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To Copy What Is Right And True Or The Liability Of The Official Court Reporter Who Does Not

By ARNOLD TAYLOR*

I have brought the ink-pot and the palette as being the objects which are in the hands of Thoth; hidden is that which is in them. Behold me in the character of a scribe! . . . I have copied the words of the great and beautiful god each day fairly. O Harmachis, thou didst order me and I have copied what is right and true, and I do bring it unto thee each day.¹

Introduction

Experts such as physicians, engineers and lawyers are generally well compensated for the exercise of their particular skills but they also have a necessarily concomitant liability. Because these professional groups hold themselves out to the public as qualified, they are bound to suffer the consequences of their negligent acts. Just as the physician must, in addition, often accept responsibility for the acts of his agent-nurse, so too must the lawyer accept responsibility for the mistakes of his administrative staff. While the medical profession has not entirely understood the rationale of this principle, lawyers more readily accept it. Yet the lawyer, no less than the physician, would be distressed by the notion of being burdened with responsibility for the misfeasance or nonfeasance of a person not under his control; each could be expected to consider this an unacceptable risk. Even so, a lawyer involved in almost any type of litigation runs that risk practically every day. He may rely upon a judge

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¹ *Of the Ink-Pot and Palette*, EGYPTIAN BOOK OF THE DEAD.

to see that some action is taken, he may entrust documents to a court clerk, or he may request a court reporter to prepare a transcript of evidence for an appeal. If the judge does not complete the act, the doctrine of judicial immunity protects him from the consequences of his inaction; if the clerk loses the documents, he, a state official, is probably clothed with sovereign immunity; but if the court reporter fails to prepare the transcript in time, should the responsibility for the consequent failure of an appeal fall wholly upon the lawyer?

It may have been the boast of the common law that there was no wrong without a remedy, but the above examples clearly contradict that assertion. Of course, in an earlier day this inconsistency was explained by the status of the judge and clerk as arms of the sovereign; since the sovereign was incapable of doing wrong, the judge and the clerk could commit no wrong for which a remedy need be supplied.

Certainly the exigencies of the judicial system may well demand that a judge be supplied immunity from the unhappy consequences of his judicial acts. Likewise, persuasive arguments can be made in favor of immunizing the court clerk. It is submitted, however, that no justification whatsoever exists for similarly shielding the court reporter from the legal consequences of his acts and that the Kentucky Court of Appeals, if confronted with this issue, should therefore scrupulously refrain from erecting such a barrier.

In order to intelligently consider this complex question an examination must first be made of: (1) the functions of the court reporter; (2) his responsibilities to litigants; and (3) the position he occupies in the judicial structure.

I. THE NATURE OF THE OFFICIAL COURT REPORTER'S ROLE²

A. *The Status of the Official Court Reporter in the Judicial Structure*

While some jurisdictions have adopted the view that an

² It should be noted that these general principles apply only to situations where the reporter is treated as the official court stenographer, not where he serves as an employee of a party, as at the taking of a deposition before trial. *Lester v. Lester*, 380 N.Y.S.2d 190 (Sullivan Co. 1972). Such a rule does not mean that a privately employed reporter cannot be held responsible for his negligence or breach of contract, but simply that such liability is not covered by these principles or this article.

official court reporter is an officer of the state,³ the majority rule seems to be that he is not a public officer, but merely an *employee* of the state.⁴ The Kentucky rule is that "the official court reporter is a statutory officer of the *Court*, subject to the control and discretion of the judge."⁵

It has been held that a reporter cannot be an *official* reporter unless he has taken the statutory oath.⁶ The Kentucky Court of Appeals, however, has stressed that any stenographer who temporarily takes the place of an official stenographer becomes a *de facto* officer, subject to the control and discretion of the court.⁷ He need not be appointed officially, or take an oath, if he has assumed the duties with the tacit consent of all. The Court of Appeals has, indeed, apparently adopted the position that the taking of an oath by the reporter in no way raises his status beyond that of any other state employee.

B. *The Functions of the Official Court Reporter*

The primary role of the court reporter is to serve the litigants.⁸ As an arm of the court he has the general duty of "preserving a record of the evidence, and transcribing and certifying the record for use on an appeal."⁹ Accordingly, the court reporter is expected to act in a diligent and timely manner,¹⁰ and a party has a right to rely upon the presumption that he will properly perform his duties.¹¹ It should be noted, however, that it is not the reporter's function to practice law for an attorney,¹² and in

³ See, e.g., *State v. Mitchell*, 267 S.W. 873 (Mo. 1924).

⁴ *Robbin v. Brewer*, 236 So. 2d 448 (Fla. 1970); *Tom Green County v. Proffitt*, 195 S.W.2d 845 (Tex. 1946); cf., *Butcher v. Tinkle*, 183 S.W.2d 227 (Tex. 1944).

⁵ *Louisville & N.R.R. v. Paul's Adm'r*, 235 S.W.2d 787 (Ky. 1950). The term "officer of the court" is utilized in the language of several statutes, e.g., ALA. CODE, tit. 13, § 261 (1958); MISS. CODE ANN. § 9-13-5 (1972); MO. ANN. STAT. § 485.040 (Vernon, Cum. Supp. 1974); WASH. REV. CODE ANN. § 2.32.180 (Supp. 1972).

⁶ *Cleary Bros. Constr. Co. v. Phelps*, 24 So. 2d 51 (Fla. 1945); *In re Johnson's Estate*, 282 P. 1082 (Ore. 1929).

⁷ *Walker v. Burgevin*, 295 S.W. 997 (Ky. 1927).

⁸ *Sebree v. Rogers*, 102 S.W. 841 (Ky. 1907). Language in this case, to the effect that the reporter is a "public official", should be considered overridden by the language of *Louisville & N.R.R. v. Paul's Adm'r*, 235 S.W.2d 787 (Ky. 1950).

⁹ *International Shoe Company v. Carmichael*, 105 So. 2d 389, 390 (Fla. Ct. App. 1958).

¹⁰ *Peacock v. State*, 154 So. 2d 856 (Fla. 1963).

¹¹ *Louisville & N.R.R. v. Paul's Adm'r*, 235 S.W.2d 787 (Ky. 1950); *Butler Auto Sales, Inc. v. Skog*, 199 A.2d 597 (R.I. 1964).

¹² *Louisville & N.R.R. v. Paul's Adm'r*, 235 S.W.2d 787 (Ky. 1950).

Kentucky it is not the reporter's task to see that papers necessary for an appeal are filed.¹³ Beyond these broad functions generalizations are unsafe because the federal government and several states have enacted sometimes widely differing statutes which must be analyzed to determine the exact nature of a court reporter's function in a particular case.

1. *Federal Statutory Provisions*

Until the enactment of the Court Reporter's Act,¹⁴ there was no federal law providing for the position of official court stenographer or requiring the stenographic reporting of any case. Those who did function as reporters in federal trials were therefore not considered officers of the United States.¹⁵ Briefly, the Court Reporters Act provides that the reporter's qualifications are to be measured by standards formulated by the Judicial Conferences¹⁶ and that the reporter is subject to the supervision of those conferences and of the appointing court. Once qualified, he must take an oath to faithfully perform the duties of his office; beyond that, it is incumbent upon the district court to see that he complies with the law.¹⁷

Under the Act, the reporter's basic duties are: to attend and record certain proceedings; to certify his notes and records and promptly file them with the District Court Clerk; and to transcribe various criminal matters specified by the statute. With regard to the last of these, it is clear that Congress intended that, as a minimum, the court reporter should record and transcribe the arraignment and sentencing proceedings in every criminal case. In contrast, the reporter is allowed considerable flexibility in the transcription of civil matters.

¹³ *Id.* This case dealt with the filing of a "bill of exceptions", a document not called for under our present rules governing appellate procedure, but this does not affect the legal principle demonstrated.

¹⁴ 28 U.S.C. § 753 (1968).

¹⁵ *Miller v. United States*, 317 U.S. 192 (1942).

¹⁶ Attached to this article, as Appendix A, is a copy of the Federal Standards of Qualifications for Official Court Reporters now in force. More recently, the Judicial Conference has adopted a more specific qualifications plan, a copy of which is attached as Appendix B. According to a letter of July 26, 1974 to the author from William T. Barnes, Chief, Division of Personnel, Administrative Office of the United States Courts, the earlier standards are still in force, but Mr. Barnes expects the later standards, referred to herein as Appendix B, to be in effect and operative by January 1, 1975.

¹⁷ *Poole v. United States*, 250 F.2d 396 (D.C. Cir. 1957).

The provisions of the Act, particularly those dealing with criminal cases, have been held to be mandatory—not permissive.¹⁸ They cannot be overridden by local custom and practice nor can the responsibilities they impose be shifted from the reporter to the respective attorneys.¹⁹ Still, strict compliance with this mandate is not always required, and some courts have held that not every violation of the Act constitutes prejudicial error.²⁰ On balance, however, sound policy dictates that such decisions should be narrowly construed since compliance with the Act is not difficult and a full and accurate transcript is of crucial importance to appellate review.

