William Lloyd Prosser

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“Bill Prosser has suggested that you might be interested in coming to Hastings for a year as a visiting professor of law.”

This was the opening sentence of a letter from the Dean of Hastings College of the Law that was on my desk in my Philadelphia law office on a snowy January morning in 1970. The letter concluded: “Insofar as torts is concerned I am certain that you and Bill Prosser will have a great deal to talk about.” Many things had happened to both of us since Professor William Lloyd Prosser wrote me from the University of Minnesota Law School in November 1941, “I wish I could have a torts session with you.”

In the 1930’s Professor Francis Hermann Bohlen was the outstanding authority on the law of torts in the United States and was the Reporter for the first Restatement of Torts. I remember Judge Cardozo describing him as “a great Master of Torts”. To me, Professor Bohlen was the Great White Father, and I worshipped at his feet. He was stricken with illness in 1937; I went to Penn Law School to take over his classes in torts. Shortly after that, I began to hear and read about a man named Prosser. Bohlen and Prosser had many differences, but as I look back in this year 1972 I can see how alike they were in certain aspects of their lives, personalities and accomplishments.

In 1941, as I read every word of the new Handbook of the Law of Torts by William L. Prosser, I realized that a new “Master of Torts” was coming up on the horizon to follow the stricken Bohlen and carry on the task of reforming the law of torts to serve “the felt necessities of the times.” In my review of the first “Prosser on Torts”, I said:

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The informed reader will close this book with the realization that it is the best general text on the American law of torts which has ever been published. The uninformed reader will find within its covers a clear and understandable discussion of this fascinating field of law. Although judges, lawyers and law students alike will find the book an invaluable working tool, I believe that, as a class, the teachers of torts will appreciate most fully what Professor Prosser has done.

For they will realize that he has surveyed the modern literature of tort law, which is scattered throughout the law reviews of the country, and has synthesized within 1127 pages the best thinking by the judges and scholars who have brought our tort law to what it is today. This in itself was a tremendous task which required years of study, and the scope of that study is reflected in footnotes which refer to hundreds of articles.

It is regrettable that the text is called a "Hornbook" and is in the Hornbook Series. The word "hornbook" means "a rudimentary treatise" whereas this book is a product of thoughtful scholarship, probing deep into the why and wherefore of tort law and criticizing those parts of existing law which although unsuited to present social needs still hang on to bedevil the community. Professor Prosser not only knows his theories, he knows the cases, and he supports everything he says with citations which are at times selective and at times exhaustive, and in all total some 15,000. But with all the actual labor of writing this book Professor Prosser, unlike some writers in the field, has not forgotten the importance of putting thought as well as energy into his product. As a result he can look upon his work and call it good.

The book is easy to read. While it does not have the literary excellence of an essay by Holmes, it avoids stuffiness without descending to Rodellian devices, and there are frequent sentences which not only drive home a point to, but also produce a smile for, the reader. Some may deprecate this but a little sparkle and levity can be a good thing in a law book as well as elsewhere.¹

The six page review ended:

... When the book is viewed as a whole it is seen to be a splendid piece of creative scholarship which I heartily recommend to all who may read this review. Any American scholar in the field of torts would be proud to be its author. I doubt if any could do a better job and I am sure only a very few could hope to equal it.²

In succeeding editions the author corrected a few initial errors and rewrote and improved various parts of the book. The fourth edi-

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2. Id. at 510.
tion was published in 1971, and I doubt if any American scholar in the field of torts could hope to equal it. "Prosser on Torts" is a familiar citation not only in the appellate opinions in California but in appellate opinions all over the United States. It, and his articles, have greatly influenced changes in worn-out rules of tort law. For example, just as Bohlen's trenchant criticism in 1905 of the law concerning the non-liability of the manufacturer of a dangerously defective product led to Judge Cardozo's 1916 opinion in MacPherson v. Buick Motor Co., so Prosser's 1960 critical analysis, The Assault Upon the Citadel, led to Justice Traynor's 1963 decision in Greenman v. Yuma Power Products, Inc. and to the Restatement 2d, Torts § 402A, imposing strict products liability. Cardozo cited Bohlen and Traynor cited Prosser.

