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THE ATTORNEY'S LIABILITY FOR NEGLIGENCE

JOHN W. WADE*

The concept of negligence was late in developing in the common law. Perhaps the first group of cases in which the idea began to take shape involved the liability of persons who professed competence in certain callings.¹ One of these "callings" was that of the attorney, and cases as early as the middle of the eighteenth century hold an attorney liable on this basis.²

But the judges were obviously convinced that they must be careful not to impose too heavy a burden upon the members of their own profession. Though an attorney (or solicitor) might be liable, a counsel (or barrister) was not subject to liability for negligence.³ The attorney was liable only for "culpable negligence,"⁴ and he was not responsible for mistakes.⁵ As Abbott, C. J., fervently declared in an early case, "God forbid that it should be imagined that an attorney, or a counsel, or even a judge is bound to know all the law. . . ."⁶ No reference is made to the apparent inconsistency with the old maxim that everyone is presumed to know the law.⁷ The judicial determina-

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1. See generally Winfield, *The History of Negligence in Torts*, 42 L.Q. Rev. 184, 185-90 (1926).

2. Thus in 1767, there were two holdings of the King's Bench to this effect. *Pitt v. Yalden*, 4 Burr. 2060, 98 Eng. Rep. 74 (K.B. 1767); *Russell v. Palmer*, 2 Wils. K. B. 325, 95 Eng. Rep. 837 (K.B. 1767). At an earlier time it was necessary to allege "covin." *Adams v. Ward*, Winch 91, 124 Eng. Rep. 76 (C.P. 1625).

3. See *Pitt v. Yalden*, 4 Burr. 2060, 2061, 98 Eng. Rep. 74 (K.B. 1767). This is specifically held in the later case of *Purves v. Landell*, 12 Cl. & F. 91, 8 Eng. Rep. 1332 (H.L. Sc. 1845). See also *Fell v. Brown*, Peake 131, 170 Eng. Rep. 104 (N.P. 1791).

4. See the more detailed discussion of this later.

5. In the first important decision, *Pitt v. Yalden*, 4 Burr. 2060, 2061, 98 Eng. Rep. 74 (K.B. 1767), Lord Mansfield is quoted: "That part of the profession which is carried on by attorneys is liberal and reputable, as well as useful to the public, when they conduct themselves with honour and integrity: and they ought to be protected where they get to the best of their skill and knowledge. But every man is liable to error: and I should be very sorry that it should be taken for granted, that an attorney is answerable for every error or mistake. . . ."

6. *Montriu v. Jefferys*, 2 Car. & P. 113, 116, 172 Eng. Rep. 51, 53 (N.P. 1825).

7. "[A]ttorneys do not profess to know all the law or to be incapable of error or mistake in applying it to the facts of every case, as even the most skillful of the profession would hardly be able to come up to that standard." *Savings Bank v. Ward*, 100 U.S. 195, 199 (1880). "No man is supposed to know any branch of the law perfectly, particularly when called on to act at once, and without time for reflection. The knowledge which we use the utmost industry to acquire, is often forgotten at the moment when most needed. The science is a most extensive and difficult one. Cases frequently occur, when learned men differ, after the greatest pains is taken to arrive at a correct result. No one, therefore, would dare to pursue the profession, if he was held responsible for the consequences of a casual failure of his memory, or a mistaken course of reasoning." *Breedlove v. Turner*, 9 Mart. (O.S.)

tion to protect lawyers against undue responsibility is evidenced by numerous statements,⁸ and only one case has been found in which the court openly declared that suits of this nature should be encouraged.⁹

The attorney's liability for negligence arises out of the attorney-client relationship. This relationship is created through a contract. Is the action for damages one for breach of contract or one for tort? The question has not troubled the courts often and there has been little discussion of it.¹⁰ If the action is treated as one in tort, the court is concerned to find present the various elements of a cause of action in negligence, and the fact that the duty to use care arises out of a contract normally has no immediate significance. If the action is treated as one in contract, the court simply declares that the attorney "impliedly contracts" to exercise the degree of care, skill and knowledge which would be required by the negligence standard.¹¹ Thus the

353, 374 (La. 1821). "Finally, it is simply not true that the lawyer makes any pretense about 'knowing' the statutes and decisions of his state. At most he represents that he knows where and how to look for them and that he will do everything necessary to find the pertinent parts." Isaacs, *Liability of the Lawyer for Bad Advice*, 24 CALIF. L. REV. 39, 42 (1935). "The profession of the law would be the most hazardous of all professions, if those who practice it in any of its branches were to be held strictly accountable for the accuracy of their opinions." *Alexander v. Small*, 2 U.C.Q.B. 298, 300 (1846).

8. Three examples will suffice:

Lord Campbell, in speaking of erroneous opinions: "Against the barrister in England and the advocate in Scotland, luckily, no action can be maintained. But against the attorney, the professional adviser, or the procurator, an action may be maintained. But it is only if he has been guilty of gross negligence, because it would be monstrous to say that he is responsible for even falling into what must be considered a mistake." *Purves v. Landell*, 12 Cl. & F. 91, 103, 8 Eng. Rep. 1332, 1337 (H.L. Sc. 1845).

Sherwood, C. J., in *Babbitt v. Bumpus*, 73 Mich. 331, 41 N.W. 417, 419 (1889): A lawyer is not required to use more than ordinary skill. Any other rule would subject him "to the vagaries and imaginations of witnesses and jurors, and not infrequently to the errors committed by courts. This the law never has done; and the fact that the best lawyers in the country find themselves mistaken as to what the law is, and are constantly differing as to the application of the law to a given state of facts, and even the ablest jurists find themselves frequently differing as to both, shows both the fallacy and danger of any other doctrine. . . ."

Stone, J., in *Goodman & Mitchell v. Walker*, 30 Ala. 482, 495 (1857): "If . . . members of the legal profession were held accountable for the consequences of each act which may be pronounced an error by the courts of the country, no one, I apprehend, would be found rash enough to incur such fearful risks."

9. Frazer, J., in *Reilly v. Cavanaugh*, 29 Ind. 435, 436 (1868): "An attorney is always liable to his client for the consequences of his ignorance, carelessness, or unskillfulness, just as a physician is for his malpractice; and we cannot forbear remarking that a few suits of the kind, judiciously distributed through this State, might, by making this principle of law more publicly known, have some tendency to relieve the community of the consequences which have resulted from that section of the state constitution which allows every voter, who can prove a good moral character, to practice law in all our courts."

10. See generally PROSSER, *The Borderland of Tort and Contract*, in *SELECTED TOPICS ON THE LAW OF TORTS*, ch. 7 (1954).

11. Cf. Erle, C. J., in *Fish v. Kelley*, 17 C.B. (N.S.) 194, 206, 144 Eng. Rep.

issues arising are essentially the same under both actions, and except for the issue of whether privity of contract is necessary for a duty to use care to arise, there are comparatively few questions where the form of the action is likely to affect the answer.¹² There are several statements to the effect that an action can be brought on either basis.¹³ For the purposes of this article the action will be treated as if it were in tort for negligence, and the article itself will be divided according to the necessary elements for a cause of action in negligence.

DUTY

The relationship of attorney and client gives rise to the duty to use care and skill and to display a requisite legal knowledge.

There have been some suggestions that the duty does not arise unless there was a binding contract with a valid consideration.¹⁴ But as the Virginia court said in the first reported case in this country, "The most complete answer to the objection [that there was no allegation of consideration] is, that the appellee undertook to conduct the suit, and in his management of it, was guilty of such a neglect of his duty as to subject the plaintiff to a loss; after this it is not competent to him to allege a want of consideration."¹⁵ Thus, an attorney serving

78, 83 (C.P. 1864): "So in the case of one who holds out a certain profession, the law supposes him to be of competent skill, and he is responsible for any failure in that respect. . . . From the holding out, the law implies a contract or a duty to exert competent and reasonable skill. . . . In these cases a duty often arises beyond the contract which the law implies. But I am unable to perceive any duty arising out of the casual conversation here." And see *National Savings Bank v. Ward*, 100 U.S. 195, 198 (1879); *Goodman & Mitchell v. Walker*, 30 Ala. 482 (1857); *Stimpson v. Sprague*, 6 Me. 470 (1830); *Cochran v. Little*, 71 Md. 323, 18 Atl. 698 (1889).

12. There are some questions which are so affected—*e.g.*, limitation of actions, set-off. These will be treated individually in the appropriate places.

13. *E.g.*, Viscount Haldane, L. C., in *Nocton v. Lord Asburton*, [1914] A.C. 936, 956 (H.L.): "My Lords, the solicitor contracts with his client to be skilful and careful. For failure to perform his obligation he may be made liable at law in contract or even in tort, for negligence in breach of a duty imposed upon him."

Tindall, C. J., in *Boorman v. Brown*, 3 Q.B. 511, 525, 114 Eng. Rep. 603, 608 (1842): "That there is a large class of cases in which the foundation of the action springs out of privity of contract between the parties, but in which, nevertheless, the remedy for the breach, or non-performance, is indifferently either assumpsit or case upon tort, is not disputed. Such are actions against attorneys, surgeons, and other professional men, for want of competent skill or proper care in the service they undertake to render. . . ."

14. Cf. *Cavillaud v. Yale*, 3 Cal. 108, 58 Am. Dec. 388 (1853) (failure to prosecute appeal payment in advance treated as condition precedent); *Gambert v. Hart*, 44 Cal. 542 (1872) (implication of no liability for gratuitous act); *Eccles v. Stephenson*, 6 Ky. 517 (1814) (allegation that defendant undertook suit for fee sufficient without allegation of payment).

