

1972

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Recommended Citation

H. R. Belden, H. R. Belden Jr. & Marcia B. Lappas, *Professional Liability of Lawyers in Pennsylvania*, 10 Duq. L. Rev. 317 (1972).

Available at: <https://dsc.duq.edu/dlr/vol10/iss3/2>

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Duquesne Law Review

Volume 10, Number 3, Spring 1972

Professional Liability of Lawyers in Pennsylvania

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In the past decade, the bar, and especially the trial bar, has become keenly aware of the problems relating to the professional liability of medical doctors, osteopaths, and other practitioners of the healing arts. The number of medical malpractice suits, particularly against surgeons, has multiplied during that period of time. The verdicts in medical malpractice actions and the settlements arising out of such actions have been headlined in the newspapers in various parts of the country. While the law of medical malpractice has been developing into something of a specialty among some members of the trial bar, and while the bar generally has developed a familiarity with the problems relating to medical malpractice, little attention has been given its counterpart in the legal profession—the responsibility of lawyers for professional negligence.

While a survey of the literature reveals a fair number of articles in law reviews in a number of states, there is a paucity of information in Pennsylvania on the subject of the liability of lawyers for professional errors and omissions. It will be the purpose of this discussion to present to the bar of Pennsylvania the posture of the law in Pennsylvania relating to this subject, as compared with the law in other states, and, in some respects, as compared with the law in Pennsylvania relating to

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medical malpractice. The recent rise in the cost of purchasing professional liability insurance in Pennsylvania demonstrates the need for such a survey. Illustrative of this need is a Bulletin issued by the Pennsylvania Bar Association on December 1, 1971, where the following statistics appeared:

DURING THE PAST FIVE YEARS, the insurance carrier handling the professional liability insurance program sponsored by the PBA Insurance Fund Trustees has alone handled 231 PROFESSIONAL LIABILITY CLAIMS FILED AGAINST PENNSYLVANIA LAWYERS. To date, \$379,000 HAS BEEN PAID OUT on these claims, and the TOTAL INCURRED AMOUNT for these claims (amounts paid, plus costs, plus reserves for the pending claims) during this period HAS REACHED THE SUM OF \$820,000.¹ (Emphasis in original).

Admittedly there are no known statistics on the number of claims handled by carriers other than the one chosen by the PBA Insurance Fund Trustees to handle the group coverage for the Pennsylvania Bar Association. Similarly, there is no known record of the number of malpractice claims actually litigated. An examination of the digests and cases, however, points up the fact that lawyers in Pennsylvania cannot afford to be impervious to the danger of suits against them for professional negligence.

Before examining the various aspects of liability of attorneys for professional negligence, several related matters deserve brief mention. First, there has been some discussion in legal periodicals concerning the appropriateness of the term "malpractice" in connection with negligent conduct by lawyers in their professional capacity. The question has arisen, no doubt, because legal periodicals and digests seem to restrict the term "malpractice" almost exclusively to cases concerning the medical profession, while information and cases regarding the negligence of an attorney are generally found under headings such as "Legal Profession—Negligence," or "Attorneys—Negligence."² Notwithstanding this fact, however, our research has indicated, and writers have concluded,³ that the term is equally applicable to the medical and legal professions, and it generally is defined as negligent conduct or lack of professional care or skill. The only time a real problem arises is in those

1. Bulletin issued by the Pennsylvania Bar Association headquarters to all Pennsylvania lawyers, December 1, 1971.

2. See Porter, *Legal Malpractice in Pennsylvania*, 37 PA. BAR ASS'N Q. 46 (1965).

3. *Id.*; Tallin, *Liability of Professional Men for Negligence and Malpractice*, 3 CANADIAN BAR J. 230, 231 (1960).

jurisdictions whose legislatures have enacted a "malpractice" statute. In such states, the terminology may be determinative of the appropriate statute of limitations,⁴ but no such problem exists in Pennsylvania.

It is the purpose of this article to consider only those cases which directly relate to an attorney's negligence or lack of care or skill. We will not discuss an attorney's liability in regard to improper handling of criminal actions, suits against attorneys for libel, slander or malicious prosecution, or cases relating to patents, embezzlement, conversion, contempt, or conflicts of interest.⁵ We also necessarily exclude ethics and grievance cases.

STANDARD OF CARE

When an attorney is considering the merits of an action against another attorney, unquestionably the first factor to be considered is whether the conduct of the prospective defendant-attorney has met the required standard of care.

In determining the standard of care which a lawyer must employ in representing his client, it is appropriate to consider, for comparison purposes, the principles relating to the standard of care required of a physician under the law of Pennsylvania. The principles relating to actions for medical malpractice are delineated in *Smith v. Yohe*:⁶

(a) in the absence of a special contract, a physician neither warrants a cure nor guarantees the result of his treatment . . . ; (b) "A physician who is not a specialist is required to possess and employ in the [diagnosis and] treatment of a patient the skill and knowledge

4. Baxter, *Statutes of Limitations in Legal Malpractice*, 18 CLEV.-MAR. L. REV. 82, 83-4 (1969); Coggin, *Attorney Negligence . . . A Suit Within A Suit*, 60 W. VA. L. REV. 225, 230-32 (1958).

5. Though not within the scope of this article, it seems important to note the significance of the conflicts of interest area. Cases may arise, e.g., in which an attorney represents both the insurer and the insured. Assuming that the insurer refuses to settle within policy limits and counsel continues to represent both clients, would the attorney then be liable to the plaintiff for an excess judgment? In regard to this area, it might be of interest to know that at the American Bar Association 1972 Midyear Meeting in New Orleans, Louisiana (February 7-8, 1972), the House of Delegates of the ABA approved the agreement between the ABA and liability insurers, as follows:

IV. CONFLICTS OF INTEREST GENERALLY—DUTIES OF ATTORNEY

In any claim or in any suit where the attorney selected by the company to defend the claim or action becomes aware of facts or information which indicate to him a question of coverage in the matter being defended or any other conflict of interest between the company and the insured with respect to the defense of the matter, the attorney should promptly inform both the company and the insured, preferably in writing, of the nature and extent of the conflicting interest. In any such suit, the company or its attorney should invite the insured to retain his own counsel at his own expense to represent his separate interest.

6. 412 Pa. 94, 194 A.2d 167 (1963).

usually possessed by physicians [of good standing] in the same or a similar locality giving due regard to the advanced state of the profession at the time of the treatment; and in employing the required skill and knowledge he is also required to exercise the care and judgment of a reasonable man" . . . ; (c) the burden of proof is upon the plaintiff to prove either (1) that the physician did not possess and employ the required skill or knowledge or (2) that he did not exercise the care and judgment of a reasonable man in like circumstances . . . ; (d) the doctrines of *res ipsa loquitur* and exclusive control are not applicable in this area of the law . . . ; (e) in malpractice cases which involve an appraisal of the care and skill of a physician a lay jury presumably lacks the necessary knowledge and experience to render an intelligent decision without expert testimony and must be guided by such expert testimony . . . ; (f) the only exception to the requirement that expert testimony must be produced is "where the matter under investigation is so simple, and the lack of skill or want of care so obvious, as to be within the range of the ordinary experience and comprehension of even non-professional persons" . . . ; (g) a physician is not liable for an error of judgment . . . ; (h) if a physician employs the required judgment and care in arriving at his diagnosis, the mere fact that he erred in his diagnosis will not render him liable, even though his treatment is not proper for the condition that actually exists. . . .⁷

Although the law in Pennsylvania relating to legal malpractice has not crystallized to the same extent as in medical malpractice, somewhat parallel standards were set out by the Pennsylvania Superior Court in *Enterline v. Miller*.⁸

An attorney is not liable to his client for a failure to succeed, resulting in loss to the client, unless this is due to his mismanagement of the business intrusted to him, through bad faith, inattention or want of professional skill. Without discussing at length the degree of skill and care required of an attorney, it is sufficient for the purposes of the case in hand to say that he must, at least, be familiar with the well-settled principles of law and rules of practice which are of frequent application in the ordinary business of the profession; must observe the utmost good faith toward his client; and must give such attention to his duties, and to the interests of his client, as ordinary prudence demands, or members of the profession usually bestow. For loss to his client, resulting from the lack of this measure of professional duty and attainments,

7. *Id.* at 98-99, 194 A.2d at 170-71. [Citations of cases omitted.]

8. 27 Pa. Super. 463 (1905). This, however, was not a malpractice case, but a suit by an attorney to recover his fee.

he must be held liable; and such loss forms an equitable defense to his demand for compensation.⁹

In addition, with the ready availability of seminars on subjects of general interest to the bar, with easy access of treatises and decisions on almost any subject related to the general practice of law, and with state-wide practice, it would seem that a Pennsylvania lawyer should be obliged to keep abreast of his profession, and that if his failure to do so causes loss or damage to a client, that failure would constitute actionable professional negligence.

This, of course, leaves a number of unanswered questions: Is the standard of care a matter of law which will be determined by the judge, or is it a question of fact which is within the province of the jury? Is a lawyer bound to the standard of care of lawyers of good standing in his own community or a similar community, or in his own state? If the standard of care to which the lawyer is bound is a question of fact, is expert testimony either admissible or required to establish that standard?

Res Ipsa Loquitur

Black's Law Dictionary defines *res ipsa loquitur* as:

The thing speaks for itself. Rebuttable presumption that defendant was negligent, which arises upon proof that instrumentality causing injury was in defendant's exclusive control, and that the accident was one which ordinarily does not happen in absence of negligence.¹⁰

The discussions in periodicals state that the doctrine of *res ipsa loquitur* has not been applied to legal malpractice cases,¹¹ and at least one case in another jurisdiction has specifically held the doctrine is not applicable to legal malpractice,¹² but there is at least one comment to the effect that it is the "next stop."¹³ And, while the Pennsylvania

9. *Id.* at 467.

10. BLACK'S LAW DICTIONARY 1470 (4th ed. 1951).

11. Averill, Jr., *Attorney's Liability To Third Persons For Negligent Malpractice*, 2 LAND & WATER L. REV. 379, 383 (1967); Wade, *The Attorney's Liability For Negligence*, 12 VAND. L. REV. 755, 766-67 (1959).

12. *Olson v. North*, 276 Ill. App. 457 (1934).

13. Wallach & Kelly, *Attorney Malpractice in California: A Shaky Citadel*, 10 SANTA CLARA LAWYER 257, 266 (1970). See also Comment, *Attorney Malpractice*, 63 COL. L. REV. 1292, 1312 (1963), where the author seems to be saying *res ipsa* should apply, without using the words, when he says:

courts hold that the doctrines of *res ipsa loquitur* and exclusive control are not applicable in medical malpractice cases,¹⁴ it appears that they may have applied the doctrine to legal malpractice without using the term.

