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THE STATE OF LEGAL MALPRACTICE IN OKLAHOMA

For a good many years the bar has been keenly aware of the large volume of litigation that takes place in the area of medical malpractice. The verdicts and settlements arising out of such actions have made headlines in newspapers throughout the land. Due to the sheer volume of medical malpractice suits, and the large money verdicts involved, it is no surprise that the area of medical malpractice has developed into a specialty among members of the trial bar. The volume of litigation in the area of legal malpractice has not, as yet, reached this level and, at the present time, there is an extraordinary dearth of Oklahoma case law relating to the professional liability of the attorney. But one cannot expect this situation to continue. For a long time the concept of privity of contract limited the attorney's liability to the pecuniary losses suffered by his client. In the early 1960's, in the now famous case of *Lucas v. Hamm*,¹ the Supreme Court of California rejected the privity test and held that third persons could recover from an attorney where these third persons suffered economic loss as a proximate result of the attorney's negligent legal practice. As the Court noted:

[T]he 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, and the policy of preventing future harm.²

In addition to potential liability to third persons, other

¹ 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821, *cert. denied*, 368 U.S. 987 (1962).

² *Id.* at 585, 364 P.2d at 687, 15 Cal. Rptr. at 823.

developments have contributed to the possible expansion of liability. The law itself is constantly increasing in volume and complexity, and clients are beginning to expect the attorney to provide them with a larger variety of services. These things tend to increase the probability that errors will occur, and, as a result, clients demand a constantly increasing degree of protection from professional negligence. This may be a never-ending cycle. The availability of professional liability insurance offers protection on one hand but encourages suits on the other, and the increased volume of these actions causes a rise in the cost of purchasing such insurance.

The purpose of this article is to consider the elements that make up a cause of action against an attorney for negligence. Of necessity, an attorney's liability in regard to cases relating to ethics, conflicts of interest, conversion, embezzlement, contempt, and the improper handling of criminal actions will not be discussed.

THE ELEMENTS OF A CAUSE OF ACTION

According to the late Dean Prosser, the traditional elements necessary for a cause of action in negligence are:

- 1) A duty, or obligation, recognized by the law, requiring the actor to conform to a certain standard of conduct, for the protection of others against unreasonable risks.

- 2) A failure on the part of the actor to conform to the standard required. These two elements go to make up what the courts usually have called negligence; but the term quite frequently is applied to the second alone. Thus it may be said that the defendant was negligent, but is not liable because he was under no duty to the plaintiff not to be.

- 3) A reasonably close causal connection between the conduct and the resulting injury. This is what is commonly known as "legal cause" or "proximate cause."

4) Actual loss or damage resulting to the interests of another.³

Oklahoma requires that similar elements be established in order to recover against an attorney for negligence. The plaintiff must prove:

1) The existence of the attorney-client relationship.

2) A breach of duty.

3) The attorney's negligence was the proximate cause of the injury.

4) Actual damages.⁴

THE EXISTENCE OF THE ATTORNEY-CLIENT RELATIONSHIP

As a general rule, the relation of attorney and client is contractual in nature, but such a contract contains certain unique and special features.⁵ It is a contract created by the employment of an attorney possessing the authority necessary to practice his profession, by a client competent to contract.⁶ This relationship is not dependent on the payment of fees.⁷ It is created by a valid offer and acceptance, and is either in the form of an offer by the client and an acceptance by the attorney, or an offer by the attorney and an acceptance by the client. Form is not important, as formality is not an essential element of the employment contract in general. Although a

³ W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 28, at 143 (4th ed. 1971).

⁴ Collins v. Warner, 382 P.2d 105 (Okla. 1963).

⁵ Martin v. Camp, 219 N.Y. 170, 114 N.E. 46 (1916); Kellogg v. Kellogg, 166 N.Y.S. 417 (1917).

⁶ Wheatland v. Maloney, 110 Cal. App. 288, 294 P. 499 (1930); Healy v. Gary, 184 Iowa 111, 168 N.W. 222 (1918); *Ex parte* Schneider, 294 S.W. 736 (Mo. App. 1927).