15. *Stephens v. White*, 2 Wash. 203, 210 (Va. 1796); *Glenn v. Haynes*, 191 Va. 574, 66 S.E.2d 509 (1951). See also *Donaldson v. Haldane*, 6 Cl. & F. 762, 7 Eng. Rep. 1258 (H.L. Sc. 1840) (attorney who volunteered his services is liable for negligence); *French v. Armstrong*, 80 N.J.L. 152, 76 Atl. 336 (1910) (no need to allege that fee paid).

without fee in a charity case may be liable for negligence.¹⁶ This should not be taken to mean that an attorney who casually gives curb-stone advice to a friend is liable for wrong advice. Under such circumstances he is not treated as undertaking to meet the standard of care involved in the attorney-client relationship.¹⁷

One who holds himself out as an attorney is under a duty to demonstrate the standard of skill to which an attorney is held,¹⁸ even though he is not qualified to practice law. If he does not purport to be an attorney but merely undertakes to use his own best skill and ability in performing a legal task, a person who knows this cannot hold him to a higher standard.¹⁹

An attorney who commences his relationship with a client may be liable in negligence for abandoning the client at a critical stage.²⁰

If an attorney performs services for his client and as a result of his negligence a third person is injured, can that person maintain an action against him for damages? Until contemporary times the answer has been a resounding no; privity of contract has been regarded as a categoric necessity. The House of Lords spoke first in 1861, Lord Campbell declaring that he "never had any doubt of the unsoundness of the doctrine" that the third party could recover. "I am clearly of

16. The fact that a barrister has no legal right to be paid a fee for his services is sometimes given as the basis for the rule that he is not liable for negligence, though a solicitor is subject to liability. In theory his employment "is a purely voluntary one." See EDDY, *PROFESSIONAL NEGLIGENCE* 22 (1955); *Swinfen v. Lord Chelmsford*, 5 H. & N. 890, 157 Eng. Rep. 1436 (Ex. 1860). But a solicitor who volunteers his services and charges no fee is still liable. *Donaldson v. Haldane*, 6 Cl. & F. 762, 7 Eng. Rep. 1258 (H. L. Sc. 1840). In *Leslie v. Ball*, 22 U.C.Q.B. 512 (1863), the same man acted as attorney and barrister under the Canadian practice, and was held liable.

17. See *Fish v. Kelly*, 17 C.B. (N.S.) 194, 144 Eng. Rep. 78, 83 (C.P. 1864). Plaintiff casually asked defendant as to his rights under a deed which defendant had earlier drawn up for plaintiff's employer. From an erroneous recollection, defendant replied. He was held not liable on the ground that there was neither a contract nor a legal duty. "I am unable to find any relation between the parties from which any duty could arise. . . . They did not, therefore, stand in such a relation towards each other as to make it any part of the defendant's duty to give professional advice to the plaintiff. . . . If this sort of action could be maintained, it would be extremely hazardous for an attorney to venture to give an opinion upon any point of law in the course of a journey by railway." 17 C.B. (N.S.) at 205, 207. See also *McGregor v. Wright*, 117 Cal. App. 186, 3 P.2d 624 (1931). "The test in these cases should be whether the attorney has held himself out as one who is applying his professional skill to help the other party, rather than merely giving advice as a friend." Blaustein, *Liability of Attorney to Client in New York for Negligence*, 19 BROOKLYN L. REV. 233, 243 (1953).

18. *Miller v. Whelan*, 158 Ill. 544, 42 N.E. 59 (1895); *Foulks v. Falls*, 91 Ind. 315 (1883); *Brown v. Tolley*, 31 L.T. 485 (C. P. 1874).

19. *Morris v. Muller*, 113 N.J.L. 46, 172 Atl. 63 (1934) (real estate broker preparing a chattel mortgage, question of fact as to his undertaking); cf. *Wakeman v. Hazleton*, 3 Barb. Ch. 148 (N.Y. 1848) ("more than doubtful" whether there can be recovery from one hired to foreclose a mortgage when he was known to be unauthorized to practice in equity).

20. Cf. *Howard v. McCarson*, 215 Ala. 251, 110 So. 296 (1926); *Rohr v. Chicago, N. S. & M. R. R.*, 179 Wis. 106, 199 N.W. 827 (1922).

the opinion that this is not the law of Scotland, nor of England, and it can hardly be the law of any country where jurisprudence has been cultivated as a science."²¹ The U.S. Supreme Court followed soon afterwards, with a similar opinion,²² and other cases were to the same effect.²³

This position is of course impelled if the action is based on breach of contract, and even in the negligence action, the requirement of privity of contract has held its pristine vigor. But during the past year the California Supreme Court has rendered a strong opinion in the case of *Biakanja v. Irving*,²⁴ which consciously repudiates the requirement. A notary, improperly acting as an attorney, drew up a will which was inadequately witnessed and therefore void. In holding that the intended beneficiary could recover, the court said:

The determination whether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct and the policy of preventing future harm.²⁵

This decision thus carries the "assault upon the citadel of privity"²⁶ against another bastion which has hitherto been impregnable. It is likely to have a substantial effect in other states and to rank with a number of other leading decisions which have eliminated the requirement of privity in other fields of endeavor.²⁷ But the prediction seems

21. *Robertson v. Fleming*, 4 Macq. 167, 177, 10 Scots Rev. Rep. 447 (H.L.Sc. 1861). See also *Rae v. Meek*, 14 App. Cas. 558 (H.L.Sc. 1889); and cf. *Moss v. Solonon*, 1 F. & F. 342, 175 Eng. Rep. 756 (N.P. 1858).

22. *National Savings Bank v. Ward*, 100 U.S. 195 (1879). Chief Justice Waite dissented.

23. *Dundee Mtge. & Trust Inv. Co. v. Hughes*, 20 Fed. 39 (C.C.Ore. 1884); *Buckley v. Gray*, 110 Cal. 339, 42 Pac. 900 (1895); *Mickel v. Murphey*, 147 Cal. App. 2d 718, 305 P.2d 993 (1957); *Kendall v. Rogers*, 181 Md. 606, 31 A.2d 312 (1943); see *Re Fitzpatrick*, 54 Ont. L.R. 3, 8, [1914] D.L.R. 981 (1923) (dictum). The case of *Schirmer v. Nethercutt*, 157 Wash. 172, 288 Pac. 265 (1930), could possibly be regarded as contrary, but the court did not treat the problem. Cf. *Ward v. Arnold*, 328 P.2d 164 (Wash. 1958). The fact that the attorney's fee was paid by another person is not controlling in this connection. *Arnold v. Robertson*, 3 Daly 298 (N.Y.C.P. 1870).

24. 49 Cal. 2d 647, 320 P.2d 16 (1958), 11 VAND. L. REV. 599, 12 ARK. L. REV. 413, 27 FORDHAM L. REV. 290, 72 HARV. L. REV. 380, 7 KAN. L. REV. 83, 11 OKLA. L. REV. 473, 19 U. PITT. L. REV. 811, 5 U.C.L.A. L. REV. 681.

25. 320 P.2d at 19.

26. "The assault upon the citadel of privity is proceeding in these days apace. How far the inroads shall extend is now a favorite subject of juridical discussion." Cardozo, C. J., in *Ultramares Corp. v. Touche*, 255 N.Y. 170, 174 N.E. 441, 445 (1931).

27. *E.g.*, *Glanzer v. Shepard*, 233 N.Y. 236, 135 N.E. 275 (1922) (public weighers); *Ultramares Corp. v. Touche*, 255 N.Y. 170, 174 N.E. 441 (1931) (public accountants); *Hale v. Depaoli*, 33 Cal.2d 228, 201 P.2d 1 (1948) (independent contractors). The original leading case in this connection is, of course,

safe that the ambit of an attorney's liability for negligence for the near future will be confined to persons who were in his contemplation at the time he rendered his services, or could at least have been easily foreseen by him to be directly affected by his conduct.

BREACH OF DUTY

There has been universal agreement that a lawyer is not an insurer or guarantor of the correctness of his work or of the results which will be attained.²⁸ He is liable only for negligent failure to use the requisite care or skill.

The early cases frequently stated that the attorney is liable only for gross negligence or gross ignorance—often using the Latin phrases, *lata culpa* and *crassa negligentia*. This has sometimes been regarded as laying down a different standard of care from that expressed by ordinary negligence. A study of the early English cases, however, raises considerable doubt if a distinction was really intended. This was the formative period of the negligence concept, and the terminology had not become conventional. In the first case where the matter was discussed, Lord Mansfield used the two Latin expressions and referred to gross negligence and ignorance, but his language later in the opinion indicates that he was simply trying to describe "a culpable negligence"—negligence of the type which involves fault.²⁹ In 1830 Chief Justice Tindall declared that:

It would be extremely difficult to define the exact limit by which the skill and diligence which an attorney undertakes to furnish in the conduct of a cause is bounded; or to trace precisely the dividing line between that reasonable skill and diligence which appears to satisfy his undertaking, and that *crassa negligentia*, or *lata culpa* mentioned in some of the cases, for which he is undoubtedly responsible.³⁰

There is no indication that a gap may exist between the exercise of reasonable skill and diligence on the one hand and gross negligence on the other; the failure to exercise such skill and diligence was apparently regarded as amounting to gross negligence.

MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916) (manufacturers).

28. See, e.g., Purves v. Landell, 12 Cl. & F. 91, 102, 8 Eng. Rep. 1332 (H.L.Sc. 1845) ("The professional adviser has never been supposed to guarantee the soundness of his advice"); McCartney v. Wallace, 214 Ill. App. 618, 624 (1919) ("Attorneys do not guarantee that their judgment is infallible, and are not necessarily negligent because they do not discover all decisions on a subject or may question their finality"). For other cases, see 1 THORNTON, ATTORNEYS AT LAW, § 313 (1914). If an attorney by contract guarantees the correctness of his work, the action would then be on the contract.

29. Pitt v. Yalden, 4 Burr. 2060, 98 Eng. Rep. 74 (K.B. 1767). See Lord Ellenborough's similar treatment in Baikie v. Chandress, 3 Camp. 17, 170 Eng. Rep. 1291 (N.P. 1811).