Perhaps the strongest evidence of this latter supposition is the case of *Lichow v. Sowers*.¹⁵ The plaintiff alleged that he had hired the defendant-attorney, paying him a retainer, for three specific purposes: (a) to file an answer to a petition to show cause why attachment proceedings for contempt should not issue and to represent the plaintiff at the hearing on the petition, (b) to file a petition to reinstate a former petition to open a final decree which had been dismissed for want of prosecution, and (c) to file a petition for insolvency if (a) and (b) failed. The court, reversing a judgment of non-suit, held:

Defendant having accepted a retainer, and having agreed to file certain petitions, he cannot, by a demurrer to the statement of claim, raise the question as to whether they would have been effective. It became his duty to file them and to have their merits passed upon by the court.¹⁶

The defendant had not done any of the specific things which he allegedly agreed to do, and had sent an assistant, unfamiliar with the facts, to represent the plaintiff at the contempt proceedings.

Has the court, by its language, done less than grant the plaintiff a "rebuttable presumption"? The language of the court seems to fit within the *res ipsa* test set forth in *Skeen v. Stanley Co. of America*.¹⁷ In *Skeen* the Supreme Court of Pennsylvania outlined the following elements of the test: 1) an omission to observe some absolute duty; 2) a contract relation, as in the case of the carrier who agrees to carry safely; 3) sole control; and 4) an injury.¹⁸ This is not to say that the defendant cannot present evidence and have the court instruct the jury that they are to consider all of the evidence to determine whether or not there was negligence, for in the *Skeen* case the court went on to say:

Even in such instances, the legal conclusion [of liability] may be

The defendant [attorney] should be required to demonstrate that his choice of alternatives, though subsequently revealed to be mistaken, was not unreasonable, for only then is the allegation of negligence rebutted.

14. See accompanying text to note 7.

15. 334 Pa. 353, 6 A.2d 285 (1939).

16. *Id.* at 355, 6 A.2d at 286.

17. 362 Pa. 174, 66 A.2d 774 (1949).

18. *Id.* at 177, 66 A.2d at 775.

rebutted by showing the accident was one which the utmost skill, foresight, and diligence could not have prevented.¹⁹

In the *Lichow* case there existed a duty upon the defendant-attorney, a contract relation between the plaintiff and defendant, sole control by the defendant and injury to the plaintiff. An argument could be made in the *Lichow* case that the plaintiff would not have been able to eliminate all other possible causes of his injury.²⁰ This, of course, would be a matter of proof.

Question of Law or Question of Fact

There are at least three types of cases in which the court, if not applying the doctrine of *res ipsa loquitur*, puts the plaintiff in an even stronger position as to the burden of going forward with the evidence.

In the three areas to be discussed, we believe that the standard of care is a question of law properly placed with the court. Unfortunately, some of the cases are inconsistent as to whether the standard is a question of law or one of fact.

1. Failing to Pay Over Money

The first area is the failure on the part of the attorney to pay over the money he has collected for his client.

In the early case of *McDowell v. Potter*,²¹ it was assumed there was a breach of duty when the attorney failed to turn over the money. That court placed the burden of proof on the defendant to show that either the client knew of the collection of the money, or that with ordinary care and diligence the client would have known of it. The rule was modified to some extent by *Krause v. Dorrance*²² as to the time at which suit could be brought. It was held in *Krause* that the action could not be brought until after a demand was made for the money. Therefore, rather than the burden being on the defendant to show actual or constructive notice of the collection to the client, the burden was placed on the client-plaintiff to show a demand. However, this does not change the assumption to the effect that the failure to pay over the money was a breach of duty.

19. *Id.*

20. *Norris v. Philadelphia Elec. Co.*, 334 Pa. 161, 5 A.2d 114 (1939).

21. 8 Pa. 189 (1848).

22. 10 Pa. 462 (1849).

In 1864 the Pennsylvania Supreme Court, commenting on the failure of an attorney to pay over money, said: "A breach of duty it undoubtedly was."²³ The holding of such failure as a matter of law continued through the case of *Campbell's Adm'r. v. Boggs*²⁴ where the court said: "[I]t is part of the attorney's duty to give prompt notice of the collection of the money; it is neglect of that duty which renders him liable to the action on the contract"²⁵ The rule was reaffirmed in 1857²⁶ and 1944.²⁷

Even in this seemingly clear area, however, there is one case which clouds the question. In *Ramage v. Cohn*²⁸ the defendant-attorney was engaged by the plaintiff and another to collect a debt, and instructed by the plaintiff not to surrender the check until he received plaintiff's share of the proceeds from the other creditor. The defendant surrendered the check to the other creditor, and the other creditor sent plaintiff only a part of plaintiff's share of the proceeds. A non-suit was reversed by the Superior Court of Pennsylvania seemingly on the basis that:

It was not a situation where the defendant was warranted in using his own discretion; he had received express instructions what to do. . . . "An attorney's duty, where he is specially instructed, is to follow the instructions of his client, except as to matters of detail connected with the conduct of the suit, and he is liable for all losses resulting from his failure to follow such instructions with reasonable promptness and care."²⁹

The conflict comes in the last paragraph where the court stated: "Whether the defendant used the reasonable care that the circumstances required was eminently a question of fact for the jury's consideration."³⁰ *Quaere* where an attorney is held to be duty bound to follow special instructions given by his client and he fails to follow those instructions, can it be said to be a question of fact as to whether or not he was negligent?

23. *Fleming v. Culbert*, 46 Pa. 498, 500 (1864).

24. 48 Pa. 524 (1855).

25. *Id.* at 525.

26. *McCoon v. Galbraith*, 29 Pa. 293 (1857).

27. *In Re Huffman's Estate*, 349 Pa. 59, 36 A.2d 640 (1944).

28. 124 Pa. Super. 525, 189 A. 496 (1937).

29. *Id.* at 528, 189 A. 497-98 quoting from 6 C.J. *Attorney & Client* § 234 (1916).

30. *Id.* at 529, 189 A. at 498.

2. *Negligence in Title Searching*

The second area, one in which there is apparently no conflict as to whether the standard to be applied is a question of law or fact, occurs when there has been a failure to discover liens against realty by the title searcher. The Pennsylvania courts³¹ have spoken in terms of a breach of duty and, where that specific language is not used, there has been an underlying assumption that the defendant-attorney³² was negligent.

In the recent case of *Zurich General Accident and Liability Ins. Co. v. Klein*,³³ an attorney representing the purchasers of real estate, failed to discover tax liens, and the purchasers were required to pay those taxes. The court held that the plaintiff, insurer of the attorney, was under a contractual duty to the attorney to pay the purchasers, his clients. Thus, it seems, liability again was assumed by the court in the underlying obligation between the attorney and his clients.

3. *Missing the Statute of Limitations*

The third area, perhaps the most analytically difficult of the three, concerns the statute of limitations. This problem arises when the attorney has been hired to bring suit and fails to do so prior to the expiration of the statute of limitations.

In *Moore v. Juvenal*,³⁴ where the defendant-attorney failed to bring an action in equity against a railway company prior to the running of the statute of limitations, the court assumed³⁵ there was a negligent breach of duty on the part of the attorney by stating:

It follows, therefore, that as soon as their claim against the railway company was barred and lost, they had a right of action against

31. *Spitzer v. Buten*, 306 Pa. 536, 160 A. 444 (1932); *Lawall v. Groman*, 180 Pa. 532, 37 A. 98 (1897); *Owen v. Western Savings Fund*, 97 Pa. 47, 39 A.R. 794 (1881); *Bodine v. Wayne Title & Trust Co.*, 33 Pa. Super. 68 (1906).

32. Though two of the cases, *Owen v. Western Savings Fund*, 97 Pa. 47, 39 A.R. 794 (1881), and *Bodine v. Wayne Title & Trust Co.*, 33 Pa. Super. 68 (1906), did not involve attorneys, the courts in those cases applied the same language or assumption and they are sufficiently analogous to be determinative of the question.

33. 181 Pa. Super. 48, 121 A.2d 893 (1956).

34. 92 Pa. 484 (1880).

35. The assumption could be incorrect because the case was before the supreme court on stipulated facts; however, see text accompanying note 37 *infra*.

their attorney for any neglect of duty on his part, which resulted in the loss then actually sustained.³⁶

Moreover, the court labeled the attorney's conduct as "dilatory."³⁷

Another case where the court considered the failure to bring suit within the statute of limitations as a question of law was *Rhines Adm'rs. v. Evans* in which the court said:

There were no facts, no circumstances to enable them [the jury] to determine the reasonableness or unreasonableness of the delay except the mere lapse of time, and this was fully within the knowledge of the Court. It became, therefore, a question of law for the Court to decide, and surely it is not a difficult question to determine, for no one could assert that it is reasonable the attorney should delay 17 months without taking a step . . .³⁸

The *Rhines* case was decided upon a question of the statute of limitations as a bar to the suit against the attorney. The attorney had received a note for collection on February 10th, 1858, and suit was not commenced against him until seven years, five months later. For the plaintiff to come within the six year statute of limitations it was necessary to show either that the attorney had been diligent for the first year and five months, or that the attorney had somehow misled the plaintiff. However, the attorney had done nothing during that period and the plaintiff did nothing to inquire of him. It seems, though, from the language of the court that had the statute not been a bar to the client's action, the negligence of the attorney would have been treated as a matter of law.

The earliest case in the statute of limitations area was *McWilliams v. Hopkins*.³⁹ In *McWilliams* the plaintiff, as administratrix, had hired an attorney to bring suit against one who had embezzled funds from the deceased. The attorney obtained judgment, but, through his alleged neglect, permitted the embezzler to escape because his bail was insufficient. Plaintiff then hired defendant-attorney to sue the first attorney. Defendant-attorney missed the statute of limitations. The

36. 92 Pa. 484 (1880).

37. *Id.* at 490. The quote ends "their attorney acted in good faith, but with mistaken judgment." A judgment for defendant non obstante veredicto was affirmed on the basis of a bar by the statute of limitations. However, it is curious that judgment n.o.v. was affirmed on that basis when the lower court had instructed the jury to enter a verdict for plaintiff on the negligence aspect of the case. It seems the lower court should have taken the case from the jury on the basis of the bar of the statute rather than granting judgment n.o.v.

38. 66 Pa. 192, 195-96 (1871).

39. 4 Rawle 382 (Pa. 1834).

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plaintiff would have failed in her original action against the embezzler because her administration bond was faulty, only having one surety. The court held that the defendant-attorney in this case could not take advantage of the fact that the embezzler might have discovered the defect in plaintiff's administration bond, thereby defeating plaintiff's suit against the first attorney. The court held that the basis of the suit against this defendant-attorney was not the grant of administration but rather the duty which he owed the plaintiff that her action would be conducted with reasonable diligence and skill.

