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A NOTE ON LAWYERS' MALPRACTICE: LEGAL BOUNDARIES AND JUDICIAL REGULATIONS

T. G. BASTEDO*

In recent years the legal profession in Ontario has increasingly been subjected to public scrutiny. Though only one of the twenty-two self-governing professions in the province,¹ the legal profession is ubiquitous, pervades most aspects of the social polity, and through its very role is perhaps peculiarly vulnerable to public attack. Unlike the medical profession, its greatest competitor for tangible recompense and prestige, the actions of lawyers affect others in an economic sense. For all of these reasons the adequacy of the self-government of the profession is being questioned.² The government of any profession must have as its primary aim the protection of the public, and one substantial aspect of this is the disciplining of incompetence.³ A second is ensuring that the public will be recompensed for any unfortunate experiences in dealing with members of the profession. To a large extent, the standards of incompetence are set by the courts, and it is these standards which will determine ultimately who will be recompensed, and who may be subject to discipline. While the insurance companies may ultimately recompense, and while the law society may discipline, both will use the courts' guidelines. The primary function of this note is to set out these guidelines, and to suggest where they might be amended. The subject conveniently falls into a discussion of the legal relationship giving rise to legal obligation, of the duty of care of the lawyer, and of causation and damage. In two final parts we survey an area peculiar to legal malpractice, that relating to what may be loosely termed the judicial dilemmas stemming from "procedural negligence"; we conclude with some observations on the self-government of the profession and the protection of the client.

The Legal Relationship

In order to prefer a malpractice suit against a lawyer, a plaintiff must first establish that a "relationship" exists between the two of them

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¹ ROYAL COMMISSION INQUIRY INTO CIVIL RIGHTS (McRuer Report), Report Number 1, Volume III, Part III, Section 4, *Self-Governing Professions and Occupations*, p. 1159-1229, at p. 1159.

²MCRUER REPORT, pp. 1159-1229.

³ Cf. *In Re Anonymous* 248 N.Y.S. 2d 368 (1964). "... the disqualifying factor is unfitness, not just culpability. Indeed, culpability is relevant only because it may bear on fitness."

which gives rise to legal obligations; in order for the judiciary to give effect to the legal obligation, the relationship must be legally delineated. Ordinarily these tasks will cause little difficulty, though if the plaintiff is not the lawyer's client he faces, in Canada, a nearly insurmountable hurdle. Anglo-Canadian jurisprudence has insisted that the solicitor's liability for malpractice be defined in contractual terms,⁴ thus dismissing actions framed in tort or outside the privity structure. In the United Kingdom the peculiar immunity of the barrister was unsuccessfully challenged in the great case of *Rondel v. Worsley*.⁵ But the reasons for this decision are rooted in English legal history, and the case would seem to have little relevance to those jurisdictions in which the bar is joined. In Canada, the differences between the divided English bar and the joined Canadian bars were emphasized very early by the courts⁶ and the position has since been accepted that since barristers in Canada may sue for their fees, they are also liable in negligence actions.⁷ Though the type of practice a Canadian lawyer carries on may indeed be relevant in a negligence action against him it will not go to the determination of whether he is capable of being held liable for breach of contract.

The question of whether a suit against a lawyer for negligence sounds in tort or flows out of a contractual relationship is important chiefly in problems relating to the Statute of Limitations. Since Anglo-Canadian jurisprudence decrees that the Statute of Limitations begins to run when a cause of action accrues, whether the cause of action accrues when the breach of duty occurs (contract) or when the damage is actually suffered (tort), assumes importance. The English and Canadian cases have resolutely taken the former view on the basis that if a contract exists no other relationship can exist concomitantly.⁸ A professional contractual relationship is sufficiently wide to "smother" any tort duty which may (possibly) exist independently of the contract. In order to arrive at this result, the courts have had to decree that the *Hedley Byrne* case does not support the proposition that tort liability may arise out of a solicitor's negligence. Lord Morris of Borth-y-Gest's

⁴ *Groom v. Crocker* [1939] 1 K.B. 194 (C.A.) is the leading English case. Followed by *Clark v. Kirby-Smith* [1964], 3 W.L.R. 239; *Cook v. Swinfen* [1967] 1 W.L.R. 457 (C.A.) and *Rondel v. Worsley* [1967] 1 Q.B. 443 (C.A.). In Ontario, see *Schwebel v. Telekes* [1967] 1 O.R. 541 and *Rowswell v. Pettit* [1968] 2 O.R. 81.