30. Godefroy v. Dalton, 6 Bing. 460, 467-68, 130 Eng. Rep. 1357 (C.P. 1830). As late as 1920, Lord Justice Scrutton quoted a part of this statement and indicated his agreement as to the difficulty in drawing the "precise line." Fletcher & Son v. Jubb, Booth & Helliwell, [1920] 1 K.B. 275, 280-81 (C.A.).

A few years later Baron Rolfe made his famous statement that he "could see no difference between negligence and gross negligence—that it was the same thing, with the addition of a vituperative epithet. . . ."³¹ Some decisions of the House of Lords at this time laid emphasis on the distinction and others ignored it.³²

In the meantime the gross-negligence terminology crossed the Atlantic, and there were numerous state decisions which used it.³³ Some of them apparently treated it literally; and others, somewhat more sophisticated, indicated an awareness of the special meaning it had in this connection.³⁴ In any event, the decisions have now either been overruled or explained away,³⁵ and on both sides of the Atlantic the term "gross" no longer complicates the statement of the standard of care required of a lawyer.³⁶

31. *Wilson v. Brett*, 11 M. & W. 113, 115-16, 152 Eng. Rep. 737 (Ex. 1843). The case involved the liability of a defendant who rode a horse gratuitously for the plaintiff and let him fall on slippery ground. Rolfe had instructed the jury that they were to determine whether it was "culpable negligence" to ride the horse on the slippery ground and added that defendant, being shown to be skilled in the management of horses, was bound to take as much care as if he had borrowed it. Parke explained parts of Rolfe's instruction thus: "The whole effect of what was said by the learned Judge as to the distinction between this case and that of a borrower, was this: that this particular defendant, being in fact a person of competent skill, was in effect in the same situation as that of a borrower, who in point of law represents that he is a person of competent skill. In the case of a gratuitous bailee, where his profession or situation is such as to imply the possession of competent skill, he is equally liable for the neglect to use it." *Id.* at 115, 152 Eng. Rep. at 738. The term "gross negligence" had customarily been used regarding a gratuitous bailee as well as a member of a learned profession. Occasionally it had been used regarding the conduct of an ordinary individual. See the famous case of *Vaughan v. Menlove*, 3 Bing. N.C. 467, 132 Eng. Rep. 490 (C.P. 1837), holding that the test for negligence is objective, not subjective.

32. *Compare Purves v. Landell*, 12 Cl. & F. 91, 8 Eng. Rep. 1332 (H.L.Sc. 1845), with *Hart v. Frame*, 6 Cl. & F. 193, 7 Eng. Rep. 670 (H.L.Sc. 1839). "*Crassa negligentia* then just means failure to use such skill as may be reasonably expected from a man's profession . . . or average diligence and skill." *Professional Negligence*, 1955 Scors. L.T. 145, 146. In speaking of the negligence of a solicitor in *Simmons v. Pennington & Son*, [1955] 1 All E.R. 240, 245 (C.A.), Hodson, L. J., said, "'Crass' and other adjectives attached to 'negligence' are no longer used."

33. *E.g.*, *Suydam v. Vance*, 23 Fed. Cas. 477 (No. 13, 657) (C.C.N.D. Ind. 1840); *Evans v. Watrous*, 2 Port. 205 (Ala. 1835); *Pennington's Ex'rs v. Yell*, 11 Ark. 212, 52 Am. De. 262 (1850); *Stephens v. White*, 2 Wash. 203 (Va. 1799).

34. See, *e.g.*, *Holmes v. Peck*, 1 R.I. 242, 245 (1849): "We recognize the principle, which subjects an Attorney for the want of ordinary skill and care in the management of the business entrusted to him, as any one else, who professes any other art or mystery. The want of ordinary care and skill in such a person is gross negligence."

35. With the cases in note 33, *supra*, contrast the later decisions in *Goodman & Mitchell v. Walker*, 30 Ala. 482 (1857); *Hampel-Lawson Merc. Co. v. Poe*, 169 Ark. 840, 227 S.W. 29 (1925); *Glenn v. Haynes*, 191 Va. 574, 66 S.E.2d 509 (1951). In Canada, contrast the earlier case of *Marriott v. Martin*, 21 B.C. 161, 21 D.L.R. 463 (1915), with *Aaron v. Seymour*, [1956] Ont. R. 736.

36. The position in England is thus indicated by Sir Alfred Denning, L.J.: "One hundred years ago the courts said that a solicitor was not liable except for gross negligence. This phrase has been discarded, but the cases are treated much the same now as then." *Foreword*, to EDDY, *PROFESSIONAL NEGLIGENCE* at vii (1955). See, generally, Elliott, *Degrees of Negligence*, 6 So. CAL. L. REV. 91 (1933).

In determining whether an ordinary individual is negligent in causing injury to another, the standard of care is usually expressed in a simple fashion by speaking of what a reasonable prudent person would do under similar circumstances.³⁷ The standard in the case of an attorney is somewhat more complicated. It is composed of at least two elements and possibly three. The first has to do with the care and diligence which he must exercise. The second is concerned with the minimum degree of skill and knowledge which he must display. The third may involve any additional skill which he may himself possess. The three are aptly combined in a statement from the recent North Carolina case of *Hodges v. Carter*,³⁸ that a lawyer

is answerable in damages for any loss to his client which proximately results from a want of that degree of knowledge and skill ordinarily possessed by others of his profession similarly situated, or from the omission to use reasonable care and diligence, or from the failure to exercise in good faith his best judgment in attending to the litigation committed to his care.

An earlier statement quoted on a number of occasions and probably used in instructions to juries is the following from *Spangler v. Sellers*:³⁹

It did not require of him the possession of perfect legal knowledge, and the highest degree of skill in relation to business of that character, nor that he would conduct it with the greatest degree of diligence, care, and prudence. But it required that he should possess the ordinary legal knowledge and skill common to members of the profession; and that, in the discharge of the duties he had assumed, he would be ordinarily and reasonably diligent, careful, and prudent.

Other expressions vary the idea somewhat. Thus: An attorney should use "such skill, care, and diligence as men of the legal profession commonly possess and exercise in such matters of professional employment."⁴⁰ An attorney is held "to use a reasonable degree of

37. This derives, of course, from the famous case of *Blyth v. Birmingham Waterworks*, 11 Exch. 781, 156 Eng. Rep. 1047 (Ex. 1856). See generally PROSSER, TORTS, § 31 (2d ed. 1955).

38. 239 N.C. 517, 80 S.E.2d 144, 146 (1954).

39. 5 Fed. 882, 887 (C.C.S.D. Ohio 1881).

40. *National Savings Bank v. Ward*, 100 U.S. 195, 200 (1879); *Hampel-Lawson Merc. Co. v. Poe*, 169 Ark. 840, 227 S.W. 29, 34 (1925); cf. *Morrison v. Burnett*, 56 Ill. App. 129, 135 (1849) ("such skill and prudence as lawyers of ordinary ability and care would exercise"). The *Restatement* speaks of the "skill and knowledge normally possessed by members of that profession or trade in good standing" RESTATEMENT (SECOND) TORTS, § 299A (Tent. Draft No. 4, 1959). It explains that the term "average" is inaccurate since this would disqualify half of the profession. *Id.*, comment d.

References are usually to lawyers in general or the normal lawyer. Unlike the situation in the medical profession there is little reference to lawyers in a similar community. One clear reference is in the early case of *Pitt v. Yalden*, 4 Burr. 2060, 2061, 98 Eng. Rep. 74, 75 (K.B. 1767), where Lord

care or skill and to possess to a reasonable extent the knowledge requisite to a proper performance of his duties."⁴¹ A client "has a right to the exercise . . . of ordinary care and diligence in the execution of the business entrusted to him, and to a fair average degree of professional skill and knowledge."⁴² One court has recently declared that the "diligence required of an attorney is such as a man of ordinary prudence gives to his own business."⁴³ Occasionally language will be used which seems to suggest that the standard is subjective rather than objective in nature.⁴⁴

In applying the part of the standard involving knowledge and skill the courts have declared that it is negligence not to know a rule of law which is clearly defined, either in the textbooks or the court decisions⁴⁵ or not to "understand the leading and fundamental principles of the Common Law."⁴⁶ So also if the rule is clearly set out in the statute,⁴⁷ even though recently adopted.⁴⁸

On the other hand if the state of the law is uncertain or doubtful, or if there is disagreement among attorneys then it is very unlikely that an attorney will be found negligent.⁴⁹ In this connection, it may

Mansfield said, "they were country attorneys; and might not, and probably did not know that this point was settled here above." See also WEEKS, ATTORNEYS AND COUNSELLORS AT LAW, § 289 (2d ed., 1892); RESTATEMENT (SECOND) TORTS, § 299A, comment f (Tent. Draft No. 4, 1959).

41. *Clinton v. Miller*, 124 Mont. 463, 226 P.2d 487, 498 (1951); cf. *Cox v. Sullivan*, 7 Ga. 144, 148 (1849) ("employment of a degree of skill ordinarily adequate and proportioned to the business he assumes").

42. *Cochrane v. Little*, 71 Md. 323, 18 Atl. 698, 701 (1889).

43. *Williams v. Knox*, 10 N. J. Super. 384, 76 A.2d 712, 715 (1950).

44. *E.g.*, *Stevens v. Walker & Dexter*, 55 Ill. 151, 153 (1870): "If the attorney acts with a proper degree of attention, with reasonable care, and to the best of his skill and knowledge, he will not be held responsible." Compare the statement of the California court in a disciplinary proceeding: "he must perform his duties to the best of his individual ability, not the standard of ability required of lawyers generally in the community." *Friday v. State Bar*, 23 Cal. 2d 501, 144 P.2d 564, 567 (1943).

45. *Goodman & Mitchell v. Walker*, 30 Ala. 482 (1857).