2. State Statutory Provisions

Section 28.410(1) of the Kentucky Revised Statutes [hereinafter KRS] requires that the court reporter “be skilled in his profession” and provides that he hold his office at the pleasure of the presiding judge. The same requirements and regulations are also applied to certain stenographic reporters other than the official court reporter. KRS § 28.420, like the federal statute, requires the reporter to take an oath to faithfully discharge the duties of his office. Perhaps the broadest of these is the reporter’s obligation to fully record and report any proceeding wherein his services are requested by either party or the court. Again paralleling the Court Reporters Act, the Kentucky statute places added emphasis on the reporter’s role in criminal cases by requiring the transcription of *all* proceedings in the criminal branch of the circuit court in counties having a population of 150,000 or more.²¹ In addition to these statutory provisions, the *Kentucky Rules of Civil Procedure* govern the manner of recording proceedings and transcribing evidence²² and have the force of positive law.²³

¹⁸ *Casalman v. Upchurch*, 386 F.2d 813 (5th Cir. 1967).

¹⁹ *United States v. Upshaw*, 448 F.2d 1218 (5th Cir. 1971), *cert. denied*, 405 U.S. 934 (1972); *Edwards v. United States*, 374 F.2d 24 (10th Cir. 1966), *cert. denied*, 389 U.S. 850 (1967); *Fowler v. United States*, 310 F.2d 66 (5th Cir. 1962).

²⁰ *United States v. Upshaw*, 448 F.2d 1218 (5th Cir. 1971), *cert. denied*, 405 U.S. 934 (1972); *United States v. Workcuff*, 422 F.2d 700 (D.C. Cir. 1970).

²¹ *Woods v. Commonwealth*, 305 S.W.2d 935 (Ky. 1957). Additionally, *Woods* held this statute to be mandatory, rather than permissive.

²² KY. REV. STAT. § 28.430(3) (1971) [hereinafter cited as KRS]; *see generally* Rules of Kentucky Court of Appeals [hereinafter cited as RCA].

²³ KRS § 447.156; *see Caldwell v. Harvey*, 192 P.2d 62 (Cal. Ct. App. 1948), for liability of an attorney when a court reporter failed in such duties.

Though not required in Kentucky some states have court rules requiring that the reporter perform certain acts necessary for the protection of the appeal, such as obtaining extensions of time in which to file a transcript.²⁴ There are also several statutory provisions requiring the reporter to post bond for the performance of his duty, giving persons injured by the reporter a right to recover under that bond.²⁵

One question left unanswered by the Kentucky statute is how long a stenographic reporter need retain his notes or transcripts. Although there is generally a dearth of interpretative analysis in Kentucky concerning the statutory duties of a reporter, one opinion of the attorney general²⁶ addresses itself to this very issue. Noting the absence of an applicable statute or court rule, the opinion advises that the most logical solution is to require that such records be kept a reasonable period of time. So much is manifest. The attorney general further suggests (in the words of the opinion, "for what it is worth") that three years would be adequate.²⁷ What constitutes reasonableness, as always, depends upon all the circumstances; but it is not clear, nor does the opinion indicate, the basis for the attorney general's selection of a period of three years. In civil cases the criterion used by the attorney general might not be unwarranted, and several states *do* have statutes requiring the preservation of notes for a stated period of time;²⁸ perhaps an effort should be made to establish a definite time by statute in Kentucky as well. A better rule for criminal cases might be that suggested by one federal court which, with respect to the duty of the federal district clerk to preserve his

²⁴ *Moody v. Crane*, 199 P. 652 (Idaho 1921).

²⁵ *E.g.*, FLA. STAT. ANN. § 457.16 (Supp. 1973); IDAHO CODE §§ 1-1102, 58-812, 59-812, 59-815 (Supp. 1973); LA. REV. STAT. §§ 13:961 (B), (D)(2) (1968); MISS. CODE ANN. § 9-13-45 (1972); UTAH CODE ANN. § 78-56-7 (1953); *see also* *Johnson v. Ward*, 59 So. 806 (Miss. 1912); *International Shoe Company v. Carmichael*, 105 So. 2d 389 (Fla. Ct. App. 1958).

²⁶ KY. ATT'Y GEN. OP. 41,686 (1958).

²⁷ *Id.*

²⁸ *E.g.*, ALA. CODE tit. 13, § 262 (1959) (apparently notes are to be kept permanently and turned over to clerk upon reporter's retirement); OKLA. STAT. ANN. tit. 20, § 1006 (Supp. 1973) (varying from five to twenty-two years, depending upon the type of case); R.I. GEN. LAWS ANN. § 8-5-4 (1969) (notes are property of state, to be held by clerk twelve years or two years after death of reporter); TEX. REV. CIV. STAT. ANN. art. 2324 (1971) (full year); WASH. REV. CODE ANN. § 36.23.070 (Supp. 1972) (upon order of court, seven years after entry of trial judgment in civil cases and fifteen years in criminal matters); WYO. STAT. ANN. § 5-79 (1957) (ten years, or sooner if a transcript has been furnished a party).

records for not less than ten years,²⁹ advised that as a matter of policy it would be wise to preserve the original records for as long as the period of detention.³⁰

II. VARIETIES OF REPORTER FAILURE

Human capacity for error being what it is, the number of ways in which a court reporter may fail in his duties is infinite. Certain broad areas of deficiency readily appear, however, and can be studied with a view toward noting common elements and as a basis for a discussion of available remedies. It should be noted at the outset that not all failures involve an element of fault. For instance, a reporter may die before completing his records. In such cases, even though no liability exists, some of the remedial alternatives discussed hereinafter may be employed to reduce the hardships on the parties.

Certain forms are required for the preparation of a record and transcription of evidence for civil matters,³¹ and parallel forms exist for criminal cases.³² The reporter might fail to follow these prescribed forms and thereby prejudice a litigant's case. A somewhat more common error is the failure to report a portion of the trial, such as opening statements³³ or colloquy between court and counsel concerning the admissibility of evidence.³⁴ The reporter might also neglect to record tendered instructions,³⁵ closing arguments,³⁶ or stipulations between counsel.³⁷ He could further willfully or negligently deprive an indigent of a transcript, even though provision is ordered by a court,³⁸ or completely fail to transcribe the record,³⁹ possibly as a result of his failure to preserve his records.⁴⁰

²⁹ 28 U.S.C. § 753(b).

³⁰ *Aeby v. United States*, 409 F.2d 1 (5th Cir. 1969).

³¹ KRS § 28.430(3) (1971); *Pendleton v. Garrard Bank and Trust Co.*, 272 S.W. 917 (Ky. 1925); *Taylor Coal Co. v. Miller*, 182 S.W. 920 (Ky. 1916).

³² See generally RCA; *Mills v. Commonwealth*, 185 S.W.2d 689 (Ky. 1944); *Meek v. Commonwealth*, 283 S.W. 1032 (Ky. 1926).

³³ *United States v. Upshaw*, 448 F.2d 1218 (5th Cir. 1971), *cert. denied*, 405 U.S. 934 (1972).

³⁴ *Edwards v. United States*, 374 F.2d 24 (10th Cir. 1966), *cert. denied*, 389 U.S. 850 (1967).

³⁵ *United States v. Workcuff*, 422 F.2d 700 (D.C. Cir. 1969).

³⁶ *United States v. Upshaw*, 448 F.2d 1218 (5th Cir. 1971), *cert. denied*, 405 U.S. 934 (1972); *Casalman v. Upchurch*, 386 F.2d 813 (5th Cir. 1967); *Fowler v. United States*, 310 F.2d 66 (5th Cir. 1962).

³⁷ *Butler Auto Sales, Inc. v. Skog*, 199 A.2d 597 (R.I. 1964).

³⁸ *Washington v. Official Court Stenographer*, 251 F. Supp. 945 (E.D. Pa. 1966).

In some jurisdictions the reporter has statutory duties to expeditiously prepare and file the transcript of record,⁴¹ and to obtain extensions of time in which to file papers.⁴² Obviously, there may be failures in respect to these matters. Likewise, in the federal courts, the reporter may fail to comply with the provisions of the Court Reporters Act regarding the filing of various documents.

With these general examples of reporter errors as a backdrop, logically the next step should be an analysis of the remedies courts have fashioned to minimize the hardships on the parties and to reimburse those that have suffered loss.

III. REMEDIAL ACTION BY THE COURTS

The search for justice has compelled courts to develop remedies to aid litigants who, because of reporter's misfeasance or nonfeasance, have been prejudiced through no fault of their own. For example, post conviction relief is available in criminal cases where the accused has been prejudiced by the reporter's error.⁴³ Beyond remedies which are peculiar to criminal proceedings, there are numerous avenues of remedial action equally applicable to both civil and criminal matters. A condition precedent to the granting of any of these remedies, however, is a demonstration of prejudice; and where the party complaining of the absence or incompleteness of a transcript cannot have been prejudiced thereby, the court will find little reason to allow relief. Under the Court Reporters Act a court must determine that the reporter's error is harmless to be non-prejudicial;⁴⁴ but the court must find that no harm resulted in fact, and cases finding

³⁹ *United States v. Washabaugh*, 435 F.2d 1298 (9th Cir. 1970); *Johnson v. Ward*, 59 So. 806 (Miss. 1912).