⁵ [1967] 1 Q.B. 443 (C.A.); aff'd [1967] 3 W.L.R. 1666 (H.L.). The argument, based upon *Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd.* [1964] A.C. 465 (H.L.) was that even though the barrister was not in a contractual relationship with his client, a duty of care giving rise to legal obligations, did exist. The argument was rejected solely upon grounds of public policy. See P. N. North, *From Hedley Byrne to Rondel v. Worsley*, (1968), 118 *NEW LAW JOURNAL* 137.

⁶ *Leslie v. Ball* (1863) 22 U.C.R. 512 (Q.B.); *McDougall v. Campbell* (1877) 41 U.C.R. 332 (Q.B.); *Wade v. Ball* (1870) 20 U.C.R. 302 (C.P.); *Robertson v. Furness* (1879) 43 U.C.R. 143 (Q.B.); *The Queen v. Joseph Doutre* [1884] A.C. 745 (P.C.).

⁷ This argument is the substance of the decisions in the cases cited in footnote 6 above. See also *Robinson and Morgan-Coakle v. Behan* [1964] N.Z.L.R. 650.

⁸ See cases cited in footnote 4. The reasoning is adapted from *Jarvis v. May, Davies, Smith, Vanderwell & Co.* [1936] 1 K.B. 399 (C.A.), and is best set out in a case involving architects, *Bagot v. Stevens Scanlon & Co. Ltd.* [1966] 1 Q.B. 197, 203-05.

formula of a duty of care stemming from reliance upon a special skill applied for the purpose of assisting another was held not to be applicable to the solicitor-client relationship.⁹

A second question of importance relating to the ambit of the lawyer's duty centres upon the constricting effect of privity. Privity of contract will be most important in those situations in which a party other than the original party is injured. In the Ontario case of *Re Fitzpatrick* (1923)¹⁰, a solicitor negligently failed to sign a will as an attesting witness. As a result, the will was refused probate, an intestacy ensued, and the widow took one-third of the estate rather than the entire estate. The widow's application for an order declaring the solicitor negligent and liable for the loss she sustained was disallowed — the claim was held to have no foundation because there was no privity of contract between beneficiary and solicitor.

By closely adhering to the "contractual view" of the lawyer's liability, the English and Canadian courts both ignore considerations of "justice", and attempt to define the lawyer's obligations in terms which are surely too narrow to encompass the realities and complexities of modern professional practice. The cases in this area of the law are notable for their lack of discussion of such matters as loss distribution and the responsibilities which the lawyer must now bear. The considerations which ought to determine the court's rulings may best be set out by reference to American cases concerning the lawyer. In passing we may note that we do *not* advocate wholesale abandonment of the common law tradition of *stare decisis*; in fact, we suggest that the English and Canadian courts have much more room in which to manoeuvre than at first glance may be supposed.