In 1941, Bill Prosser and I commenced a desultory correspondence which meant a great deal to me. He left teaching in 1943 and returned to active practice in Minneapolis, and I followed suit in Philadelphia a year later. In 1946, Dean Young B. Smith of Columbia Law School had his heart set on getting Bill as a permanent member of that great law school's faculty. I was there for the summer as a visiting professor (commuting from Philadelphia) and, at Dean Smith's urging, I wined and dined Bill at the Knickerbocker Club and used all my advocacy to induce him to accept Dean Smith's offer, but to no avail. He had too much sense to want to live anywhere in or near Morningside Heights. He remained in practice and turned down various offers of law school professorships and deanships, but finally succumbed, to be a professor of law at Harvard in 1947. A year later he was lured away to become dean of the University of California Law School at Berkeley.

Although Dean Smith did not get Bill on his faculty, the two of them worked together to produce Smith and Prosser's Cases and Materials on Torts, which first appeared in 1952. In my review of it I said:

There is no doubt about it; this book is all a teacher of tort law can ask for. It is probable that Smith and Prosser's Cases and Materials on Torts will in the near future come to occupy the place as a teaching tool which Bohlen's Cases on Torts occupied twenty years ago.

The teacher with little background in torts will rejoice greatly in this book and give silent thanks for the scholarship which is handed to him on a silver platter. But the senior teachers of torts, the experienced old warhorses, will find one drawback. Never again will they be able to convince their classes of their own scholarship and their own ingenuity in thinking up hypothetical questions. For here, in addition to cases, the reader finds clear, terse, accurate
text materials, presented in several different ways; and he finds all the best hypothetical questions; and scores of other thought provoking questions designed to develop analysis and etch distinctions, with numerous citations of cases to point an answer or conflicting answers. For purposes of emphasis it will still be necessary for teachers to lecture on various points of substantive law but it will be difficult to cover anything that the student will not have before his eyes. Certainly note taking will be substantially reduced; and the same will be true of the student's use of text books.

In short, Dean Smith and Dean Prosser, who are known to the profession as two of the leading American scholars in tort law, and as experienced and stimulating teachers, have produced a book which reflects both their scholarship and their teaching experiences. It also reflects a tremendous amount of careful work in selecting cases and writing the accompanying material. The book is an outstanding addition to the University Casebook series.

I also said:

Going over this book gave this reviewer and quondam teacher a sense of nostalgia and I read it from cover to cover except for leafing over the cases I knew. Again and again I revelled in its scholarship, chuckled over its humor, and envied the ingenuity of the questions posed.

My prediction in the second sentence of this review proved to be a good one. Smith and Prosser's book went through four editions, the last published in 1967. The fifth edition, published in 1971, appeared as Prosser and Wade's Cases and Materials on Torts. I used it this past academic year. It is a great teaching tool.

One of the joys of working with Bill was his whimsical humor, which Dean John W. Wade talks about in his separate article. I agree with him that it was "quite unpredictable." One of its results is The Judicial Humorist, A Collection of Judicial Opinions and Other Frivolities, which Prosser edited. This was published in the same year the case book first appeared. The preface commences "Judicial humor is a dreadful thing," and concludes "I think this book might make a good Christmas gift for a judge; but it would be necessary to select the judge with a considerable degree of care." One of my precious mementos of Bill is a copy of this book, which reached me just before Christmas, 1952, with the inscription in his hand "To my good friend Larry Eldredge in the forlorn hope that it will improve his mind."

My really great experience with Bill started in 1955 when The American Law Institute selected him to be the Reporter for the second
Restatement of Torts. I was fortunate to be selected as one of his Advisors. Another veteran of the first Restatement was Professor Warren A. Seavey of Harvard, who had previously served both as Reporter and Adviser. (Bill regarded Professor Seavey as his mentor and gave much weight to his opinions, but he completely rejected Seavey's analysis of voluntary assumption of risk, in the 1963 "Battle of the Wilderness" described by Dean Wade.) Judge Herbert F. Goodrich had also been an Advisor on Torts for the first Restatement. Now, as Director of the Institute, he presided over all the conferences of the Reporter and his Advisors. Dean Wade has described the rest of the group. They were the top torts men in the country, and it was a joy to work with them. We had our first conference in September, 1955.