46. *In re A. B.'s Estate*, 1 Tuck. 247 (N.Y. Surr. 1866); cf. *Trimboli v. Kinkel*, 226 N.Y. 147, 123 N.E. 205, 206 (1919) ("It is negligence to fail to apply the settled rules of law that should be known to all conveyancers").

47. *W. L. Douglas Shoe Co. v. Rollwage*, 187 Ark. 1084, 63 S.W.2d 841 (1933) (error of law no excuse, "as a mere glance at the statute would have been sufficient to convince him of his error"); *Jones v. White*, 90 Ind. 255 (1883). In England a solicitor may not be required to know all the statutes but he must know the important ones. See *Fletcher & Son v. Jubbs, Booth & Helliwell*, [1920] 1 K.B. 275 (C.A.).

48. *In re A. B.'s Estate*, 1 Tuck. 247 (N.Y. Surr. 1866) ("cannot be excused for ignorance of the public statutes of the state"). *But cf.* *Citizens' Loan, Fund & Sav. Ass'n v. Friedley*, 123 Ind. 143, 23 N.E. 1075 (1890).

49. See, *e.g.*, *Citizens' Loan, Fund & Sav. Ass'n v. Friedley*, 123 Ind. 143, 23 N.E. 1075 (1890); *Breedlove v. Turner*, 9 Mart. (O.S.) 353 (La. 1821); *Rapuzzi v. Stetson*, 160 App. Div. 150, 145 N.Y.S. 455 (3d Dep't 1914) (court of appeals had voted 4 to 3 on the issue); *Gimbel v. Waldman*, 84 N.Y.S. 2d 888 (Sup. Ct. 1948); *Hodges v. Carter*, 239 N.C. 517, 80 S.E. 2d 144 (1954); *Stevenson v. Howard*, 2 Dow. & C. 104, 6 Eng. Rep. 668 (H.L.Sc. 1830); *Baikie v. Chandless*, 3 Camp. 17, 170 Eng. Rep. 1291 (N.P. 1811).

be relevant that the lower court agreed with the attorney⁵⁰ or that he sought the advice of another attorney before taking his action.⁵¹

It is to be expected that one who holds himself out as a specialist will be held to the legal skill and knowledge common among such specialists.⁵²

As to the knowledge which is required of foreign law, a difference of viewpoint exists. The New Jersey court declares that an attorney is "not to be presumed to know the laws of a foreign state."⁵³ The New York court's position is that "when a lawyer undertakes to prepare papers to be filed in a state foreign to his place of practice, it is his duty, if he has no knowledge of the statutes, to inform himself, for, like any artisan, by undertaking the work; he represents that he is capable of performing it in a skillful manner."⁵⁴ The second position seems clearly preferable, but a decision should of course depend upon the scope of the defendant's undertaking.⁵⁵

As in the case of the medical profession the indication is that a lawyer is not liable in the exercise of discretion as to the better way to

50. Cf. *Hart v. Frame*, 6 Cl. & F. 193, 7 Eng. Rep. 670 (H.L.Sc. 1839) (if there had been any real doubt as to the law the magistrate's original decision would have been controlling). *But cf.* *Armstrong v. Adams*, 102 Cal. App. 677, 283 P. 871 (1929) (error in drawing up findings, which trial judge failed to discover). "When a lawyer yields to the opinion of the presiding judge, in reference to such a question, and forbears to take an exception, he cannot be convicted of a want of professional skill, professional knowledge, or professional diligence." *Pearson v. Darrington*, 32 Ala. 227, 259 (1858). An attorney is not liable for advising his client in accordance with an appellate decision, even though the decision is later overruled. *Taylor v. Robertson*, 31 Can. Sup. Ct. 615 (1901).

51. Cf. *Watson v. Muirhead*, 57 Pa. St. 161 (1868); *Godefroy v. Dalton*, 6 Bing. 460, 130 Eng. Rep. 1357 (C.P. 1830). *But cf.* *Goodman & Mitchell v. Walker*, 30 Ala. 482 (1857); *Herr v. Toms*, 32 U.C.Q.B. 423 (1872).

52. See Blaustein, *Liability of Attorney to Client in New York for Negligence*, 19 BROOKLYN L. REV. 233, 254 (1953); Holdridge, *Malpractice of Patent Attorneys*, 7 CLEV.-MAR. L. REV. 345 (1957); cf. RESTATEMENT (SECOND) TORTS, § 299A, Comment c, (Tent. Draft No. 4, 1959).

53. *Fenaille & Despeaux v. Coudert*, 44 N.J.L. 286, 291 (1882): "It could hardly be contended that the attorney who is employed to draw an agreement affecting one of our immense railways, traversing a dozen states and territories, impliedly holds himself out as familiar with the laws of each. In such a case the prudent client submits the contract to professional gentlemen of each state." The difficulty here lay not with the content of a contract drawn by the defendants, but with a failure to have it filed correctly; and there was indication that this was outside the scope of the defendants' employment.

54. *Degen v. Steinbrink*, 202 App. Div. 477, 195 N.Y.S. 810, 814 (1st Dep't 1922). The opinion continues: "Not to do so, and to prepare documents that have no legal potency, by reason of their lack of compliance with simple statutory requirements, is such a negligent discharge of his duty to his client as should render him liable for loss sustained by reason of such negligence. . . . If the attorney is not competent to skillfully and properly perform the work, he should not undertake the service."

55. On the effect of an attorney's utilization of another attorney in the foreign state, see *Wildeman v. Wachtell*, 149 Misc. 623, 267 N.Y.S. 840, 841 (Sup. Ct. 1933) ("A lawyer should not be held to a stricter rule in foreign matters than the exercise of due care in recommending a foreign attorney").

proceed or for a simple error of judgment.⁵⁶ On the other hand, if "there are two ways of doing a thing, and one is clearly right and the other is doubtful, to do it in the doubtful way" may be held to constitute negligence.⁵⁷ When an attorney "departs from the ordinary mode" of accomplishing an object and resorts to an unusual method, it has been suggested that "in so doing he must be considered as undertaking to do what was necessary to render the mode which he adopted effectual for its purpose; and if, whether from ignorance or inadvertance, he failed to do so, he must be held responsible for the consequences."⁵⁸

One factor to be considered in applying the standard regarding skill and knowledge is whether the attorney is "called on to act at once, and without time for reflection,"⁵⁹ or whether he has an opportunity to look up the law and to plan his course of procedure.

An important distinction is drawn in the case of *Byrnes v. Palmer*.⁶⁰ While the same standard of care is expressed for various activities of an attorney, the application may vary.

In a litigation a lawyer is well warranted in taking chances. . . . The conduct of a lawsuit involves questions of judgment and discretion, as to which even the most distinguished members of the profession may differ. They often present subtle and doubtful questions of law. If in such cases a lawyer errs on a question not elementary or conclusively settled by authority, that error is one of judgment, for which he is not liable. But passing titles, as a rule, is of an entirely different nature. A purchaser of real estate is entitled not only to a good but to a marketable title. . . . It is therefore the duty of a conveyancer to see that his client obtains a marketable title, and to reject titles involved in doubt, unless the client is fully informed of the nature of the risk and is willing to accept it. A careful lawyer might readily advise a client that he was entitled to a piece of real property, and that it was proper to bring an action for its recovery, while at the same time he would unhesitatingly reject a title which involved the same question as to which he advised a suit.⁶¹

This distinction, letting the application of the standard depend upon what the attorney is undertaking to do, deserves a wider consideration by the courts.⁶²

56. See, e.g., *Hodges v. Carter*, 239 N.C. 517, 80 S.E.2d 144 (1954); *Morgan v. Giddings*, 1 S.W. 369, 370 (Tex. 1886); *Hart v. Frame*, 6 Cl. & F. 193, 210, 7 Eng. Rep. 670 (H.L.Sc. 1839).

57. *Levy v. Spyers*, 1 F. & F. 3, 5 n.(a), 175 Eng. Rep. 599 (N.P. 1860).

58. *Stevenson v. Howard*, 2 Dow. & C. 104, 119, 6 Eng. Rep. 668, 674 (H.L.Sc. 1830); see also *Carrigan v. Andrews*, 6 N.B. 485 (1849). Contrast *Simmons v. Pennington & Son*, [1955] 1 All E.R. 240 (C.A.), where solicitors used the customary method of answering a requisition on title. When this was held subsequently to be erroneous and to change the legal status of the parties, the solicitors were held not negligent.

59. *Breedlove v. Turner*, 9 Mart. (O.S.) 353, 374 (La. 1821).

60. 18 App. Div. 1, 45 N.Y.S. 479 (2d Dep't 1897).

61. 45 N.Y.S. at 481-82. In *Levy v. Spyers*, 1 F. & F. 3, 175 Eng. Rep. 599 (N.P. 1860), it is specifically held not to be negligence to sue when it is doubtful whether there can be recovery, even though the suit is lost.

62. It is quoted in 1 THORNTON, ATTORNEYS AT LAW 556, n.16 (1914); and

The question of whether an attorney has breached the standard of conduct is treated as one of fact for the jury.⁶³ Occasionally there are statements which would seem to indicate that the application of the standard is to be treated as a question of law to be decided by the court,⁶⁴ but they have been rare. The burden of proof, of course, is on the plaintiff.⁶⁵

In the case of a negligence action against a physician, it is the general rule that expert testimony of other doctors is required to give the jury a basis for making a determination. No such requirement appears to have developed in actions against attorneys, though testimony of other attorneys is normally received as relevant and helpful evidence.⁶⁶

There is no indication of application of the doctrine of *res ipsa loquitur* to attorney-negligence cases.⁶⁷ Since the attorney does not guarantee results, the fact that a case is lost or that a title proves invalid does not constitute evidence of negligence.⁶⁸ Evidence as to

Blaustein, *Liability of Attorney to Client in New York for Negligence*, 19 BROOKLYN L. REV. 233, 244-45 (1953).