However, on the question of negligence the court held:

She is not to be precluded therefore, if she can show negligence, in this particular, in the original action [by the attorney hired to sue the embezzler], as well as negligence by the defendant [in this case] in prosecuting the original counsel for it.⁴⁰

Two cases before the Pennsylvania Supreme Court, though not based upon a failure to file suit prior to the running of the statute of limitations, are so similar to that situation that they are worthy of our consideration here. Both cases were between the same parties. The second was an appeal from the new trial ordered as a result of the first. The plaintiff had hired a lawyer to bring suit for him but the lawyer neglected to do so. If there had been a timely suit the intended defendant would not have been insolvent and could have paid any recovery awarded by a jury. In *Cox v. Livingston*,⁴¹ the court made the negligence of the attorney clearly a question of law where the jury found that the client had not given the attorney discretion as to whether to bring suit:

The jury, therefore, ought to have been instructed by the court, if they came to this conclusion, and we do not see well from the evidence how they could have avoided it, that notwithstanding they might think that Mr. Livingston had omitted to bring a suit, solely with a view to promote the interest of the plaintiff, yet he had violated his engagement with and failed to perform his duty to the plaintiff, in not having brought and prosecuted a suit with reasonable diligence for the recovery of the debt due to the plaintiff; and having thus failed to perform his duty, he had rendered himself liable to pay to the plaintiff whatever of the debt might have been recovered of Dubbs by suit having been brought and prosecuted, which Dubbs has now become unable to pay; and that it was the duty of the jury to find a verdict in favour of the plain-

40. *Id.* at 382.

41. 2 W. & S. 103 (Pa. 1841).

tiff for that sum, whatever they should think it was. But if from the evidence they should be of the opinion, that a suit brought against Dubbs would have been unavailing, and that nothing could have been recovered by means of it, their verdict, though it ought still be for the plaintiff, should only be for nominal damages.⁴²

The court, therefore, left to the jury only the question as to the discretion which the client had given the attorney. This was a stick which the court used to muddy the water in *Livingston v. Cox*,⁴³ when the case came round again. In that case, the court discussed whether the action against an attorney should be on a theory *ex contractu* or *ex delicto* and said:

Although not at all times obvious, the distinction seems to be between misfeasance, which imports in itself a wrong without reference to contract, and non-feasance, being the violation of an obligation by a neglect or refusal to fulfill its requirements. [B]ut at present, it is scarcely necessary to trouble ourselves with these shades of difference; for it is obvious the present is an action in form as well as in substance, upon a contract, specially and circumstantially set out in the plaintiff's declaration, and necessarily so too, for I take it, it is only on this ground an action can be maintained against a negligent attorney. . . .⁴⁴

If an action against a negligent attorney can be maintained only on a theory of contract and, according to *Cox v. Livingston*, the jury is to determine whether or not the client gave the attorney any discretion—which would be one of the elements of the contract—what is the position of the injured client whose lawyer negligently abused the discretion given to him by his client? To avoid the possibility of a non-suit, must the client proceed in his pleadings and at the trial on the alternative theories that he did not give his attorney such discretion as would permit him not to bring suit or, that if the jury find that such discretion was given, the attorney negligently abused it? Unfortunately, these questions remain unanswered in Pennsylvania.

A case which does not fit within any of the above three areas, but which should be mentioned on the question of whether the standard is to be measured by the jury or the court, is *Miller v. Wilson*.⁴⁵ There, the plaintiff had judgments against property owned by her sisters, and the husband of one of her sisters undertook to pay the judgment

42. *Id.* at 106.

43. 6 Pa. 360 (1847).

44. *Id.* at 363.

45. 24 Pa. 114 (1854).

through his mortgage-secured bond. The defendant was hired and paid to prepare the papers, satisfy the judgments with a power of attorney, and record the mortgage. He satisfied the judgments but failed to record the mortgage until after other liens had been entered against the property. The plaintiff's brother-in-law became insolvent and the only security she had was his worthless bond. The court said:

The defendant's counsel thinks that he should not pay for the great injury which his neglect has occasioned. The Court of Common Pleas and the jury thought otherwise, and we are of the same mind.⁴⁶

The opinion in the *Miller* case contains some colorful language which emphasizes the court's opinion that the negligence of the attorney was strictly a matter of law.

Moving from the areas where the standard is, or should be, a matter of law for the court to determine, there are some areas in which the question as to whether the attorney's conduct met the standard of care should be a question for the jury. *Davis v. Associated Indem. Corp.*⁴⁷ so held. There, the defendant-attorney was brought on the record as a third-party defendant by plaintiff's insurance company. Plaintiff had suffered a verdict which his insurance company refused to pay. The allegation was that the defendant-attorney failed to file a motion for new trial. The court, while sustaining a motion for judgment on the pleadings in favor of the defendant on another issue,⁴⁸ held that the questions of want of skill, knowledge or due care or liability for an honest mistake were questions of facts for the jury.

Expert Testimony

Where the standard of care is for the jury, the question arises as to whether expert testimony is necessary to permit a plaintiff to recover in an action against a lawyer who has represented him. This question has been answered in the affirmative in Illinois. In *Dorf v. Reeles*⁴⁹ the defendant-attorney was alleged to have failed to discuss a settlement offer with his client (the plaintiff) and to conduct proper settlement negotiations. The court held the law in Illinois required expert testi-

46. *Id.* at 120.

47. 56 F. Supp. 541 (M.D. Pa. 1944).

48. There was no allegation against the attorney as third party defendant that the judgment against plaintiff was incorrect or would have been reversed on appeal (*i.e.*, that a new trial would have been granted). Hence, no damages.

49. 355 F.2d 488 (7th Cir. 1966).

mony for a plaintiff to make out a prima facie case against an attorney whom he charged with professional negligence. The court cited *Olson v. North*,⁵⁰ equating the requirement for expert testimony in legal malpractice cases to the requirement in actions for medical malpractice. Other states have held that: expert testimony is unnecessary;⁵¹ is "sometimes" needed;⁵² is admissible;⁵³ the question of want of skill is a question of law for the court.⁵⁴ These various rules have been the subject of a number of discussions in legal periodicals.⁵⁵

There are several Pennsylvania cases which have some bearing in this area, though perhaps not specifically referring to expert testimony. In *Watson v. Muirhead*⁵⁶ the defendant-conveyancer had advised the plaintiff that title was free and clear. The defendant presented evidence from two persons. The witnesses indicated that in their opinion a judgment on unliquidated damages did not constitute a lien. It appears that the men were experts in the area and the court, affirming a judgment for the defendant, said:

[I]n addition, it appears that having been previously employed to investigate the same title, he [defendant] had submitted it to eminent counsel, who had given a written opinion in its favor without even expressing a doubt as to the judgment in question. . . .⁵⁷

The court seemed to approve the use of expert testimony by saying: "Therefore, an attorney ought not to be liable in case of a reasonable doubt. . . ."⁵⁸ The court said further:

No attorney, . . . is bound to know all the law; God forbid that it should be imagined that an attorney or a counsel, or even a Judge, is bound to know all the law; or that an attorney is to lose his fair recompense on account of an error, being such an error as a cautious man might fall into. . . .⁵⁹

The inference of approving expert testimony can be drawn from

50. 276 Ill. App. 457 (1934).

51. *Surity v. Lelner*, 155 So. 2d 831 (Fla. App. 1963).

52. *Pennington's Exer's. v. Yell*, 11 Ark. 212 (1850).

53. *Cochrane v. Little*, 71 Md. 323, 18 A. 698 (1879); *Central Cab. Co., v. Clarke*, 259 Md. 542, 270 A.2d 662 (1970).

54. *Gamber v. Hart*, 44 Ga. 542 (1872).

55. *Averill, Jr.*, *supra* note 11; *Wade*, *supra* note 11; *Wallach & Kelly*, *supra*, note 13; *Comment*, *supra*, note 13; 43 IND. L. J. 771 (1968); 15 HASTINGS L.J. 584 (1964).

56. 57 Pa. 161 (1868).

57. *Id.* at 168.

58. *Id.* at 167.

59. *Id.* at 168.

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the language: "such an error as a cautious man might fall into," because only experts in the area could inform a lay jury as to which errors might be fallen into by even a cautious man.

In a later case, *Waln v. Beaver*,⁶⁰ where the defendant-attorney failed to collect a full debt secured by mortgage and bond against property prior to the time that the property was sold at a tax sale, the court approved the charge of the lower court to the effect that:

It was for them [the attorneys] to show you by evidence that what they did was properly done; and that they did all that was required of them as attorneys to prevent the loss of the claim. If they have failed to do so, and if it appears from the evidence that the loss of the claim was due to their negligence, then the verdict should be for the plaintiff.

* * *

[I]f the jury are satisfied from all the evidence that the defendants, or either of them, knew of the tax sale of the lands in controversy, then it was their duty to inform the plaintiffs in reasonable time thereafter, and before the time of redemption had expired, of the tax sale. If they did not do so, then they were negligent as attorneys, and are responsible for the loss or damage which resulted therefrom.

* * *

Even if the jury are satisfied from the evidence that the defendant did not have actual knowledge of the tax sale, they would be responsible, if the evidence satisfies the jury that they should have known it, as attorneys for the plaintiffs.⁶¹

The plaintiff presented expert testimony of other members of the bar who testified that when claims secured by mortgages were sent to them they regarded it as their duty to look for unpaid taxes and to watch the sales and notify their clients of the facts. The court found nothing in the evidence that indicated the attorney-defendants in *Waln* had done that.⁶²

In a later case, *Points v. Gibboney*,⁶³ the plaintiff-attorney had entered judgment against the defendant and others and the court below opened the judgment as to all defendants except appellant. The appellant had signed certain judgment notes as executrix of her

60. 161 Pa. 605 (1894).

61. *Id.* at 607.

62. In addition, the court cited evidence at trial concerning the knowledge the defendants had of the mortgage; what would divest the lien of the mortgage; the fact that they took newspapers in which the tax sales were published; that one of them was at the sale; that they had access to the mortgage of record near their office; and that a great deal of land is sold for taxes.

63. 340 Pa. 522, 17 A.2d 365 (1941).

husband's estate. The plaintiff-attorney then induced the executrix and the other defendants to sign a judgment note to him assuming the debts of the estate as individuals. In remanding the case with directions to open the judgments as to all defendants, including appellant, the court stated:

The burden is upon him, as attorney, to show that he did not gain a personal advantage by misrepresenting the legal situations or by failing to make it plain to those whom it was his duty to advise and protect. There is little, if anything, in the evidence to indicate that he fulfilled that duty, nor was this aspect of the case apparently considered by the court. While he testified that he constantly cautioned appellant not to use her personal funds for the payment of debts of the estate, it seemed strange that he ignored this advice in the instance where his own claim was concerned and induced her to assume just such a personal liability.⁶⁴

The court seemed to urge the defendant to present expert testimony to show that what he did was proper.

What rule as to expert testimony should prevail in connection with certain matters of local practice? It is well known that in small counties, where every lawyer knows every other lawyer, it is common practice to grant extensions of time to opposing counsel for the filing of pleadings. Would it be necessary to present expert testimony on this point in Pennsylvania?

From the language contained in *Lynch v. Commonwealth ex rel. Barton*,⁶⁵ it seems that it would not:

[T]he attorney is in some degree the agent as well as the lawyer of the plaintiffs; when execution has issued, he often gives time to the defendant, and directs the Sheriff to postpone a sale advertised; and so far as I know, this has always been taken as a justification to the Sheriff for not selling. Such discretionary powers are necessary for plaintiff's interest: Without the exercise of them, many times, and under many circumstances, property, sufficient to pay the debt, would not sell for enough to pay the costs.⁶⁶

There are, of course, other areas where perhaps expert testimony should be used if, through such testimony, it can be shown that the area of the law is not free from doubt as to what defendant-attorney should have done. For, as was stated in *Enterline v. Miller*,⁶⁷ an attorney

64. *Id.* at 527, 17 A.2d at 367.

