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William L. Prosser: Some Impressions and Recollections

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Almost everyone who has had anything to do with law has an impression of Dean William Lloyd Prosser (hereafter, Bill). Inevitably he becomes concerned with some aspect of tort law, and that means direct contact with the Prosser writings—the treatise, the casebook, the articles or the Restatement. If as a beginning law student he does not use Prosser's casebook for the first-year course in Torts, he will certainly have occasion to refer to his treatise, and probably also to the Restatement. Prosser on Torts! It has a completed sound, a belonging sound, a natural sound, a sound to be remembered for years to come.

What impressions does one form from reading his treatise? The first is that it is a pleasure to read. It's not a ponderous tome. On the contrary, it is bright and spritely; it's fun to read and it must have been fun for him to write. The second is one of clear organization, excellent synthesis and lucid style, remarkably easy to read. The third is of a fine sense of perspective, taking up and treating the significant ramifications of a problem without dodging them when they are difficult, but not going so deep into minutaie as to leave a confused understanding of the whole. I remember having all these impressions when his treatise first came out in 1941. I didn't know Bill then, hadn't even heard of him; but I also remember thinking that he must be a fine person to know and associate with. That was one of my "correctest" thoughts.

What impression might one have if he came to know Bill Prosser personally? Observing him, I found myself reminded of Lord Blackburn's opinion in Rylands v. Fletcher. There was in him a pent-up force—a restless intellectual and nervous energy—"which though harmless whilst it remains there, will naturally do mischief if it escape." The quizzical glint in his eye, the whimsical humor in words and deeds, the readiness to take on anyone in debate—all bespoke an imprisoned imp which he normally harnessed and kept under control but which was always there (like the prowling tiger in its cage or the restive water within the reservoir), likely to do "mischief" if it could escape and which he harbored "at his peril."

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That pent-up energy explained many things about him—his wonderful memory, his ability to peruse and digest legal materials in minimum time, and his incredible ability to complete legal writings in much less than minimum time. While others were thinking about a piece of research and writing or mulling over how they would set about beginning it, he had the whole thing completed.

Bill Prosser had a remarkably inquisitive and acquisitive mind. He liked to delve out odd quirks. He liked to solve problems, legal and otherwise, especially if they had an element of mystery in them. His interests were wide-ranging. I remember one afternoon when we enjoyed a discussion of famous or obscure mysteries of history—who did something or what motives were involved. I suspect each of us was trying mildly to “snow” the other. He succeeded far better than I did. What his inquisitive mind unearthed, his acquisitive mind held.

Sometime he must have had an interest in railroads. On another afternoon he let a bunch of us try to stump him by asking what railroads would be used to go from one city to another or what cities were connected by a particular railroad. Only once or twice did he stumble, and even then he still came up with the right answers.

Bill’s sense of humor was always present, but it was quite unpredictable. It varied from the subtlest type of irony to a somewhat crude practical joke. The very uncertainty of the form it might take often added to the relish of it.

He was a considerate man, and compassionate. There are people who would dispute that statement and point to occasions when he lost patience and acted abruptly and harshly. It is true that in his last years he was somewhat less flexible than earlier, but he never really lost his considerateness. The loss of patience and abrupt action came as a response to the initial approach. If it was reasonable and indicated a readiness to cooperate in reaching a conclusion or attaining a result, he reacted with similar attitude. If the approach was arrogant, or a power-play, or rigid or innately stubborn, it produced a harsh response and a stubbornness that had no give. An illustration: Bill became increasingly intolerant of what he regarded as utterly unreasonable student demands in the last couple of years. Yet in 1959, when he was president of the Association of American Law Schools, he took as the subject of his presidential address the “forgotten man . . . the law student,” and he concluded his speech by saying that law buildings should have this inscription on their walls: “This law school is conducted for the benefit of its students, who are as fine a body of men as can be found in a university, and are worthy of all of
the help that they can possibly be given. The faculty only work here."

This is not the place to attempt to recount Bill Prosser's distinguished career, or to try to identify and evaluate his contributions to the improvement of the law. These contributions are many, and they have been demonstrated in many ways—by the frequency with which he is cited and quoted in court opinions, by the greater frequency with which he is cited by attorneys in appellate briefs in the confident knowledge that his statements would influence the court, in the persistent requests for him to speak at attorney gatherings, and in the rousing ovations with which his speeches were received.

Instead of recounting matters like these I should like to recall a few personal memories of Bill, presenting them in vignette form.

