
Article

Prosser's *The Fall of the Citadel*

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Historians are fond of saying that “the past is a foreign country.”¹ By this I take them to mean that, like coming to know a foreign country, understanding the past requires translation and imagination, and that even then our understanding always will be incomplete. I face this challenge in discussing William L. Prosser’s 1966 article, *The Fall of the Citadel (Strict Liability to the Consumer)*,² which is justly regarded in this Symposium as one of the four most influential articles published during the first one hundred years of the *Minnesota Law Review*. *The Fall* was cited 120 times in the state and federal courts in the ten years after it appeared, when products liability was in a process of rapid change and the article was an important resource for the courts.

The Fall chronicled what has become one of the central features of modern tort law: the imposition of “strict” liability on manufacturers for injuries caused by defective products. Prosser’s title referred to the citadel of privity, the cluster of rules precluding liability for certain kinds of wrongs unless the victim and injurer were in privity of contract. The notion of these rules as a citadel against liability was made famous by (then) Judge Benjamin Cardozo’s observation that the “assault upon the citadel of privity is proceeding in these days apace.”³ Because the case in which Cardozo made that statement in-

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1. The origin of this statement seems to be L.P. HARTLEY, *THE GO-BETWEEN* 9 (1953); see also DAVID LOWENTHAL, *THE PAST IS A FOREIGN COUNTRY* 191 (1985).

2. William L. Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 *MINN. L. REV.* 791 (1966) [hereinafter Prosser, *Fall*].

3. William L. Prosser, *The Assault upon the Citadel (Strict Liability to the Consumer)*, 69 *YALE L.J.* 1099, 1099 (1960) [hereinafter Prosser, *Assault*] (quoting *Ultramares Corp. v. Touche*, 174 N.E. 441, 445 (N.Y. 1931)).

volved accountants' liability, not injury caused by a product, and because the case held that the accountant was *not* liable to a set of non-clients because of the absence of privity, the quoted statement had an ambiguous valence in the products liability context. Prosser nonetheless had picked up the notion of the privity requirement as a citadel, and he ran with it.

In *The Fall*, Prosser announced the demise of the privity rule, against which he had campaigned in successive editions of his famous treatise and in an article published in the *Yale Law Journal* in 1960;⁴ catalogued the manner in which the courts were now implementing the new rule; and trumpeted a draft of the American Law Institute's Restatement (Second) of Torts § 402A, articulating the new rule.

The Fall was all the more significant because of the position its author occupied in American law at the time. Prosser was the author of the leading twentieth-century treatise on tort law, often referred to simply as "Prosser on Torts."⁵ By 1966 the treatise was in its third edition. Prosser had previously served as Dean of the School of Law at the University of California, Berkeley for thirteen years, and he was the sole Reporter for the Restatement (Second) of Torts. He was, in short, the foremost torts authority of his time. Interestingly, *The Fall* was not only a piece of scholarship, but was also something of a hometown victory lap for its author, who had first practiced law in Minneapolis and then begun his academic career at the University of Minnesota Law School thirty-seven years earlier.⁶

For all these reasons, it is worth trying to understand how Prosser conceived of and reported on the rise of strict products liability, both in *The Fall* and in his work leading up to that article. The challenge of understanding the historical context in which *The Fall* was situated, however, is heightened by the fact that, in that article and in work that preceded it, Prosser failed almost completely to anticipate important developments that would follow very soon thereafter. He showed virtually no interest in the significance of the differences between what we now call manufacturing, design, and warning defects, or in the

4. *Id.* As Catherine Sharkey shows in her article in this Symposium, the privity rule fell in claims for physical injury or damage, but not in claims for economic loss. Catherine M. Sharkey, *The Remains of the Citadel (Economic Loss Rule in Products Cases)*, 100 MINN. L. REV. 1845, 1847 (2016).

5. Kenneth S. Abraham & G. Edward White, *Prosser and His Influence*, 6 J. TORT L. 27, 28 (2013).

6. *Id.* at 31.

difficulty of defining a defect in design. Yet those differences, and that difficulty, have turned out to be central to the law of products liability after *The Fall*. Consequently, the question is not only how to understand the past as it is embodied in *The Fall*, but also what to make of the article's own relation to the future of its subject. The relation of this particular past to its immediate future is the foreign country that we must visit.

As I will indicate at more length below, I think that three factors explain why Prosser did not focus on what turned out to be the future of products liability. First, throughout his career, Prosser was a no-duty skeptic. He attacked a whole series of such no-duty limitations on the scope of tort liability. He was at least as interested in eliminating these limitations as in the precise scope of the liability that would grow up thereafter. The privity rule was a no-duty barrier to liability. For Prosser, the privity rule was the target; strict liability was the result. The precise scope of strict products liability was therefore secondary to him. Second, most of the appellate cases on products liability that Prosser read and cited involved what we now call manufacturing defects. These cases gave him little reason to anticipate the challenge of defining a design defect that arose later. Third, in considering manufacturers' liability, Prosser may have been thinking mainly of "shoddy" products such as adulterated food or poorly made durable goods whose defectiveness was obvious to him. In this context there would have been no need to attend to possible differences in the causes or nature of this shoddiness.

In short, Prosser had been fighting mainly to remedy the past failings of products liability law by bringing down the citadel of privity, rather than to erect a fully-designed replacement. Because he was recounting the results of that effort in the *The Fall*, we should understand the article in that context. In the following pages I attempt to do that.

I. PRODUCTS LIABILITY BEFORE THE FALL

To understand the fall, we must understand exactly what was still standing before the fall.

And it turns out that the citadel whose fall Prosser announced had already been partly, arguably even substantially, dismantled. Indeed, what fell in the end was the last (though important) piece of an only partly-standing edifice.