65. 16 S. & R. 367 (Pa. 1827).

66. *Id.* at 368.

67. 27 Pa. Super. 463 (1905).

will not be held for a mistake where "the question is not so free from doubt that an attorney must be required to decide it correctly, on pain of being held lacking in professional knowledge should the courts reach a different conclusion."⁶⁸

Similarly, a lawyer will not be held liable for what is a poor result rather than negligence.⁶⁹ A lawyer is not bound to bring every suit which his client may have, unless there is an express understanding that he is to bring a particular action or actions,⁷⁰ and an attorney will not be held liable for the failure to do an act which he did not assume to do.⁷¹

We may compare the language in *Smith v. Yohe*,⁷² a medical malpractice case, with the rules announced in the cases involving legal malpractice hereinabove discussed. We have seen that just as a physician does not warrant a cure or guarantee the result of his treatment, neither does a lawyer guarantee the result of a case which he litigates or the advice followed by his client. Pennsylvania seems to encourage expert testimony where the standard of care required is not so clear as to be a question of law or where the jury would lack sufficient knowledge to determine the question—which is substantially similar to the rule governing medical malpractice cases. As in medical malpractice cases the burden is upon the plaintiff; however, the lawyer may have the burden of going forward with the evidence in certain cases where either the doctrine of *res ipsa loquitur* (not applied in medical malpractice) or a violation of the standard of care is a matter of law. Furthermore, the lawyer, as the physician, is required to exercise skill and knowledge as well as the due care usually exercised by members of the profession.

PRIVITY⁷³

An attorney hired by a dissatisfied client to bring suit against an attorney about whose representation the client complains must first determine that the previous attorney's conduct has not met the required

68. *Id.* at 469.

69. *Harkness v. Caven*, 199 Pa. 267, 48 A. 1080 (1901).

70. *Youngman v. Miller*, 98 Pa. 196 (1881).

71. *Merrill v. Norton*, 2 Walk. 213 (Pa. 1885).

72. 412 Pa. 911, 194 A.2d 167 (1963). See text accompanying note 7, *supra*.

73. Due to the paucity of Pennsylvania cases on the subject of an attorney's liability to third persons, it seemed more desirable to consider the question of privity separately and at length instead of including it under the discussion of Defenses. In this way we hope to inform the reader of the present status of the law in other jurisdictions as some indication of the direction in which the courts have been moving in this area.

standard of care. He must next determine whether or not such a relationship existed between the client and the previous lawyer as will permit the client to assert a cause of action against him.

Most professional negligence actions against attorneys arise directly from the attorney-client relationship. It is well recognized, however, that in the handling of certain legal matters an attorney's negligent conduct might easily affect or injure persons outside that relationship. Until recently,⁷⁴ however, such "third persons"⁷⁵ have had no remedy against the negligent attorney because courts consistently have invoked the traditional rule that an attorney is liable for negligence only to persons in privity with him.⁷⁶ The reason for this unswerving adherence to the privity doctrine over the years seems to be a reluctance of the courts to impose an undue burden or unpredictable liability upon attorneys.⁷⁷ In other areas of consumer services, however, the doctrine of privity either has been abolished, or is rapidly collapsing.⁷⁸ It was almost inevitable, considering the complexities of modern practice, that the doctrine eventually would break down in the area of professional negligence also, and, to some extent, it has.

There has been an increasing number of actions by third parties against attorneys in recent years, and they arise most frequently in the areas of title searches⁷⁹ and drafting of wills.⁸⁰ Although, the law has developed more clearly in the area of negligence in drafting wills, it is necessary to consider the cases in both areas for complete understanding of both the history and present status of the law. The first court to hand down an opinion in regard to the doctrine of privity in this type of action was the House of Lords.⁸¹ In 1861, Lord Campbell stated that he "never had any doubt of the unsoundness of the doctrine" that the third party could recover stating: "I am clearly of the opinion that this is not the law of Scotland, nor of England, and it can hardly

74. *Lucas v. Hamm*, 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961), *cert. denied*, 368 U.S. 987 (1962).

75. *Averill, Jr.*, *supra* note 11.

76. *National Savings Bank of the District of Columbia v. Ward*, 100 U.S. 195 (1879) [hereinafter cited as *Savings Bank v. Ward*]; *Jacobsen v. Overseas Tankship Corp.*, 11 F.R.D. 97, 100 (E.D. N.Y. 1950); *Wade, The Attorney's Liability for Negligence*, 12 *VAND. L. REV.* 755, 758-59 (1959).

77. *Lucas v. Hamm*, 56 Cal. 2d 583, 589, 364 P.2d 685, 688, 15 Cal. Rptr. 821, 824; Comment, *supra* note 13, at 1311.

78. *MacPherson v. Buick*, 217 N.Y. 382, 111 N.E. 1050 (1916); *Jarnot v. Ford Motor Co.*, 191 Pa. Super. 422, 156 A.2d 568 (1959).

79. *Savings Bank v. Ward*, 100 U.S. 195 (1879).

80. *Lucas v. Hamm*, 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961), *cert. denied*, 368 U.S. 987 (1962); *Buckley v. Gray*, 110 Cal. 339, 42 P. 900 (1895).

81. *Robertson v. Fleming*, 4 Macq. 167 (H.L. Sc. 1861).

be the law of any country where jurisprudence has been cultivated as a science.”⁸²

The Supreme Court of the United States considered the question in 1879, when it handed down its landmark decision in *National Savings Bank of the District of Columbia v. Ward* (hereinafter referred to as *Savings Bank*).⁸³ There, plaintiff bank filed suit against an attorney for professional malpractice, alleging negligence in the examination and certification of title to real estate. The title examination had been requested and paid for by the purported owner of the property for the purpose of securing a loan. Plaintiff alleged that in reliance on the attorney's certificate of title, it made a loan to the supposed owner. Apparently, the owner had transferred title to the property prior to the loan; thus the trust-deed to plaintiff proved to be valueless. It was alleged, and conceded, that the prior recorded deed would have been discovered by proper investigation. The Court, however, directed its attention to the question of privity of contract in holding:

Beyond all doubt, the general rule is that the obligation of the attorney is to his client and not to a third party, and unless there is something in the circumstances of this case to take it out of that general rule, it seems clear that the proposition of the defendant must be sustained.⁸⁴

The lower court found as a matter of fact there had been no contract and no communication between the plaintiff and the attorney, and it directed a verdict and entered judgment for the defendant. The Supreme Court affirmed this judgment, having found no “special circumstances”⁸⁵ to warrant recovery. In making its decision, the Court relied primarily on the English precedent⁸⁶ mentioned above.

The Supreme Court of California was the next to consider a similar problem in *Buckley v. Gray*.⁸⁷ The *Buckley* court adhered to the requirement of privity of contract before plaintiff could maintain an action against the attorney. Buckley was a legatee under his mother's will, which defendant-attorney prepared. Defendant negligently had Buckley witness the will, thus invalidating his legacy. The *Buckley*

82. *Id.* at 177.

83. 100 U.S. 195 (1879).

84. *Id.* at 200. The “special circumstances” to which the Court referred included fraud, collusion and an act of negligence that would be imminently dangerous to the lives of others. *Id.* at 203-04.

85. See note 84.

86. *Robertson v. Fleming*, 4 Macq. 167 (H.L. Sc. 1861); *Fish v. Kelly*, 144 Eng. Rep. 78 (C.P. 1864).

87. 110 Cal. 339, 42 P. 900 (1895).

court relied on *Savings Bank v. Ward*⁸⁸ in holding that the doctrine of privity was firmly established. Significantly, the court also held that the privity doctrine would not be circumvented on a third party beneficiary theory since the contract was not expressly for the plaintiff's benefit.⁸⁹

It was not until 1922 that the privity rule was again challenged, this time in the New York courts. In *Glanzer v. Shepard*,⁹⁰ a case not involving negligence of an attorney, the Court of Appeals of New York distinguished *Savings Bank v. Ward*, and found that the question at bar was a question of duty, not contract or privity.⁹¹ In affirming a directed verdict for the plaintiff, Chief Judge Cardozo stated that "one who follows a common calling may come under a duty to another whom he serves, though a third may give the order or make payment,"⁹² thus indicating that in a proper case, an attorney would no longer be able to hide behind the privity rule.

Later, in 1931, in *Ultramares Corp. v. Touche*,⁹³ the Court of Appeals of New York again considered the privity doctrine in an action against accountants for negligence in certifying a balance sheet. As in *Glanzer*, the court based its decision on the concept of duty, but distinguished *Glanzer* on the facts,⁹⁴ and thus was able to deny recovery to the plaintiff. Recovery was denied even though plaintiff was within the group of persons defendants knew would rely on their certificate and even though plaintiff had a right to rely on the certificate. The court felt this case involved simply a negligent misstatement, and that the concept of duty should not be extended so far⁹⁵ as to put an undue burden on the accounting and other professions. Of the *Ultramares* decision, one writer has said: "Notwithstanding this thesis, the *Ultramares* decision, if it did not kill the effectiveness of *Glanzer*, certainly took the punch out of it."⁹⁶

Finally, in 1958, the Supreme Court of California confronted the

88. 100 U.S. 195 (1879).

89. 110 Cal. 339, 342-43, 42 P. 900, 901-02. California had a statute providing: "A contract made expressly for the benefit of a third person may be enforced by him at any time before the parties thereto rescind it." Cal. Civ. Code § 1559 (West 1954).

90. 233 N.Y. 236, 135 N.E. 275 (1922).

91. *Id.*, 135 N.E. at 276.

92. *Id.*

93. 255 N.Y. 170, 174 N.E. 441 (1931).

94. *Id.* at 182-83, 174 N.E. at 445-46.

95. It is important to note, however, that the extent of liability in the two cases differed greatly. The damages alleged in *Glanzer* were small, in terms of dollars but in *Ultramares*, the damages alleged were much greater. The amount of damages, of course, should not control the outcome.