⁴⁰ *See Aeby v. United States*, 409 F.2d 1 (5th Cir. 1969).

⁴¹ *International Shoe Company v. Carmichael*, 105 So. 2d 389 (Fla. 1958); *cf. Louisville & N.R.R. v. Paul's Adm'r*, 235 S.W.2d 787 (Ky. 1950).

⁴² *Moody v. Crane*, 199 P. 652 (Idaho 1921); *cf. Clement v. Reclamation Board*, 200 P.2d 196 (Cal. Ct. App. 1948).

⁴³ *See generally Ky. R. CRIM. P. 11.42; see also Hefton v. United States*, 339 F. Supp. 475 (D. Del. 1972) (proceeding to vacate sentence); the district court held that it was not reversible error for a reporter to fail to transcribe closing arguments until after the motion was filed, the case therefore being an example of those which seem to allow exceptions to the Court Reporters Act, 28 U.S.C. § 8753(b) (1964), and which should therefore be construed narrowly. Nor will the courts issue a writ of habeas corpus where a state is not at fault in the loss of a reporter's notes. *United States v. Pate*, 318 F.2d 559 (7th Cir. 1963).

⁴⁴ *United States v. Upshaw*, 448 F.2d 1218 (5th Cir. 1971), *cert. denied*, 405 U.S. 934 (1972).

error non-prejudicial are narrowly construed.⁴⁵ Thus where a reporter's error is alleged, the complaining party has the burden of showing how the alleged error or omission is prejudicial.⁴⁶ This rule was applied in *Edwards v. United States*,⁴⁷ where a reporter's failure to record a colloquy between court and counsel concerning the attempted introduction of character evidence was declared harmless, since the trial court ultimately admitted proper evidence.

If the requisite prejudice is shown, any court has sufficient supervisory powers over its own administrative affairs, including the preparation of the record,⁴⁸ to effect an appropriate remedy. The available alternatives fall into three broad areas: (1) actions directly against the reporter; (2) actions taken to supply a record; and (3) reversal of a judgment below, remanding the case for a new trial.

A. Action Against the Reporter

A court may hold the reporter in contempt for failure to transcribe his notes in a manner required by law⁴⁹ or by order of the court. As a result of such error, the reporter may also be denied his fees or compelled to refund a portion thereof⁵⁰ and may be subjected to further penalties, monetary⁵¹ or otherwise,⁵² provided by statutes and rules of procedure.

One of the most effective remedies available to injured parties is the issuance of a writ of mandamus against the reporter.⁵³

⁴⁵ *United States v. Workcuff*, 422 F.2d 700 (D.C. Cir. 1972).

⁴⁶ *United States v. DiCanio*, 245 F.2d 713 (2d Cir.), *cert. denied*, 405 U.S. 934 (1957); thus, in *Addison v. United States*, 317 F.2d 808 (5th Cir. 1963), *cert. denied*, 376 U.S. 905 (1964), the defendants-appellants failed to point out specific error in arguments not transcribed, and the court held this to be insufficient grounds on which to reverse. Note, however, that of the six original trial lawyers, one was still in the case, making it possible for a trial lawyer to point out the error lying in the unreported arguments. Such facts may prevent operation of the principle enunciated in *Upshaw*, to the effect that without a total record, new counsel in a case cannot effectively do his duty.

⁴⁷ 374 F.2d 24 (10th Cir. 1966), *cert. denied*, 389 U.S. 850 (1967).

⁴⁸ *Hydramotive Mfg. Corp. v. SEC*, 355 F.2d 179 (10th Cir. 1966); *Louisville & N.R.R. v. Paul's Adm'r*, 235 S.W.2d 787 (Ky. 1950); KRS § 28.410. *But see* a peculiar result in *Charles Brooks & Co. v. Gentry*, 64 So. 214 (Miss. 1914).

⁴⁹ *United States v. Washabaugh*, 435 F.2d 1298 (9th Cir. 1970).

⁵⁰ *Mills v. Commonwealth*, 185 S.W.2d 689 (Ky. 1945); *Meek v. Commonwealth*, 283 S.W. 1032 (Ky. 1926); *Pendleton v. Garrard Bank & Trust Co.*, 272 S.W. 917 (Ky. 1925); *Taylor Coal Co. v. Miller*, 182 S.W. 920 (Ky. 1916).

⁵¹ *E.g.*, Miss. CODE ANN. § 9-13-45 (1972).

⁵² *International Shoe Company v. Carmichael*, 105 So. 2d 389 (Fla. 1953).

⁵³ *United States v. Metzger*, 133 F.2d 82 (9th Cir. 1943); *Richardson v. Cannon*, 506 S.W.2d 509 (Ky. 1974); *Trodgen v. Judge, Daviess Circuit Court*, 371 S.W.2d 40 (Ky. 1963).

Although one appellate court has held that it lacked sufficient control over stenographers hired in courts below to issue such writs,⁵⁴ this is not the general rule. In order to obtain issuance of a mandamus, of course, the technical requirements must be met. For example, since mandamus is in the nature of a personal action, where the petitioner failed to seek the writ against a specifically named individual, styling the respondent only as "Judge, Daviess Circuit Court", it was held that there was no proper respondent and the petition was denied.⁵⁵ Nor will mandamus be granted to compel one who formerly held an office to perform the duties of that office; thus a petition was denied where it was not sought until after the official reporter in question had resigned his post.⁵⁶

B. *Actions to Supply a Record*

The reporter's failure to supply a complete record is not always the result of either negligence or willful misconduct. It might be, for instance, that the reporter was not responsible for a particular phase of the trial. Consequently, a variety of techniques have been developed by courts to supply a record upon which an appeal can be heard. The court may issue an order supplementing the record,⁵⁷ sustain a motion to correct a record,⁵⁸ allow the filing of the record out of time,⁵⁹ or have a hearing between court and counsel for the purpose of reconstructing the record.⁶⁰ There are, in addition, rules automatically operable enabling litigants to prepare a record for the appellate court in a manner other than transcription of notes taken by the reporter.⁶¹

C. *Granting of a New Trial*

The granting of a new trial is set apart from other forms of relief by its potential harm to the initially prevailing litigant. Obviously that party must undergo again the hazards unique to a jury trial, which can conceivably result in a complete reversal

⁵⁴ Charles Brooks & Co. v. Gentry, 64 So. 214 (Miss. 1914).

⁵⁵ Trodgen v. Judge, Daviess Circuit Court, 371 S.W.2d 40 (Ky. 1963).

⁵⁶ United States v. Oswald, 141 F.2d 921 (9th Cir. 1944).

⁵⁷ United States v. Upshaw, 448 F.2d 1218 (5th Cir. 1971); Ky. R. Civ. P. 75.08.

⁵⁸ Butler v. Skog, 199 A.2d 597 (R.I. 1964); Ky. R. Civ. P. 60.01, 75.08.

⁵⁹ Clement v. Reclamation Board, 200 P.2d 196 (Cal. Ct. App. 1948); Moody v. Crane, 199 P. 652 (Idaho 1921).

⁶⁰ United States v. DiCanio, 245 F.2d 713 (2d Cir. 1957).

⁶¹ Ky. R. Civ. P. 75.13-14.

without relation to substantive error in the original trial. Courts are therefore reluctant to quickly set aside such judgments, and the mere absence of a stenographic record is not necessarily an adequate basis for granting a new trial, especially since there exist other means for obtaining a record for the appellate court.⁶² The peculiarities of particular statutes may also affect the appellate court's power to grant this relief. Thus one court, applying a statute which required a record to be filed before it could entertain an appeal, denied a new trial where the reporter had died before completing the record, holding that the case had to be dismissed for want of prosecution. The decision was based on the somewhat strained reasoning that since there was no record, the court was without jurisdiction to hear the appeal.⁶³ This is not the accepted rule, however; and ordinarily if the appellate court is unable to determine whether a litigant's rights have been violated by reason of the absence of all or part of the record, the judgment below will be reversed and the case remanded for a new trial.⁶⁴ Indeed, some states specifically provide for this by statute.⁶⁵

The question of whether the original prevailing litigant is damaged by the granting of a new trial is open to discussion, but it can rationally be argued that even if he is again successful, both he and his attorney have suffered additional expenses as a result of the second trial. The ultimately prevailing party may have lost interest on money or suffered legal costs, or the attorney may have lost the value of his legal services rendered at the second trial.⁶⁶ Whether these and other damages are recoverable from the reporter is a question that will be discussed below, but before reaching that point a consideration of some of the important factors affecting the reporter's *substantive liability* is necessary.