A. FROM *WINTERBOTTOM* TO *MACPHERSON*: THE RISE AND FALL OF THE CITADEL IN NEGLIGENCE

The appropriate starting point for understanding the nature and history of the citadel is the English case of *Winterbottom v. Wright*.⁷ It was in *Winterbottom* that the citadel of privity was erected, or at least first recognized. The plaintiff in *Winterbottom* was an employee of a party who had contracted with the Postmaster General to operate mailcoaches. The Postmaster General had contracted with a third party to supply the coaches and to keep them in a safe condition. The employee of the third party was injured by an allegedly unsafe feature of one of the coaches. He sued the supplier of the coach for his injuries. The court held that the plaintiff-employee had no cause of action for these injuries against the supplier of the coach because he had no contract with the supplier.

Winterbottom was soon taken to have held that a plaintiff could not recover in tort for product-related injuries unless he was in privity of contract with the defendant. Tort actions for negligence in making or supplying products that resulted in bodily injury were therefore precluded, in the absence of privity between the maker or supplier and the injured party.⁸

The trajectory of the law on this issue over the next seventy years followed a familiar pattern. First the courts created a narrow set of exceptions to the privity rule, for negligence actions involving products that were "inherently dangerous," such as poison.⁹ Then the courts expanded the products that fell into this category, to include such seemingly ordinary products as a scaffold¹⁰ and a coffee urn.¹¹ Analyses of these developments usually focus on the law of New York,¹² because they culminated in the celebrated opinion in *MacPherson v. Buick Motor Co.*¹³

7. (1842) 152 Eng. Rep. 402; 10 M. & W. 109.

8. Over the decades there has been some question whether the plaintiff was suing in contract or in tort, exactly what the basis of the court's opinion was, and whether the opinion ruled out recovery as broadly as it appeared to do. For discussion, see Vernon Palmer, *Why Privity Entered Tort—An Historical Reexamination of Winterbottom v. Wright*, 27 AM. J. LEGAL HIST. 85, 92–98 (1983).

9. See *Thomas v. Winchester*, 6 N.Y. 397, 409–11 (1852).

10. *Devlin v. Smith*, 89 N.Y. 470 (1882).

11. *Statler v. George A. Ray Mfg. Co.*, 88 N.E. 1063 (N.Y. 1909).

12. See, e.g., EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 11–17 (1949).

13. 111 N.E. 1050 (N.Y. 1916).

The plaintiff in *MacPherson* was injured when a wooden wheel on his car shattered. He sued Buick for negligence. Writing for the court, Judge Cardozo held that the plaintiff could recover from Buick notwithstanding the absence of privity, because a car was inherently dangerous if negligently made.¹⁴ Dismissing the argument that *Winterbottom* dictated the result, he deployed the memorable conclusion that “[p]recedents drawn from the days of travel by stagecoach do not fit the conditions of travel to-day.”¹⁵

Exactly what that principle of *MacPherson* was, however, could be discerned only with hindsight. On one level the opinion in *MacPherson* read as if it was merely developing an even broader category of exceptions to the privity rule for things that were “inherently dangerous” than had prevailed up to that point. The possibility that the privity rule had not been abolished, but merely further eroded, was not merely a theoretical point; in the years to come sometimes it still had liability-limiting consequences.¹⁶ Whether, technically speaking, *MacPherson* overruled *Winterbottom* or only created a broader exception that eventually swallowed up the *Winterbottom* rule, within decades scholars took the former view, and we certainly now understand *MacPherson* to have abolished the privity rule.

14. *Id.* at 1053. After reviewing the record in *MacPherson* almost twenty years ago, James Henderson concluded that the facts actually were more complicated than Cardozo had made them seem. The wheel might already have been weakened because the car in question had been carrying tombstones over rough country roads for a number of months before the accident, the accident probably could not have occurred in the manner that was alleged, and the defendant’s negligence was not as clear as the opinion makes it appear. See James A. Henderson, Jr., *MacPherson v. Buick Motor Company: Simplifying the Fact While Reshaping the Law*, in *TORTS STORIES* 41, 42–46 (Robert L. Rabin & Stephen D. Sugarman eds., 2003). But these differences between what may have been the actual facts, and the facts that Cardozo reports, go to whether Buick was negligent, not to whether Buick could be held liable even in the absence of privity if Buick were negligent. Both Buick and Cardozo appear to have been more interested in the principle at issue than in the facts of this particular case.

15. *MacPherson*, 111 N.E. at 1053.

16. As late as 1934, for example, even in New York liability was barred for injuries suffered when a defective door handle on a car allowed the door to open and the plaintiff to fall out of the car, on the ground that a defective door handle was not inherently dangerous. *Cohen v. Brockway Motor Truck Corp.*, 240 A.D. 18, 19 (N.Y. App. Div. 1934). On the other hand, by 1949 Edward Levi could write that “the exception in favor of liability for negligence where the instrument is probably dangerous has swallowed up the purported rule that ‘a manufacturer or supplier is never liable for negligence to a remote vendee.’” LEVI, *supra* note 12, at 17.

As early as 1941, Prosser had written that the “reasoning and . . . fundamental philosophy” of *MacPherson* rested on the “foreseeability of harm if proper care were not used” and that although “[m]ost courts have continued to speak the language of ‘inherent danger,’ . . . it seems clear that this has meant no more than that substantial harm is to be foreseen if the chattel should be defective.”¹⁷ The point here is that it took some time before it was recognized that in *MacPherson* the citadel of privity in negligence cases had actually fallen, rather than merely having been somewhat further dismantled. And Prosser, as he often did, was not only observing but also predicting the direction he both hoped and expected the law to develop, but doing so in the language of observation.¹⁸ By 1960, he was able to report that the rule was now “a general rule imposing negligence liability upon any supplier, for remuneration, of any chattel,” with only “New York and three or four other courts” still talking “the language of ‘inherent danger.’”¹⁹

B. PARALLEL DEVELOPMENTS IN STRICT LIABILITY

Prosser’s account of *MacPherson* was part of a larger story that he had been recounting since the publication of the first edition of his treatise in 1941. This other piece of the story involved strict liability. It had three parts.