96. Averill, Jr., *supra* note 11, at 391.

issue squarely, and rejected the stringent privity test.⁹⁷ In *Biakanja v. Irving* the court was presented with an action against a notary public who, though unauthorized to practice law, drafted a will which was later declared invalid because of improper attestation. The court held that defendant was liable in tort to an intended beneficiary who suffered a loss as the result of the invalidity of the will. The duty concept was the basis of the court's decision, and it announced a test which was to be used in this and future cases of a similar nature. The language of the court is as follows:

The determination whether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm.⁹⁸

After *Biakanja*, there remained only one question: would that holding be limited to its factual situation, *i.e.*, a case in which the defendant was violating a statute such as one prohibiting practicing law without a license? This question was soon answered by the Supreme Court of California in its landmark decision of *Lucas v. Hamm*.⁹⁹ Defendant-attorney in *Lucas* was employed by the testator to draft a will. Plaintiffs were beneficiaries under a residuary trust set forth in the will, and after testator's death, it became apparent that the trust provision violated several of California's Civil Code provisions. The trust subsequently was attacked, and defendant advised plaintiffs to settle, reducing their share under the trust by \$75,000.00. This is the amount that plaintiffs alleged as damages. Plaintiffs' complaint sounded in both tort and contract (based on a third party beneficiary theory). Chief Justice Gibson affirmed the lower court's dismissal of the action on the ground that as a matter of law the defendant's error was neither negligence nor breach of contract. However, the court also indicated that plaintiff beneficiaries could have brought the action in either tort or contract¹⁰⁰ and that lack of privity would be no bar. In so stating, the

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

98. *Id.* at 651, 320 P.2d at 19.

99. 56 Cal. 2d 583, 364 P.2d 685 (1961), *cert. denied*, 368 U.S. 987 (1962).

100. *Id.* at 592, 364 P.2d at 689.

court expressed its concern over the possibility of placing too great a burden on the legal profession. Answering in the negative, it stated:

We are of the view that the extension of his liability to beneficiaries injured by a negligently drawn will does not place an undue burden on the profession, particularly when we take into consideration that a contrary conclusion would cause the innocent beneficiary to bear the loss.¹⁰¹

Thus, the doctrine of privity as it relates to professional negligence was overthrown in California, at least insofar as future cases are found to fit within the *Biakanja-Lucas* rationale and so-called "balancing test."¹⁰²

As with any landmark decisions, *Lucas* and *Biakanja* produced a rash of law review articles,¹⁰³ but since these decisions were handed down there has not been a great deal of litigation on the matter. Only two other states have expressly approved and followed the decisions.¹⁰⁴ Another jurisdiction,¹⁰⁵ by way of dicta, has indicated possible future approval and adoption of the California rule. Still another¹⁰⁶ seemed

101. *Id.* at 589, 364 P.2d at 688. Though dicta, it was accepted as a rule of law.

102. 10 SANTA CLARA LAWYER 257, 263 (1970). The California Supreme Court again used this balancing test in *Heyer v. Flaig*, 70 Cal. 2d 223, 449 P.2d 161 (1969).

103. 4 ARIZ. L. REV. 100 (1962); 42 BOSTON U. L. REV. 256 (1962); 27 FORDHAM L. REV. 290 (1958); 30 FORDHAM L. REV. 369 (1961); 72 HARV. L. REV. 380 (1958); 75 HARV. L. REV. 620 (1962); 7 KAN. L. REV. 83 (1958); 22 MD. L. REV. 161 (1962); 34 ROCKY MT. L. REV. 388 (1962); 16 RUTGERS L. REV. 475 (1962); 14 STAN. L. REV. 580 (1962); 40 TEXAS L. REV. 1046 (1962); 64 W. VA. L. REV. 361 (1962).

104. *Licata v. Spector*, 26 Conn. Supp. 378, 225 A.2d 28 (1966). This court held at 225 A.2d 28, 29-30: "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 incident to 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." In *Howarth v. Pfeifer*, 443 P.2d 39, 42-43 (Alaska 1968), the Supreme Court of Alaska, relying on the California decisions, remanded the case for the jury to consider the various balancing factors of *Biakanja* in determining negligence of defendant.

105. *Ryan v. Kanne*, 170 N.W.2d 395 (Iowa 1969). This was an action against an accountant for negligence, and the court indicated the California rule may be applicable to attorneys, but, as to the case under consideration, it said:

This being a case of first impression in Iowa, we are disposed to reject the rule that third parties not in privity of contract or in a fiduciary relationship are always barred from recovery for negligence of the party issuing the instrument upon which the third party relies, to his detriment. It is unnecessary at this time to determine whether the rule of no liability should be relaxed to extend to all foreseeable persons who may rely upon the report, but we do hold it should be relaxed as to those who were actually known to the author as prospective users of the report and take into consideration the end and aim of the transaction. *Id.* at 402-03.

See *Stephens Industries, Inc. v. Haskins & Sells*, 438 F.2d 357 (10th Cir. 1971) explaining the holding in *Ryan*.

106. *Robinson v. Colebrook Guaranty Savings Bank*, 109 N.H. 382, 254 A.2d 837 (1969). *But cf.* *Murray v. Bullard Co.*, 110 N.H. 220, 265 A.2d 309 (1970) where the Supreme Court of New Hampshire cited *Robinson* as authority for the opinion that: "The common law concept of privity is subject to extension, modification or extinction without legislative aid, as the common law in its normal evolution may demand." *Id.* at 226, 265 A.2d at 313.

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to approve the decisions, but was able to distinguish them on the facts from the case under consideration. *Lucas* was specifically rejected by the Supreme Court of New York in *Maneri v. Amodeo*¹⁰⁷ in 1963.

To date, there has been no Pennsylvania case directly in point on the privity issue. One writer, however, has suggested that Pennsylvania would extend the third party beneficiary concept in this area to grant recovery. The commentator argues:

To mitigate the harshness of the privity requirement in such cases, many courts have carved out an exception to the general rule by extending the third party beneficiary concept. . . . Thus, an attorney may be liable to a third party relying on the search when the client retained the attorney for the benefit of the third party and this fact was known to the attorney.¹⁰⁸

The writer cited the case of *Lawall v. Groman*¹⁰⁹ as so holding. The *Lawall* court, however, did not really address itself to the question of privity of contract or the third party beneficiary concept. Instead, it found that the relationship of attorney and client existed between the plaintiff and defendant even though the plaintiff did not pay defendant's fee, and that defendant owed a duty to plaintiff for the breach of which he would be liable. If the court had not specifically found an attorney-client relationship in *Lawall*, it could be argued that Pennsylvania would apply the same rationale as the California courts, basing liability on the duty concept. However, the additional factor in *Lawall* makes it difficult to know what the Pennsylvania courts will do with similar cases in the future. On the basis of the reasoning by the California courts, it does not seem unfair to find liability—at least in those cases in which the attorney knows that the plaintiff is relying on his conduct, where the harm to plaintiff is foreseeable, and where the imposition of liability would not impose an unpredictable burden on the members of the legal profession.

The whole area of privity contemplates the scope of one's duty to others. The courts which have abandoned the privity rule in actions

107. 38 Misc. 2d 190, 238 N.Y.S.2d 302 (1963).

108. Comment, *supra* note 13, at 1310.

109. 180 Pa. 532 (1897). Defendant-attorney had represented Lawall's brother in various investments, and he notified his client to inform him of a good investment. His client visited the property with him and defendant agreed to examine the title and search the records for liens. Plaintiff had just come into some money and wanted to make an investment of \$1,000.00, so plaintiff and her brother met defendant in his office. Defendant said that he wanted to check the records once more. He later reported that plaintiff's mortgage would be the first lien. Subsequently, it developed there were two prior liens of \$700.00 and \$300.00, respectively, and the property was not worth more than \$1,200.00. Plaintiff's suit was for \$1,500.00.

against attorneys have not held that attorneys will be liable to every single person who is touched by their conduct or advice, but instead the courts have placed limitations on the concept of duty, and have held that liability is to be determined by consideration and application of various "balancing" factors. As one writer has said: "There are to be some limitations on liability. The lack of privity may no longer be a valid defense but the concept of duty still has its limitations."¹¹⁰

One further problem in this area deserves brief mention. If lack of privity will no longer bar an action by third parties against attorneys, does this new concept alone protect such third parties, or may they still be met with the defense of the statute of limitations? Suffice it to say that in those jurisdictions which hold that the statute does not begin to run until the injured party has discovered the negligence, protection is afforded. But where the statute is held to begin to run at the time of the negligent conduct, such action by third parties will most likely fail.¹¹¹

STATUTE OF LIMITATIONS

The statute of limitations as it applies to legal malpractice actions has been the subject of considerable discussion in legal periodicals as well as judicial decisions in Pennsylvania and other jurisdictions.

The entire area of malpractice is relatively undefined by legislative enactments, with the exception of the statute of limitations, the specific time period of which varies from state to state. Three particular statutes of populous states, those of Ohio, New York and California, were compared in an article which pointed out a seemingly minor but significant disparity in statutes of limitations, "the statute of limitations in legal malpractice is three years in New York, two years in California, and only one year in Ohio."¹¹² In contrast, Pennsylvania has uniformly held that the six-year statute of limitations set forth in the Act of March 27th, 1713 applies to a legal malpractice case.¹¹³

In spite of the absence of extensive discussion concerning the applicability of the six year statute¹¹⁴—that is, it has been assumed that

110. Averill, Jr., *supra* note 11, at 397.

111. In regard to the rule in Pennsylvania as to the time when the statute begins to run, see the discussion accompanying notes 116-127, *infra*.

112. Baxter, *supra* note 4.

113. PA. STAT. ANN. tit. 12, § 31 (1953).

114. The only discussion was that in *Skyline Builders, Inc. v. Kellar*, 50 Pa. D. & C.2d 19 (C. P. Lehigh Co. 1970) which mentions that the neglect of the attorney is a breach of an implied contract between the attorney and the client:

the statute applies¹¹⁵—there has been a great deal of litigation in Pennsylvania concerning when the statute begins to run. A substantial amount of this litigation has concerned cases in which attorneys have failed to pay over to their client money which they have collected on behalf of the client. In some cases, of course, this was done intentionally or fraudulently rather than negligently. However, it seems the same rule would apply as to the running of the statute of limitations whether the failure to pay was fraudulent or negligent.

An early Pennsylvania case, *McDowell v. Potter*,¹¹⁶ held that the statute began to run when the client had notice of the attorney's receipt of the money. The burden was on the defendant-attorney to show that notice had been given to the client-plaintiff, or, with reasonable diligence the client-plaintiff would have learned of the receipt of the money by the defendant-attorney. The Supreme Court of Pennsylvania, in the case of *Campbell Adm'r v. Boggs*,¹¹⁷ to some extent overruled the *McDowell* rule.¹¹⁸

In *Campbell* the defendant was an attorney-in-fact rather than an attorney-at-law, but the court held there was no ground for distinction between the two.¹¹⁹ The *Campbell* court, in attempting to reconcile the *McDowell* case with the facts in the case before it, noted that in *McDowell* the plaintiff had alleged concealment of the receipt of the money by the attorney. However, the *Campbell* court specifically stated:

If a client applies to his attorney and receives a false or evasive answer as to monies collected, let him prove that, and it will arrest the running of the statute; but if he can prove nothing to excuse his delay suing, the statute must have its course, for it is founded in wisdom.¹²⁰

In Pennsylvania, the default or malpractice of an attorney has been treated as a breach of contract between attorney and client: *Campbell's Administrator v. Boggs*, 48 Pa. 524; *Rhines' Administrators v. Evans*, 66 Pa. 192; *Huffman Estate (No. 3)*, 349 Pa. 59. The period of limitation to be applied to such action is six years: Act of March 27, 1713, 1 Sm. L. 76, 12 P.S. § 31.

