



# Laidlaw, Sage, Prosser & Joseph Choate

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ONE OF THE WAYS to mark the passage of time is by noting the editions of Prosser on Torts. The first edition was published in 1941. The 1971 fourth edition was the last written by Professor William L. Prosser himself. In his preface he says: “The writer can only deplore the limitations of space that compel the condensation of so vast an amount of material into so limited a number of pages. As before, he must express his gratitude, together with his apologies, to the dozens of other able and distinguished writers whose ideas he has unblushingly appropriated. A packrat is at best a collector, and no heroic figure; and the most that can be said for him is that he sometimes chooses well.”

Prosser engages in a display of modesty well knowing that Prosser and Torts had become as closely connected as Burns and Allen and Lord and Taylor. Prosser on Torts was the safe place to be for judges and lawyers.

Prosser, in the preface to the First Edition, brings in the example of Joel Bishop, who proposed in 1853 to write a text on torts. He was told there was no market for such a

work and that, “if the book were written by the most eminent and prominent author that ever lived, not a dozen copies a year could be sold.”

I doubt that Bishop could have written with Prosser’s playfulness as he summarizes a mountain of cases with a common sense metaphor.

When free to write on subjects other than torts Prosser’s writing style went from the light to the humorous: “Judicial humor is a dreadful thing. In the first place, the jokes are usually bad; I have seldom heard a judge utter a good one. There seems to be something about the judicial ermine which puts its wearer in the same general class with the ordinary radio comedian. He just is not funny.”

The 1984 fifth edition was the work of four law professors, W. Page Keeton, Dan B. Dobbs, Robert E. Keeton and David G. Owen.

Professor Dobbs (a contributor to the fifth) originally intended to write a sixth edition of Prosser. After reflection, he said: “But the law has changed a good deal and so have ideas about it, and ultimately it seemed better

to write an entirely new book built from the ground up.” Professor Dobbs, in 2001, published his own Law of Torts in two volumes.

As the Prosser editions appeared I turned to the table of cases to see whether *Laidlaw v. Sage*<sup>1</sup> was still carried in the footnotes. It always was. It was cited as authority for the “but for” rule. “The defendant’s conduct is not a cause of the event, if the event would have occurred without it.”

Now back to Mr. Laidlaw and Mr. Sage and how their lives connected with William L. Prosser and Joseph Choate. The events of December 4, 1891 in New York brought them together. On that Friday, Sage was in his bare office right off Wall Street in New York City. Unknown to Sage, a man named Norcross had decided that Sage was going to make a substantial departure from his usual stingy, miserly habits. Norcross wrote out a note that read: “This carpet bag I hold in my hand contains ten pounds of dynamite, and if I drop this bag on the floor it will destroy this building in ruins and kill every human being in it. I demand \$1,200,000 or I will drop it. Will you give it? Yes or no.”

Norcross handed Sage the note. Sage stood considering the note. Sage was like Jack Benny who when told by a robber: “Your money or your life” paused and when threatened again by the robber said – I’m thinking, I’m thinking. Sage was thinking.

Norcross grew impatient. “Then you decline my proposition? Will you give it to me? Yes or no.” Just at that time Laidlaw entered the room. Laidlaw was a young man of promise on Wall Street. He came to deliver documents to Sage. When Laidlaw entered the room he was unaware of the role he was to play.

According to Laidlaw’s trial testimony, Sage edged towards him and in a surpris-

ingly warm gesture Sage took Laidlaw’s left hand with both his own hands and moved Laidlaw into a position between Sage and Norcross. Sage then said to Norcross: “If you don’t trust me how can you expect me to trust you?” There was a terrible explosion. Norcross was blown to bits. Laidlaw was found unconscious lying on Sage.

Laidlaw was encouraged to place the facts before Joseph H. Choate (1832–1917). He was at the time, the early 1890’s, New York’s most successful trial lawyer. Choate’s greatest victory was getting the Supreme Court of the United States to declare Congress’s 1894 income tax statute unconstitutional.<sup>2</sup> Mr. Choate, in his argument before the Court asserted that those who defended the tax “defended it upon principles as communistic, socialistic – what shall I call them – populistic, as ever have been advanced to any political assembly in the world.” It took an amendment to the Constitution to undo what Choate did.

