is it really true that the cases are of infinite variety as regards apportionment? The road accident cases which bulk so large on the dockets would seem to fall into three or four categories as regards the apportionment problem. In this area at least it might be possible to identify a basis for apportionment more specific than "the extent of the claimant's departure from the standard of care" and the "relative importance of his conduct in causing the damage".[8] The High Court in *Pennington* v. *Norris*[9] emphasised that the pedestrian endangers only himself while the motorist endangers the community. This is one way and a rather neat way of recognising that liability borne by motorists is distributable since motorists must anticipate liability for losses they visit on others and make suitable provision therefor, whereas the pedestrian threatens no one else and is thus not a suitable agency or focal point for loss distribution.[10] Since the High Court's decision I should think pedestrians as a class are now measurably less subject to apportionment as against motorists than they were before and a rule of thumb may emerge. With time and further litigation more enlightenment on the function of "just apportionment" should come. This process of development of a kind of common law on apportionment will provide not only a more uniform type of justice in court but a more satisfactory basis for the great bulk of cases that must be settled on the basis of informed judgment as to what a court would do.

But to elaborate on a few differences of opinion (and thus discharge the reviewer's obligation to demonstrate familiarity with the text) should not obscure the general verdict of enthusiastic approval not only of the fashion in which the "law" is expounded but the viewpoint from which his constructive criticism is offered. Professor Fleming sees the law of torts as "the agency for the proper distribution of losses typically involved in modern

[7] At 264. [8] *Id.* at 264, 265. [9] (1956) 30 *A.L.J.* 242.

[10] For a penerating analysis of the apportionment problem see R. W. Parsons, "Negligence, Contributory Negligence, and the Man Who does not Ride the Bus to Clapham," (1957) *University of Melbourne L.R.* 163.

living".[11] He must have cheered the recent utterance of Lord Radcliffe that

> No one really doubts that the common law is a body of law which develops in process of time in response to the developments of the society which it rules. Its movement may not be perceptible at any distinct point of time, nor can we always say how it gets from one point to another, but I do think that, for all that, we need abandon the conviction of Galileo that somehow, by some means, there is a movement that takes place.[12]

Noble words these, uttered, alas, in dissent. The decision of the majority in *Lister* v. *Romford Ice Co. Ltd.*[13] allowing the employer's insurer indemnity from the negligent employee rejected in dramatic fashion an opportunity to further the cause of loss distribution in favour of ancient assumptions about the efficacy of personal liability as a potion for the prevention of negligence. Such a decision and the sheer magnitude of the task prompt doubts as to whether it is possible, without massive legislative intervention, to equip the common law to deal satisfactorily with our injury-prone-mechanised-society. Whatever the processes by which the law of torts is to be better adapted to modern life the Fleming text offers, for all those interested, perceptive and provocative counsel on the problems that fill this area of the law with so much of fascination and frustration.

W. N. PEDRICK *

Essays on the Law of Evidence, by Zelman Cowen, Professor of Public Law in the University of Melbourne, and P. B. Carter, Fellow of Wadham College, Oxford. Oxford, Clarendon Press, 1956. xx and 278 pp. with Index. (£2/19/3 in Australia).

This collection of essays on a miscellany of topical questions in the law of evidence amply fulfils the authors' expressed hope of providing a supplement to the treatment of the topics by the recognised authorities on the subject: the need for the text writers to cover the ground denies to them the opportunity of isolating especially interesting or intricate topics which the essay form provides. The bulk of the matter contained in the nine essays in this volume has previously appeared in the form of articles or notes in the *Law Quarterly Review*, *Modern Law Review* and other legal periodicals. The collaboration between the authors has gone to the extent of a joint adoption of views hitherto expressed by the one or the other alone.

For the most part the treatment of the subjects is purely expository, and the practising lawyer will appreciate the empirical approach to their subjects which the authors have adopted; there is little sign of a preconcieved structure to which the case law is made to conform: the cases which are rejected by the authors as unsound earn that condemnation mainly because of their incompatibility with the weight of authority. The only occasion on which this approach is in danger of being abandoned is in the elaboration of Mr. Carter's ambitious attempt to rationalise the law relating to evidence of similar facts by reference to the notion of "propensity", where, in an effort to embrace all binding decisions within one complex formula concepts are employed (such as that of a propensity to keep on knowing) which seem foreign to the language of the common law. This criticism, however, verges on the captious: the book as a whole is a source of most valuable reference material on all the topics dealt with, the more so because of the attention paid to the decisions of the common law jurisdictions

[11] At p. 11.
[12] *Lister* v. *Romford Ice Co. Ltd.* (1957) All E.R. 125, 142.
[13] *Ibid.*

* Professor of Law, Northwestern University School of Law, Fulbright Professor of Law, University of Western Australia School of Law, 1956-1957.