To this point, the discussion has focused upon the role and function of the official court reporter in order to establish a basis

⁶² Hydramotive Mfg. Corp. v. SEC, 344 F.2d 179 (10th Cir. 1966); Moore v. Moore, 144 A.2d 765 (Del. 1969); Ky. R. Civ. P. 75.13-14.

⁶³ Morin v. Claffin, 61 A. 782 (Me. 1905).

⁶⁴ United States v. Gracia-Bonifascio, 443 F.2d 914 (5th Cir. 1971); United States v. Workcuff, 422 F.2d 700 (D.C. Cir. 1970); Fowler v. United States, 310 F.2d 66 (5th Cir. 1962).

⁶⁵ CAL. CODE CIV. PRO. §§ 914, 657.1 (West Supp. 1974); CAL. PENAL CODE § 1181(9) (1970); ME. REV. STAT. ANN. tit. 4, § 654 (1967); ORE. REV. STAT. § 19.130(3) (1971).

⁶⁶ See Waterman v. State, 232 N.Y.S.2d 22 (Ct. Cl. 1962).

for deciding what constitutes negligence on the reporter's part. Now we are confronted with the highly important practical problem of whether the injured party will be able to obtain *any* relief from the reporter. The significant considerations in this context are: (1) whether the reporter is, in fact, immune from liability; (2) whether the act of the reporter was the proximate cause of the injury; (3) whether damages can be calculated with legally sufficient precision; and (4) whether external factors such as the contributory negligence of the attorney could affect the reporter's ultimate liability.

IV. IMMUNITY OF THE OFFICIAL COURT REPORTER

A. *The Federal Rule*

The federal courts are firmly committed to the principle that an official court reporter, in the discharge of his official responsibilities, is protected by judicial immunity. The purpose of the judicial immunity doctrine, the antiquity of which has been noted by the United States Supreme Court,⁶⁷ is to avoid intimidation of the bench by insubstantial litigation.⁶⁸ One federal court in a case styled *Stewart v. Minnick* has even applied this doctrine to a state court reporter. In that case the appellant had sued a reporter and court clerk under the Civil Rights Act for their refusal to furnish him a transcript of the prosecutor's closing argument.⁶⁹ Since California was not amenable to a suit under the Act and the acts alleged had been performed in the defendants' capacities as quasijudicial officers, the court held that they were

⁶⁷ *Pierson v. Ray*, 386 U.S. 547, 555 (1967).

⁶⁸ It is felt that men considering public life would be deterred by potential liability; that the drain upon the time of the official, caused by insubstantial litigation, would be great; that it is unfair to subject officials to liability for the acts of their subordinates; that the duty of the official is to the public and not the individual; and that valid and formal removal proceedings are more appropriate ways to prompt proper action on the part of public officials. *Bauers v. Heisel*, 361 F.2d 581, 590 & n.9 (3d Cir. 1966), *cert. denied*, 386 U.S. 1021 (1967).

The federal courts' rule that an official court reporter is protected by judicial immunity was not abolished by the Civil Rights Act. *Dieu v. Norton*, 411 F.2d 761 (7th Cir. 1969); *Peckham v. Scanlon*, 241 F.2d 761 (7th Cir. 1957).

The burden of raising the issue of judicial immunity is upon the parties, and unless it is raised in the pleadings it will not serve as a defense. *Washington v. Official Court Reporter*, 251 F. Supp. 945 (E.D. Pa. 1966).

It should also be noted that federal officers can avail themselves of this doctrine of immunity by removing any action against them to a federal court. 28 U.S.C. § 1442 (1973).

⁶⁹ *Stewart v. Minnick*, 409 F.2d 826 (9th Cir. 1969), *citing* *Peckham v. Scanlon*, 241 F.2d 761 (7th Cir. 1957).

clothed with judicial immunity. A better analysis for the federal courts would seem to suggest looking to state law to determine whether the court reporter is immune where the reporter involved is a state court reporter. State law creates the position; state law should determine its characteristics. If this were the test, the decision in *Stewart* would have been different because California decisions consistently have referred to the reporter as an officer of the *court* and not of the *state*.⁷⁰ It is important to note the difference between an *officer* of the state and a mere state *employee*. While the former is usually accorded *sovereign immunity*, the latter is not. Consequently, if an individual is a state *employee* but is called an "officer of the court," he will still ordinarily have no immunity, unless he falls within the pale of *judicial immunity*. The same result would obtain in most jurisdictions outside California, because the California rule that court reporters are not officers of the state is the majority rule.

B. *The State Rule*

It is obvious that the status of the reporter under the Court Reporters Act has influenced the federal decisions. For the defense of sovereign immunity to be available to an individual in a state case, however, he must be an officer of the state exercising sovereign powers; some part of the sovereign power of the state must have been delegated to him.⁷¹ While a few jurisdictions consider the court reporter to be an official of the state,⁷² the majority view seems to be that he is not an official, but merely a state employee, and that he holds no sovereign powers.⁷³ Under this view the reporter clearly should not be, and generally has not been, accorded either judicial or sovereign immunity. Even under the principle that the reporter is merely a state employee, however, one court has held that the status of the reporter as an *officer of the court* meant that he was responsible to the court alone, and not the litigants.⁷⁴ Most jurisdictions,

⁷⁰ *Clement v. Reclamation Board*, 200 P.2d 196 (Cal. Ct. App. 1948); *Caldwell v. Harvey*, 192 P.2d 62 (Cal. Ct. App. 1948).

⁷¹ *Robbin v. Brewer*, 236 So. 2d 448 (Fla. 1970); *In re Opinion of the Justices*, 163 So. 76 (Fla. 1935).

⁷² *Sills v. Sills*, 6 P.2d 1026 (Idaho 1931); *State v. Mitchell*, 267 S.W. 873 (Mo. 1924).

⁷³ *Robbin v. Brewer*, 236 So. 2d 448 (Fla. 1970); *Tom Green County v. Proffitt*, 195 S.W.2d 845 (Tex. 1946).

⁷⁴ *Wheeler v. Birch & Sons Constr. Co.*, 178 P.2d 331 (Wash. 1947).

though, have as yet had no opportunity to decide the question.

Among the few landmark decisions in this area of the law is a series of connected cases, each bearing the style *Waterman v. State*, decided by the courts of New York between 1959 and 1966. An action was filed in the New York Court of Claims against the state of New York for personal injury damages incurred in an automobile accident which resulted in judgment in favor of the claimants, and the state appealed. Unfortunately, the court stenographer lost his notes and was unable to furnish a transcript of the evidence. The appellate division vacated the judgment and granted a new trial, whereupon the Court of Claims once again gave judgment for the claimants. These second judgments, in substantially the same amounts as were awarded in the first trial, were paid by the state.

Shortly thereafter, the claimants filed an action against the state alleging that because of the negligence of the reporter in losing his notes they sustained damage, suffering expenses for the second trial and loss of interest from the date of the first judgment to the date of the judgment resulting from the second trial. Their attorney also made a claim for the additional legal services he rendered at the second trial, alleging that this was required by reason of the stenographer's negligence.

The attorney general argued that the court stenographer was a judicial officer, shielded from civil liability under the doctrine of judicial immunity and that although the state had waived its sovereign immunity to a certain extent under the provisions of the Court of Claims Act, it never intended to surrender such immunity in the case of judicial officers. While recognizing that the doctrine of judicial immunity was one of the oldest in Anglo-American jurisprudence, designed to protect a judicial officer from the consequences of his judicial acts, the court concluded that the rule had no application and could not be successfully asserted.⁷⁵ It emphasized that

⁷⁵ There are numerous cases styled *Waterman v. State* including the original suits for personal injury damages, and suits for damage due to loss of the reporter's notes. What we are primarily concerned with here are two of the reported cases. The first (here styled textually *Waterman I*) is *Waterman v. State*, 232 N.Y.S.2d 22 (Ct. Cl. 1962). It was in this case that the court decided that judicial immunity did not protect court reporters, but the claims were dismissed because the loss of the reporter's notes was not the "natural and probable cause" of the damage sustained by the claimants. *Id.* at 27.

. . . to be immune from civil responsibility the judicial officer involved must be doing something in the nature of a judicial function calling for weighing facts and evidence, considering legal principles, and making a decision thereon.⁷⁶

Although New York statutes provided that the stenographer was an "officer of the court", the court rejected the state's contention that the acts of the reporter were covered by the judicial immunity rule, stating:

A Court stenographer, notwithstanding the fact that he is an Officer of the Court, by the very nature of his work performs no judicial function. His duties are purely ministerial and administrative; he has no power of decision. The Doctrine has no application to the facts with which we are confronted here.⁷⁷

The Kentucky Court of Appeals has as yet had no occasion to rule upon the immunity of the court reporter, but if confronted with the appropriate case, the Court should follow the well-considered majority rule by holding that a court reporter is merely an employee of the commonwealth with no defense of sovereign immunity. This was the approach of the New York Court of Claims in *Waterman I*, and appears to be the soundest approach. Yet the reporter in *Waterman I* was held not to be liable because the court concluded that the damages asserted by the claimant were not the proximate result of the loss of the reporter's notes and that the damages were speculative. This result is open to question and will be considered at length below; thus, while *Waterman I* represents the better view regarding immunity, it is questionable that the entire reasoning of the court should be accepted without serious deliberation in light of the usual rules of proximate causation and specificity of damages.