As you see, Mr. Choate took the subject of money and property seriously. Why would Choate, a protector of the moneyed interests, be interested in suing a wealthy banker such as Russell Sage? The story that has come down to us is that some of Choate’s wealthy clients did not like Russell Sage. He had a reputation for sharp dealing combined with grasping stinginess.

When Choate heard the facts he foresaw a headline trial in which he would cross-examine Russell Sage. He was very interested. He liked the case. He immediately went to the heart of the matter. He told Laidlaw that he was used by Sage as a human shield. Choate drafted a complaint charging Sage with just that, using Laidlaw as a human shield against the explosion and alleging that Laidlaw’s injuries would not have occurred but for Sage’s misconduct. Somewhere in the

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1 158 N.Y. 73, 52 N.E. 679 (1899).

2 *Charles Pollock v. The Farmers Loan & Trust Company, et al.*, 157 U.S. 429 (1895).

past Choate had developed a dislike for Sage. He saw the case as the way he would vindicate that dislike.

As the trial approached a lawyer commented that Laidlaw was bound to lose because of his own contributory negligence: "When any man finds Russell Sage taking his hand in both of Sage's hands, it is his duty to run."

The trial judge dismissed the complaint. The judge ruled that Laidlaw would have been injured no matter what Sage did because the explosion was so violent. Laidlaw did not meet the "but for" test.

Choate appealed. The appellate court reversed declaring that Laidlaw must recover if Sage did anything – even touched Laidlaw – with the intent to shield himself with Laidlaw. The case was sent back for trial. The jury returned a verdict of \$25,000.

Sage appealed again. He claimed that the court should have given an instruction that if Sage acted involuntarily he was not liable. Sage prevailed in the appeal. The case was returned for a third trial. The jury was unable to agree. The case was retried. On June 19, 1895 almost four years after the event the jury rendered a verdict of \$40,000 for Laidlaw.

Sage appealed again and when the case finally reached New York State's highest court Sage's defense prevailed. The Court held that there was no legally sufficient relationship between anything Sage did and the injury to Laidlaw. Prosser cites it for that principle.

The failure to prove the – "but for" – , the Court said, required a reversal. The court took pains to point out that Joseph Choate's cross examination of Sage, standing alone, would have required reversal.

This cross-examination exploiting Sage's miserliness is included in Francis L. Wellman's *The Art of Cross Examination*. Here is a sample from Wellman's sampler:

Mr Choate: Were your glasses hurt by the explosion which inflicted forty-seven wounds on your chest?

Mr Sage: I do not remember.

Mr. Choate: You certainly would remember if you had to buy a new pair.

Russell Sage's lawyer wanted to prove that Russell Sage, himself, was injured by the explosion. Sage's cardiologist testified concerning the stethoscopic examination. He opined that there was in fact heart injury caused by the explosion. The witness was then turned over to Joseph Choate for cross-examination. Choate first had the cardiologist repeat the stethoscopic examination.

Then this followed:

Mr. Choate: Doctor, you said in your direct examination that you examined Mr. Sage and if I understand you correctly, you said that you sought in the first instance to locate his heart to learn how severe the shock was to him. Doctor, you realize you are under oath, and you don't mean to tell the court and jury that you went to the extent of trying find Russell Sage's heart!

Witness: Yes.

Mr. Choate: With all your temerity in testifying you would not be willing to state to the court and jury that you found Russell Sage's heart!

Witness: Yes.

Mr. Choate: You testified that on an occasion when an explosion like this place, there is an enlargement of the heart. You are not, I am sure, so reckless as to mean that you found an enlargement of Russell Sage's heart.

The opinion that ended the case was published when Mr. Choate was serving as the American ambassador to Britain. After this assignment ended he returned to New York and resumed his busy trial practice.

He was a sought after speaker at bar

functions. He occasionally ended his speech with this story. A British barrister invited him to watch a trial at the Old Bailey. The barrister said that the sitting judge liked wine with his lunch and would often doze off during the afternoon session. The barrister intended to play a little joke on the judge during one of his nods.

When the barrister saw his chance he looked up to the visitor's gallery and winked at Mr. Choate. He then said to the witness, "Then sir, you are saying that your friend was drunk, drunk as a judge." The judge woke up and said, "Sir – don't you mean drunk as a lord." The barrister responded, "Yes, my lord." *GB*