In his well known decision in the "bean" case of 1922, Mr. Justice Cardozo said of the bean-weighers' duty: "We do not need to state the duty in terms of contract or of privity. Growing out of a contract, it has none the less an origin not exclusively contractual . . . Constantly the bounds of duty are enlarged by the knowledge of prospective use."¹¹ Like the bean weighers' duty, the lawyers' is more than contractual. Distasteful as it may be to the professional ethic, the lawyer is today involved in an *enterprise*, and his actions have ramifications for which he should be responsible which extend beyond mere dealing with his client. The substance of this argument was accepted

⁹ *Clark v. Kirby-Smith* [1964] 3 W.L.R. 239, 241. Lord Morris of Borth-y-Gest's formula in the *Hedley Byrne* case appears at [1964] A.C. 465, 502-03 (H.L.):

"It should now be regarded as settled that if someone possessed of a special skill undertakes, quite irrespective of contract, to apply that skill for the assistance of another person who relies upon such skill, a duty of care will arise. The fact that the service is to be given by means of or by the instrumentality of words can make no difference. Furthermore, if in a sphere in which a person is so placed that others could reasonably rely upon his judgment or his skill or upon his ability to make careful inquiry, a person takes it upon himself to give information or advice to, or allows his information or advice to be passed on to, another person, who, as he knows or should know, will place reliance upon it then a duty of care will arise."

¹⁰ (1923) 54 O.L.R. 3, 7.

¹¹ *Glanzer v. Sheppard* 135 N.E. 275, 276 (1922). See also *Ultramares Corporation v. Touche* 174 N.E. 441 (1931).

by the court in the Connecticut case of *Licata v. Spector* (1966),¹² following the sod-turning decision of *Lucas v Hamm* (1961).¹³ Both cases involved negligent solicitors who made errors in drawing wills which resulted in loss to the plaintiff legatees.¹⁴ In *Lucas*, the court held that the solicitor could be held liable in either tort or contract and that whether the defendant ought to be liable to a third party not in privity was a matter of policy. Chief Justice Gibson concluded that in this case an affirmative answer would "not place an undue burden on the profession". In *Licata v. Spector*, the court held that;

Liability for a negligent performance of a contract, or nonperformance should be imposed where the injury to the plaintiff is foreseeable and where the contract is an enterprise of the defendant and there are adequate reasons from policy for imposing a duty of care to avoid the risk thus encountered as an incident to the enterprise.¹⁵

Where the harm is a reasonably foreseeable consequence of a negligent act, there would seem to be little reason in law or in policy why a lawyer-client contract would eliminate all tort claims whatsoever.¹⁶ In the Commonwealth, the *Hedley Byrne* case can be interpreted to permit tort claims in these situations. Moreover, holding lawyers accountable for such negligence can only help to control professional incompetence.

In the United States, it may indeed be true, as Dean West suggests, that the question of whether the action for damages is framed in tort or contract, "has not troubled the courts often and there has been little discussion of it".¹⁷ One reason for this lack of concern has been the willingness of the American courts to accept arguments framed in tort or contract. Another has been some courts' predilection to "start" the statute of limitations running at a point in time which will permit a just decision. Since it is quite clear that in Ontario, at least, a court may not extend a limitation period fixed by statute,¹⁸ the point at which the statute begins to run assumes great importance. In Canada and in England, the statute will begin to run when the act of negligence occurs and not when the injury is suffered.¹⁹ In the United States, the position taken by the courts varies from jurisdiction to jurisdiction. In California²⁰ and New York,²¹ the cause of action accrues, as in Canada, on

¹² 225 A. 2d 28 (1966) (Conn.)

¹³ 364 P. 2d 685. (1961) (Calif.); cert. denied 368 U.S. 987.

¹⁴ This point arose also in *Maneri v. Amodeo* 238 N.Y.S. 2d. 302 (1963). The New York court refused to follow *Lucas v. Hamm*.

¹⁵ 225 A. 2d 28, 29-30 (1966).

¹⁶ See: Lawrence H. Averill, *Attorney's Liability to Third Persons for Negligent Malpractice* (1967) II LAND AND WATER LAW (REVIEW) 379.

¹⁷ John W. Wade, *The Attorney's Liability for Negligence* (1959) 12 VANDERBILT L. REV. 755, at p. 756.

¹⁸ In Ontario, see e.g. *Stringer v. Nyman* [1956] O.W.N. 182 (C.A.).