(Footnote continued from preceding page)

Upon appeal the appellate division in *Waterman v. State*, 241 N.Y.S.2d 314 (App. Div. 1963) decided that the reporter's loss of his notes was the proximate cause, reversed the dismissal, and reinstated the claimants actions. This case is herein textually referred to as *Waterman II*. Finally, the claimants won judgments in the Court of Claims, ultimately affirmed by the New York Court of Appeals in *Waterman v. State*, 216 N.E.2d 26, 268 N.Y.S.2d 929 (N.Y. 1966).

⁷⁶ *Waterman v. State*, 232 N.Y.S.2d 22, 26 (Ct. Cl. 1962).

⁷⁷ *Id.*

V. PROXIMATE CAUSE AND CERTAINTY OF DAMAGES

A. *Waterman I*

As the Court of Claims noted in *Waterman I*, it is not enough that the reporter's negligence can be shown; the negligence must be causally related to the damages asserted.⁷⁸ The court found the crucial question to be whether the damage sustained by the claimants was the natural and probable consequence of the reporter's negligent acts and held that it was impossible to predict with any certainty what disposition of the case the appellate division would have made had the appeal actually been perfected by the state. The court noted that several possible actions could have been taken by the appellate court, at least one of which would have resulted in retrial of the case even if the reporter's loss had not occurred. The court then concluded that since the action by the appellate court which would cause a retrial had the same likelihood of occurrence as any other action, the court would be forced to indulge in conjecture to decide that the damages, *e.g.*, the expense of the new trial, flowed naturally from the loss of the reporter's notes.⁷⁹ The court stated that:

... we would have to hold that at the time the Stenographer misplaced his notes he knew or should have known that the Appellate Division would not reverse the judgments; or to state it conversely, that he knew or should have known that as a natural consequence of his negligence the Appellate Division would have affirmed the judgment making the expense of the second trial unnecessary.

We feel that to so hold would be stretching the rule of proximate cause beyond any limits heretofore fixed by the Courts. We are constrained to hold as a matter of law that the damages sustained by these claimants were not the natural and probable results of the Stenographer's negligence.⁸⁰

⁷⁸ *Id.* at 27. It should be noted that what the court actually said was that the negligence complained of had to be the proximate cause of the claimed damages. In that particular case, that was true; but where the aggrieved litigant proposes to sue his own attorney and the reporter is also sued or impleaded, it will be sufficient that the reporter's negligence be a proximate cause of the damages, in accordance with accepted principles dealing with concurrent negligence.

⁷⁹ *Id.* at 28-29.

⁸⁰ *Id.*

The Court of Claims relied upon two New York cases, *Cole v. Vincent*,⁸¹ and *25 Fifth Avenue Management Co. v. Ivor V. Clark, Inc.*,⁸² as authority for this portion of their decision in *Waterman I*. A very cogent argument can be made that this reliance was misplaced and that these cases do not support the decision in *Waterman I* that proximate cause was absent. These cases will be considered at length to determine whether in fact they do support the decision in *Waterman I*, and a third case, *Chaplin v. Hicks*,⁸³ will be discussed as displaying a better analysis of the problem of proximate cause as well as providing a better rule to follow.

B. *Cole v. Vincent*

*Cole v. Vincent*⁸⁴ involved a suit against a county clerk and a title abstract company by the purchaser of a parcel of real estate. The plaintiff had hired the abstract company to search the title, and the company was specifically advised of a judgment against the owner of the property which might affect the marketability of the title. Upon searching the title the judgment was not found, presumably because the clerk had not properly recorded it. At the trial a verdict was directed against both the clerk and the abstract company. On appeal the court held that the trial court had been in error in directing a verdict against the county clerk and that there was "a question of fact as to whether or not such negligence was a proximate or concurring cause of the injury sustained by plaintiff."⁸⁵

Citing *Cole*, the *Waterman I* court quoted the following passage:

But if the consequences were only made possible by the intervening act of a third party which could *not* have been reasonably anticipated, then the sequential relation between act and result would not be regarded as so established as to come within the rule.⁸⁶

⁸¹ 242 N.Y.S. 644 (App. Div. 1930).

⁸² 112 N.Y.S.2d 117 (App. Div. 1952).

⁸³ [1911] 2 K.B. 786.

⁸⁴ 242 N.Y.S. 644 (App. Div. 1930).

⁸⁵ *Id.* at 650.

⁸⁶ *Waterman v. State*, 232 N.Y.S.2d 22, 29 (Ct. Cl. 1962), *citing* *Cole v. Vincent*, 242 N.Y.S. 644, 651 (App. Div. 1930) (emphasis in original).

The quotation is correct, but it was preceded in *Cole* by an anti-theoretical proposition of law, wherein the court said:

If the act of a party sought to be charged is in clear sequence with the result, and it *could* have been reasonably anticipated that the consequences complained of would follow the alleged wrongful act, it is a proximate cause.⁸⁷

Thus, it is apparent that *Cole* did not at all require the result reached in *Waterman I* with regard to proximate cause. *Cole*, rather, stands for the proposition that it is a question of fact whether a county clerk's erroneous indexing of an item caused or contributed to an injury. *Waterman I* distorts this principle to mean that in order to hold the court reporter liable, the court would have to find that he knew or should have known that the judgement *would* have been affirmed, thus *obliging* the Court of Claims to hold *as a matter of law* that the claimants' damages were not the proximate result of the reporter's negligence. At first blush, the test employed by *Waterman I* is a fair one. Upon reflection, though, it becomes evident that the *Waterman I* criterion is unsound and unworkable. Just as an attorney cannot defend himself in a malpractice action solely on the grounds that he thought the client's case was without merit or that he was never personally persuaded that an appeal would prevail, neither should the negligent court reporter be able to escape liability merely because he thought that the judgement would not be affirmed. Beyond that, the *Waterman I* test requires the plaintiff to demonstrate that the reporter could do the impossible; that he could with little or no knowledge of the applicable law, before an appeal was perfected, before briefs were written and filed and before arguments were heard, foresee exactly how the appellate court would dispose of the case. Such a requirement is patently absurd.

Nor is the "reasonably prudent person" approach applicable to the court reporter situation. An attorney is compared to a reasonably prudent attorney when his acts of negligence are considered, but only when the question is whether the proper exercise of his professional judgement would have caused him to take a

⁸⁷ *Cole v. Vincent*, 242 N.Y.S. 644, 650-51 (App. Div. 1930) (emphasis in original).

certain course of action. When that issue is raised, he can defend by arguing that no lawyer is bound to exercise absolutely correct judgement and that his actions were as prudent as would have been those of a hypothetical practitioner. In contrast, when the neglect does not involve the exercise of judgement, as where the reporter fails to file papers, the reasonableness test is entirely without validity. The same applies to almost every official act of the court reporter for, unlike the attorney, he is not vested with professional discretion, at least not in Kentucky, and has no decisions to make. It is of no legal consequence what a court reporter, thinking reasonably or unreasonably, might, for example, conclude about the worth of the appeal. He is a mere amanuensis. He is instructed by the judge, or the litigants, or both, to take certain steps, such as preparation of a transcript, and has no judgement to exercise; he merely executes his duties as instructed. The *Waterman I* court failed to recognize this fact and in so doing lost sight of the real basis of the action against the reporter—that the litigant has lost his *chance* of success, that the value of this lost opportunity represents the damages to the litigant, and that the probability of a felicitous outcome should affect only the amount and not the existence of these damages.

C. *25 Fifth Avenue Management Co. v. Ivor V. Clark, Inc.*

Fifth Avenue was an action by the owner of certain real estate against a mortgage broker in which it was alleged that through the negligent acts and misrepresentations of its officer, the broker caused the plaintiff to lose an advantageous settlement in a bankruptcy matter and suffer concomitant expenses. The mortgage broker had been engaged to secure the acceptance of a settlement by proposing the matter to the trustee in bankruptcy. It was the practice in such cases to have such an offer submitted by the trustee to the court, which would then canvass the views of certificate holders; thereafter, the court would approve or disapprove the offer. Recovery was denied on the grounds that the plaintiff had not proved that the defendant's misconduct was the cause of any damage, in that the proof had not reached the necessary level of reasonable certainty.⁸⁸ The court applied the well-

⁸⁸ *25 Fifth Ave. Management Co. v. Ivor V. Clark, Inc.*, 112 N.Y.S.2d 117 (App. Div. 1952).

known rule that damages must be ascertainable and not be the result of conjecture or guesswork.

Again, at least superficially, this case seems to support the proposition for which it was cited in the *Waterman I* decision, but here too a closer examination reveals that the case and the result reached by citing it are inconsistent. In *Waterman I*, the court quoted the following language from *Fifth Avenue*:

Plaintiff's proof on the subject of damages was required to establish a loss that flowed naturally and directly from defendant's breach of its engagement. The proof in this regard lacked that standard of reasonable certainty required to establish damages. . . . The fact of damage must be susceptible of ascertainment in some manner other than mere conjecture or guesswork. . . .