Supra at 20-21.

115. *Schwab v. Cornell*, 306 Pa. 536, 160 A. 449 (1932); *Bodine v. Wayne Title & Trust Co.*, 33 Pa. Super. 68 (1906); *Lawall v. Groman*, 180 Pa. 532, 37 A. 98 (1897); *Owen v. Western Saving Fund*, 97 Pa. 47, 39 A.R. 794 (1881); *Moore v. Juvenal*, 92 Pa. 484 (1880); *Stephens v. Downey*, 53 Pa. 424 (1867); *Fleming v. Culbert*, 46 Pa. 498 (1864); *McCoon v. Galbraith*, 29 Pa. 293 (1857); *Downey v. Garard*, 24 Pa. 52 (1854); *McDowell v. Potter*, 8 Pa. 189 (1848); *Derrickson v. Cady*, 7 Pa. 27 (1847).

116. 8 Pa. 189 (1848) [hereinafter cited as *McDowell*]; *Derrickson v. Cady*, 7 Pa. 27 (1847).

117. *Campbell's Adm'rs. v. Boggs*, 48 Pa. 524 (1855) [hereinafter cited as *Campbell*].

118. 8 Pa. 189 (1848).

119. 48 Pa. 524.

120. *Id.* at 526.

Thus, in *Campbell* the burden was shifted from the defendant to the plaintiff.

More broadly stated, the question is whether the statute begins to run when the act of negligence occurs or, rather, when the injured client becomes or should become aware of the negligent act or the damage which he has suffered. So stated, the principle can be applied to virtually every legal malpractice situation. In a case decided after *Campbell*, a partner in a law firm had collected money on behalf of clients. The law firm later dissolved, and one of the former partners wrote to the clients expressing his ignorance of the case, saying that he would find out what happened to the money. In deciding the case the Pennsylvania Supreme Court held the statute began to run at the time of the partner's letter to the clients on the theory that the partner was charged with the knowledge that his former partner had long before collected the money. His letter, therefore, was treated as not revealing (*i.e.*, fraudulently concealing) that knowledge when called upon, and such action tolled the statute of limitations.¹²¹ In an analogous situation where a conveyancer failed to notify the purchaser of property of tax liens against the property, the court held that because the conveyancer had sent a letter saying the title was free and clear, the statute of limitations did not begin to run until the purchaser received notice that his property had been sold at a tax sale. The court reasoned that the letter acted as a fraudulent concealment of the actual circumstances.¹²² *Schwab v. Cornell*¹²³ effectively overruled previous cases, which held that the statute began to run at the time of the negligent act by the conveyancer or title searcher.¹²⁴ The most clearly reasoned case in this area is *Skyline Builders, Inc. v. Kellar*,¹²⁵ decided by a common pleas judge in Lehigh County.

The *Skyline* court analogized to the rule applicable in Pennsylvania to physicians and architects¹²⁶ in order to bring all malpractice actions under the same rule. The reasoning was as follows:

121. *McCoon v. Galbraith*, 29 Pa. 293 (1857).

122. *Schwab v. Cornell*, 306 Pa. 536, 160 A. 449 (1932).

123. *Id.*

124. *Lawall v. Groman*, 180 Pa. 532, 37 A.98 (1897); *Owen v. Western Saving Fund*, 97 Pa. 47 (1881); *Bodine v. Wayne Title & Trust Co.*, 33 Pa. Super. 68 (1906).

125. 50 Pa. D. & C.2d 19 (C. P. Lehigh Co. 1970).

126. *Ayres v. Morgan*, 397 Pa. 282, 154 A.2d 788 (1959), where a surgeon left a sponge in the patient's body and the statute did not begin to run until the sponge was discovered; *Med-Mar, Inc. v. Dilworth*, 214 Pa. Super. 402, 257 A.2d 990 (1969), where an architect's negligence was responsible for a defect in the roof and the statute did not begin to run until the defect was discovered.

The anomaly inherent in a strict application of the statute of limitations in cases of legal malpractice is readily apparent. In many instances, the client will be unaware of the attorney's negligence until loss or injury is actually threatened. If this negligence is discovered for the first time after the expiration of the period of limitation, a strict application of the statute will bar any action. To deny a person a right before he can reasonably be expected to know that he has such a right is unreasonable and unjust. Moreover, to impose upon the client the duty of ferreting out his lawyer's mistakes, a burden which in the usual situation, can be met only by employing a second attorney, is to discourage the trust and confidence which are essential to a sound attorney-client relationship.¹²⁷

It therefore appears to be the rule in Pennsylvania that the statute will begin to run upon the commission or omission which constitutes negligence unless, because of the subsequent fraud of the attorney (actual or constructive) or in spite of diligence on the part of the client, the knowledge of the negligence or its consequences would not be acquired until some period thereafter. In that case, the statute begins to run from the time the negligent act of the attorney or its consequences is or should be discovered by the client.

Whereas Pennsylvania courts have applied a uniform six-year statute and defined its point of application, courts of other jurisdictions have expanded their discussions to the question of whether the tort statute of limitations or the contract statute of limitations should apply.¹²⁸ The cases are sometimes decided on the basis of the cause of action stated in the complaint,¹²⁹ while others are based upon the form of action.¹³⁰ This difference has led to considerable discussion in law reviews concerning the applicable statute.¹³¹ Obviously, in other jurisdictions, the problem of which statute of limitations to apply will not be solved immediately. Perhaps the solution awaits further legislative thought on whether a malpractice suit is the same as any other cause of action for negligence.

127. 50 Pa. D. & C.2d 19, 24-25 (C.P. Lehigh Co. 1970).

128. See Annot., 18 A.L.R.3d 978 (1968) and Annot., 49 A.L.R.2d 1216 (1956) and cases cited in those annotations.

129. Bland v. Smith, 197 Tenn. 683, 277 S.W.2d 377 (1955).

130. Schrimmer v. Nethercutt, 157 Wash. 172, 288 P. 265 (1930); Buchanan v. Huson, 39 Ga. App. 734, 148 S.E. 345 (1929).

131. Averill, Jr., *supra* note 11; Bastedo, *A Note on Lawyers' Malpractice: Legal Boundaries and Judicial Regulations*, 7 OSGOODE HALL L.J. 311 (1969); Baxter, *supra* note 4; Coggin, *supra* note 4; Leavitt, *The Attorney as Defendant*, 13 HASTINGS L.J. 1 (1961); Wade, *supra* 11; Comment, *supra* note 13; 15 HASTINGS L.J. 590 (1964).

DAMAGES

Assuming the client-plaintiff has sustained the burden of proof of showing a negligent breach of duty on the part of the attorney-defendant, the next question is whether the client suffered any damages as a result of that negligent breach of duty. In addition to determining whether damages have been proximately caused by an attorney's breach of duty, it is also incumbent upon the court to determine how the damages are to be measured.

Probably the clearest case of determining the measure of damages occurs where the attorney, by reason of his negligence, has failed to enter judgment on a promissory note of a solvent debtor prior to the running of the statute of limitations, thus barring the client from collection of his debt. There is no question the client has suffered damages, or that the damages were proximately caused by the negligence of the attorney, and there is little question as to how those damages are to be measured. However, in most cases the question of whether the client suffered damages and the measure thereof is much more complex. Suppose, for example, that the attorney in conducting a trial, based on a theory of medical malpractice in which punitive damages were recoverable, failed to object to irrelevant questions concerning an intimate relationship which existed between the defendant-doctor and the plaintiff in the malpractice case. Suppose the jury did not return a verdict for punitive damages. Assuming that the failure to object was negligent, can the jury in the action brought against the attorney for such negligence speculate as to whether the previous jury would have awarded punitive damages had evidence of that relationship been objected to properly and excluded by the court?

The first of the above hypotheticals has been litigated in Pennsylvania. In *Cox v. Livingston*,¹³² the attorney gave Cox a receipt indicating that he had received a note for collection drawn to the order of the plaintiff by Dubbs. The same day, plaintiff swore to an affidavit in support of his claim against Dubbs. Attorney Livingston died approximately six months after the date of the receipt, two terms of court having elapsed from that date. The evidence revealed the possibility that Livingston had not brought suit because Dubbs told him he would have the money shortly and would pay the note. The lower court instructed the jury that if they believed the delay was caused by an honest,

132. 2 W. & S. 103 (Pa. 1841).

but mistaken, error of judgment on the part of Mr. Livingston, their verdict should be for the defendant. The jury found for the defendant. On appeal the Pennsylvania Supreme Court determined there was nothing in the evidence which revealed there was to be any discretion on the part of Mr. Livingston as to when suit was to be brought on the note. This determination, impliedly at least, indicates the court based its finding on a theory of contract.¹³³ The court, having recited the evidence, indicating it was the clear intention of the parties that such discretion did not exist, stated:

The jury, therefore, ought to have been instructed by the court, if they came to this conclusion, and we do not see well from the evidence how they could have avoided it, that notwithstanding they might think that Mr. Livingston had omitted to bring a suit, solely with a view to promote the interest of the plaintiff, yet he had violated his engagement with and failed to perform his duty to the plaintiff, in not having brought and prosecuted a suit with reasonable diligence for the recovery of the debt due to the plaintiff; and having thus failed to perform his duty, he had rendered himself liable to pay the plaintiff, whatever of the debt might have been recovered of Dubbs by suit having been so brought and prosecuted, which Dubbs has now become unable to pay; and that it was the duty of the jury to find a verdict in favour of the plaintiff for that sum, whatever they should think it was. But if from the evidence they should be of the opinion, that a suit brought against Dubbs would have been unavailing, and that nothing could have been recovered by means of it, their verdict, though it ought to still be for the plaintiff, should only be for nominal damages. Under this view of the case, we think that the plaintiff ought to have a new trial.¹³⁴

The case was retried and again was taken to the Supreme Court of Pennsylvania.¹³⁵ One new fact appeared in the evidence in the subsequent case: suit was brought after Livingston's death by his partners before the action was filed against Livingston's administrators. In the meantime, however, Dubbs had become insolvent. The court, then, specifically placed the case within the theory of contract actions.¹³⁶ The court stated:

133. This is further substantiated by the fact that in its opinion the court placed printing emphasis, by means of italics, on the word "collection" in quoting the language of the receipt given by Livingston. *Id.* at 104.

134. *Id.* at 106-07.

135. *Livingston v. Cox*, 6 Pa. 360 (1847).

136. "The weight of authority has put it beyond question that though the action may be in form as for tort, yet if the subject of it be based on contract, the suit will be attended by all the incidents of an action *ex contractu* . . ." *Id.* at 362.