First, as Prosser described,²⁰ versions of the Uniform Sales Act of 1906, predecessor to the Uniform Commercial Code, were enacted in a number of states during the first decades of the 20th century.²¹ These Acts provided that an implied warranty of merchantability accompanied the sale of goods subject to the Act.²² This was mainly a warranty of quality pertaining to the economic value of the goods sold. But some courts held that direct sellers were liable to purchasers for bodily injury caused by breach of that implied warranty.²³

The innovation here was in the liability standard that implied warranty entailed. The implied warranty of merchantabil-

17. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 677–78 (1st ed. 1941) [hereinafter PROSSER, HANDBOOK I] (footnotes omitted).

18. For an account of the settings in which he did this, see Abraham & White, *supra* note 5, at 46–51.

19. Prosser, *Assault*, *supra* note 3, at 1102 (footnotes omitted).

20. PROSSER, HANDBOOK I, *supra* note 17, at 670–72.

21. CHARLES THADDEUS TERRY, UNIFORM STATE LAWS IN THE UNITED STATES 189 (1920).

22. *Id.* at 205.

23. See, e.g., *Rinaldi v. Mohican Co.*, 121 N.E. 471, 472–73 (N.Y. 1918).

ity was breached, and liability for resulting bodily injury could be imposed, regardless of whether the seller had been negligent in any way and even if the package was sold without the possibility of inspection. The seller might have received a sealed package from the manufacturer and sold the product in that package. In effect, liability for breach of the implied warranty was strict liability. Because there was privity between seller and buyer in this situation, this was of course no exception to the privity rule and therefore involved no attack on the citadel.

Second, however, under the warranty theory a retail seller held liable to its buyer might have an action-over for indemnification from the wholesaler that had sold it the product, or from the manufacturer.²⁴ The practical result was that, indirectly, the manufacturer was strictly liable to the buyer.

Third, the concept of an implied warranty of merchantability was a link to the frontal attack on the citadel that would become Prosser's focus. In cases involving impure food, some courts held that an implied warranty of merchantability ran from the manufacturer or producer of food to the ultimate consumer.²⁵ This was an enormous conceptual leap, since the notion of warranty was essentially contractual and there was no contract between the manufacturer or producer and the ultimate consumer. And the liability accomplished by the leap was effectively strict liability.

The courts that imposed this liability described it in a variety of ways, at which the Realist in Prosser scoffed.²⁶ He wanted warranty liability to be extended beyond food, to all products. In the first edition of *Prosser on Torts*, in 1941, he argued that:

No reason is apparent for limiting it to food cases, and it may be anticipated that it will extend, first to other products involving a high degree of risk, and perhaps eventually to anything which may be expected to do harm if it is defective. If that is to occur, it seems far bet-

24. See *Escola v. Coca Cola Bottling Co. of Fresno*, 150 P.2d 436, 442 (Cal. 1944) (Traynor, J., concurring).

25. See, e.g., *Mazetti v. Armour & Co.*, 135 P. 633 (Wash. 1913); PROSSER, HANDBOOK I, *supra* note 17, at 690–91.

26. PROSSER, HANDBOOK I, *supra* note 17, at 690–91 (“The various devices adopted include a fictitious agency of the intermediate dealer for the consumer’s purchase, an imaginary assignment by the dealer of the producer’s warranty of fitness for the purpose, a third party beneficiary contract made with the dealer for the benefit of the consumer, a warranty ‘running with the title’ as in the case of conveyances of land, and the rather undefined ground that the manufacturer has represented the goods to be suitable by placing them on the market.” (footnotes omitted)).

ter to discard the troublesome sales doctrine of “warranty,” and impose strict liability in tort, as a pure matter of social policy.²⁷

Thus we see the first published salvo in Prosser’s prolonged attack on the citadel.

The dismantling of the citadel prior to the fall continued one step further after that. The implied warranty of merchantability of the manufacturer of food to the ultimate consumer had originated at least as early as 1913.²⁸ By the late 1950s it had been extended, in some cases in some states, to products intended for intimate bodily consumption, such as hair dye²⁹ and permanent wave solution.³⁰

In retrospect, intellectually the most important event in the period was the appearance of Justice Roger Traynor’s 1944 concurrence in *Escola v. Coca Cola Bottling Co. of Fresno*.³¹ Citing Prosser five times,³² Traynor argued that there should be strict liability for injuries caused by all defective products, not only food, and that the whole warranty apparatus should be discarded in favor of more straightforward strict liability (he called it “absolute” liability) in tort. But Traynor’s opinion was not influential at the time and gained attention only later.³³

So the citadel was hardly a fully erect edifice by the end of the 1950s. Without question, however, there was one very important part of it still standing: manufacturers of durable goods—products other than food, drink, drugs, or material applied to the body—were liable to third parties only in negligence. That restriction on products liability was the “citadel” about which Prosser wrote.

C. PROSSER’S ASSAULT

That is where products liability law stood when Prosser published *The Assault on the Citadel* in 1960.³⁴ In the first quarter of the article he reported the developments I have just

27. *Id.* at 692.

28. *See Mazetti*, 135 P. at 634.

29. *Graham v. Bottenfield’s, Inc.*, 269 P.2d 413, 418 (Kan. 1954).

30. *Markovich v. McKesson & Robbins, Inc.*, 149 N.E.2d 181 (Ohio Ct. App. 1958).

31. *See Escola v. Coca Cola Bottling Co. of Fresno*, 150 P.2d 436, 440 (Cal. 1944).

32. *Id.* at 441–43.