The fact that a Supreme Court Justice . . . would eventually have ratified the proposal was wholly conjectural.⁸⁹

The second paragraph of this quotation is entirely misleading, for the full passage reads (with the portions deleted in the *Waterman I* decision emphasized):

The fact that a Supreme Court Justice *would have submitted the offer of 95 cents to the 250 certificate holders, that the latter or a majority of them would have accepted the offer, and that the Supreme Court would eventually have ratified the proposal was wholly conjectural.*⁹⁰

The facts of *Fifth Avenue* reveal that the conjecture does not relate to what the bankruptcy court would have decided but that it was conjectural in regard to what 250 individuals, plus the bankruptcy court, would have done. Manifestly this is to be distinguished from the consideration of what an appellate court would do with an appeal before it, for a court is guided by precedent, persuasive authority, and common sense, or a combination of all three, which, it is to be presumed, a trial judge could rightly use to determine what the appellate court would probably have done. *Fifth Avenue*, on the other hand, clearly deals with a

⁸⁹ *Waterman v. State*, 232 N.Y.S.2d 22, 28 (Ct. Cl. 1962), citing 25 Fifth Avenue Management Co. v. Ivor V. Clark, Inc., 112 N.Y.S.2d 117, 119 (App. Div. 1952).

⁹⁰ 25 Fifth Ave. Management Co. v. Ivor V. Clark, Inc., 112 N.Y.S.2d 117, 119 (App. Div. 1952).

contingency based upon the business desires of 250 individuals, with an overlay of discretionary action by the bankruptcy court. The decision in *Fifth Avenue* was undoubtedly correct, based upon its facts, but it must be remembered that it deals with unbridled discretion of individuals and should be limited in its application, at least not extended to apply to judgments based upon principles of law.

The court in *Fifth Avenue* raised the intriguing possibility of a jury in a collateral proceeding determining what an appellate court would have decided upon an appeal. Such a decision by a jury is subject to criticism, but the concept was conveniently ignored in *Waterman I*. In *Fifth Avenue*, the court aptly pointed out:

In such assumed situation, however, the circumstances would have to be that a particular result could be reasonably expected based upon the factual evidence of the merits of the claim and the applicable law. We have no such situation or proof here. The determination of the direct proceeding rested in the discretion of the certificate holders and the court.⁹¹

Thus, it was "incomprehensible that a jury could have found from the evidence what the decision of the certificate holders and the court would be other than to guess the result."⁹² That is an acceptable conclusion, and one may readily concede that a judge could not have divined the collective decision of 250 people, but this is hardly support for the court's position in *Waterman I*. Moreover, in *Fifth Avenue* the court properly noted that it was not a case where ". . . the result was to be dependent upon a fortuitous event, and the defendant prevented the plaintiff from having the advantage of the chance . . .," but rather it was one in which "the result is dependent upon the mere unrestricted volition of others—here the volition of the certificate holders plus the judicial discretion of the Court. . . ."⁹³ In distinguishing the facts of *Fifth Avenue* from a situation wherein a defendant prevented a plaintiff from having had the advantage of a chance, the New York court cited the English case of *Chaplin v. Hicks*.⁹⁴ A

⁹¹ *Id.* at 120.

⁹² *Id.*

⁹³ *Id.* at 120.

⁹⁴ [1911] 2 K.B. 786.

thorough analysis of *Fifth Avenue* by the Court of Claims in *Waterman I* would have necessitated a consideration of *Chaplin*, which illustrates the better rule regarding proximate cause and certainty of damages.

D. *The Rule in Chaplin v. Hicks*

In the fall of 1908, Eva Chaplin read an advertisement in the *Daily Express*, in which Hicks, an actor and lessee of a theater in London, made a public offer to ladies wishing to become actresses. He proposed that they complete an application and send it, together with a photograph and one shilling, to him, after which he and a committee would select the twenty-four most beautiful faces among the photographs sent in. The twenty-four pictures would be published by the newspaper, and its readers would vote, electing the twelve most beautiful. To the four of the twelve receiving the greatest number of votes Hicks promised a theatrical engagement for three years at a salary of £5 a week. The four having the next highest number of votes would receive an engagement for three years at £4 a week, and the final four were also to be awarded three years engagement, but at £3 a week. Ms. Chaplin accepted the offer by sending her photograph and shilling with the application form.

Subsequently a modification of the contract occurred, to which Chaplin did not object. Because so many photographs of beautiful girls had been received, it had become impossible for Hicks to select only 24 photographs. The plan was changed to provide that Hicks would reduce the number of applicants as far as possible but that the United Kingdom was then to be divided into ten districts, with the candidates selected by Hicks to be voted on by readers of the *Daily Express* in the candidate's district. Out of the five girls with the highest vote totals in each district, Hicks was himself to select the twelve winners. In December, Chaplin's photograph was published, and she headed the poll in her district.

On January 4, 1909, a letter was delivered to the London residence of Ms. Chaplin, requesting her to see Mr. Hicks on the sixth of January. Unfortunately, she was out of town and did not receive the letter until the morning of the 6th. She immediately wrote, requesting Hicks to advise her of another time she could see him. She wrote three more times and called at the theater three times, but Hicks never responded. Finally,

she sued Hicks claiming damages for her loss of the chance of selection for an engagement which, in addition to the salary she would have received, would have been to her professional benefit. At trial, the jury found that Hicks had not taken reasonable steps to give Chaplin an opportunity to present herself. The court, after receiving arguments from Hicks' counsel that the alleged damage was too remote, entered judgment for Chaplin in the sum of £100.⁹⁵

The argument for the defendant was analyzed by the court as containing two propositions: (1) that the asserted damages were too remote and (2) that the damages were not capable of assessment. These issues are not essentially different from those in *Waterman*. The court defined the applicable standard as follows:

[T]he test that is generally applied is to see whether . . . the damage . . . sought to be recovered flows so naturally or by express declaration from the terms of the contract . . . that it can be said to be the result of that breach.⁹⁶

The contract, giving Chaplin a chance of winning one of the prizes, had been breached by Hicks. The court agreed that a jury could not in all cases assess damage because it was possible that a loss resulting from a breach of contract would be so dependent upon the unrestricted volition of a third person as to make it impossible to calculate the loss. Yet, as the court noted, Chaplin had a right to belong to a limited class of competitors, and where that right was removed wrongfully, the jury could assess the damage sustained. An accepted measure of damages is not always necessary and in such cases the jury must simply do its

⁹⁵ *Id.*

⁹⁶ *Id.* at 790. Judge Williams went on to say:

[I]t is impossible to say that such a result and such damages were not within the contemplation of the parties as the possible direct outcome of the breach. I cannot think these damages are too remote. . . .

Id. at 791. But this is not the only means of determining if the breach and the damages are proximately related. In *Otter v. Church, Adam, Tatham & Co.*, [1953] 1 All E.R. 168 (Ch.), a firm of solicitors was sued for negligence in advising the plaintiff in a real property matter. There the court stated, after discussing the contemplations of the parties:

It seems to me impossible in this case to apply the latter [contemplation of the parties] test having regard to the nature of the breach of contract.

Therefore, I have to consider what are the damages which may naturally be expected to flow from the breach.

Id. at 170.

best to make the assessment. Indeed, the court held that the "existence of a contingency which is dependent on the volition of a third person is not enough to justify us in saying that the damages are incapable of assessment . . ." ⁹⁷ and that the defendant was liable for the prospective probable loss of the plaintiff. ⁹⁸

The court found the argument for the defendant unsound in its failure to distinguish between the questions of remoteness and assessment of damages. The former, it held, was an issue for the judge while the latter was for the jury to decide. ⁹⁹ The same English justices would have recognized immediately in *Waterman I* that the solution to cases where the reporter's negligence makes an appeal impossible is to let the trial court, in a subsequent action against the reporter, decide the question of law (that is, whether the appeal would have failed or not) and then let the finder of the fact proceed to the question of damages. This approach, unlike that found in *Waterman I*, is both fair and workable and should be adopted by the Kentucky Court of Appeals at the earliest opportunity.

E. *The Kentucky Rule*

Although no Kentucky case is directly in point, several decisions may serve as guideposts indicating the Court of Appeal's probable disposition of the questions of proximate cause and certainty of damages with regard to the liability of court reporters. First, the Kentucky legal principles relative to questions of causation and ascertainment of damages should be examined. The exact nature of the wrong has little legal significance, except insofar as the rules governing damages are affected. In Kentucky, damages recoverable in a tort action must be the natural and reasonable result of the wrong; while damages recoverable for breach of contract are generally those which are reasonably supposed to have been within the contemplation of the parties, ¹⁰⁰ a test which is more or less synonymous with foreseeability. These standards are hardly peculiar to Kentucky; substantially similar language was used in *Waterman I*, *Cole*, *Fifth Avenue* and *Chap-*

⁹⁷ *Chaplin v. Hicks*, [1911] 2 K.B. 786, 799.