⁷ Pyeatt v. Estus, 72 Okla. 160, 179 P. 42 (1916); Healy v. Gary, 184 Iowa 111, 168 N.W. 222 (1918); *Ex parte* Schneider, 294 S.W. 736 (Mo. App. 1927).

writing is always desirable, the contract may be written or oral, expressed or implied.⁸

Once created, the relationship of attorney and client, and the powers, rights and obligations arising therefrom, continue until there has been a final and complete fulfillment of the particular object or case for which the attorney was employed.⁹ As is the case in other employment contracts, the relationship may always be terminated by mutual agreement of the parties.¹⁰ It should be noted, however, that while a client may discharge his attorney at any time, even without cause,¹¹ an attorney cannot terminate services to his client without cause and reasonable notice.¹² Depending upon the personal nature of the contract and the types of entities involved, the death¹³ or insanity¹⁴ of either party may also operate to terminate the employment contract.

It is the existence of the attorney-client relationship which creates the "duty" element of a cause of action. It should be noted, however, that the relationship of attorney and client need not exist in order to justify disciplinary action for misconduct by a member of the bar.¹⁵

⁸ *Hutton & Co. v. Brown*, 305 F. Supp 371 (S.D. Tex. 1969); *Lawrence v. Tschirgi*, 244 Iowa 386, 57 N.W.2d 46 (1953); *Prigmore v. Hardware Mut. Ins. Co. of Minn.*, 225 S.W.2d 897 (Civ. App. 1949).

⁹ *Calloway v. State*, 117 Okla. 43, 246 P. 873 (1926); *Sandall v. Sandall*, 57 Utah 150, 193 P. 1093 (1920).

¹⁰ *Poe v. Walker*, 183 Ark. 659, 37 S.W.2d 866 (1931); *Emerson-Grantingham Instrument Co. v. Olson*, 56 S.D. 132, 227 N.W. 567 (1929).

¹¹ *White v. American Law Book Co.*, 106 Okla. 166, 233 P. 426 (1924).

¹² *McLaughlin v. Nettleton*, 47 Okla. 407, 148 P. 987 (1915).

¹³ *City of Barnsdall v. Curnutt*, 198 Okla. 3, 174 P.2d 596 (1946); *Overstreet v. Overstreet*, 319 S.W.2d 49 (Mo. 1958); *Huddleston v. Wallow*, 117 Okla. 259, 246 P. 585 (1926).

¹⁴ *Corson v. Lewis*, 77 Neb. 446, 109 N.W. 735 (1906); *Sullivan v. Dunne*, 198 Cal. 183, 244 P. 343 (1926); *Joost v. Racher*, 148 Ill. App. 548 (1909).

¹⁵ *State v. Martin*, 410 P.2d 49 (Okla. 1965).

THE BREACH OF DUTY

When talking about "duty" and "breach of duty" we are really talking about a standard of conduct. If the performance in question falls below this standard we say that there has been a breach of duty. The difficulty is in measuring this standard. In non-professional negligence actions the standard of conduct is defined in terms of that expected from an abstract and mythical person known as the "reasonable man of ordinary prudence."¹⁶ Sometimes simply referred to as a reasonable man,¹⁷ one writer described him as follows:

He is an ideal, a standard, the embodiment of all those qualities which we demand of the good citizen. . . . He is one who invariably looks where he is going, and is careful to examine the immediate foreground before he executes a leap or a bound; who neither star-gazes nor is lost in meditation when approaching trapdoors or the margin of a dock; . . . who never mounts a moving omnibus and does not alight from any car while the train is in motion . . . and will inform himself of the history and habits of a dog before administering a caress; . . . who never drives his ball until those in front of him have definitely vacated the putting-green which is his own objective; who never from one year's end to another makes an excessive demand upon his wife, his neighbors, his servants, his ox, or his ass; . . . who never swears, gambles or loses his temper; who uses nothing except in moderation, and even while he flogs his child is meditating only on the golden mean. . . . In all that mass of authorities which bears upon this branch of the law there is no single mention of a reasonable woman.¹⁸

If there is such a thing as the "reasonable attorney," he is apparently an even more magnanimous individual than

¹⁶ *Vaughan v. Menlove*, 3 Bing. N.C. 468, 132 Eng. Rep. 490 (1738).

¹⁷ *Blyth v. Birmingham Waterworks Co.*, 11 Ex. 781, 156 Eng. Rep. 1047 (1856).