33. George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461, 498–99 (1985).

34. Prosser, *Assault*, *supra* note 3.

recounted, though in greater detail, and then moved to a section he called "Beyond Food."³⁵ Here he reported "seven spectacular decisions, which appear to have thrown the limitation to food onto the ash pile, and to hold that the seller of any product who sells it in a condition dangerous for use is strictly liable . . . for injuries resulting from such use."³⁶

This was exaggeration, to say the least. One of the cases (from California), as Prosser admitted, had promptly been vacated after it was decided.³⁷ Another, he also admitted, was decided by a New York court applying California law, in which the court apparently was unaware that the California case on which it relied had been vacated.³⁸ Only one of the five remaining cases involved bodily injury.³⁹ Although the theory behind the four cases involving property damage was the same as the theory that would have applied to bodily injury, none of the five decisions seemed to have recognized that they were adopting a radically new rule. This was not a set of "spectacular" decisions, not the "Trend" Prosser claimed, and the cases did not "give the definite impression that the dam has busted, and [that] those in the path of the avalanche would do well to make for the hills."⁴⁰ Rather, there was a trickle of cases moving in the direction Prosser was pointing. If a contemporary law student had made Prosser's claims solely on the basis of the cases in question, his or her competence to practice law at all might well have been called into question.

Nonetheless, based on the "Trend," Prosser said that "it needs no prophet to foresee [sic] that there will be other such decisions in the next few years, and that the storming of the inner citadel is already in full cry."⁴¹ Actually, it did need a prophet,

35. *Id.* at 1110.

36. *Id.* at 1112.

37. *Peterson v. Lamb Rubber Co.*, 343 P.2d 261 (Cal. Ct. App. 1959), *vacated*, 353 P.2d 575 (Cal. 1960); Prosser, *Assault*, *supra* note 3, at 1113 n.113.

38. *Hinton v. Republic Aviation Corp.*, 180 F. Supp. 31 (S.D.N.Y. 1959); Prosser, *Assault*, *supra* note 3, at 1113 n.115.

39. *B. F. Goodrich v. Hammond*, 269 F.2d 501 (10th Cir. 1959); Prosser, *Assault*, *supra* note 3, at 1112 n.109.

40. Prosser, *Assault*, *supra* note 3, at 1113.

41. *Id.* at 1113–14. As George Priest has noted, at other points in *Assault* Prosser seems to suggest that he did not think that strict liability would be quickly adopted. *See* Priest, *supra* note 33, at 507. For example, Prosser says that "[w]hen we come to other products, not intended for such bodily use, one may speculate that, notwithstanding the spectacular eruption of recent decisions, expansion of the strict liability of the seller is likely to proceed more slowly." Prosser, *Assault*, *supra* note 3, at 1139 (footnotes omitted). Although

and Prosser was both a prophet and more. As he had been in the past in predicting other changes in tort law, Prosser was extremely adept at prophesying legal change, even if he was apt to exaggerate the support he had for his predictions.⁴² In addition, however, Prosser could actually affect the accuracy of his predictions, because he was so influential. And that is exactly what he did.

II. THE FALL, THE RESTATEMENT, AND *THE FALL*

In the six years following publication of *The Assault*, there were major developments. First, the last part of the citadel did actually fall; next, Prosser captured the new regime in a draft of the Restatement (Second); and then he chronicled both developments in *The Fall*.

A. THE FALL AND THE RESTATEMENT

At virtually the same moment that *The Assault* appeared in print, the first of two decisions that Prosser regarded as constituting the fall of the citadel was published. First, in *Henningsen v. Bloomfield Motors*,⁴³ the Supreme Court of New Jersey held in 1960 that an auto manufacturer could be held liable for bodily injury to the wife of an ultimate purchaser of the vehicle, for breach of the manufacturer's implied warranty of merchantability, and that the manufacturer's attempted disclaimer of such liability in the contract of sale between the dealer and the purchaser was invalid.

In contrast to the seven decisions that Prosser had characterized as a "trend" in *The Assault*, *Henningsen* combined all the elements necessary to constitute a clear "fall." The plaintiff had suffered bodily injury, not economic loss or property damage only; the court clearly recognized the significance of its holding, engaging in extended analysis of the justifications for imposing such liability, and rejecting the arguments against doing so.⁴⁴ In addition, the court made clear not only that the implied warranty of merchantability required no privity, but

this statement is not technically inconsistent with the other passages I have quoted in the text, at the least the tone and import of these passages, all in the same article, are certainly very different.

42. See Abraham & White, *supra* note 5, at 52–53, 59–60 (discussing Prosser's earlier predictions regarding the torts of intentional infliction of emotional distress and invasion of privacy).

43. 161 A.2d 69 (N.J. 1960).

44. *Id.*

also that such a warranty could not be disclaimed so as to preclude liability for bodily injury.⁴⁵ *Henningsen* effectively imposed strict liability in tort, although the court did not describe it that way.

Then, in *Greenman v. Yuba Power Products, Inc.*,⁴⁶ the Supreme Court of California held in 1963 that a manufacturer could be held strictly liable in tort for bodily injury caused by a defect in a product, regardless of any of the “intricacies” of warranty law (what the court called “the law of sales”). Citing Prosser’s *Assault* three times,⁴⁷ the opinion was written by (now) Chief Justice Roger Traynor, who had written the concurrence in *Escola* proposing strict liability in tort, nineteen years earlier.⁴⁸ His concurrence had become the unanimous opinion of the court. At least in New Jersey and California, then, without question the entire citadel had finally fallen.

During these years, as the sole Reporter for the Restatement (Second) of Torts, Prosser prepared successive drafts that attempted to capture the developing law on the subject. Finally, his 1965 draft of § 402A of the Restatement provided that there was strict liability for injury caused by a product in a “defective condition, unreasonably dangerous to the user or consumer.”⁴⁹ As was sometimes his tendency, the case law he cited in support of this section was more ambiguous than he acknowledged,⁵⁰ though it is quite possible that § 402A would have been adopted by the American Law Institute even if Prosser’s citations had erred by being too conservative. In any event, the fall of the citadel had begun, and it would be consummated across the country over the next decade.