1. The Advisory Committee Meetings. Back in the days when the world was younger and Bill was just starting his work as Reporter for the second Restatement of Torts, he picked out about a dozen people to serve as his Advisory Committee. We met twice a year in unusual places for periods of about three days each, sometimes with our families. Judge Herbert Goodrich, of the Third Circuit, the Executive Director of the Institute, presided and kept us in line. It was a wonderful group: Larry Eldredge, who seemed to be primarily defendant-minded much of the time; Fleming James, who seemed to be primarily plaintiff-minded; Page and Bob Keeton, who split as often as they were together; Wex Malone, the disciple of Leon Green, who gave us the insight from the factual-classification approach; Sam Thurman, with his dry witticisms; Roger Traynor, who didn't speak often but carried great weight when he did; Warren Seavey, the sharpest analyst of them all, who was frequently ready to "throw dirt on" a doctrine he didn't like; Clarence Morris, who emphasized evidence and damages; Gerry Flood and Calvert Magruder, two judges who died before the work was over. Allan McCoid came in later. Francis Bird and Charlie Willard often sat in as Council members.

Each of us had studied the drafts carefully and had suggestions and criticisms. Comments from one person struck fire from another. We were all immensely stimulated by the association, and there was always much said, sometimes quite vigorously. Those meetings, I am sure, were the highlight of the year for each of us. There's an ecstasy in the intellectual give-and-take of friends who are vividly discussing something they are fully expert in and who have true respect for each other. Halcyon days... that phrase seems just right.

Bill always kept the clutter of our discussion in mind, kept up with the votes, promptly prepared a revised draft and had it ready for the Council in time. He was always the central figure at the meetings,
and I know from them that he must have been a fine teacher when
the class was not too big to develop dialectic. In the evenings, unless
the materials to cover were too many, we would often sit around and
talk. On one of these occasions Bill was badly beaten. He recklessly
vied with Judge Goodrich and Charlie Willard in a poetry-reciting
contest. Bill was good; but the Judge easily surpassed him, and Char-
lie was never stumped on any poem anybody could think of.

2. The Battle of the Wilderness. The only really major dis-
agreement in the consultations of the Reporter and his Advisory
Committee came on the subject of assumption of risk. (This is not to
say that individuals didn't disagree frequently or that they hesitated to
attack the draft on the Institute floor. After all, we were trying for the
best Restatement possible.) Reporter Francis Bohlen had intention-
ally left assumption of risk out of the treatment of negligence in the
first Restatement, though it was added after his retirement by Warren
Seavey in a single section at the very end (§ 893). Bill felt that the
state of the case law and proper analysis required that it be presented as
an integral part of the volume on negligence, and he prepared chapter
17A, covering §§ 496A to 496G. Three of the advisers agreed with
him, but eight disagreed strongly, contending that assumption of risk
was entitled to no independent significance but was more accurately
and understandably analyzed as being a form of contributory neglig-
ence, a lack of duty on the part of the defendant, or the presence of
actual consent to be subjected to the risk.

The debate was lengthy and vociferous and produced no agree-
ment. It carried over into position papers which were mailed to com-
munity members and which didn't change any minds; but it was al-
ways friendly and never bitter. Bill completed his draft, including
some changes in language as a result of the debate, and to be scrupu-
ulously fair, put in the Council Draft a selection of the debate papers.
In the written debate he called the dispute the Battle of the Wilder-
ness, and he dubbed the dissenters the Confederate Army. (One
of us accused him of doing this to insure that ours would be a “Lost
Cause.”) Bill's draft went before the Council and apparently passed
without trouble. It came before the Institute floor in May, 1963, in
Tentative Draft Number 9, which contains on pages 70 to 106 the
suggested new chapter and the interesting debate in the position papers.

The Battle of the Wilderness came before the floor of the Insti-
tute on a late Friday afternoon and Saturday morning, with many
Institute members staying over to watch the ebb and flow of battle.
The “Confederates” charged with dash and elan. The beleaguered cap-
tain held his ground with pluck and vigor and made counterattacks of
his own. By a clever ruse he convinced many of the umpires that the
Confederates were impetuous academics whose sense of the practical had been lost at birth, or shortly thereafter; and by a substantial margin he won approval of the Reporter's "general approach." Thereafter extended debate continued on specific details and the wording of the comments. Eventually, on motion of one of the Confederates, the material was returned to the Reporter "to work on in the light of the discussion." He did so work on it, and the finished draft came close to satisfying many of the Confederates. A blow-by-blow account of the Battle is to be found in the 1963 Proceedings of the Institute, at pages 366-76 and 396-467. The debate spilled over into a symposium in the first 166 pages of 22 Louisiana Law Review; it has continued since that time in the courts, with considerable shifting of position, so that each side now has basis for contending that it has won the judgment of history.

3. The Last Appearance on the Institute Floor. Thursday, May 21, 1970 started most inauspiciously for Bill. Through an error on someone's part, he had embarked on the wrong plane from San Francisco and reached New York rather than Washington, had to take another plane down and arrived late at night. After a poor night's sleep, he was nervous the next morning and cut his lip badly while shaving. There was a long 215-page draft to cover, beginning with Chapter 40 on Nuisance. A year before, he had finished and had received approval of the three sections on the new topic of public nuisance; but they had been included in this draft to provide a complete picture. As he began the presentation with § 821D on private nuisance, he was interrupted by two people who wanted to reconsider the sections on public nuisance. The first wanted tort law to stay out of the field of pollution regulation and leave it to administrative control or noncontrol. The second wanted the tort remedies to be greatly expanded, so that ecology-minded persons might use the courts to regulate pollution. There ensued a rather confused babel of voices and eventually the whole topic was recommitted to the Reporter to revise, without clear directions.