¹⁹ *Smith v. Fox* 6 Hare 386; 67 E.R. 1216 (1848); *Schwebel v. Telekes*, *supra* note 4.

²⁰ *Fazio v. Hayhurst* 55 Cal. Rptr. 370 (1967); *Eckert v. Schaal* 58 Cal. Rptr. 817 (1967). The latter case is discussed in Note, *The Commencement of the Statute of Limitations in Legal Malpractice Actions—The Need for Re-Evaluation: Eckert v. Schaal* (1967) 15 U.C.L.A. L. REV. 230.

²¹ *Troll v. Glantz* 293 N.Y.S. 2d. 345 (1968).

the date of the negligent act; a contrary result came out of the District of Columbia: *Fort Myers Seafood Packers Inc. v. Steptoe and Johnson*.²² In the *Fort Myers* case, the statute was held to begin to run from the time at which the plaintiff actually suffered injury. The court rejected the contention that there was any difference between malpractice suits and other negligence actions. Since the essence of a malpractice suit is negligence, and since the *measure* of damages in an action against a lawyer is treated on a tort basis,²³ it is difficult to find fault with this argument.

The Duty and its Breach

Once the plaintiff has established that his relationship with the lawyer is such that he will have standing to press his suit, he must next show that the lawyer has been negligent—that the duty owed by the lawyer to him has been breached. It is in this aspect of his case that the plaintiff may well have the most difficulty. Put in the simplest form, the plaintiff must show “that the error or ignorance was such that an ordinary competent solicitor would not have made or shown it.”²⁴ Within these broad and uncharted boundaries, a lawyer’s “honest mistake” will go unpunished and the client will have no means of recourse.

By accepting employment to render legal services,²⁵ the lawyer implicitly agrees to carry out instructions with the care and skill required of a reasonably competent solicitor,²⁶ and to act in accordance with the general and approved practices of the profession. When determining whether a lawyer’s behavior is negligent, the court may accept a defence established by evidence of the “general and approved practice”²⁷; or, it may simply note an ordinary and well-recognized precaution that must be followed to absolve a solicitor from negligence.²⁸ Moreover, the mere fact that the practice is long established will not protect a solicitor if the practice is found by the courts to be “inconsistent with provident precautions against a human risk”.²⁹

Less easily articulated is the duty of the lawyer to protect his client. For instance, the solicitor is not justified in simply remaining silent when

²² 381 F. 2d. 261 (1967). The District of Columbia Statute ran “from the time the right to maintain the action accrues”. In Ontario, the statute reads “after the cause of action arose”, producing an opposite result in the *Schwebel* case.

²³ See Wade, *The Attorney’s Liability for Negligence*; also, *Cook v. Swinfen* [1967] 1 W.L.R. 457 per Lord Denning.

²⁴ *Aaroe and Aaroe v. Seymour* [1956] O.R. 736, 737. Label, J citing CHARLES-WORTH ON NEGLIGENCE 2nd. ed. (1947), from p. 411.

²⁵ The lawyer may be liable even if he has been paid no consideration for his services. *Glenn v. Haynes* 66 S.E. 2d. 509 (1951).

²⁶ *Roswell v. Pettit* [1968] 2 O.R. 81.

²⁷ *Winrob and Winrob v. Street and Wollen* (1959) 19 D.L.R. (2d.) 172 (B.C.S.C.).

²⁸ E.g. the failure of a solicitor to take the “ordinary conveyancing precaution” of inspecting a head lease on behalf of a sub-lessee client was sufficient evidence on which to find a solicitor negligent. *Hill v. Harris* [1965] 2 W.L.R. 1331.