¹⁸ A. HERBERT, *MISLEADING CASES IN THE COMMON LAW* 12-16 (1930).

the reasonable man himself. For attorneys, and professional men in general, are required not only to exercise reasonable care, but to possess special knowledge and skill as well.¹⁹

Occasionally authority may be found suggesting that an attorney will be held liable only where he is chargeable with gross negligence. This is especially true in the earlier cases.²⁰ It would appear, however, that the better rule, and the rule that is presently followed in Oklahoma and a majority of American jurisdictions, is that an attorney is liable to his client for damages caused by a failure to exercise the ordinary care, skill, and diligence which is exercised and possessed by attorneys in practice in the jurisdiction.²¹

It has been suggested that an attorney's liability in negligence is subject to the same tests used to determine a doctor's liability, and, as a result, attorneys are required to exercise the same degree of care and skill in the legal profession as physicians and surgeons are required to exercise in the medical profession.²²

An excellent summary of the principles relating to actions for medical malpractice is set out in *Smith v. Yohe*:²³

1) [I]n the absence of a special contract, a physician neither warrants a cure nor guarantees the result of his treatment.

2) A physician who is not a specialist is required to possess and employ in the treatment of a patient the skill and knowledge usually possessed by physi-

¹⁹ *Ward v. Arnold*, 52 Wash. 2d 581, 328 P.2d 164 (1958); *Citizen's Loan Fund & Sav. Ass'n v. Friedley*, 123 Ind. 143, 23 N.E. 1075 (1890); *Hodges v. Carter*, 239 N.C. 517, 80 S.E. 2d 144 (1954).

²⁰ *Douglas Shoe Co. v. Rollwage*, 187 Ark. 1084, 63 S.W.2d 841 (1933).

²¹ *Collins v. Warner*, 382 P.2d 105 (Okla. 1963); *Sprague v. Morgan*, 185 Cal. App. 2d 519, 8 Cal. Rptr. 347 (1960).

²² *Olson v. North*, 276 Ill. App. 457 (1934).

²³ 419 Pa. 94, 194 A.2d 167 (1963).

cians [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.

3) [T]he burden of proof is upon the plaintiff to prove either that the physician did not possess and employ the required skill or knowledge or that he did not exercise the care and judgment of a reasonable man in like circumstances.

4) [T]he doctrines of *res ipsa loquitur* and exclusive control are not applicable in this area of the law.

5) [I]n 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. [T]he only exception to the requirement that expert testimony must be produced is where the matter under investigation is so simple, and the want of skill or care so obvious, as to be within the range of the ordinary experience and comprehension of even non-professional persons.

6) [A] physician is not liable for an error of judgment if . . . [he] 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.²⁴

Virtually the same provisions would appear to apply to legal malpractice.

1) A lawyer is not an insurer of the outcome of a case unless he makes a special contract to that effect.²⁵

2) An attorney engaging in the practice of law and contracting to prosecute on behalf of his client impliedly warrants

²⁴ *Id.* at 98, 194 A.2d at 170-71.

²⁵ *Babbit v. Bumpus*, 73 Mich. 331, 41 N.W. 417 (1889).

that he possesses the requisite degree of knowledge, ability, and skill necessary to practice his profession and which other attorneys similarly situated normally possess, and that he will exercise reasonable care and diligence.²⁶

3) The client has the burden of proving that he would have been successful in the prosecution or defense of the action in question were it not for the negligence of the attorney.²⁷

4) The doctrine of *res ipsa loquitur* is not applicable to legal malpractice.²⁸

5) The courts are split as to whether expert testimony should be required to make out a *prima facie* case against an attorney charged with malpractice.²⁹ For the most part, unlike medical malpractice cases, actions against attorneys have rarely involved the question of the necessity of expert testimony. This is due to the fact that the court itself sits as an expert on the subject in such cases. It has been said that it is the duty of the court to instruct the jury as to the want of skill or degree of negligence for which the attorney will be held answerable, and the duty that is imposed on him by law. It is to be left to the jury to determine, upon all the facts and circumstances of the case, whether the attorney has performed his duty. If they find he has not, they must determine whether his neglect or want of skill was of a character or degree sufficient to render him liable to the client, in accordance with the definitions furnished by the instructions of the court.³⁰ That is, it is for the court to determine the degree of care required, and the care exercised is a question of fact to be determined by the jury under proper instructions from the court.³¹ *Gambert v. Hart*³² illustrates these principles in holding

²⁶ *Hodges v. Carter*, 239 N.C. 517, 80 S.E.2d 144 (1954).

²⁷ *Collins v. Warner*, 382 P.2d 105 (Okla. 1963).

²⁸ *Olson v. North*, 276 Ill. App. 457 (1934).

²⁹ *Dorf v. Reeles*, 355 F.2d 488 (7th Cir. 1966); *Surity v. Lelner*, 155 So. 2d 831 (Fla. App. 1963).