B. *THE FALL*

And that brings us to the *The Fall*. In addition to *Henningsen*, *Greenman*, and the Restatement, *The Fall* was influential in persuading other courts to bring down the citadel.

45. *Id.* at 95, 99–100.

46. 377 P.2d 897, 901 (Cal. 1963).

47. *Id.* at 900–01.

48. Not entirely coincidentally, Traynor had recommended that Prosser be Dean of Boalt Hall School of Law at the University of California, Berkeley, and Prosser took the post in 1948. Abraham & White, *supra* note 5, at 35. Traynor’s son, Michael Traynor, has told me that while they were growing up, he and his siblings were “in and out of the Prosser home all the time.”

49. RESTATEMENT (SECOND) OF TORTS § 402A (AM. LAW INST., Tentative Draft, 1965).

50. Priest, *supra* note 33, at 511–18.

In the ten years between the time the article was published and 1975, *The Fall* was cited ninety-five times in state courts and twenty-five times in federal courts.⁵¹

The article spans fifty-seven pages. The first fourteen are an account of the fall itself, with a focus on *Henningsen*.⁵² The remaining forty-one pages address a long list of issues that the cases thus far had not addressed, and that subsequent cases would have to address: What Products?, What Defendants?, What Plaintiffs?, What Damages?, Abnormal Use, Intervening Conduct, Notice to the Seller, Disclaimers, Express Representations, Contributory Fault, and Proof.⁵³

The one issue that is not discussed, however, is What Defects? And yet that is the issue that has dominated strict products liability in the years since it was adopted and *The Fall* was published. In the decades after the fall of the citadel, products liability defects turned out to fall into three different categories: manufacturing, design, and warning defects.⁵⁴ Perhaps the principal challenge has been how to define a design defect in a way that results in strict liability for a “defective” design, rather than simply for a design itself. The modern risk-utility test that has emerged seems much more like a negligence than a

51. Cases Citing William L. Prosser's *The Fall of the Citadel (Strict Liability to the Consumer)* from 1966–1975, HEINONLINE, <http://home.heinonline.org> (enter “*The Fall of the Citadel (Strict Liability to the Consumer)*” into the search bar and click on “Cited by 207 Cases” link next to the article title to see the cases citing this article).

52. *Henningsen* was undoubtedly the right case to cite as marking the final fall of the citadel. It was decided in 1960. In 1964, however, a year before *The Fall* appeared, in the third edition of Prosser's treatise, *Henningsen* and *Greenman* were relegated to a footnote, and it was *Spence v. Three Rivers Builders and Masonry Supply*, one of the seven “spectacular” cases he had cited in *The Assault*, that was mentioned in the text. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 677 (3d ed. 1964) [hereinafter PROSSER, HANDBOOK III]. By the time *The Fall* was published, however, it was *Spence* that was relegated to a footnote. Prosser, *Fall*, *supra* note 2, at 792 n.4. I think the explanation for this radical change of emphasis is probably that, at the time he revised the treatise, Prosser had other priorities, including being Reporter for the Restatement, and simply did not make the effort to revise the third edition of the treatise to conform to what he knew was the significance of *Henningsen* and *Greenman*. Two years later, in *The Fall*, he made that effort. See generally Abraham & White, *supra* note 5 (describing the frequently minimal revisions that Prosser made in successive editions of his treatise).

53. Prosser, *Fall*, *supra* note 2, at 805–40.

54. See KENNETH S. ABRAHAM, THE FORMS AND FUNCTIONS OF TORT LAW 227–35 (4th ed. 2012).

strict liability test.⁵⁵ But at the time of the fall the potential importance of the differences among these categories was not recognized. The third edition of Prosser's treatise (1964) contained a single sentence about negligent design, two sentences about negligent warning, and a half-sentence about strict liability for defective design.⁵⁶

Prosser had written about unsafe products as early as the first edition of his treatise, published in 1941.⁵⁷ He was generally fond of employing graphic factual examples to illustrate the points he made in the treatise. But in the 1941 edition the text of his material on liability for defective products (he called them "chattels" until the fourth edition in 1971) was curiously abstract. There were no textual examples illustrating what it meant for a manufacturer to be negligent, for the immediate seller of a product to breach its implied warranty of merchantability, or for the indirect seller of food to breach the same warranty. It was necessary to consult the cases in which these products figured to identify what made them unmerchantable. By the second edition (1955), there were a few textual examples of products other than food for which the cases had imposed liability for breach of implied warranty in the absence of privity. This revealed that the cases involved contaminated dog food, wire embedded in a bar of soap, a grinding wheel that disintegrated during ordinary usage, and a dangerous crop-dusting compound likely to drift.⁵⁸

Even in the third edition of the treatise, published after the actual fall of the citadel but two years before *The Fall*, there are only a few additional examples, and with the exception of the case that Prosser identifies as bringing down the citadel by imposing liability for injury caused by defective cinder building blocks,⁵⁹ the text identifies the products involved in the cases

55. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 (AM. LAW INST. 1997) (defining a design defect in risk-utility terms).

56. PROSSER, HANDBOOK III, *supra* note 52, at 665. The half-sentence regarding strict liability contains a footnote citing *Blitzstein v. Ford Motor Co.*, 288 F.2d 738 (5th Cir. 1961), but that case itself is really about a manufacturing defect. It involved an explosion of a new vehicle purchased two days earlier, resulting from the combination of a manufacturing defect and a design that made the vehicle vulnerable to explosion if there was a manufacturing defect. PROSSER, HANDBOOK III, *supra* note 52, at 665 n.77.