⁹⁸ *Id.*

⁹⁹ *Id.* at 798.

¹⁰⁰ *Western Union Telegraph Co. v. Guard*, 139 S.W.2d 722 (Ky. 1940).

lin. Of course, as previously noted,¹⁰¹ these are not rigid rules, and in an appropriate case damages for breach of contract may be calculated by the extent to which they naturally flow from the wrong.¹⁰² Furthermore, if damages should arise out of special circumstances surrounding a contract, even though they are "different from those which would naturally and probably flow from the breach of such a contract," such damages can be recovered if it is shown that the defaulting party had knowledge of the special circumstances.¹⁰³ Such a variety of tests indicates that the courts are willing to apply whatever rule is necessary to ensure that the aggrieved party recovers all reasonable losses. Consequently, it appears that the theoretical basis of the cause of action against the court reporter is of little importance, because the courts have molded the law to insure that in every case the loss, in order to be recompensed, must be the *proximate result* of the reporter's failure. Even if the *Waterman I* rationale is spurned, the issue of damages will probably cause little difficulty. If a party suffers a money judgment and his appeal fails because of the reporter's inaction, the damages there are liquidated. If a party seeking a money judgment loses his opportunity to have it, the amount he probably would have received can easily be determined by the finder of fact at the second trial.

The only Kentucky case that approaches these questions is *Smitha v. Gentry*.¹⁰⁴ Therein the appellees had learned of a reward being offered for the arrest of a fugitive and had arranged for another person to call them with information confirming his whereabouts. When the informant attempted to telephone the appellees at Smitha's store, Smitha, instead of conveying the message to them, used the information, arrested the man, and collected the reward himself. The appellees received a judgment at the trial, but on appeal the judgment was reversed. The Court of Appeals held that the appellees were deprived of nothing more than the opportunity to attempt to earn the reward before someone else did, which was little different than the loss of an opportunity to compete for a public prize or to enter a horse in a race. So many contingencies could cause failure in each example that

¹⁰¹ See *Otter v. Church, Adams, Tatham & Co.*, [1953] 1 All E.R. 168 (Ch.).

¹⁰² *Staves Mfg. Corp. v. Robertson*, 128 S.W.2d 745 (Ky. 1939).

¹⁰³ *Hogg v. Edley*, 82 S.W.2d 744, 746 (Ky. 1930).

¹⁰⁴ 45 S.W. 515 (Ky. 1898).

the loss from the deprivation of the right to compete for the reward was considered too remote to form the basis of an action at law.¹⁰⁵ The Court concluded that "there is no way of showing that any loss or damage was suffered by them, *except a nominal one*. . . . Their injury was the loss of a naked possibility."¹⁰⁶

Obviously, the Court considered the *damages* too remote, for if nominal damages could be recovered there has been an injury. If there is a cause of action and damages are reasonably ascertainable, there is no reason why the Court of Appeals should fail to find for the party who was deprived of his opportunity. In this respect, it is clear that *Smitha* is not fundamentally opposed to *Chaplin*, in view of the differences in the probability of a culmination of events favorable to the plaintiffs in the two cases.

F. *The New York Supreme Court Opinion in Waterman II*

After the Court of Claims rendered its opinion, an appeal was taken by the claimants and their attorney, wherein the appellate division held that the Court of Claims erred in holding that the stenographer's negligence was not the proximate cause of the damages.¹⁰⁷ The court stated that:

The question of proximate cause, under the circumstances of this case, is a question of the facts. The Court below seems to have felt that the damages were speculative and conjectural since the Appellate Division might have reversed the decision in favor of the claimants even if a proper record had been perfected but it seems to us that this is the wrong way to look at the case. The loss of the minutes was the direct proximate cause of the need for a new trial. The damages in the way of loss of interest and expenses of retrial were consequences of the stenographer's negligence. The liability thus established *prima facie* cannot be escaped by speculating that the damage might have occurred anyway.¹⁰⁸

The Appellate Division went on to dismiss the claim of the attorney, however, on the grounds that he was not a party to the original action and as such had no personal claim against the

¹⁰⁵ *Id.* at 516.

¹⁰⁶ *Id.* (emphasis added).

¹⁰⁷ *Waterman v. State*, 241 N.Y.S.2d 314 (App. Div. 1963), *aff'd sub nom. Williams v. State*, 200 N.E.2d 212, 251 N.Y.S.2d 30 (1964).

¹⁰⁸ *Id.*

State of New York; the court reporter, in the court's opinion, owed the attorney no duty whatsoever.¹⁰⁹ It should be noted, however, that the court also held that if the claimants had been required to pay additional attorney's fees for a second trial, such additional expenses would be included in the sum awarded to them as a result of the negligence of the reporter. Allowing a claim by the attorney, therefore, would have been a possible improper duplication of that award.¹¹⁰ The decision of the Appellate Division in *Waterman II* is sound both in result and reasoning and thus provides an excellent example for Kentucky courts to follow should the same question arise in this jurisdiction. Logically the reporter should not be entitled to immunity and should be held responsible for his negligent acts.

VI. EFFECT OF ATTORNEY'S NEGLIGENCE

If an appellant who is injured by the reporter's sole negligence is not granted relief by the court, he has lost his opportunity for redress on the original action; even if a remedy is granted, both the successful litigant and his attorney will have suffered expense and inconvenience due to the reporter's error. In each of these situations both the attorney and his client have actionable rights against the court reporter, including the right of the attorney to cross claim against the reporter or implead him, in the event of an action against the attorney by his client.

The alternate situation is one in which the attorney *contributes* to the negligence of the reporter. It will be seen that a court will seldom grant relief where an attorney has contributed to the delay prejudicing his client's rights, for even if the rules of the court require the reporter to take some action, the appellant may not sit idly by. He is bound to exercise reasonable diligence to see that the reporter complies with his legal obligations, and where the only step taken to obtain the record is an occasional inquiry of the reporter as to the progress of the transcript, there is no justification for relief from default.¹¹¹ In this regard it should again be noted that the reporter in Kentucky has no duty to insure that appellate papers are filed or to obtain extensions of

¹⁰⁹ *Id.* at 319 (Williams, P.J., speaking for the majority in a separate opinion).

¹¹⁰ *Id.* at 320 (Williams, P.J., speaking for the majority in a separate opinion).

¹¹¹ *Caldwell v. Harvey*, 192 P.2d 62 (Cal. Ct. App. 1948).

time in which to file such papers.¹¹² Contribution to the delay by the attorney may be critical and certainly must be considered in determining ultimate liability.

If the attorney's negligence is determined to be contributory or superseding,¹¹³ he has no cause of action against the reporter; and in view of his status as the client's agent during the course of the litigation,¹¹⁴ the client is also ordinarily barred from a direct action against the reporter. On the other hand, if the attorney's negligence is merely concurrent, the client will have a cause of action against both the attorney and the reporter, and the attorney may well have rights over against the reporter for contribution.¹¹⁵

VII. OTHER CONSIDERATIONS

A. *Respondeat Superior*

Any litigant who obtains a judgment is confronted with the practical problem of collecting it. At the present time a malpractice insurance policy similar to those held by physicians and attorneys is probably not available to court reporters, and while a reporter's employment may provide him a comfortable income, it is unlikely to make him wealthy. Thus, anyone recovering a judgment against a reporter will necessarily have to explore all possibilities of collection, among them collection from the state itself on the basis of *respondeat superior*.

Such an attempt would likely be unavailing, however, since even though the reporter is a state employee (if not a state officer), recovery against the employer-state via *respondeat superior* would be impossible in most jurisdictions due to the doctrine of sovereign immunity. In *Waterman I*, the Court of Claims applied *respondeat superior*, but only because New York in its Court of Claims Act has waived immunity in such situations.¹¹⁶ Therefore, unless the state has a tort claims act covering negli-

¹¹² *Louisville & N.R.R. v. Paul's Adm'r*, 235 S.W.2d 787 (Ky. 1950).

¹¹³ See *Illinois Cent. R.R. v. Vincent*, 412 S.W.2d 874 (Ky. 1967).

¹¹⁴ *Childers v. Potter*, 165 S.W.2d 3 (Ky. 1942); *Douthitt v. Guardian Life Ins. Co.*, 31 S.W.2d 377 (Ky. 1930).

¹¹⁵ See *Parker v. Redden*, 421 S.W.2d 586 (Ky. 1967).

¹¹⁶ The appellate court agreed with the Court of Claims that the stenographer was not a judicial officer, making *respondeat superior* a doctrine of possible application, but stated that the exact relationship of the reporter to the state should be further developed at the trial since it might appear that the reporter is an independent contractor.

gence of a state employee, the doctrine of *respondet superior* will not facilitate the collection of a judgment against a reporter.