³⁰ *Cochrane v. Little*, 71 Md. 323, 18 A. 698 (1889).

³¹ *Glenn v. Haynes*, 192 Va. 574, 66 S.E.2d 509 (1951).

³² 44 Cal. 542 (1872).

that an expert witness may not testify that certain conduct of an attorney constitutes professional negligence:

The (expert) witness was not called to prove any fact in the case, and his evidence, if admitted, would have been only an expression of his opinion, as an attorney, that the alleged acts or omissions of the defendant amounted to negligence in law. This was a question for the court, and not for the witness to decide. The facts being admitted or proved, it was a question of law for the court whether they established the negligence of the defendant.³³

An excellent restatement of the general rule as to liability of an attorney for negligence is set out in *Glenn v. Haynes*:³⁴

While there can be no doubt that for any misfeasance or unreasonable neglect of an attorney whereby his client suffers a loss an action may be supported and damages recovered to the amount of that loss, yet it is equally well established that an attorney in the management of his professional business is not bound to extraordinary diligence, but only to use a reasonable degree of care and skill, reference being had to the character of the business he undertakes to do, and is not to be answerable for every error or mistake, but, on the contrary, will be protected if he acts in good faith, to the best of his skill and knowledge, and with an ordinary degree of attention. While some law writers and some adjudged cases state that an attorney is liable to his client for "gross negligence" only, yet it would appear that even when such term is used it merely means the want or absence of "reasonable care and skill."

A majority of jurisdictions follow the rule that an attorney is liable for damages resulting to his client which are proximately caused by the attorney's failure to exercise the degree of skill, care, and diligence which is commonly exercised and possessed by practicing attorneys in the jurisdiction

³³ *Id.* at 549.

³⁴ 191 Va. 574, 577-78, 66 S.E.2d 509, 512-13 (1951).

in which the client's cause of action arose.³⁵ But where the attorney's negligence is predicated upon his alleged ignorance of the law, the attorney will not be liable in negligence where the question in issue is a controversial point of law and he has reached a conclusion which has been proven erroneous by a subsequent authoritative decision:

An attorney who acts in good faith and in an honest belief that his advice and acts are well founded and in the best interest of his client is not answerable for a mere error of judgment or for a mistake in a point of law which has not been settled by the court of last resort in his state and on which reasonable doubt may be entertained by well-informed lawyers.³⁶

Failure to Observe Local Statutes and Decisions

As noted in the case of *Citizens' Loan, Fund & Savings Association v. Friedley*³⁷ in which an attorney was being sued for a mistake concerning the law applicable to the state of title on a piece of mortgaged property, an attorney is not liable for every error or mistake. But he will be liable if his client's interests suffer due to his failure to understand and apply those rules and principles of law which are well established and clearly defined in the elementary books, or those declared in cases that have been duly reported, and published for a length of time sufficient to have become known to those who exercise reasonable diligence in keeping pace with the literature of the legal profession. An attorney is without excuse for being ignorant of the ordinary settled rules of pleading and practice and of the statutes of his own state.

Negligence in Initiating and Conducting Litigation

In *Boyle v. Krebs and Schulz Motors, Inc.*³⁸ where failure to move to restore a case to the trial calendar within a speci-

³⁵ *Collins v. Warner*, 382 P.2d 105 (Okla. 1963).

³⁶ *Id.* at 109.

³⁷ 123 Ind. 143, 23 N.E. 1075 (1890).

³⁸ 18 App. Div. 2d 1010, 239 N.Y.S.2d 143 (1963).

fied period after it was stricken was due primarily to neglect of the plaintiff's attorney, the court held that the attorney would be required to personally pay the costs of restoring the case to the trial calendar. This decision echoes the language of *Gambert v. Hart*,³⁹ which stated that losses suffered by a client as a result of his attorney's negligence in failing to prepare, file or serve pleadings essential to the proper presentation of the client's cause were recoverable from the client's attorney.

Negligence in Failing to Protect the Client's Right to Appeal

*Pete v. Henderson*⁴⁰ illustrates the rule that a client can recover damages for negligence in permitting a judgment rendered against him to become final if he can show that an appeal would have resulted in a judgment more favorable to the client.

An attorney may also be held liable for taking an appeal which he should have realized would be completely fruitless. In the case of *In Re Hegarty's Estate*⁴¹ the court pointed out that the statute was clear as to the length of time required for giving notice, and it would have to be assumed that the attorneys knew of the statutory provision in question and that they could count. Therefore, they had no excuse for putting their client to the expense of a hopeless appeal.