57. PROSSER, HANDBOOK I, *supra* note 17.

58. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 510 (2d ed. 1955) [hereinafter PROSSER, HANDBOOK II].

59. *Spence v. Three Rivers Builders & Masonry Supply, Inc.*, 90 N.W.2d 873 (Mich. 1958); PROSSER, HANDBOOK III, *supra* note 52.

that imposed strict liability, not what made these products unsafe.⁶⁰ The point in all three editions is to indicate what products are subject to liability, not what about the products generates liability when there is liability. Nor was this due to the limitations of a treatise. Prosser's discussion in *Assault* of the seven cases that he identifies as showing that "the dam has busted"⁶¹ names the products but not the alleged defects in them.

In failing even to note what made those products unsafe, Prosser was implying either that this was unimportant or that it went without saying. Since we can discount the former, the latter seems more likely to have been the case. Why would he have failed to recognize or discuss what has become so central an issue in the body of law whose creation he helped to make possible? I believe there are three reasons.

1. A Predominant Concern with No-Duty Limitations on Liability

Prosser was concerned for decades with eliminating what he considered unjustified, formalistic common law limitations on the imposition of tort liability. For Prosser, the citadel of privity was not an isolated restriction on the scope of liability for one type of injury. Rather, it was one of a whole series of no-duty or limited-duty rules with which Prosser and many of his contemporaries were extremely impatient.

From the beginning, Prosser's treatise was strewn with examples of this impatience, and with accompanying criticism of a series of formalistic common law no-duty restrictions on liability. Criticizing the courts' reluctance to recognize liability for intentional infliction of emotional distress, he said that "[i]t is the business of the law to remedy wrongs that deserve it, even at the expense of a 'flood of litigation,' and it is a pitiful confession of incompetence on the part of any court of justice to deny relief on such grounds."⁶² Speaking of the rule that there is no duty to avoid injuring an unborn child, he said that "[a]ll writers who have discussed the problem have joined in condemning

60. PROSSER, HANDBOOK III, *supra* note 52, at 677–78 (identifying, in addition to the products identified in the second edition, PROSSER, HANDBOOK II, *supra* note 58, automobiles, airplanes, an electric cable, other grinding wheels, a combination power tool, playground equipment, herbicides, insecticides, a chair, a riveting machine, and a water heater).

61. Prosser, *Assault*, *supra* note 3, at 1111–13.

62. PROSSER, HANDBOOK I, *supra* note 17, at 56 (footnote omitted).

the existing rule.”⁶³ Regarding the cases holding that there is no affirmative duty to rescue, he said that “[s]uch decisions are revolting to any moral sense.”⁶⁴ As to the objections to recovery for negligently causing mental distress, he said that “[a]ll these objections have been demolished many times, and it is threshing old straw to deal with them.”⁶⁵ Indeed, he is famous for saying more generally that “duty is not sacrosanct in itself, but only an expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection.”⁶⁶

It was this same attitude toward restrictions of liability based on the absence of duty, I think, that made Prosser dismiss the privity rule and its roots in contract. From 1941 on he repeatedly argued to the effect that, since warranty

was originally a tort action, . . . [a] return to tort theory is still possible, if the courts choose to find that the manufacturer has assumed a duty toward those who use his product. . . . By whatever name, the result is that the producer is made to guarantee the fitness of the product.⁶⁷

Thus, I believe that Prosser’s motivation and understanding of what happened when the citadel fell were of a piece with what he had been saying, over an entire career, of no-duty limitations on liability generally. One of his goals was to help bring down the citadel of privity, as well as eliminate the other, arbitrary and formalistic limitations on liability. After that, the courts would be liberated to address the proper scope of liability on the merits. And exactly what those merits consisted of was sometimes important to Prosser, but not always. His concern was not whether or under what circumstances there would be liability for design defects, but that the courts be permitted to decide this question without the artificial restrictions imposed on them by the citadel of privity. It was ensuring the fall of that citadel, and not what edifice would be erected in its place, with which Prosser was predominantly concerned.

2. A Limited Body of Design Defect Cases

A close examination of the cases Prosser cited in *The Fall* helps to explain his inattention to what it meant for a product

63. *Id.* at 190.

64. *Id.* at 193.

65. *Id.* at 211.

66. *Id.* at 180 (internal quotation marks omitted).

67. *Id.* at 690–91 (footnotes omitted).

to be defective. There had been few appellate opinions directly addressing the issue, and most allegations pertained to what we would now call manufacturing defects. By my count (there is some judgment involved) there are 163 different cases cited in what I would call the weight-bearing footnotes of *The Fall*—those that address in some way the basis for imposing liability and in which it is possible to identify the basis for the allegation of defectiveness.⁶⁸ Of these, 121 cases involved what we would now call a manufacturing defect. An additional handful involve allegations of the failure to warn.

Of the forty-two cases that can be characterized as containing what we would now call a design defect allegation, one sub-group involved such products as cigarettes or drugs, for which (judging from Restatement § 402A) Prosser thought that, at most, only a warning would normally be required. He would not have found it necessary to consider what might have constituted a design defect in these products, because he would not have thought them defective.⁶⁹

Another sub-group alleged a design defect but the issue on appeal was something else, such as whether the privity rule applied at all. A final sub-group involved durable products, but never seemed to have confronted the nature of a design defect directly. This was often, though not always, because the defect in design was pretty obvious: for example, an under-the-chair mechanism that severed the plaintiff's finger when he simply rested his hand underneath a rocking chair and rocked on it,⁷⁰ and a valve on a welding unit that permitted the release of explosive gas.⁷¹

Based on those cases—the cases that Prosser was reading and citing—I believe that he simply did not think that design defect litigation would become a major phenomenon after the

68. These are footnotes 4, 10–27, 34–39, 49–59, 61–63, 69, 75, 80, 84–89, 95–103, 105–08, and 110–19.

69. Comment i to § 402A reflected his position on this issue:

Good whiskey is not unreasonably dangerous merely because it will make some people drunk . . . Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful . . . Good butter is not unreasonably dangerous merely because, if such be the case, it deposits cholesterol in the arteries and leads to heart attacks . . .

RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (AM. LAW INST. 1965).

70. *Matthews v. Lawnlite Co.*, 88 So. 2d. 299 (Fla. 1956); Prosser, *Fall*, *supra* note 2, at 794 n.14.

71. *Hill v. Harbor Steel & Supply Co.*, 132 N.W.2d 54 (Mich. 1965); Prosser, *Fall*, *supra* note 2, at 795 n.18.

fall of the citadel, or that defining what we would now call a design defect would create any more difficulty than defining what we would now call a manufacturing defect.

Nor was Prosser alone in his lack of attention to the nature of the defects that would be the subject of liability after the fall. At around the same time there were a number of other articles addressing products liability. Two of the most prominent were by Dean Page Keeton and Chief Justice Roger Traynor. Both articles reveal the same, nearly-complete absence of a sharp focus on the nature and contours of the “defectiveness” for which strict liability was now going to be imposed. Keeton distinguished products in which “[t]here was something deleterious,” the “presence of which was unknown to the manufacturer,” from those in which the product “is exactly as it was intended to be and as other products of like kind were, as is generally true . . . of drugs, cosmetics, and tobacco.”⁷² Keeton was obviously groping toward the later distinction between manufacturing and design defects, but his analysis revealed the same unreflective attitude toward the question of what made a product defective as Prosser’s.⁷³

Traynor’s article revealed a somewhat greater appreciation of the issue, but did not make much headway with it. He noted that “the manufacturer’s strict liability depends on what is meant by defective.”⁷⁴ He then went on to say that no single definition would resolve all cases, but that a defective product may be defined as:

[O]ne that fails to match the average quality of like products . . . Thus, the lathe in *Greenman v. Yuba Power Products, Inc.* was defective because it was not built with a proper fastening device as other lathes are. The automobile in *Vandermark v. Ford Motor Co.* was defective because the brakes went on unexpectedly, as normal brakes do not. Although many questions still attend the problem of harm caused by smoking itself, courts have found the manufacturer liable for injury from a foreign object in tobacco. If a normal sample of defendant’s product would not have injured plaintiff, but the peculiari-

72. Page Keeton, *Products Liability—Liability Without Fault and the Requirement of a Defect*, 41 TEX. L. REV. 855, 859 (1963).

73. In fact, the remainder of the article was divided into the following categories: “Foreign Substance in Product,” “Food,” “Allergies,” and “Cigarettes,” the kinds of products whose defects were obvious when they were defective. *Id.* at 857–59.

74. Roger J. Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363, 366 (1965).

ties of the particular product did cause harm, the manufacturer is liable for injuries caused by this deviation.⁷⁵

In this passage, Traynor strayed back and forth between examples of what we now call manufacturing (defective brakes, a foreign object in a cigarette) and design defects (a lathe with an improper fastening device). The lathe example is taken directly from *Greenman*. But it is worth noting that the opinion even in that case does not clearly reveal that the lathe had a design defect. In his article, Traynor's "deviation from the norm" conception appears to have comprehended both types of defects. And his subsequent discussion strayed off into unavoidably dangerous products, mostly drugs, as to which only a warning would be required. The one exception was his example of a case he considered difficult and had no ready way of resolving—an automobile part that normally lasts five years, but "the one in question proves defective after six months."⁷⁶

To sum up, neither Prosser nor his peers seemed to contemplate the difficulty of defining a defect, in part because what is problematic about this notion tends to arise in design defect cases, and there were few of those.

3. A Focus on "Shoddy" Products

A third reason Prosser did not attend in *The Fall* to the nature of product defects is a bit more speculative, since we are dealing very much here with the "foreign country" to which I referred at the outset. He may have thought that the products that would result in liability for injuries they caused would be obviously unsafe, or of obviously low quality. He may have thought, that is, that what made a product defective went almost without saying. There are only a few sentences expressly about the issue in all of § 402A, for example, and they are consistent with this interpretation:

The defective condition may arise not only from harmful ingredients, not characteristic of the product itself either as to presence or quantity, but also from foreign objects contained in the product, from decay or deterioration before sale, or from the way the product is prepared or packed.⁷⁷

Although we cannot precisely reconstruct what Prosser actually had in mind, it is consistent with Prosser's reasoning and arguments over the years that he was operating under the as-

75. *Id.* at 367 (footnotes omitted).

76. *Id.* at 369.

77. RESTATEMENT (SECOND) OF TORTS § 402A cmt. h (AM. LAW INST. 1965).

sumption that the core problem that needed to be addressed was the “shoddy” product. The notion of shoddiness transcends the distinction we draw today between manufacturing defects and design defects. Indeed, when the focus is on the quality and safety of the individual item in the consumer’s hands, and not the manufacturer’s conduct or the cause of the shoddiness, this distinction is irrelevant.

Prosser was born in 1899. He came of age immediately after the muckraking journalists of the progressive era had exposed (among other things) the filthy conditions and low quality of the food being manufactured at the time. In *Assault*, Prosser had quoted at length from a piece of journalism published fifty-five years earlier, demonstrating that a “major part of the food” that the public consumed was “adulterated and preserved with poisonous chemicals.”⁷⁸ He indicated that Upton Sinclair’s 1906 novel about the conditions in the meatpacking industry, *The Jungle*, was in his view a “bad piece of literature,” but he acknowledged that these conditions “were in all conscience bad enough.”⁷⁹

In addition, this was an era during which there was increase in the availability of consumer products, and therefore of the possibility of being injured by them if they were of poor quality. To give just one example, the electrification of homes in the United States meant that electronic irons, sewing machines, vacuum cleaners, and other electric products became much more available. In 1907, only 8% of U.S. residences had electricity. By 1925, when Prosser was thirty-three years old, the figure had risen to 53.2%.⁸⁰ In subsequent years there was concern—how widespread is unclear—that the quality of such products was unsatisfactory.⁸¹ It seems quite likely that Prosser and others of his generation were familiar with these concerns.