B. *Civil Rights Act*

The Civil Rights Act of 1871¹¹⁷ imposes liability upon anyone who

. . . under color of any statute, ordinance, regulation, custom or usage, of any state or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws¹¹⁸

Under that Act, one convicted of a crime has a cause of action against a reporter who refuses to comply with court orders directing him to furnish a transcript of the testimony taken at the trial.¹¹⁹ The advantages of such an action under the Civil Rights Act are multiple, the most important of which is that it is not a petition to obtain the transcript, but rather is an action for damages for the failure to provide it. Thus, if the transcript is provided subsequent to the suit being brought against the reporter, the fact that the wrong alleged in the complaint is not continuing is irrelevant to the existence of a cause of action. Moreover, since the Civil Rights Act allows such actions to be brought in a federal court, the doctrine of exhaustion of state remedies is eliminated. Finally, the absence of actual prejudice from the reporter's action, and absence of actual damages, does not defeat an action under the Civil Rights Act because even though actual damages are not sustained, nominal and punitive damages may be recovered.¹²⁰ As against a reporter, however, the Civil Rights Act is of use only in proceedings involving state court reporters, since the judicial immunity granted the reporter in federal courts is not abolished by the Civil Rights Act¹²¹ and since that Act is aimed only at *state* action. Furthermore, *Stewart v. Minnick*¹²² established that if the defense of judicial immunity is properly

¹¹⁷ 42 U.S.C. § 1981 (1970).

¹¹⁸ *Id.* § 1983.

¹¹⁹ *Washington v. Official Court Stenographer*, 251 F. Supp. 945 (E.D. Pa. 1966).

¹²⁰ *Id.* at 947.

¹²¹ *Dieu v. Norton*, 411 F.2d 761 (7th Cir. 1969); *Peckham v. Scanlon*, 241 F.2d 761 (7th Cir. 1957).

¹²² 409 F.2d 826 (9th Cir. 1969).

raised, it may apply even to a state court reporter in a federal action. As previously noted, however, this should not be an automatic finding in the federal court but should depend upon the immunity of the reporter *vel non* under the laws of the particular state.

VIII. RECOMMENDATIONS AND CONCLUSIONS

A. Recommendations

As in several other jurisdictions,¹²³ failure to perform his duties may subject the court reporter in Kentucky to criminal penalties. KRS § 28.990(5) provides:

A reporter guilty of wilful or corrupt misconduct or neglect in the discharge of any of the duties required of him by any of the provisions of KRS 28.410 to 28.480 shall be fined not more than five hundred dollars (\$500) or imprisoned in the county jail not more than six (6) months.

Even so, such steps may be of little comfort to one who has suffered monetary damages. A number of state legislatures have solved this problem by requiring the reporter to post a bond to protect innocent parties from his failure to faithfully discharge his duties.¹²⁴ Using those statutes as models, it is recommended that the Kentucky General Assembly enact legislation similar to the following:

Proposed KRS § 28.420: Oath; Bond; Appointment and Bond to be Recorded; Action on Bond; Penalty for Wilful Neglect of Duty.

1. Every person appointed as a court reporter under the authority of KRS § 28.410, or appointed as court reporter *pro tempore* in any judicial proceeding by agreement of court and parties, shall, before entering upon the discharge of his duties, take an oath before the judge of the court or division for which he is appointed to faithfully discharge the duties of his office. The appointment of the reporter and the fact of his having qualified shall be entered upon the order book of the court. The reporter shall thereby be deemed an officer of the court.

¹²³ *E.g.*, FLA. STAT. ANN. § 839.24 (Supp. 1973); KAN. STAT. ANN. § 20-911 (1963); MISS. CODE ANN. § 9-13-45 (1972).

¹²⁴ See statutes compiled *supra* note 25.

2. Every such person shall furnish a bond for the faithful performance of the duties of his office. The bond shall be in the sum of two thousand five hundred dollars, or such larger sum as the court may fix, and shall be subject to the approval of the appointing court. The bond shall be in favor of the court making the appointment, any party litigant and any party litigant's attorney, for the purpose of protecting the court, counsel and litigants against any acts of incompetence or misconduct on the part of the reporter. The bond shall be filed in the Circuit Clerk's Office of each county in the judicial district for which the appointment is made, or in the Circuit Clerk's Office for the county in which the *pro tempore* court reporter is serving.

3. If any person shall be injured or aggrieved by default of the reporter in his capacity as officer of the court, such person so injured or aggrieved may bring suit on the reporter's bond for any damages sustained.

4. If any court reporter shall neglect or refuse to transcribe his official notes and to file such transcription within the time and in the manner required by law, or by order of the court or judge, he shall be liable upon his bond for a penalty in the amount of five hundred dollars, to be recovered by the party aggrieved thereby, whether the person aggrieved has suffered any actual damage or not.

5. Any remedies given by this act shall not be construed to limit any other remedy which would otherwise exist, but shall be cumulative in effect.

B. Conclusion

The last section of the proposed legislation specifically provides that remedies granted thereby are not to be exclusive of any other existing remedies. Those other remedies, the common law actions for negligence or breach of contract, should be enforced in Kentucky. Since the Kentucky Court of Appeals has adopted the view that in the performance of his duties the reporter is no different from any other recognized officer of the court,¹²⁵ this approach should be brought to its logical conclusion. The Court of Appeals, if confronted with an appropriate case, should hold that the reporter is a mere employee of the Common-

¹²⁵ Louisville & N.R.R. v. Paul's Adm'r, 235 S.W.2d 787 (Ky. 1950).

wealth, and not an officer granted immunity. If the case deals with a reporter hired by the parties with the consent of the court, thus making the reporter a *de facto* officer of the court, the reporter should be deemed an independent contractor, not entitled to immunity under any rule.

The Court of Appeals should further apply its usual and normal rules regarding causation to cases involving reporter's misconduct. By reason of these legal principles, if it is found that *but for* the act of the reporter the complaining litigant would have achieved his goal, then only the question of damages should remain for the finder of fact. Only when such a stance is firmly adopted will litigants in Kentucky's courts be assured of adequate protection from the reporter who fails to copy and record "what is right and true".

APPENDIX A

STANDARDS OF QUALIFICATIONS FOR OFFICIAL
COURT REPORTERS

(Resolution of the Judicial Conference of the United States, September 1944 session, rpt. 13-14)

Be it Resolved:

1. That persons appointed as court reporters of the United States district courts shall be capable of reporting accurately verbatim by shorthand or mechanical means, proceedings before the court at a rate of 200 words a minute, and furnishing a correct typewritten transcription of their notes with such promptitude as may be requisite. They shall demonstrate familiarity with the terminology used in the courts, and shall be persons of unquestionable probity;

2. That the method of determining these qualifications in each particular case be left to the appointing court which will have a vital interest in securing for the reporting of its proceedings only persons who are competent and upright. The Conference suggests that the district judges may properly take into consideration the experience of applicants who have been reporting in the courts and may appoint without examination such reporters as are known to them to possess through such experience the necessary qualifications. The Conference also suggests that judges would be justified in treating as qualified without examination:

(1) Persons presently engaged in reporting court proceedings in the locality and known to the appointing court to be competent; (2) persons holding certificates of proficiency from the National Shorthand Reporters Association, or state or local shorthand reporters' associations known to the appointing judges to base such certificates on merit; or (3) persons holding certificates of proficiency issued by states which have provisions for the examination and certification of shorthand reporters;

3. That where examination of applicants is necessary to determine their qualifications, the Conference suggests that the appointing judge appoint a Committee composed of members of the bar or court reporters or both to conduct such examinations.

APPENDIX B

QUALIFICATIONS AND COMPENSATION PLAN FOR
OFFICIAL COURT REPORTERS, UNITED
STATES DISTRICT COURTS

1. An Applicant for appointment hereafter as an official court reporter in the United States district courts shall possess as a minimum requirement:
 - (a) At least four years of prime court reporting experience in the free lance field of service or service in the lower courts or a combination thereof;
 - (b) A certificate of proficiency from the National Shorthand Reporters Association; or
 - (c) A certificate from the Administrative Office of the United States Courts stating that he has passed an examination conducted under the auspices of the Administrative Office.

Such a qualified person shall, upon appointment, receive the starting salary for court reporters set by the Judicial Conference plus transcript fees;

2. All official court reporters who have satisfactorily served the United States district courts as official court reporters for 10 years shall receive a 10% increase over the starting salary set by the Judicial Conference for court reporters.
3. A holder of a certificate of merit from the National Shorthand Reporters Association (or the equivalent therefore established by the Administrative Office) shall after five years of satisfactory service as official court reporter receive a 10% increase over the starting salary set by the Judicial Conference for court reporters;
4. The recommendation of the employing court is prerequisite for advancement to the 10% salary increase. The salary rates above-mentioned may be adjusted upwards whenever there is a statutory pay increase for judiciary employees generally;
5. All initial appointments shall be on a probationary basis to be fixed by the employing court;
6. This Plan shall be administered by the Director of the Administrative Office of the United States Courts, under the general direction and supervision of the Judicial Conference of the United States. The requirements of Item 1, above, may be subject to modification where special problems exist.