²⁹ *Lloyd’s Bank v. Savory & Co.* [1933] A.C. 201 235 (per Lord Wright), app’d in *Winrob and Winrob v. Street and Wollen*, *supra*, note 27.

it is plain that his client is rushing into an "unwise, not to say disastrous adventure."³⁰ Legal malpractice may, then, stem from a failure to act—to advise, to investigate, to disclose.³¹ From a recent case in the Supreme Court of Canada, it is evident that if a solicitor possesses special knowledge which he could use to protect his client, he will be held negligent if he fails to do so.³² These types of situations suggest that the solicitor's duty goes far beyond that determined by his contract of instructions. At least in that area outside of the specific tasks which the solicitor undertakes to perform, the solicitor's liability might reasonably be supposed to sound in tort. *Hedley Byrne* would seem applicable.³³

Though it is difficult to define the ambit of a lawyer's duty towards his client,³⁴ it is clear that if the solicitor does make an "honest mistake" he will not be held liable in a court of law. In Ontario the courts have declared that "a solicitor does not undertake with his client not to make mistakes, but only not to make negligent mistakes".³⁵ The courts have for many years adhered consciously to this policy of protecting the lawyer from suits stemming from inaccurate opinions honestly and fearlessly given. In 1846 the Chief Justice of Ontario said that, "The profession of law would be the most hazardous of all professions if those who practice in any of the branches were to be held strictly accountable for the accuracy of their opinions".³⁶ This opinion remains good law today. The lawyer is presumed to have discharged his duty until the contrary is made to appear,³⁷ and it is up to the plaintiff to demonstrate that the solicitor has strayed from the permissible posture of errors of judgment and trespassed upon the road of negligence. In determining whether the solicitor is liable to his client, the courts have been loath to take notice of legal specialization or of the locale in which the solicitor practices.³⁸

While the lawyer's immunity from liability for his errors in judgment probably contributes to independence and vigorous advocacy, the courts' policy is of no assistance to the unfortunate and disadvantaged client. The lawyer who has made the error may incur an increase in his insurance premiums, but he suffers in no other way. In a sense, it is misleading to

³⁰ *Neushul v. Mellish & Harkavy* (1967) 111 S.J. 399, per Lord Danckwerts.

³¹ See *Ishmael v. Millington* 50 Cal. Rptr. 592 (1966).

³² *Millican v. Tiffen Holdings Ltd.* (1967) 60 D.L.R. (2d.) 469, reversing 53 D.L.R. (2d.) 674 and restoring 49 D.L.R. (2d.) 416.

³³ See above, p. 3.

³⁴ One of the best general definitions appears in a decision of the Supreme Court of North Carolina, *Hodges v. Cartes* 80 S.E. 2d. 144 (1954). For a Canadian case, see *Cornell v. Jaegar* (1967) 59 W.W.R. 513 (Man.) aff'd (1968) 63 W.W.R. 747 (Man. C.A.).

³⁵ *Meakins v. Meakins* (1910) 2 O.W.N. 150. See also *Howse v. Shaw* (1913) 4 O.W.N. 971.

³⁶ *Alexander v. Small and Gavan* (1846) 2 U.C.R. 298, 300.

³⁷ *Dorf v. Relles* 355 F.2d. 488 (1966) (7th Circ.). Also: Note *Standard of Care in Legal Malpractice* (1968) 43 INDIANA L. J. 771.

³⁸ Locality was a determining factor in *Cook v. Irion* 409 S.W. 2d. 475 (1966) (Texas).

state that the lawyer who makes an honest error is "guilty" of malpractice in any sense. Yet a series of honest mistakes may well amount to incompetence. And certainly, a culpable error would seem to require that the lawyer be penalized to an extent greater than the amount of the judgment against him. In other words, the function of the court should be more than penal; it must also be protective. The public has the right to be shielded from incompetence, and the courts, in conjunction with the governing body of the profession, must assume more responsibility than they have up to this time.³⁹

Causation and Damage

As in other negligence actions, the plaintiff in a legal malpractice suit must show that he has suffered damage and that the damage resulted from the action taken by his attorney. Today, the causation question is little disputed. However, in certain situations proof of damage may be a difficult task to achieve. The degree of causation in an action for damages for malpractice is the same as that required in an ordinary negligence suit:⁴⁰ the plaintiff need only demonstrate the negligence was a proximate cause of the injury, and there is no requirement that either the attorney's negligence be the sole cause, or that the complaint must negative any other cause.⁴¹