In reviewing the annual proceedings of earlier years, Bill and I were both disturbed by the fact that quite a few sections of the first Restatement of Torts had been approved on the floor without the Reporter making clear that the proposed section was controversial. Bill was determined that before the Institute voted on an important section on which there was little, or a substantial division of case law, the members were going to know what they were doing. His presentations, both in the tentative drafts and orally from the podium, were clear and fair. Often we met together in his hotel room at the annual meetings and planned strategy about sections which were going to provoke opposition from the floor, sometimes from special interests. Bill would present the section and explain the problem. The opposition would rise and declaim against this "legislation, not restatement." Then I would rise to support the Reporter and move that the section be approved. This generally worked.

There were times when there was a real division among the Advisors about a proposed section. I did not hesitate to oppose the Reporter from the floor when I strongly disagreed with him, and it was a joy to debate with Bill at the annual meetings. The members seemed to enjoy it, and they certainly knew what the issue was when they voted. Bill kept the debate on a high intellectual level. Whether he won or I won, our friendship and respect for each other increased each year. There was one rare day when my view prevailed on each of three different questions. Shortly after that, Bill and I were together on a Practising Law Institute panel in New York. He asked me to be his guest for the evening, took me to one of the best French restaurants in the city, dined me, wined me with vintage wines, and then on to the theatre. A little man could not have done that. Our common interest was to produce the best possible Restatement of Torts.
That May day in 1970 when he told us he was resigning as Reporter was an unhappy day for me. It ended fifteen years of work together on the second Restatement of Torts.

But the following September, I began again talking tort law to Bill when, as Visiting Professor at Hastings, I became his faculty colleague and resumed teaching torts. Bill was a great help, filling me in on recent important cases I did not know, including California ones. When, after two weeks of teaching, the Dean asked me to give up active practice in Philadelphia and stay permanently at Hastings, the thought of having several more years to work closely with Bill was one of the strong motivations for my decision to do so. The fates decreed otherwise.

My wife and I flew back to Philadelphia in May 1971 to clear out our home in Bryn Mawr and close out my law practice. The last weekend we were in California Bill drove Helen and me to Yosemite National Park to show us the sights. Months before he had said he wanted to do it. On that long ride Bill revealed more about himself than I had ever known before. I had long suspected that underneath he was a somewhat lonely, shy, and very sensitive human being. Bill's conversation had never been better, and his sense of humor was priceless. But he seemed to tire quickly, and on the drive back on Sunday he curled up on the back seat and slept while Helen drove part of the way. When he dropped us at our flat in San Francisco he refused an invitation to stop in, saying he had to get home to have dinner with his family.

After we were back in Bryn Mawr we heard that Bill was in the hospital and learned that when he got home that Sunday afternoon he lay down for a nap and slept through until Monday morning. We realized, with a sense of pain, what an effort he made on that last trip, and what he would do for old friends. Again, it was a mark of the measure of the man as a warm, lovable human being.

My last written message from Bill is on the fly-leaf of a copy of the 1971 edition of Prosser on Torts which I found on the desk in my office at Hastings when I returned in August. It is dated July 10, 1971, and it says “To Larry Eldredge without whom Torts would be no fun at all.”

Torts is less fun without Bill.

Earlier, I mentioned that in some ways Bohlen and Prosser were much alike. In Dr. William Draper Lewis' obituary of Professor Bohlen he wrote:

Like many others who are themselves sensitive to criticism, he never thought whether what he said hurt or not. His wit was a
manifestation of his candor, combined with a keen sense of the ridiculous. Unthinkingly, he could say such things because false flattery was abhorrent to him.

... More than one member of the Institute has said to me that Frank had no superior among the Institute’s Reporters in the power of clear statement and that his ease of manner and quickness of repartee were a delight.

... In the first place he not only had fine brains but an extraordinary appreciation of the direction in which the law of the subject in which he was most interested should and often with his guidance did develop.5

All of these statements describe Bill Prosser and as Dr. Lewis also said of Bohlen, Prosser “instinctively revolted from shallow reasoning and those weasel words which tried to hide the law’s defects and the processes of its development by judicial decision.”

The accolade “a great Master of Torts” falls on William Lloyd Prosser. I cherish my memories of him; and I think of what Holmes said about “the secret isolated joy of the thinker who knows that, a hundred years after he is dead and forgotten, men who never heard of him will be moving to the measure of his thought.”