63. *E.g.*, *O'Neill v. Gray*, 30 F.2d 776 (2d Cir. 1929); *Walker v. Goodman & Mitchell*, 21 Ala. 647, 650 (1852) ("The degree of negligence necessary to charge him is a question of fact for the jury"); *Hampel-Lawson Merc. Co. v. Poe*, 169 Ark. 840, 227 S.W. 29 (1925) (lower court improperly passed on the issue as matter of law); *Cochrane v. Little*, 71 Md. 323, 18 Atl. 698 (1889); *Parker-Smith v. Prince Mfg. Co.*, 158 N.Y.S. 346 (2d Dep't 1916); *Stein v. Kremer*, 112 N.Y.S. 1087 (Sup. Ct. 1908); *Mercer v. King*, 1 F. & F. 490, 175 Eng. Rep. 822 (N.P. 1859).

64. See *Gambert v. Hart*, 44 Cal. 542, 552 (1872) ("In actions of this character against attorneys, . . . when the facts are ascertained, the question of negligence or want of skill is a question of law for the Court"); *Gimbel v. Waldman*, 84 N.Y.S. 2d 888, 891 (Sup. Ct. 1948) ("no question of fact is involved but . . . the matter is one of pure law and . . . it would be improper to submit to a jury of lay persons the question whether the advice was correct, or, if incorrect, whether in view of the state of the law on the subject the defendant was guilty of negligence").

65. *E.g.*, *McLellan v. Fuller*, 226 Mass. 374, 115 N.W. 481 (1917); *Powys v. Brown*, 25 N.S.W. St. 65 (1924). When the controversy relates to the good faith or fraudulent conduct of an attorney, because of the fiduciary relationship with his client, he may be under the burden of showing the validity of a transaction. This does not apply, however, to an action for negligence. *Priest v. Dodsworth*, 235 Ill. 613, 85 N.E. 940 (1908).

66. *E.g.*, *Pennington's Ex'rs v. Yell*, 11 Ark. 212, 227 (1850) (negligence "is a question of fact to be determined by the jury, and is sometimes to be ascertained by the evidence of those who are conversant with and skilled in the same kind of business . . ."); *Olsen v. North*, 276 Ill. App. 457 (1934); *Cochrane v. Little*, 71 Md. 323, 18 Atl. 698 (1889); *Godefroy v. Dalton*, 6 Bing. 460, 130 Eng. Rep. 1357 (C.P. 1830); *Fletcher v. Winter*, 3 F. & F. 138, 176 Eng. Rep. 62 (N.P. 1862). *But cf.* *Gambert v. Hart*, 44 Cal. 542 (1872) (whether defendant was negligent was a question for the court, not the witness to decide). In *Livingston v. Cox*, 8 Watts & S. 61 (Pa. 1844), it was held that evidence of another attorney was not admissible as to negligence when the "proper exercise of such discretion depends not on technical skill."

67. In *Olsen v. North*, 276 Ill. App. 457 (1934), the court specifically indicates that the doctrine is not applicable.

68. "Failure of success in a law suit is not *prima facie* evidence of negligence or want of proper skill." *Seymour v. Cogger*, 13 Hun 29, 33 (N.Y. App. 1878). "The mere fact that a complaint turns out to be demurrable does not show that the attorney who prepared it was incompetent or negligent. If he

what the attorney did to lose a case (e.g., failed to file a pleading in time) or why a title was invalid (e.g., misinterpretation of the effect of a clause in a will) will be direct evidence of negligence.⁶⁹ This type of evidence should be present in any case where the plaintiff is seeking to prove negligence.

The doctrine of negligence per se has not arisen in suits against attorneys, with the possible exception of the situation where a person is practicing without a license and is therefore in violation of a statute.⁷⁰

Being normally a matter for the jury, application of the standard of care to specific fact situations is not subject to detailed analysis and discussion. Some factual groupings of the cases, however, may prove useful.

Thus in connection with the conduct of litigation⁷¹ or the collection of an obligation,⁷² an attorney has been held negligent in the following respects: unreasonable delay in bringing suit, especially if the statute of limitations runs;⁷³ error in the pleadings;⁷⁴ suit in the wrong court;⁷⁵ suit on the wrong theory;⁷⁶ improper service on the defendant,⁷⁷ or failure to persist in seeking to obtain service on him;⁷⁸ failure

sets out the facts of the plaintiff's case fully and in proper form, and the question whether they constitute a cause of action or not is fairly debatable, and after being so advised his client desires to obtain the decision of the court thereon, the attorney is justified in proceeding with the suit." *Kissam v. Bremerman*, 44 App. Div. 588, 61 N.Y.S. 75, 77 (2d Dep't 1899). Cf. *Chapman v. Boulthbee*, 13 U.C.C.P. 372 (1863) (fact that *capias* was set aside for irregularity not proof of negligence without proof of irregularity).

69. The record of the first case would be admissible in evidence to show why it was dismissed. *Reilly v. Cavanaugh*, 29 Ind. 435 (1868); *Eccles v. Stephenson*, 6 Ky. 517 (1814).

70. See *Biakanja v. Irving*, 310 P.2d 63 (Cal. App. 1957), where liability was placed on this basis. The option was vacated by the Supreme Court in 49 Cal. 2d 647, 320 P.2d 16 (1958), but this aspect of the opinion was not disapproved.

71. See generally 1 THORNTON, ATTORNEYS AT LAW, §§ 319-25 (1924).

72. *Id.* at §§ 326-30.

73. *Fletcher & Son v. Jubb, Booth & Helliwell*, [1920] 1 K.B. 275 (C.A.) (failure to call statute of limitations to attention of client); cf. *Lally v. Krester*, 177 Cal. 783, 171 P. 961 (1918) (delay caused dismissal; liable); *Niosi v. Aiello*, 69 A.2d 57 (Mun. App. D.C. 1949) (not liable; no causation); *Parker-Smith v. Prince Mfg. Co.*, 158 N.Y.S. 346 (2d Dep't 1916). *Stevens v. Walker & Dexter*, 55 Ill. 151 (1870) (unreasonable delay); *Pitt v. Yalden*, 4 Burr. 2060, 98 Eng. Rep. 74 (K.B. 1767).

74. *Goodman & Mitchell v. Walker*, 30 Ala. 482 (1857); *Jones v. White*, 90 Ind. 255 (1883) (replevin bond; liable); *Rapuzzi v. Stetson*, 160 App. Div. 150, 145 N.Y.S. 455 (3d Dep't 1914) (not negligent).

75. *Breedlove v. Turner*, 9 Mart. (O.S.) 352 (La. 1821); *Williams v. Gibbs*, 5 Ad. & E. 208, 111 Eng. Rep. 1144 (K.B. 1836).

76. *Hart v. Frame*, 6 Cl. & F. 193, 7 Eng. Rep. 670 (H. L. Sc. 1839).

77. *Reilly v. Cavanaugh*, 29 Ind. 435 (1868); *Hodges v. Carter*, 239 N.C. 517, 80 S.E.2d 144 (1954) (not liable; doubtful legal question).

78. *Dearborn v. Dearborn*, 15 Mass. 316 (1818).

to attach a lien on a debtor's interest in time;⁷⁹ allowing a case to go by default;⁸⁰ error in affidavit or publication of notice of sale;⁸¹ arranging for witnesses;⁸² conduct of trial in general;⁸³ preparing trial findings and court orders;⁸⁴ arranging for the entry and enrollment of judgment;⁸⁵ actions to collect judgment;⁸⁶ distribution of funds received;⁸⁷ making arrangements for appeal;⁸⁸ and for failure to follow client's instructions.⁸⁹

An attorney has been held for erroneous advice as to legal liability⁹⁰ and as to the settling of litigation⁹¹—similarly for advice as to the condition of the title to property⁹² and advice to a trustee.⁹³

An attorney who had drafted instruments has been held liable when a contract was not enforceable,⁹⁴ when he failed to advise as to the effect of the contract,⁹⁵ and when he failed to record the instrument properly.⁹⁶ He has also been held for failure to see that a will was

79. *Orr v. Waldorf-Astoria Hotel Co.*, 291 Fed. 343 (8th Cir. 1923); *Foulks v. Falls*, 91 Ind. 315 (1883) (not liable).

80. *Grayson v. Wilkinson*, 13 Miss. 268 (1845); cf. *Hill v. Finney*, 4 F. & F. 616, 176 Eng. Rep. 616 (N.P. 1865); *Vail v. Duggan*, 7 U.C.Q.B. 568 (1851) (not negligence to fail to urge an unconscientious defense).

81. *Wilson v. Carroll*, 80 Colo. 234, 250 Pac. 555 (1926).

82. *Mercer v. King*, 1 F. & F. 490, 175 Eng. Rep. 822 (N.P. 1859) (jury question).

83. *Olsen v. North*, 276 Ill. App. 457 (1934) (not liable).

84. *Armstrong v. Adams*, 102 Cal. App. 627, 283 Pac. 871 (1929) (liable; fact that trial judge approved no excuse); *Morrison v. Burnett*, 56 Ill. App. 129 (1894) (not liable).

85. See *Atlantic Coast Line R.R. v. Holliday*, 73 Fla. 269, 74 So. 479 (1917).

86. *Evans v. Watrous*, 2 Port. 205 (Ala. 1835); *Pennington's Ex'r v. Yell*, 11 Ark. 212, 52 Am. Dec. 262 (1850) (surety on bond).

87. *Ramage v. Cohn*, 124 Pa. Super. 525, 189 Atl. 496 (1937) (jury question).

88. *Spangler v. Sellers*, 5 Fed. 882 (C.C.S.D. Ohio 1881) (not liable; no cause); *General Acc. Fire & Life Assur. Corp. v. Cosgrove*, 259 Wis. 25, 42 N.W.2d 155 (1950) (not liable; lack of causal proof).