The broad rule as regards the damages to be awarded is that the party whose rights have been violated is to be put in the same position, in so far as it is monetarily possible, as if his rights had been observed. If there has been no pecuniary loss, then no award (other than nominal damages) will be made.⁴² Since the lawyer's liability has been held by the courts to stem from his contract, his actual liability may be less than if it had sounded in tort. *Groom v. Crocker*⁴³ held, for instance that damages for mental suffering could not be recovered in contract; therefore they would be less than if they were to be awarded in tort which was circumscribed only by the "foreseeability test". In *Cook v. Swinfen*,⁴⁴ Lord Denning maintained that the measure of damages in both tort and contract is the reasonable foreseeability of the consequences. He then proceeded to hold that a client's actual breakdown in health which, it was agreed, was a direct consequence of the solicitor's negligent conduct of a divorce action, was not a foreseeable consequence. The *ratio* of the case is difficult to square with the general principle purportedly followed. Realistically, the question of damage claims against lawyers ought to be treated on a tort basis.

³⁹ This point is expanded below.

⁴⁰ *Ward v. Arnold* 328 P. 164 (1958) (Wash.).

⁴¹ *Modica v. Crist* 276 P. 2d. 14 (1955) (Calif.); see also *Licata v. Spector* 225 A. 2d. 28 (1966) (Conn.).

⁴² These general principles are set out in *British Westinghouse Electric & Manufacturing Co. Ltd. v. Underground Electric Railway Co. of London Ltd.* [1912] A.C. 673, 689 (per Lord Haldene), *Victoria Laundry (Windsor) Ltd. v. Newman Industries Coulso & Co. Ltd.* [1949] 2 K.B. 528, 529 (Asquith, LJ), and were applied in *Ford v. White & Co.* [1964] 1 W.L.R. 885, and in *Roswell v. Pettit* [1968] 2 O.R. 81.

⁴³ [1939] 1 K.B. 194.

⁴⁴ [1967] 1 W.L.R. 457, 461 (C.A.).

Perhaps of more import in proof of damage disputes is the problem which arises when it is claimed that because of alleged negligence a case either never reached a court or appellate tribunal, or that a case was lost in court because of the negligent conduct of the plaintiff's lawyer. In either situation the client must show that he suffered damage. The suit in which he attempts to show this has popularly become known as a "suit within a suit". In *Pete v Henderson* (1954),⁴⁵ a leading American case, an attorney negligently failed to file notice of appeal, and his client was forced to pay the original judgment against him. In order to show damage, the plaintiff was required to show that the judgment in his case was erroneous and would have been reversed in the higher court. Alluding to the difficulty of meeting such a burden, the court declared that this factor "is no ground to deny the right to present such proof if it can be made". The reviewing court will peruse the evidence in order to determine whether the plaintiff has sustained his burden

of establishing that, upon proper appeal, the verdict and judgment against it would have been reversed under circumstances which would have required a directed verdict in its favor upon retrial or the entry of judgment in its favor as a matter of law.⁴⁶

In part because of these difficulties, and in part because it is difficult to convince one trial judge that another trial judge of equal jurisdiction rendered such an erroneous judgment that it would have been reversed an appeal, some commentators are of the opinion that the courts should exercise their direction in favor of those who fall victim to a negligent lawyer.⁴⁷ Conflict accrues because in this area of legal malpractice, the rights of a third party, the original opponent of the client, are affected.