It is certainly true, that the measure of damages, in a case like the present, is the actual loss sustained by the negligence of the attorney. But if the claim or debt intrusted to his professional care for collection is not, through his neglect, collected or secured when it might, and reasonably ought to have been; it will not do to say this neglect is excused by the subsequent laches of the volunteer, who possibly, by the exercise of extraordinary diligence, might have made the debt from the wreck of a failing man's fortune. Though this might have been possible, or even probable in the particular case, it may still with truth be affirmed that the client lost the opportunity of securing the amount due to him because of the default of the first attorney, and has, therefore, suffered an injury at his hands, commensurate with the debt due, should the money eventually remain uncollected.¹³⁷

The court placed the burden upon the defendant-attorney to show that the plaintiff, because of his own lack of diligence, was not entitled to damages.¹³⁸ Whether this is a theory of contributory negligence which the defendant, in any negligence action, has the burden to prove is discussed later.¹³⁹

Hence, while the *Livingston* court, in dealing with this factual situation the first time,¹⁴⁰ specifically held that it would be necessary for the plaintiff-client to show damages would have been recoverable, it does not appear in the second opinion¹⁴¹ that the court requires proof the judgment was collectable against the debtor. The only factor added in the second suit is that the suit was brought later by one of the partners.

An even stronger position against the defendant-attorney prevailed in *Miller v. Wilson*.¹⁴² In *Miller* the plaintiff had judgments against property belonging to her sisters. The husband of one of her sisters undertook to pay the judgments through his bond to be secured by a mortgage, if the plaintiff would satisfy the judgments. The defendant-attorney was hired and paid to prepare the papers, satisfy the judgments with a power of attorney and record the mortgage. He satisfied

137. *Id.* at 365.

138. A case may, indeed, be imagined in which the first attorney, though negligent of his duty, might not be liable beyond nominal damages, as for instance, when the plaintiff employed another agent or neglected to employ one after due notice of the death of the first, and the defendant continued, undoubtedly, solvent for a period sufficiently long to allow the collection of the money due by the exercise of ordinary diligence.

Id. at 366.

139. See discussion accompanying notes 170-173.

140. 2 W. & S. 103 (Pa. 1841).

141. 6 Pa. 360 (1847).

142. 24 Pa. 114 (1854).

the judgments but failed to record the mortgage until after other liens had been entered against the property. The plaintiff's brother-in-law became insolvent and the only security she had was his worthless bond.

The defendant-attorney argued that the plaintiff had not yet suffered any actual loss. The court held, however, that the defendant did not merely become a surety on the plaintiff's brother-in-law's bond but subjected himself to an immediate action. The court said that on a contract, each time there is a breach of an installment, there may be a suit for what is due at the time a suit is brought; however, this was a tort, and the duty or promise had been breached and the plaintiff was entitled to full compensation for that breach. The court stated, "a case directly in point is that of *Howell v. Young* It was held, [in *Howell*] that in an action against the attorney, the client might recover for all the *probable* loss he was *likely* to sustain from the invalidity of the security."¹⁴³ (Emphasis in original.)

Although the court reasoned that the plaintiff was entitled to the security of mind which the mortgage gave her, there is some indication the plaintiff might have been entitled to a verdict even if the brother-in-law had remained solvent. In discussing the measure of damages the court held that plaintiff was entitled to "the difference in value between her debt made absolutely safe by a mortgage, and the same debt with no security except the personal responsibility of an insolvent man."¹⁴⁴ It would seem proper, therefore, to substitute the word "solvent" for "insolvent" to comport to the factual situation of a solvent debtor on an unsecured debt and, since the jury was to determine that difference in value in the *Miller* case, the jury could just as adroitly determine the difference in value if the debtor had remained solvent.

In spite of the *Miller* court's determination that the plaintiff was entitled to full recovery in this suit on a tort theory, the decision is not in conflict with the language of the court in *Livingston v. Cox*.¹⁴⁵ *Miller*, it should be noted, also approved the affirmative answer of the lower court concerning the defendant-attorney being bound, by contract, to record the mortgage. It would appear from an analysis of the three preceding cases, therefore, that while the statute of limitations is to be determined upon a theory *ex contractu*,¹⁴⁶ in Pennsylvania the

143. *Id.* at 121.

144. *Id.* at 122.

145. 6 Pa. 360 (1847). See note 136, *supra*.

146. See also, discussion accompanying notes 112-15.

right of action and the measure of damages are to be determined on a theory *ex delicto*.

Because of their approach to the measure of damages issue, the Pennsylvania courts have not been squarely faced with one problem that has confronted other courts. Other jurisdictions have faced the question whether the measure of damages should be based upon a theory of contract limited by the rule in *Hadley v. Baxendale*,¹⁴⁷ or whether the measure of damages should be in tort limited by the rule of proximate cause in *Palsgraf v. Long Island R.R.*¹⁴⁸ The latter is perhaps less restrictive, being based on the reasonably prudent man doctrine, whereas the former, being subjective, is somewhat limiting.¹⁴⁹

Though the cases discussed above do not decide this point, the language of the court in the *Cox v. Livingston* case¹⁵⁰ clearly brings Pennsylvania within the majority rule which holds that the plaintiff-client must prove that damages would have been recovered by him were in not for the negligence of the defendant-attorney.¹⁵¹ While this may seem a hardship on the plaintiff-client, it would certainly be an injustice to permit the plaintiff-clients to recover without such proof. The very real problem, which exists where the attorney has failed to bring the original action, is that the jury in the case against the attorney must determine what a jury would have done in the original action. The same type of problem exists in a different context where the attorney has failed to file an appeal prior to the expiration of the time limit.¹⁵² There, the court must determine the likely outcome of the appeal.

One case dealing with the measure of damages other than a liquidated debt is *Bodine v. Wayne Title & Trust Co.*¹⁵³ which, though not involving an attorney, certainly involves an analogous situation. Presumably the rule announced there would apply to cases of attorney malpractice. The defendant had been hired to search a title and failed to uncover a covenant under which the previous owner had agreed to erect fences. The court held that the measure of damages was the cost to keep and maintain a good and substantial fence as required by the covenant plus the cost of the original construction of

147. 9 Exch. 341, 156 Eng. Rep. 145 (1854).

148. 248 N.Y. 339, 162 N.E. 99 (1928).

149. See discussion in Coggin, *supra* note 4, at 232-33.

150. 2 W. & S. 103 (Pa. 1941). See text accompanying note 134, *supra*.

151. Coggin, *supra* note 4 and cases cited therein; Comment, *supra* note 13, at 1307-08; Leavitt, *supra* note 131, at 28-29; Annot., 45 A.L.R.2d 62 (1956).

152. Note, *Attorney's Negligence: The Belated Appeal*, 2 VAL. U. L. REV. 141 (1967).

153. 33 Pa. Super. 68 (1906).

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the fence, stating: "If from want of proper knowledge, from a failure to use proper means, or from carelessness in applying those means to the matter in hand, loss results to his client, the failure is his and he will be responsible."¹⁵⁴ In *Bodine* the court talked in language sounding in tort, and clearly applied an *ex delicto* measure of damages.

There has been one case in Pennsylvania in which a court has recognized several of the various rules of law applicable to legal malpractice actions—both those previously recognized in Pennsylvania, and those announced in other jurisdictions.¹⁵⁵ In *Woods v. Reading Trust Co.*,¹⁵⁶ defendant's decedent, an attorney, failed to file suit on behalf of plaintiffs within the two year statute of limitations for personal injury actions. The wife-plaintiff had been a guest passenger and suffered personal injuries when the car in which she was riding came into contact with a portion of the right-of-way of a traction company, which was alleged to be improperly constructed. The accident happened on April 28th, 1929, and there was evidence that defendant's decedent was hired sometime prior to February 20th, 1931, and was paid a retainer of one hundred dollars. Plaintiffs alleged damages in the malpractice case totalling \$20,000. The trial court permitted an amendment to the statement of claim at the trial which added, as an element of damages, the sum of \$2,350 for household expenses "made necessary by the accident." The court cited *Waln v. Beaver*,¹⁵⁷ to the effect that an attorney is liable for losses sustained by his client which flow from his negligence and stated: "The test of the attorney's liability is negligence, not gross negligence."¹⁵⁸

The trial court had charged that an attorney does not have a duty to prosecute a groundless or fruitless claim. If he believes it to be groundless, however, an attorney must inform his client within such time as will allow the client to hire another attorney.

It is clear the court in the *Woods* case spoke in terms which indicate a theory *ex delicto* and impliedly approved a measure of damages which sounds in tort. Unfortunately, the court failed to address itself to a question raised by the defendant which would have had a direct effect on damages in the case. The defendant raised the question as to whether a release issued to a joint tortfeasor with the intended defen-

154. *Id.* at 75.

155. See, e.g., discussion accompanying note 188.

156. 26 Berks County L.J. 115 (1934).

157. 161 Pa. 605 (1894).

158. 26 Berks County L.J. 115, 118 (1934).

dant, against whom the attorney was hired to bring suit, would act as a release of the intended defendant. His argument was that if the release were operative, it would have barred the action against the attorney, because there would be no damages allowable to a plaintiff who had released the intended defendant. It does not appear why the court did not address itself to this issue. The reason for a new trial based on the release was dismissed on the ground that while it had been raised as evidence which was acquired after the trial, the defendant could have discovered the fact of the release before trial by use of the knowledge which defendant had at that time.

Thus, the client who proves actionable negligence will recover only nominal damages unless he proves actual loss proximately caused by that negligence. The loss will be measured in the same manner as the damages in the client's lost claim would have been measured.

DEFENSES

In addition to the statute of limitations¹⁵⁹ and standing¹⁶⁰ to recover issues, an attorney can raise a number of defenses that may effectively limit his liability for negligent conduct. As will be seen, Pennsylvania courts have not clearly defined limits specifically in terms of available defenses. However, there has been some general discussion of defenses as restricted, of course, by the particular factual situations under consideration.

Contributory Negligence

As in any negligence action, the defense of contributory negligence will never be reached if the original negligence is found not actionable. For example, it has been said as to negligence in litigation that "the defense of contributory negligence of the client is seldom an important factor in attorney negligence cases for the simple reason that, as a rule, the entire responsibility for conducting the original litigation is entrusted to the defendant. . . ."¹⁶¹ However, there are cases in which contributory negligence will be an important factor. It would seem that when a client has some affirmative duty in regard to the legal matter or litigation in question, his contributory negligence could come into play

159. See discussion accompanying notes 112-131.

160. See discussion accompanying notes 73-111.

161. Coggin, *supra* note 4, at 233.

in a subsequent negligence action against his attorney. For example, in another jurisdiction where an attorney was employed to defend an action against his client, and the client failed to furnish his attorney with information which was vital to the defense of his case,¹⁶² it was held that contributory negligence could be a bar to recovery against the attorney. So also the doctrine has been applied where the client misrepresents facts in regard to a particular available defense.¹⁶³ Furthermore, a client has been held grossly negligent for failing to inquire about the disposition of certain money which his attorney collected for him.¹⁶⁴ One court¹⁶⁵ stated that contributory negligence would be available to a negligent attorney when his client "chose to disregard" his legal advice. In analogizing to medical malpractice cases in which contributory negligence is an available defense, the court said:

[T]here would seem to be no reason whatever why the same rule should not be applicable in a legal malpractice action where there is evidence that a client chose to disregard the legal advice of his attorney. In our opinion, any other rule would be grossly unfair.¹⁶⁶

Thus, other jurisdictions seem to say that where a client misinforms his attorney, refuses to cooperate, withholds information or evidence, or fails to follow his attorney's advice, he may effectively be confronted with the defense of contributory negligence. However, when a client merely acquiesces in the conduct of his attorney, the defense should not be available unless the client himself is an attorney.¹⁶⁷

In the Pennsylvania case of *Cox v. Livingston*,¹⁶⁸ the plaintiff employed Livingston to bring suit for collection of a debt from one Dubbs. Livingston neglected to bring suit, and approximately six months later he died. Suit eventually was filed by Cox against Livingston's administrators. After Livingston's death, and prior to the action against Livingston's administrators, suit was instituted against Dubbs by Livingston's partner. However, by this time Dubbs had become insolvent. In the action against Livingston's administrators, defendant argued that if Cox, after the death of Livingston, had diligently pursued his claim by immediately hiring another attorney to sue Dubbs, the debt

162. *Salisbury v. Gourgas*, 51 Mass. 442 (1845).