Those of us who knew Bill well could sense that he was definitely upset, but it was not apparent to the audience as a whole. The session continued on through the morning on private nuisance. A substantial dispute arose between him and Fleming James and Bob Keeton on the requirement of fault for private nuisance and on the need of finding that an intentional invasion of an interest in land was "unreasonable." The dispute came to a vote, and once again the question was recommitted to the Reporter, this time to revise the provisions more nearly in accordance with the James-Keeton position.
At lunch that day he was unusually quiet, but he was put on again that afternoon and carried through in fine style until 5:15 that evening. He was in complete control of himself. His comments were clear and incisive; his quips were scintillating. He finished all of the Draft (No. 16), except for the very last section, before time ran out.

The last section which he took up (§ 886A), was a new one to the torts Restatement, on contribution between joint tortfeasors. This was his last great accomplishment in improving tort law. He had always inveighed against the original common law rule that there can be no contribution. A few states had had judicial repudiations of the common law rule. Some others had passed a motley group of statutes. As a uniform laws commissioner he became the drafter of a Uniform Act to provide for contribution. It was very carefully drafted, based on a neat balance of practicality and legal theory and treating all of the problems which might arise. Promulgated in 1955, it somehow failed to catch hold (perhaps due to insurance opposition), and was adopted in only a few states.

Bill now seized on this occasion to count up all of the statutes and add them to the minority rule, and to set forth a Restatement rule that “there is a right of contribution.” His blackletter section took up the various problems involved and settled them similarly to his uniform act. He got this through the Advisory Committee and the Council, with one exception. This had to do with the effect of a settlement with one tortfeasor upon a suit for contribution brought against him by another tortfeasor who had been forced to pay more than his share. Of the three possible solutions, the two which had case support had the practical effect of discouraging settlements, and Bill opted for the third, which would discharge the settling tortfeasor. The sole bases for it, as he freely acknowledged, were reasons of practicality and his Uniform Act. And he almost carried it through. By a vote of 44 to 43 the Institute instead determined to have a caveat expressing no opinion on this issue and leaving it to the Reporter to explain in the comments the advantages of his rule.

Getting § 886A through the Institute on the basis of the authority supporting it was a major accomplishment. A lesser man probably wouldn't have been able to get it considered. And when the section comes out in officially-promulgated, bound-volume form, it is likely to influence remarkably the state of the law.

The Institute adjourned with the president expressing “our great admiration and respect for our Reporter and the very fine work he has been doing on this Restatement,” plus a standing vote of applause. The comment was heard more than once, “The old master was in great form today, wasn’t he?” But that long day had taken a lot out
of Bill. He was utterly exhausted, and as he left he whispered to one of the committee, "I've had it." And we couldn't persuade him to change his mind during the summer that followed, no matter how much we tried.

4. His Final Publications. Bill may have been planning to retire as Reporter even prior to that meeting of the Institute in May, 1970. Earlier that spring he had called me up and invited me to join with him in preparing a new edition of his casebook. In the summer and fall of that year, we prepared the copy for it. At exactly the same time he was completing the copy for the 4th edition of his treatise. And if that weren't enough, he was engaged at the time in finishing the final polishings of the unpublished portions of the *Restatement* which had gone through the Institute, together with all the Reporter's Notes.

How he did it all, I'll never know. He did the lion's share of the work on the casebook and had copy coming at me so fast that my tongue was constantly out and I got little sleep that fall—or winter, when the proofreading and indexing had to be done.

We worked together well, communicating by letter, by phone or by visit. Each had respect for the other's ideas, and each knew that the other was ready to work as much as was necessary to get it right. At the end of his last visit to Nashville, where we had been going over the final editing of the cases to shorten the length a little, Bill turned to me and said in a note of surprise, "You know, we've never had a real disagreement, have we?" And we hadn't, though in retrospect I think my ideas prevailed as often as his. We were both a little sorry to see the work end.

Bill Prosser's last written communication to me was an inscription on the first page of the new edition of his treatise. It read: "To John Wade. My partner in committing all the Torts." The thought came to me then that all of us on the Advisory Committee were joint tortfeasors, persons *particeps criminis*. It occurred to me again on the day that his son Dick called me, and I thought also that as far as the members of our Committee were concerned, there was truly a contribution between joint tortfeasors. And a satisfaction for one produced a satisfaction for the others. On the other hand, the release of one did not release the others, but left them still under the original obligation to do all they could to improve the state of the law of torts.