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Riding the Tide Toward Modern Tort Law: William Prosser's "The Assault upon the Citadel (Strict Liability to the Consumer)"

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George L. Priest

It should not be surprising that Prosser's *Assault upon the Citadel* is among the most frequently cited articles in *The Yale Law Journal*. Prosser’s article at once predicted, justified, and outlined the implementation of the shift from warranty law to strict liability for product defects which, along with *Brown v. Board of Education*, constitutes one of the two most sudden and momentous changes in our legal regime of the past century.

Prosser’s article became heavily cited, however, not because its ideas were influential, nor, surely, because it initiated a school of thought. *Assault upon the Citadel* is hard to distinguish in content from an assortment of articles published in the late-1950s criticizing the regime of warranty law for consumer products and urging that the nearly uniform adoption of automatic liability for food poisoning be extended to other consumer goods. Rather, Prosser’s article became central because, of the assortment of articles floating above the legal surface at the time, *Assault upon the Citadel* was perfectly positioned to catch the wave of enthusiasm for greater manufacturer liability. Prosser’s article condemning warranty law and proposing automatic consumer recovery for product defects was published almost simultaneously with the New Jersey Supreme Court’s decision in *Henningsen v. Bloomfield Motors, Inc.*, invalidating warranty law and providing for automatic consumer recovery for product defects. Shortly thereafter, *Assault upon the Citadel* was propelled even further by the decision of the California Supreme Court in *Greenman v. Yuba*...
Power Products, Inc., defining a new standard of strict tort liability for defective products which Prosser, though not the New Jersey Supreme Court, had recommended.

I have earlier remarked upon the simultaneity of prediction in Assault upon the Citadel and confirmation in Henningsen as equivalent to the delivery of Einstein's relativity paper to its readers exactly during the 1919 eclipse of the sun. In retrospect, this description does not adequately distinguish Prosser's ambition from his reception. Readers at the time may well have been amazed to see Prosser's predictions in The Yale Law Journal appear within months in the pages of the New Jersey Reports. But Prosser viewed himself not as a positive scientist whose theory generates predictions, but as a reformer whose persistence may generate change. Prosser had been predicting the imminent demise of warranty law and the adoption of strict products liability as part of his propaganda in favor of reform, repeatedly—in treatise (1941), article (1943), treatise (next edition, 1955), and article (1960)—for almost two decades. And in Assault upon the Citadel he finally got lucky. A better description of Prosser in Assault upon the Citadel is that of a Jeremiah who finds that he is finally getting an audience as the earthquake begins.

The subsequent success of Assault upon the Citadel, however, was hardly accidental. Prosser exploited Henningsen and Greenman, his commanding authority in the field, and his position as Reporter for the ALI Restatement of Torts to cement the achievement and channel products law toward modern strict liability. Prosser's initial hopes for legal change were modest. In now little-remembered passages of Assault upon the Citadel, Prosser predicted that expansion of the strict liability concept beyond cases involving food or skin products would likely proceed slowly. Extension of the concept to allow recovery by bystanders "may perhaps never come." He admiringly quotes at length from Justice Traynor's concurrence in Escola v. Coca-Cola Bottling Co. recommending extension of strict liability to all consumer products, but concludes gloomily, "[t]hus far there has been relatively little indication that the time is yet ripe for what may very possibly be the law of fifty years ahead."

Prosser progressively abandoned this conservatism, however, as, in 1961, 1962, and 1964 (following Greenman), he implored the ALI to adopt strict liability, respectively, for food products, products for intimate bodily use (a category including food), and finally all consumer products, defective and

74. Priest, supra note 72, at 507.
75. See id. at 516-17.
76. Prosser, supra note 14, at 1139.
77. Id. at 1142.
79. Prosser, supra note 14, at 1120.
unreasonably dangerous. Section 402A was adopted in 1964 accompanied by extensive Comments drafted by Prosser, drawing examples—even taking full paragraphs—from *Assault upon the Citadel*.

The accumulation of citations to *Assault upon the Citadel* came in the years following the adoption of Section 402A. By this time, the world had accepted its points; there surely was no new ground for the article to break. Instead, *Assault upon the Citadel* climbed up the list of the most frequently cited because of its convenience. It provided by far the most accessible summary of the case law preceding Section 402A, which in turn seemed to provide the strongest support for the new legal regime. *Assault upon the Citadel*, thus, became at once the beacon and the bowsprit of the modern expansion of civil liability that has so significantly changed tort law over the past thirty years.

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80. A description of the ALI history appears in Priest, *supra* note 72, at 512-17.

81. *Assault* was distributed far more widely than the working drafts of section 402A that Prosser had prepared for the ALI Restatement (Second) of Torts § 402A (Tent. Draft No. 6, April 7, 1961); Restatement (Second) of Torts § 402A (Tent. Draft No. 7, April 16, 1962); Restatement (Second) of Torts § 402A (Tent. Draft No. 10, April 20, 1964).