89. *Lally v. Kuster*, 177 Cal. 783, 171 Pac. 96 (1918); *Gilbert v. Williams*, 8 Mass. 51 (1811); *Ramage v. Cohn*, 124 Pa. Super. 525, 189 Atl. 496 (1937) (jury question).

90. *Gimbel v. Waldman*, 84 N.Y.S.2d 888 (Sup. Ct. 1948) (not liable).

91. *Cochrane v. Little*, 71 Md. 323, 18 Atl. 698 (1889); *In re A.B.'s Estate*, 1 Tuck. 247 (N.Y. 1866) (advice based on erroneous knowledge of statute).

92. *Hill v. Cloud*, 48 Ga. App. 506, 173 S.E. 190 (1934) (outstanding lien); *Citizens' Loan, Fund & Sav. Ass'n v. Friedley*, 123 Ind. 143, 23 N.E. 1075 (1890) (not liable); *Bayerl v. Smyth*, 117 N.J.L. 412, 189 Atl. 93 (1937); *Trimboli v. Kinkel*, 226 N.Y. 147, 123 N.E. 205 (1916); cf. *Otter v. Church, Adams, Tatham & Co.*, [1953] Ch. 280 (failure to advise client that his title was entailed).

93. *Flynn v. Judge*, 149 App. Div. 278, 133 N.Y.S. 794 (2d Dep't 1912) (liability depends on causation); cf. *McGregor v. White*, 117 Cal. App. 186, 3 P.2d 624 (1931). On giving advice in general, see 1 THORNTON, ATTORNEYS AT LAW, § 315 (1914).

94. *Fabry v. Joy*, 104 N.J.L. 617, 141 Atl. 780 (1928); *Stein v. Kremer*, 112 N.Y.S. 1087 (Sup. Ct. 1908) (contract determinable at will; question for jury).

95. *Fowler v. American Fed. of Tobacco Growers, Inc.*, 195 Va. 770, 80 S.E.2d 554 (1954); *Stannard v. Ullithorne*, 10 Bing. 491, 131 Eng. Rep. 985 (C.P. 1834); cf. *Yager v. Fishman & Co.*, [1944] 1 All E.R. 552 (C.A.) (no duty to remind client that date for giving notice for exercise of option was passing).

96. *Hampel-Lawson Merc. Co. v. Poe*, 169 Ark. 840, 227 S.W. 29 (1927) (jury question).

properly attested,⁹⁷ for an improper acknowledgment or affidavit,⁹⁸ and for errors in the preparation of the accounts of an estate.⁹⁹

CAUSAL RELATIONSHIP

In order to recover in a negligence action against an attorney it is necessary to show that his negligence was the cause of legal damage to the client. In many situations this presents no real problem. Thus, if the attorney overlooked an outstanding lien in approving an abstract, his negligence is the cause of plaintiff's being subjected to this lien;¹⁰⁰ if he drew up a contract which was unenforceable, his negligence is the cause of plaintiff's loss in being unable to enforce the contract.¹⁰¹

When the negligence is in giving advice, the question sometimes arises as to whether his advice was the reason for the plaintiff's conduct. The phrase "sole proximate cause" has sometimes been relied on by a defendant in urging that if there were any other basis for plaintiff's action the court cannot hold the defendant liable. Two recent Pacific coast cases repudiate this argument and hold that if the defendant's erroneous advice was "a proximate cause of the injury" recovery can be had.¹⁰²

It is in connection with negligence in the conduct of litigation that the question of causation has presented its most difficult problems. Here the rule has developed that when the client lost his case he must show not only that the attorney was negligent but also that the result would have been different except for the negligence. In other words, this involves a "suit within a suit,"¹⁰³ and the client must show that he would have won the first suit as one step in order to win the second one.

If the original action was lost, the client must show that the original claim was a sound one and that he was entitled to recover on it.¹⁰⁴ If

97. *Biakanja v. Irving*, 49 Cal. 2d 647, 320 P.2d 16 (1958).

98. *Morris v. Muller*, 113 N.J.L. 46, 172 Atl. 63 (1934) (jury question); *Degen v. Steinbrink*, 202 App. Div. 477, 195 N.Y.S. 810 (1st Dep't 1922).

99. *Thompson v. Lobdell*, 7 Rob. 369 (La. 1844). On drafting instruments in general, see 1 THORNTON, ATTORNEYS AT LAW, § 317 (1914).

100. See *Hill v. Cloud*, 48 Ga. App. 506, 173 S.E. 190 (1934); cf. *Otter v. Church, Adams, Tatham & Co.*, [1953] Ch. 280, where defendants negligently advised a guardian that his ward was absolutely entitled to certain property when he held it in tail male. When he died without taking steps to make it his own absolutely, the damage was the value of the likelihood that he would have done so.

101. Cf. *Fabry v. Joy*, 104 N.J.L. 617, 141 Atl. 780 (1928).

102. *Modica v. Crist*, 120 Cal. 2d 144, 146, 276 P.2d 614 (1954); cf. *Ward v. Arnold*, 328 P.2d 164, 166 (Wash. 1958) ("the law does not require that negligence of the defendant must be the sole cause. . . . We see no sound reason . . . why the degree of causation which must be proved in an action for damages for malpractice should be any different from that required in an ordinary negligence case").

103. See *Coggin, Attorney Negligence—A Suit Within a Suit*, 60 W. VA. L. REV. 225 (1958).

104. *Piper v. Green*, 216 Ill. App. 590 (1920); *Eccles v. Stephenson*, 6 Ky.

the defense was negligently not presented in the original action, the client must show that it was a valid one.¹⁰⁵ Even if the original cause of action was a valid one, it has been held that there can be no recovery if the original defendant was insolvent so that the judgment would have been valueless.¹⁰⁶

If the original action was lost and the attorney negligently failed to effect an appeal, the client must show that the appeal would have been sustained.¹⁰⁷ In *Pete v. Henderson*,¹⁰⁸ the trial court had refused to allow the client to introduce proof that the appeal would have been effective on the ground that the first action was now final and could be attacked only by appeal so that this court was without power to determine what might have happened on appeal. This was reversed by the appellate court, which reasoned that this would not constitute a collateral attack on the original judgment, since it is final as between the parties and the purpose of the instant action was not to reverse it. Plaintiff here is trying to recover damages from his attorney, not a party to the first action. For this reason, the trial judge could be called on to determine if an appeal would have been successful.¹⁰⁹

The burden of proof on the issue of causation is on the plaintiff. Some of the earlier cases indicated that if an attorney lost a case by his negligence he must show that the cause of action or the defense was invalid;¹¹⁰ but the law seems clearly established now that the plaintiff has the burden.¹¹¹ He must be sure to include the allegation in his bill of complaint.¹¹²

517 (1814); *Spiller v. Davidson*, 4 La. Ann. 171 (1849); *Niosi v. Aiello*, 69 A.2d 571 (Mun. App. D. C. 1949); *Scott v. McCarter*, West. L. Rep. 228 (B.C. 1908); cf. *Wade v. Ball*, 20 U.C.C.P. 302 (1870) (failure to obtain witness does not sustain cause of action unless witness' testimony would have caused different result). *But cf. Lichow & Sowers*, 334 Pa. 353, 6 A.2d 285 (1939).

105. *Roehl v. Ralph*, 84 S.W.2d 405 (Mo. App. 1935); cf. *Haggerty v. Watson*, 302 N.Y. 707, 98 N.E.2d 586 (1951).

106. *Lawson v. Sigfrid*, 83 Colo. 116, 262 Pac. 1018 (1927); cf. *Jones v. Wright*, 19 Ga. App. 242, 91 S.E. 265 (1917). *But cf. Orr v. Waldorf-Astoria Hotel Co.*, 291 Fed. 343 (8th Cir. 1923); *Crooker v. Hutchinson*, 1 Vt. 73 (1827).

107. *Spangler v. Sellers*, 5 Fed. 882 (C.C.S.D. Ohio 1881); *Sutton v. White-side*, 101 Okla. 79, 222 Pac. 974 (1924); *General Accident Fire & Life Assur. Corp. v. Cosgrove*, 257 Wis. 25, 42 N.W.2d 155 (1950).

108. 124 Cal. App. 2d 487, 269 P.2d 78, 45 A.L.R.2d 58 (1954).

109. 269 P.2d at 79. The case having been reversed, it was tried again by the lower court, which held that the appeal would not have been successful. This was affirmed on appeal. *Pete v. Henderson*, 155 Cal. App. 2d 722, 318 P.2d 720 (1957). See also *Lamprecht v. Bien*, 125 App. Div. 811, 110 N.Y.S. 128 (1st Dep't 1908).

110. *Grayson v. Wilkinson*, 13 Miss. 268 (1845); *Godefroy v. Jay*, 7 Bing. 413, 131 Eng. Rep. 159 (C.P. 1831); cf. *Harter v. Morris*, 18 Ohio St. 443 (1869); *Gould v. Blanchard*, 29 N.S. 361, 364 (1897).

111. See, e.g., *Maryland Casualty Co. v. Price*, 231 Fed. 397 (4th Cir. 1916); *Spangler v. Sellers*, 5 Fed. 882, 892 (C.C.S.D. Ohio 1881); *Vooth v. McEachen*, 181 N.Y. 28, 73 N.E. 488 (1905); *General Accident Fire & Life Assur. Corp. v. Cosgrove*, 257 Wis. 25, 42 N.W.2d 155 (1950).

112. See, e.g., *Feldesman v. McGovern*, 44 Cal. App. 2d 566, 112 P.2d 645 (1941); *Jones v. Wright*, 19 Ga. App. 242, 91 S.E. 265 (1917).