Judicial Discretions and Dilemmas

It is in the area of "procedural negligence" that malpractice in the field of law diverges most sharply from the other professions, for by a ruling of the court an attorney's negligence may be "waived", and an action which ordinarily would be dismissed because of a neglected time limit may be allowed to proceed. The opposite party is by definition adversely affected, for time limits are established to ensure fair and prompt hearings. As a general principle, the courts will do all in their power to enforce expedition, and "whenever a solicitor, by his inexcusable delay, deprives a client of his cause of action, the client can claim damages against him".⁴⁸ Since a motion to dismiss for want of prosecution must be specifically brought, and when

⁴⁵ 269 P. 2d. 78 (1954) (Calif.).

⁴⁶ *Better Homes Inc. v. Rodgers* 195 Supp. 93 (1961). In *Allen v. Sir Alfred McAlpine* (1968) 1 All E.R. 543, a case concerning a motion to dismiss for want of prosecution Diplock LJ stated in *obiter* that the onus was on the *solicitor* to show that the client's claim in the action would not have succeeded had it been presented with diligence (p. 554). Though there is little authority on the point, it is difficult to square this statement with American authorities.

⁴⁷ Note, *Attorney's Negligence: the Belated Appeal*, (1967) 2 VALPARAISO UNIVERSITY L. REV. 141.

⁴⁸ *Allen v. Sir Alfred McAlpine, supra.*, Note 46. (p. 547, per Lord Denning).

brought may be either granted or denied, whether a solicitor may be found negligent for delay will depend upon the success of the defendant's motion. A recent series of British cases has extensively surveyed the considerations which will prompt the court to grant a motion to dismiss.⁴⁹ These cases, which have already received consideration in Ontario,⁵⁰ are important for the careful balancing of the equities between plaintiff and defendant, and for the inclusion as one of the factors to be considered in weighing the equities and in deciding whether or not to grant the motion to dismiss, the ability of the plaintiff's solicitor to meet a negligence claim. The court recognized that the solicitor's material worth and whether he possessed negligence insurance were both factors of significance and were to be weighed in reaching its decision.

The British decisions have tended to refuse a motion for dismissal for want of prosecution where the plaintiff has no prospect of compensation, where the delay will not prejudice the defendants, where justice can be done in the trial, where the defendant's conduct debars him such as by default in delivering a defence, or where the chance of success of a negligence action against the plaintiff's solicitors is far from strong. On the other hand, the courts will be inclined to grant a motion to dismiss if the delay is so great as to amount to denial of justice, if it is impossible to have a fair trial at such a late date, if the solicitor for the plaintiff is insured, if the plaintiff has excellent prospects of success (and can therefore easily recover against the solicitor), and if there is no real possibility of prejudice to the plaintiff. The emphasis in the cases has thus been to ensure that, where the solicitor is at fault in not pursuing a claim on behalf of his client, the client should not automatically suffer if, all matters weighed, the defendant is not unduly inconvenienced. Balancing plaintiff-defendant interests has, of course, always been done when the court's discretionary power has been applied.⁵¹ For our purposes, the British cases are more significant because *plaintiff's* and the *defendant's* interests are articulated; plaintiff and solicitor are not equated. The position of the *client* is examined and the determination of the issue rests upon this examination. Whether or not the solicitor is "negligent" is a subsidiary issue, and whether he will be found negligent or not will often depend on whether the client will be able to achieve greater satisfaction this way than by proceeding against the defendant.

In Canada, the issue has not surfaced in these terms, and the actual positions of the parties have not been closely examined in the few reported

⁴⁹ *Allen v. Sir Alfred McAlpine & Sons Ltd.; Bostic v. Bermondsey and Southwest Group Hospital Management Committee; Sternberg and another v. Hammond and another* [1968] 1 All E.R. 543 (C.A.); *Clough v. Clough* [1968] 1 All E.R. 1179; *Marlton (an infant) v. Lee-Leviten* [1968] 1 W.L.R. 1214 (C.A.); *Zimmer Orthopaedic Ltd. v. Zimmer Manufacturing Co. Ltd.* [1968] 1 W.L.R. 852; 1968 1 W.L.R. 1349 (C.A.); *Fitzpatrick v. Batger & Co. Ltd.* [1967] 2 All E.R. 657.