Negligence in Handling Collections

As illustrated in a recent Mississippi decision involving an action against an attorney for negligence in allegedly permitting the statute of limitations to run against suit on open account, the supreme court of that state held that the amount of actual loss sustained by the client as a result of the attorney's negligence was a question for the jury. The court stated:

In a suit by a client against an attorney for neg-

³⁹ 44 Cal. 542 (1872).

⁴⁰ 124 Cal. App. 2d 487, 269 P.2d 78 (1954).

⁴¹ 47 Nev. 369, 222 P. 793 (1924).

ligence in conducting the collection of a claim, whereby the debt was lost, the burden rests on the former to allege and prove every fact essential to establish such liability. He must allege and prove that the claim was turned over to the attorney for collection; that there was a failure to collect; that this failure was due to the culpable neglect of the attorney; and that, but for such negligence, the debt could, or would, have been collected. Hence, where a claim is alleged to have been lost by an attorney's negligence, in order to recover more than nominal damages it must be shown that it was a valid subsisting debt, and that the debtor was solvent.⁴²

*Negligence in the Preparation and Recordation
of Legal Documents*

In *Degen v. Steinbrink*,⁴³ an attorney employed to draft a mortgage to establish a lien on property outside of the state was held liable to his client for failure to draw the mortgage so as to comply with the statutes of the other state. The court pointed out that although a lawyer was not presumed to know the statutes of another state, he was presumed to know that the statutory law of one state usually differs from the statutory law of another. When he undertakes the preparation of papers to be filed in a foreign state, if he has no knowledge of that state's statutes, it is his duty to inform himself, for, like an artisan, when he undertakes work he represents that he can perform it in a skillful and capable manner.

An attorney will be held liable for negligent failure to record papers and will be responsible for any damage resulting from his negligence.⁴⁴

⁴² *Thompson v. Erving's Hatcheries, Inc.*, 186 So. 2d 756, 759 (Miss. 1966).

⁴³ 202 App. Div. 477, 195 N.Y.S. 810 (1922).

⁴⁴ See *Stuart v. Walkup*, 114 N.Y.S. 483 (App. T. 1909).

Negligent Handling of Funds Collected for the Client

When an attorney collects money for a client, the former impliedly agrees that he will promptly pay this money over to the latter. Collection of money by an attorney for his client is analogous to the receipt of personal property. The rules that govern his liability for the loss of the client's property received are precisely the same as those which govern in the case of a trustee. In the event of loss, he will not be excused unless he exercises the same caution in protecting his client's property as a prudent man would exercise in the protection of his own property of like character.⁴⁵

Negligence in Title Search

As legal advice often becomes necessary in purchasing and conveying real property, it is a well settled rule that an attorney may be held liable to his client for his negligence in investigating and examining the title to real property where said attorney is employed for that undertaking. This rule is applicable whether the examination is for the prospective purchaser, the grantor, or a prospective lender.⁴⁶

Acting Beyond Scope of Authority

Where an attorney has been disobedient to the proper instructions of his client, he will be held liable for any loss resulting in consequence of such disobedience. As stated in *Cornell v. Edsen*,⁴⁷ where an attorney wrongfully dismissed a cause of action which he had been employed to prosecute, the client's right to recover depends, not upon the attorney's fraud and misrepresentation, but upon his breach of professional duty, and would exist even where the breach was unintentional.

⁴⁵ Glenn v. Haynes, 192 Va. 574, 66 S.E.2d 509 (1951).

⁴⁶ National Sav. Bank v. Ward, 100 U.S. 195 (1897).

⁴⁷ 78 Wash. 662, 139 P. 602 (1914).

THE PROXIMATE CAUSE

Before a client can recover damages against an attorney for negligence it must appear that the negligence was the proximate cause of the injury which resulted to the client. Generally speaking, the attorney may not be held liable unless it appears that the client would have been successful if the action had been properly prosecuted or defended.⁴⁸

In a malpractice action, it is the client who must bear the burden of proof. There is no presumption that an attorney has been guilty of a lack of skill or want of care arising merely from the fact that he failed to be successful in an undertaking. Until the contrary has been made to appear, he is presumed to have discharged his duty, whether moral or legal, until proven otherwise.⁴⁹

Applying these principles to an action by a client against his attorney for malpractice, even if the attorney was negligent in the defense of the suit, the attorney will not be liable if the client would not have recovered regardless of the care exercised by the attorney.⁵⁰

DAMAGES

The action for negligence developed mainly out of the old form of action on the case. As a result, it retained the rule that an essential element of the plaintiff's case was proof of damages.⁵¹ In a malpractice action, the proper element of damages is the amount the client would have recovered had it not been for the attorney's negligence,⁵² or the amount of the

⁴⁸ *Sutton v. Whiteside*, 101 Okla. 79, 222 P. 974 (1924).