Therefore, it is quite possible that Prosser (and his colleagues) still had in mind the paradigm of the shoddy product that was the exemplar of a defect when they had first begun to think about product quality and product liability law. By the

78. Prosser, *Assault*, *supra* note 3, at 1105 & n.39.

79. *Id.* at 1105.

80. ROBERT N. MAYER, *THE CONSUMER MOVEMENT: GUARDIANS OF THE MARKETPLACE* 19 (1989).

81. *See, e.g.*, STUART CHASE & F.J. SCHLINK, *YOUR MONEY’S WORTH* 77–86 (1927) (recounting studies showing that only four of twenty-three representative carburetors showed good all-round performance, and that of sixteen small motors used on such appliances as washing machines and vacuum cleaners, twelve failed to comply with trade association standards).

time the citadel fell, other forces (market concerns about safety, and the beginnings of administrative safety regulation, for example) had substantially reduced the problem that Prosser had been addressing during his entire career. He was, to some extent, still fighting the last war, even while the central issue would soon become design rather than manufacturing defects. For example, Ralph Nader's book about the design of the Chevrolet Corvair, *Unsafe at Any Speed*, was published in 1965.⁸²

George Priest, who probably has studied the development of § 402A of the Restatement more than any other scholar, has concluded that what he calls the "founders" of § 402A intended only to eliminate the technical, warranty law defenses that the privity rule created, and only to address what we now call manufacturing defects.⁸³

I think the matter is more complicated than that. Professor Priest is definitely correct, for the reasons that I described earlier, that Prosser's focus was mainly on deficiencies that would later be called manufacturing defects. But the minor revisions that Prosser made in the fourth edition of his treatise (the only words he ever published about products liability after writing *The Fall*) tend to show that he did intend § 402A to apply beyond manufacturing defects and warnings. The terminology of § 402A may "leave something to be desired," he said, "since it is clear that the 'defect' need not be a matter of errors in manufacture, and that a product is 'defective' when it is properly made according to an unreasonably dangerous design."⁸⁴ He also said in a footnote⁸⁵ and in text,⁸⁶ however, that a manufacturer's liability for a defective design would usually turn on the same issues as in negligence. This suggests that he did recog-

82. RALPH NADER, *UNSAFE AT ANY SPEED: THE DESIGNED-IN DANGERS OF THE AMERICAN AUTOMOBILE* (1965).

83. George L. Priest, *Strict Products Liability: The Original Intent*, 10 *CARDOZO L. REV.* 2301, 2303 (1989).

84. WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 659 (4th ed. 1971).

85. *Id.* at 659 n.72 ("Since proper design is a matter of reasonable fitness, the strict liability adds little or nothing to negligence on the part of the manufacturer; but it becomes more important in the case of a dealer who does not design the product.")

86. *Id.* at 644 ("There are, in addition, two particular areas in which the liability of the manufacturer, even though it may occasionally be called strict, appears to rest primarily upon a departure from proper standards of care, so that the tort is essentially a matter of negligence. One of these involves the design of the product . . ." (footnotes omitted)).

nize that the major impact of § 402A would be on liability for manufacturing defects.

In any event, I disagree with Professor Priest's implication that Prosser thought that he was addressing a largely technical problem and that the move to strict liability would not be significant.⁸⁷ *The Fall*, and *The Assault* five years earlier, are written in dramatic—arguably overly dramatic—language. Prosser says in *The Fall* that “[t]he leaguer [i.e., siege] had been an epic one of more than fifty years” and that what followed *Henningsen* “has been the most rapid and altogether spectacular overturn of an established rule in the entire history of the law of torts.”⁸⁸ Reciting the justifications given for the new rule, Prosser says that the “public interest in human safety requires the maximum possible protection for the user of the product.”⁸⁹ The language in these passages does not constitute a dry report by a legal engineer recounting a technical fix. It is the triumphant language of a reformer who believes that he has helped to change public policy in an important way.

The upshot is that it would be wrong to conclude that Prosser understood the fall to be significant only for manufacturing defects. Prosser thought he was doing something important in helping to bring down the citadel, but he appreciated, at least a few years later, that the fall would not and did not change the essence of what had to be proved in order to recover from a manufacturer for injuries caused by a defective product design. Prosser thought that the fall did more than make a technical change in the law, but I suspect that he still did not appreciate how significant, conceptually and quantitatively, design defect litigation would become.

CONCLUSION

We will never be able to know exactly what Prosser was thinking about the future of products liability when he wrote *The Fall*. But based on his lifelong impatience with no-duty rules, the case law he cited, and the history of product safety and products liability during his lifetime, we have some evidence of his major concerns. He was not focused on the difference between manufacturing and design defects, and he may

87. See Priest, *supra* note 83, at 2309 (“As a consequence, Prosser believed, a standard of strict liability for product defects would introduce very little change in the law.”).

88. Prosser, *Fall*, *supra* note 2, at 791, 793–94 (footnote omitted).

89. *Id.* at 799.

well have had the paradigm of the “shoddy” product in mind when he thought about the meaning of defectiveness. This would have been a much more backward-looking rather than a forward-looking way of thinking about the issue. His major concern, as his title makes absolutely clear, was the fall of the citadel of privity, not the detailed contours of the strict liability that would develop thereafter. *The Fall* was a chronicle of Prosser’s triumph, not an attempt to anticipate the long-term results of that triumph.