In *Lally v. Kuster*,¹¹³ the defendant attorney delayed prosecuting an action for the plaintiff so long that the action was dismissed, the judge making the dismissal on the merits because the delay was to attain an unfair advantage against the debtor. Since the delay was contrary to the client's instructions he sued for negligence. Defendant contended that the dismissal was erroneous and that a rehearing or appeal should be sought. The supreme court held that the dismissal was properly granted and gave no consideration to the question of who had the burden of proof.¹¹⁴

In *Maryland Casualty Co. v. Price*,¹¹⁵ defendant insurance company was under an obligation to defend an action and had extended insurance coverage for \$5000. Defendant, attorney for the plaintiff, failed to enter an appearance and a default judgment was entered for more than \$5000. Plaintiff paid the total amount of the judgment and sued the defendant. Plaintiff contended that it did not make any difference whether there was a valid defense to the original suit since it was only because of defendant's negligence that plaintiff was forced to pay the amount in excess of the \$5000 coverage. The court refused recovery, saying that if there was no defense to the original action the plaintiff company was under no legal obligation to its insured. It held that the burden of proof was on the plaintiff to prove that the injured party (plaintiff in the original suit) would not have secured a judgment or would have received a lesser amount had the suit been defended.

DAMAGES

There is little that is unusual in the law of damages as applied to negligence suits against attorneys.

The measure of damages is not the amount of the attorney's fee, but is instead compensation for the injury which the plaintiff received and may be more or less than the fee; and the burden is on the plaintiff to prove the damages.¹¹⁶

If the negligence caused the plaintiff to lose title to property, the measure of recovery is the value of the property.¹¹⁷ If it caused the overlooking of an outstanding lien, the measure is the cost of eliminating the lien.¹¹⁸

113. 177 Cal. 783, 171 Pac. 961 (1918).

114. Cf. *Milton v. Hare*, 130 Ore. 590, 280 Pac. 511 (1929), where the suit was lost and the trial judge, hearing that plaintiff claimed she had not had a fair opportunity to present her case because of negligence of her attorney, opened the case up and gave her an additional opportunity to present her side. When she failed to take advantage of it, this was held to be the basis of her loss.

115. 231 Fed. 397 (4th Cir. 1916).

116. *Quinn v. VanPelt*, 56 N.Y. 417 (1874). The fee may sometimes be an element of the damages, as where the plaintiff pays the defendant to take an appeal and the defendant fails to act. See *Pete v. Henderson*, 124 Cal. App. 2d 487, 269 P.2d 78 (1954).

117. *Whitney v. Abbott*, 191 Mass. 59, 77 N.E. 524 (1906).

118. *Hill v. Cloud*, 48 Ga. App. 506, 173 S.E. 190 (1934); *Bayerl v. Smith*, 117

If the negligence is in conducting litigation, the measure of damages is the amount which would have been recovered except for the defendant's negligence.¹¹⁹ Correspondingly, if the defendant's negligence prevented the use of a good defense, the measure of recovery is the amount of the judgment which the defendant had to pay.¹²⁰

In *McGregor v. Wright*,¹²¹ plaintiff contended that defendant's negligent advice caused him to be removed as trustee in bankruptcy, and he sued to recover for the financial loss involved, and for nervous shock and for injury to his reputation. These were all held to be too remote and speculative.¹²²

Some of the early decisions suggested that the plaintiff might recover nominal damages when he proved that the defendant was negligent and failed to show any actual damages.¹²³ This is inconsistent with the general rule that actual damages are necessary for a negligence action, however, and has not been the basis of any recent holding.

There are cases indicating that punitive damages can be awarded, depending on the basis for such damages in the individual jurisdiction.¹²⁴

DEFENSES

Statutes of Limitations

The limitation period usually differs for contract and tort actions, with the period for contracts normally being longer. For this reason, when the limitation period is at issue, the plaintiff usually elects to

N.J.L. 412, 189 Atl. 93 (1937). In *Jacobsen v. Peterson*, 91 N.J.L. 404, 103 Atl. 983 (1918), the defendant overlooked a judgment which was a cloud on title. Plaintiff later sold the property for a sum in excess of the total cost including the discharge of the judgment lien, and the lower court granted nominal damages only. The appellate court reversed on the ground that the measure of damages was not affected by the later sale. "It will not do to say that in order for a client to recover for such negligence he must either sell the property at a loss or not sell it at all. He was entitled to all the profit he would have made by the transaction if the title had been as represented." 103 Atl. at 984.

119. *McLellan v. Fuller*, 226 Mass. 374, 115 N.W. 481 (1917). The court adds that interest can also be recovered to make "the plaintiff whole for the delay." For a more detailed treatment and collection of cases, see Annot., *Measure and Elements of Damages Recoverable for Attorney's Negligence with Respect to Maintenance or Prosecution of Litigation or Appeal*, 45 A.L.R.2d 62 (1956). In *Childs v. Comstock*, 69 App. Div. 160, 74 N.Y.S. 643 (1st Dep't 1902), it is held that there is to be subtracted from the amount that would have been recovered the part which could have gone to defendant for attorney's fees.

120. Annot., 45 A.L.R.2d 62,67 (1956).

121. 117 Cal. App. 186, 3 P.2d 624 (1931).

122. The authority of the case is somewhat weakened by the fact that the court did not find a true attorney-client relationship to exist. On loss of commissions, see *Flynn v. Judge*, 149 App. Div. 278, 133 N.Y.S. 794 (2d Dep't 1912).

123. *E.g.*, *Grayson v. Wilkinson*, 13 Miss. 268 (1845); *Godefroy v. Jay*, 7 Bing. 413, 131 Eng. Rep. 159 (C.P. 1831).

124. *Patterson v. Frazier*, 79 S.W. 1077 (Tex. Civ. App. 1904); cf. *Hill v. Montgomery*, 84 Ill. App. 300 (1899) (deliberate false statement).

treat his action as contractual in nature, and the courts have usually accepted his choice.¹²⁵

There is disagreement in determining when the statute begins to run. Some early cases hold that it is from the date of the negligent conduct, usually on the basis that nominal damages could then be obtained.¹²⁶ Others take the more logical position that the plaintiff must have suffered actual damage before the limitation period begins.¹²⁷

Illegality

In *Goodman & Mitchell v. Walker*¹²⁸ it was held that the fact that part of the contract of employment was champertous was not a defense to an action for negligence of the attorney in seeking to collect on a note. But in *Morris v. Muller*,¹²⁹ where it was urged that defendant was illegally practicing law, the court said that if he was the plaintiff knew of it and could not recover. "Such a contract is illegal and void. It directly requires an unlawful act for its performance, and is contrary to public policy. The court will not lend its aid to one who founds his cause of action upon an illegal act."¹³⁰

Others

Contributory negligence and assumption of risk appear not to have been defenses frequently used in an action for attorney's negligence.¹³¹ Perhaps engaging a person known not to be qualified to practice law would give rise to such a defense.¹³²

Survival statutes normally include many tort actions today, but at common law it would probably be necessary to bring the action in contract to prevail.¹³³ A similar election is sometimes suggested in order to come within set-off and counterclaim statutes.¹³⁴ The action in tort may be more desirable if a problem of nonjoinder of parties defendant arises.¹³⁵

125. See, e.g., *Foulks v. Falls*, 91 Ind. 315 (1883); *Schirmer v. Nethercutt*, 157 Wash. 172, 288 Pac. 265 (1930). But the election to sue in contract must be clearly indicated, see *Bland v. Smith*, 197 Tenn. 683, 277 S.W.2d 377 (1955). On the application of a statute applying expressly to "malpractice" compare *Galloway v. Hood*, 69 Ohio App. 278, 43 N.E.2d 631 (1941), with *O'Neill v. Gray*, 30 F.2d 776 (2d Cir. 1929) (New York statute).

126. E.g., *Wilcox v. Plummer*, 29 U.S. 172 (1830); *Lilly v. Boyd*, 72 Ga. 83 (1883).

127. E.g., *Lally v. Kuster*, 177 Cal. 783, 171 Pac. 961 (1918).

128. 30 Ala. 482 (1857).

129. 113 N.J.L. 46, 172 Atl. 63 (1934).

130. 172 Atl. at 66. On advice to testify to a falsehood, see *Flynn v. Judge*, 149 App. Div. 278, 133 N.Y.S. 794 (2d Dep't 1912).

131. In *Jones v. White*, 90 Ind. 255 (1883), the court held that it was not necessary to aver specifically that the plaintiff was without fault. "In averring the wrongful act of the attorney, and that the loss resulted from it, the plaintiff sufficiently shows that his own act did not contribute to the injury."

132. Cf. *Wakeman v. Hazelton*, 3 Barb. Ch. 148 (N.Y. 1848).

133. Cf. *Stimpson v. Sprague*, 6 Me. 470 (1830).

134. Cf. *Rooker v. Bruce*, 45 Ind. App. 57, 90 N.E. 86 (1909).

135. Cf. *Davies v. Lock*, 3 L.T. (O.S.) 125 (1844).

CONCLUSION

The task set for a client who seeks to recover in an action of negligence is a formidable one. He must first find another attorney who will take his case and prosecute it. This is likely to prove particularly difficult in some cities, and it may be exaggerated by the need in some cases for the testimony of other attorneys regarding the character of the defendant's work. If the charge is negligence in regard to the conduct of litigation the client is required to win two cases; he must show both that the defendant was negligent and that plaintiff was entitled to win the original suit and would have won it except for the defendant's negligence. He is likely to find the court, whether at trial or appellate level, sympathetic to the defendant as a colleague at the Bar.¹³⁶ Yet in a quite respectable percentage of the cases the plaintiff has succeeded. The very human attitude of lawyers and judges in affording protection to the members of their own profession apparently has seldom produced rank injustice, and has affected the outcome only in the close cases. During recent years the number of cases has been fewer than in earlier times. Perhaps this is due to the adoption of higher standards for admission to the Bar, producing more uniform compliance with minimum requirements for skill and competence, and to the use of better systems of law office management. On the other hand, the increasing complexity of the law is making it more difficult for the lawyer to keep abreast with all of its ramifications and would perhaps produce a countervailing tendency.