163. *Rapuzzi v. Stetson*, 160 App. Div. 150, 145 N.Y.S. 455 (1914).

164. *Simpson v. Dalziel*, 135 Cal. 599, 67 P. 1080 (1902).

165. *Theobald v. Byers*, 193 Cal. App. 2d 147, 13 Cal. Rptr. 864 (1961).

166. *Id.* at 150, 13 Cal. Rptr. at 866. However, the court held there was no contributory negligence as a matter of law where a client failed to ask his attorney about acknowledgment or recording of a chattel mortgage.

167. *Carr's Ex'rx. v. Glover*, 70 Mo. App. 242 (St. Louis Ct. App. 1897).

168. 2 W. & S. 103 (Pa. 1841).

could have been collected prior to Dubbs' insolvency. The jury found for the defendant in *Cox*, but on the basis of error in the jury instructions on another issue,¹⁶⁹ plaintiff was granted a new trial. Thus, in *Livingston v. Cox*,¹⁷⁰ the question of the plaintiff's diligence was again in issue. The Supreme Court of Pennsylvania, while not speaking in terms of "contributory negligence," said that defendant-attorney had the burden of showing that plaintiff, because of his own lack of diligence, was not entitled to damages. The court said:

A case may, indeed, be imagined in which the first attorney, though negligent of his duty, might not be liable beyond nominal damages, as for instance, when the plaintiff employed another agent or neglected to employ one after due notice of the death of the first, and the defendant continued, undoubtedly, solvent for a period sufficiently long to allow the collection of the money due by the exercise of ordinary diligence.¹⁷¹

The court appeared to apply a theory of contributory negligence in *Livingston* not to bar recovery (since the court placed the case within the theory of contract actions),¹⁷² but to reduce damages.¹⁷³

A contributory negligence theory has been used by defendant-attorneys in other Pennsylvania cases (hereinafter discussed), although no case contains a discussion of contributory negligence as such. In two cases, for example,¹⁷⁴ the defendant-attorney contended that the plaintiff could not now claim damages since, even after he was aware of the conduct which he later alleged to be negligence, he continued to employ and pay the attorney. The court in *Enterline v. Miller*¹⁷⁵ rejected this defense because it found the attorney had continually assured the plaintiff that matters were proceeding in a regular manner. However, in *Derrickson v. Cady*¹⁷⁶ the court held the jury should have been in-

169. See discussion accompanying notes 133-134.

170. 6 Pa. 360 (1847).

171. *Id.* at 366.

172. See discussion accompanying notes 136-137.

173. The court, however, held that plaintiff could collect the full amount of the debt even though diligence, after knowledge of the death of Livingston, *might* have recovered the debt for him. The court said:

When the first neglect is established, it will not do to turn the plaintiff round upon the allegation that success might have attended a subsequent exercise of stringent diligence, or to hold him to strict proof of the precise moment when insolvency overwhelmed the original defendant.

6 Pa. 360, 366 (1847). Thus, did the defendant fail to prove contributory negligence, or did the court simply reject this defense as placing an undue burden upon plaintiff under these circumstances?

174. *Derrickson v. Cady*, 7 Pa. 27 (1847); *Enterline v. Miller*, 27 Pa. Super. 463 (1905).

175. 27 Pa. Super. 463, 470 (1905).

176. 7 Pa. 27 (1847).

structed on the fact that the client continued to employ the attorney even after he was aware of the conduct which he later claimed to be negligence or lack of judgment of the attorney.¹⁷⁷

In still two other cases,¹⁷⁸ involving suits against attorneys for money collected by them for plaintiffs, defendants claimed that they were not liable because no demand had been made for the money¹⁷⁹ and no inquiry had been made.¹⁸⁰ In *Krause v. Dorrance*¹⁸¹ the court said it would allow the defense of no demand except when,

[T]he attorney has been guilty of fraud or *malpractice*, or of culpable negligence in not giving notice of the receipt of the money in a reasonable time; or when he puts in a sham plea for delay; or when he exhibits a manifest desire to baffle the plaintiff, and withhold from him his just demand. (Emphasis added.)¹⁸²

Although this language indicates that only an intentional act of fraud by the defendant-attorney will excuse plaintiff's failure to make a demand, it seems significant that proof of defendant's "malpractice" would create an exception to the general rule requiring a demand. Thus, the effectiveness of this defense in a malpractice action is not clear. But it would seem the language of *Krause*, referring to "malpractice," comports with the supposition that the same rule applies whether the failure to pay over money is fraudulent or negligent.¹⁸³

An important factor to remember in relation to the defense of contributory negligence is the nature of the action. If the action is *ex delicto*, evidence of contributory negligence on the part of plaintiff may completely bar recovery, while it will operate only to reduce damages if the action is *ex contractu*.

Release

In *Derrickson v. Cady*,¹⁸⁴ the Pennsylvania Supreme Court considered an action against an attorney for money received. The court held that an agreement between client and attorney releasing the client from

177. *Id.* at 33.

178. *Auge v. Darlington*, 185 Pa. 111, 39 A. 845 (1898); *Krause v. Dorrance*, 10 Pa. 462 (1849).

179. *Krause v. Dorrance*, 10 Pa. 462 (1849).

180. *Auge v. Darlington*, 185 Pa. 111, 39 A. 845 (1898); The court held that because plaintiff did not disaffirm defendant's act, she had ratified it.

181. 10 Pa. 462 (1849).

182. *Id.* at 464.

183. See discussion pp. 323-24, *supra*.

184. 7 Pa. 27 (1847).

attorney's fees and stating by the client "I do hereby release him" acted as a release by the client of any possible negligence claim for an error in judgment on the part of the attorney.

Others

Several jurisdictions have considered the defense of illegality,¹⁸⁵ and one has indicated by way of dictum that an attorney can avoid liability if he can show that the original defendant would have been unable to satisfy the judgment.¹⁸⁶ The case of *Woods v. Reading Trust Co.*¹⁸⁷ also raised the possible defense of the insolvency of the intended defendant where the attorney has failed to file suit within the period of the statute of limitations. There, in support of a motion for judgment n.o.v., the defendant raised the defense. The plaintiffs had introduced evidence to the effect that the assets of the intended defendant, a traction company, exceeded its liabilities for three years after the year in which the accident occurred. The court held it could not state as a matter of law that a verdict against the traction company, had suit been brought within the statute, would not be recoverable by the plaintiffs, and, since the defendant had not introduced any evidence as to the solvency of the traction company, the question was properly one for the jury. The jury had returned a verdict for plaintiffs. Thus, while the court recognized the defense, it was held not applicable.

CONCLUSION

Admittedly, the foregoing article necessarily leaves some unanswered questions in regard to the professional liability of Pennsylvania lawyers. However, the courts have spoken clearly on some issues, and at least have provided guidelines for future legal malpractice cases. For example, we know the six year statute of limitations will apply to such actions, and that the statute will begin to run at the time of the negligent act unless the client can show fraud or an act of negligence which, could not have been discovered through diligence until some future

185. *Goodman & Mitchell v. Walker*, 30 Ala. 482 (1857), held that part of a contract of employment was champertous was not a good defense to an action for negligence of an attorney in attempting to collect on a note. *Morris v. Muller*, 113 N.J.L. 46, 172 A. 63 (1934), held that if defendant was illegally practicing law and plaintiff knew it, he could not recover.

186. *Floro v. Lawton*, 187 Cal. App. 2d 657, 670-71, 10 Cal. Rptr. 98, 106 (1960).

187. 26 Berks County L.J. 115 (1934).

time. In the latter case the statute begins to run at the time of discovery, or at the time when the negligence should have been discovered.

Furthermore, it is clear that an attorney is bound to the standard of ordinary care and skill common to members of the profession. He has a duty to be familiar with well-settled principles of law and the rules of practice frequently used in the ordinary business of the profession. There are no Pennsylvania decisions indicating whether an attorney has a duty to be familiar with foreign law, but it would not seem unfair to impose such a duty when he is employed to handle a case involving conflicts of law questions. Similarly, he should have a duty to familiarize himself with federal rules of procedure when it might be advantageous to his case to proceed in the federal courts. Although the Pennsylvania courts have not addressed these last two issues, we can assume that no less than ordinary diligence would be expected of an attorney employed to handle such actions.

The courts have encouraged the use of expert testimony by a defendant-attorney to show that what he did was proper, except where the standard of care is clearly a question of law for the court. Of course, if the client is able to prove actionable negligence, he will still recover only nominal damages unless he proves actual loss proximately caused by that negligence. It is clear that such loss will be measured in the same manner as the damages in the client's original claim would have been measured.

All of the above issues are reached, of course, only after it has been determined that the plaintiff is a proper party-plaintiff, *i.e.*, that he is the one to whom defendant owed a duty, or that lack of privity will not bar his action. As we earlier pointed out, the privity question in Pennsylvania is still to be determined, but the trend in other jurisdictions is to allow suits by third parties when harm to them was foreseeable, and this seems to be a proper rule.

Fortunately, as will be noted by an examination of the footnotes in this article, a great majority of the actions for legal malpractice in Pennsylvania, which have been discovered, occurred prior to 1900. As was stated in *Lynch v. Commonwealth ex rel. Barton*: "Although, extensive authority has been exercised by the attorneys, we have had few cases of complaint, and the court has seldom been called on to state the limits of their authority, or of their responsibility to their clients: a circumstance highly honorable to the profession."¹⁸⁸

188. 16 S. & R. 367, 368 (Pa. 1827).

The Supreme Court of Pennsylvania, in 1827 concluded:

If a plaintiff wishes his attorney to have less power than is usually exercised, it would seem more consonant to right to give him in writing a special and limited authority. . . . As between the client and the attorney, I would, however, say the responsibility of the latter is as great and as strict here as in any country; I mean, where want of good faith, or attention to the cause is alleged; but in the exercise of the discretionary power usually exercised, I would not hold an attorney liable, where he acted honestly, and in a way he thought was for the interest of his client.¹⁸⁹

And we so conclude.

189. *Id.* at 368-69.