⁵⁰ *Clairmonte v. Canadian Imperial Bank of Commerce* [1969] 1 O.R. 364, 368 (Senior Master).

⁵¹ In the legal malpractice area, most cases probable arise through failure to renew a writ whose time for service has expired. Writ renewal cases are determined on the discretion of the Master. In Ontario, see *Brown v. Humble* [1959] O.R. 586; *Mathews v. Wilkes* [1960] O.W.N. 336, *Beebe v. Brown* [1963] 1 O.R. 76; *Stender v. McDonald* [1967] 1 O.R. 295.

cases concerning dismissal for want of prosecution.⁵² However, in the United States Supreme Court, the question of the extent to which a negligent solicitor binds his client has appeared with regularity in recent years.⁵³ In the *Wabash Railroad Co.* case the Court held by a 4-3 decision that since the petitioner voluntarily chose his (negligent) attorney, he could not now avoid the consequences of his agent's acts. In dissent, Black, J. held that the decision was contrary to "fundamental ideas of fairness and justice". In subsequent cases, Black paid short shrift to "mere paper-filing negligence", to "slight formalistic delinquency."⁵⁴ Formalistic attention to procedural rules severely disadvantages the victim of an incompetent or negligent lawyer in most instances. The position of the *client* should be examined and considered separately from that of his lawyer and of the defendant. Few would disagree with the opinion that clients "should not be forced to act as hawklike inquisitors of their own counsel, suspicious of every step and quick to switch lawyers".⁵⁵ Of course, prejudice or injustice to the defendant must be avoided, but if this is achieved, then there would seem to be little cause for refusing to allow a plaintiff-client his day in court. Limitation periods are not arbitrary and exist solely to advance justice, not to thwart it.

Concluding Remarks

In Canada and in the United Kingdom, the courts have narrowly circumscribed the legal scope of the relationship of the lawyer and the ones to whom he is liable for error. While this view emphasizes the independence of the professional, it does little to fit him into the twentieth century. It is suggested that there is no adequate reason for severing the lawyer from the foreseeability and enterprise liability tests which pertain to much of the remainder of contemporary economic life, and that there is ample room in the law for bringing the lawyer within the tenets of tort doctrine. As the Law Society ponders ways in which to at once stave off close state regulation, to control more strictly the bounds of incompetence within its ranks, and to secure adequate means of recompensing those who have claims against the profession, one of its more serious problems will be to set out standards of conduct and liability. In large part, these must issue from the courts. If not forthcoming, legislative action seems inevitable.

The second area of concern which emerges from the study relates to the position of the *individual* who falls victim to the negligent lawyer. The lawyer-client relationship goes beyond that of agency. In a world of complexity, society now demands protection, and judicial position that a client

⁵² See *Russell v. Glassman* [1959] Man. R. 464; *Ingliev. Peter Vaci & Sons Ltd.* [1961] O.W.N. 318; *Picke v. Mitchell* [1963] 2 O.R. 193.

⁵³ *Link v. Wabash Railroad Co.* 370 U.S. 626 (1962); *Beaufort Concrete Co. v. Atlantic States Construction Co.* 384 U.S. 1004 (1965); *Pittsburg Towing Co. v. Mississippi Valley Barge Line Co.* 385 U.S. 32 (1966); *Santena v. U.S.* 385 U.S. 848 (1966).

⁵⁴ *Pittsburg Towing Co.* case, (from p. 33).

⁵⁵ *Daley v. County of Butte* 38 Cal. Rptr. 693 (1964).

subrogates his rights and thereby deals himself out of court is no longer adequate. All interests must be weighed and considered in order to meet the ends of justice. This will call for closer attention to realities than to technicalities. It may also call for closer relations between courts and self-governing bodies. There seems little reason why transcripts of cases should not be sent to self-governing bodies for disciplinary action. It is only by attention to justice and to the public that the law profession can in the long run retain its independence and its pride of service.