Since the early days attention has been called to the similarities of negligence suits against lawyers and those against doctors.¹³⁷ Perhaps most general similarity is the circumstance that a judgment against either a lawyer or a doctor injures him not only because of the dam-

136. This may, of course, work in exactly the reverse fashion, because a court which is convinced of the incompetence or chicanery of a fellow lawyer may feel that one way of vindicating the integrity of the Bar is to allow the plaintiff to recover.

137. The following statement made to a jury by Chief Justice Tindall in 1838 has been often quoted since that time: "Every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill. He does not undertake, if he is an attorney, that at all events you shall gain your case, nor does a surgeon undertake that he will perform a cure; nor does he undertake to use the highest possible degree of skill. There may be persons who have higher education and greater advantages than he has, but he undertakes to bring a fair, reasonable, and competent degree of skill. . . ." *Lanphier v. Phipos*, 8 Car. & P. 475, 479, 173 Eng. Rep. 581 (N.P. 1838).

Another frequently quoted statement is that of Mitchell, C. J., in *Citizens' Loan, Fund & Sav. Ass'n v. Friedley*, 123 Ind. 143, 23 N.E. 1075 (1890): "Attorneys are very properly held to the same rule of liability for want of professional skill and diligence in practice, and for erroneous or negligent advice to those who employ them, as are physicians and surgeons, and other persons who hold themselves out to the world as possessing skill and qualifications in their respective trades or professions." 23 N.E. at 1075. See also *Olsen v. North*, 276 Ill. App. 457 (1934).

ages he must pay but also because of the serious damage to his professional reputation.¹³⁸ This is exaggerated because of the frequent and unfortunate use of the term "malpractice" which carries with it connotations of complete professional incompetency or of intentional wrongdoing. The term negligence ought not to carry a similar connotation because we are all aware that a competent and skillful person may make a slip or be forgetful on a single occasion without losing his professional skill; yet damage to reputation still remains. This is the reason behind the principle that neither a doctor nor a lawyer is liable for an error of judgment or an erroneous exercise of discretion. If there is a doubtful construction as to what the law is or more than one school of thought as to the proper medical practice, liability is quite unlikely.

Yet there are differences between the two professions. The damage which the doctor produces by his negligence is normally physical injury; that produced by the lawyer is normally economic loss. Problems as to the ambit of liability—those of proximate cause as distinguished from cause in fact—are potentially more controllable in the case of the doctor, even without imposing the requirement of privity of contract. In suits against physicians there is more insistence on the requirement of expert evidence and more frequent reference to the standard of skill in the particular community.

From this study certain predictions as to the future may be ventured.

The California case of *Biakanja v. Irving*¹³⁹ may well produce a number of other holdings breaking away from the rigid requirement of privity of contract or the relationship of attorney and client between the plaintiff and the defendant. But the courts will proceed extremely cautiously and are likely to confine the added liability to third parties who are essentially in the contemplation of the parties at the time the services are rendered. The suggestions in the *Ultramares* case¹⁴⁰ are likely to be controlling here.

The distinction between tort and contract actions when an attorney is sued for negligence is likely to have less significance in the future.

138. "The courts have no hesitation in holding that mistakes made by car drivers or employers are visited by damages: but they make allowances for the mistakes of professional men. They realise that a finding of negligence against a professional man is a serious matter for him. It is not so much the money, because he is often insured against it. It is the injury to his reputation which a finding of negligence involves." Denning, L.J., *Foreword to EDDY, PROFESSIONAL NEGLIGENCE* at vii (1955).

139. 49 Cal. 2d 647, 320 P.2d 16 (1958). See discussion *supra* notes 24-27, and accompanying text.

140. *Ultramares Corp. v. Touche*, 255 N.Y. 170, 174 N.E. 441 (1931). The case involved the liability of public accountants. For discussion see Hawkins, *Professional Negligence Liability of Public Accountants*, 12 VAND. L. REV. 797 (1959).

Perhaps its prime significance will be with statutes of limitation. In general the actions will be treated as tort actions.

In applying the standard of care more attention will be given to the type of service the attorney is engaged in rendering. Doubtful construction of a statute or a case may relieve him of liability if he is engaged in litigation or some other activity where it is proper for him to test that construction, but it will not if he is drafting an instrument or passing on a title and has the responsibility of avoiding the need of testing that construction. This is the distinction made by the New York court in *Byrnes v. Palmer*,¹⁴¹ quoted earlier.

More attention will probably be given in the future to the need for expert evidence. In many types of situations, such as letting the statute of limitations run before a suit is filed, no testimony of a lawyer is needed. When the problem is one of interpretation of law, there is more likely to be a resort to expert evidence to explain the matter to the jury. But even here, the judge understands the problem without such testimony, and there is little likelihood of the adoption of the rule in the physician cases that expert evidence is required. There is no real indication, however, that the decision as to negligence will be treated as one of law, to be determined by the court.

The negligence rules will continue to influence lawyers to play safe by following usual methods of procedure or using customary forms rather than adopting new methods.¹⁴²

There is little likelihood of a change in the rules regarding negligence in conducting litigation. After all, one party must always lose in litigation, and the courts are aware of the fact that many decisions must be made under pressure of time.

A number of problems remain unsettled. Among the numerous questions which occur, a few may be listed.

How far will the courts be ready to go in setting up a different standard of skill for specialists? There has been practically no discussion of this in the cases, but it is certain to arise with increasing frequency in the future. The analogy to medicine indicates that a separate standard will be established.

To what extent will specialities affect the services of the ordinary practitioner. Suppose, for example, that an attorney draws a will for a client without paying any attention to the tax aspects, with the result that a substantial tax saving is lost. Will the ordinary practitioner be expected to give consideration to the tax aspects of transac-

141. 18 App. Div. 1, 45 N.Y.S. 479, 481-82 (2d Dep't 1897). See *supra* notes 60-61 and accompanying text.

142. Compare the rules in the two cases of *Stevenson v. Howard*, 2 Dow & C. 104, 119, 6 Eng. Rep. 668 (H.L.Sc. 1830); and *Simmons v. Pennington & Son*, [1955] 1 All E. R. 240 (C.A.). See *supra* note 58 and accompanying text.

tions he conducts, on pain of being found negligent if he simply ignores them?

To what extent will a continuing attorney-client relationship require an attorney to volunteer suggestions to a client—to practice prophylactic law, so to speak. Suppose an attorney has drawn a will for a client, and changed circumstances (e.g., divorce or child born) or statutory changes (e.g., tax statutes) now indicate that the will should be modified. If he is still attorney for the client, may he be found negligent in failing to suggest the change?¹⁴³

What effect will the increasing use of attorneys' liability insurance have on the law?¹⁴⁴ It could perhaps make the courts more ready to impose liability, but it will also create a stronger and more organized defense.

There has been comparatively little careful legal writing on the subject of the liability of an attorney for negligence.¹⁴⁵ Perhaps this paper, while not containing an exhaustive collection of the cases, will at least indicate the major problems and lines of authority and provide some analysis of the problems.

143. There is no authority directly in point. Compare the implications in the following cases: *Fowler v. American Fed. of Tobacco Growers, Inc.*, 195 Va. 770, 80 S.E.2d 554 (1954) (failure to advise as to the effect of a contract-liability); *Yager v. Fishman & Co.*, [1944] 1 All E. R. 552 (C.A.) (failure to notify client of passing of date for giving notice of exercise of option to review lease, not liable); *Griffith v. Evans*, [1953] 1 W.L.R. 1424 (C.A.) (attorney, asked to advise as to remedies as to Workman's Compensation, failed to advise also of common law remedies; held, not liable; dissent by Denning, L.J.).

144. See Arnan, *Malpractice Insurance for Lawyers*, 21 SHINGLE 188 (1958); 64 CASE & COMMENT 12 (Mar. 1959).

145. Texts and treatises which have devoted at least a chapter to the subject include the following: 2 BEVAN, *NEGLIGENCE* bk. 6, ch. 3 (4th ed. 1928); CORDERY, *LAW RELATING TO SOLICITORS* ch. 6 (4th ed. 1935); EDDY, *PROFESSIONAL NEGLIGENCE* ch. 2 (1955); 5 THOMPSON, *NEGLIGENCE* ch. 166 (1905); 1 THORNTON, *ATTORNEYS AT LAW* chs. 15, 16 (1914); WEEKS, *ATTORNEYS AND COUNSELLORS AT LAW* ch. 12 (2d ed. 1892).

The two leading articles are Blaustein, *Liability of Attorney to Client in New York for Negligence*, 19 BROOKLYN L. REV. 233 (1953); and Isaacs, *Liability of the Lawyer for Bad Advice*, 24 CALIF. L. REV. 39 (1935). Others include: Coggin, *Attorney Negligence—A Suit Within a Suit*, 60 W. VA. L. REV. 225 (1958); Gardner, *Attorney's Malpractice*, 6 CLEV.-MAR. L. REV. 264 (1957); Holdridge, *Malpractice of Patent Attorneys*, 7 CLEV.-MAR. L. REV. 345 (1958); Smalley, *The Lawyer's Liability for Alleged Malpractice*, 1946 INS. L. J. [No. 279] 194, 69 N.J.L.J. 265 (1946).

Notes, of varying quality, include the following: *Liability of Attorneys for Negligence*, 91 CENT. L. J. 333 (1920); *An Attorney's Liability to His Client*, 7 MIAMI L. Q. 511 (1953); *Professional Negligence*, 1955 SCOTS L. T. 145; *Liability of Attorney for Negligence*, 68 U.S.L. REV. 57 (1934); and *The Bases of the Attorney's Liability to His Client for Malpractice*, 37 VA. L. REV. 429 (1951).