⁴⁹ *Lynch v. Munson*, 61 S.W. 140 (Tex. Civ. App. 1901) (dictum).

⁵⁰ *Masters v. Dunston*, 256 N.C. 520, 124 S.E.2d 574 (1962) (dictum).

⁵¹ W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 28, at 143 (4th ed. 1971).

⁵² *Lally v. Kuster*, 177 Cal. 783, 171 P. 961 (1918).

judgment suffered by the client.⁵³ Fees which are paid to an attorney entrusted with litigation⁵⁴ and expenses the client incurred as a result of the attorney's negligence are also proper elements of damage which the client may recover.⁵⁵

In *Jamison v. Weaver*,⁵⁶ the client was allowed to recover costs from his attorney that were charged to the client on appeal because the attorney failed to prosecute the appeal. The court said that the damages were the direct result of a breach of duty on the part of the attorney, even though the client might have been held for other costs if the appeal had been pressed.

Where title to property is lost, presumptively the value of the property is the proper measure of damages. In *Whitney v. Abbott*,⁵⁷ the client engaged an attorney to bring suit on a conditional sales contract. The client instructed the attorney that he did not wish to lose title to the property, but wanted to recover the purchase price rather than the property. When the attorney brought suit for the entire purchase price although some of the installments were not yet due, this in effect recognized the sale as absolute and waived the client's title under the conditional sales contract. The court held that the attorney was liable in damages for the market value of the property at the time of bringing the suit which deprived the client of title.

A client will not be prevented from recovering against an attorney even in an action based on an unliquidated claim,⁵⁸ but apparently the client will have to undertake the proof of two actions in one. In such cases, the jury in the malpractice action is without the benefit of evidence which presumably

⁵³ *Pete v. Henderson*, 124 Cal. App. 2d 487, 269 P.2d 78 (1954).

⁵⁴ *Id.*

⁵⁵ *French v. Armstrong*, 80 N.J.L. 152, 76 A. 336 (1910).

⁵⁶ 81 Iowa 212, 46 N.W. 996 (1890).

⁵⁷ 191 Mass. 59, 77 N.E. 524 (1906).

⁵⁸ *King v. Fourchy*, 47 La. Ann. 354, 16 So. 814 (1895).

would have been introduced by the opposing party in the original action, where the effect of the negligence of the attorney was to prevent that action.

As stated in *Patterson & Wallace v. Frazer*:⁵⁹

It is known that judgments for damages, actual and exemplary, are recovered and collected for slander, and it will not do to say that attorneys at law are not liable to their clients for negligence in managing such cases, because of the difficulty a jury may have in arriving at the damages occasioned by such negligence, for this would absolve them from all liability for negligence in such cases. To deny an injured party the right to recover actual damages in cases of this character, because they are of a nature that cannot be certainly measured, would be to enable the defendants to profit by and speculate upon their own wrongs.

CONTRIBUTORY NEGLIGENCE

Surprisingly, unlike the other traditional defenses in negligence actions such as the statute of limitations and release, claims of fault on the part of the client, or contributory negligence, seldom arise in negligence actions against attorneys. Perhaps this is because the client, normally, has placed the attorney in complete control of the direction of the proceedings. There are, however, a few cases where the conduct of the client was a factor in absolving the lawyer from liability.

In the Oklahoma case of *Tishomingo Electric Light & Power Co. v. Gullett*⁶⁰ the attorney was charged with negligent and careless inattention to his professional duties in that he did not file an appeal to the Supreme Court of the State of Oklahoma until after the time to commence such proceedings had expired. As a result, the proceedings were dismissed

⁵⁹ 93 S.W. 146, 148 (Tex. Civ. App. 1906) *rev'd on other grounds*, 100 Tex. 103, 94 S.W. 324 (1906).

⁶⁰ 52 Okla. 180, 152 P. 849 (1915).

and the client was compelled to pay a judgment of \$1,564.90. The court rendered a judgment in favor of the attorney when it became apparent that the delay in filing the appeal was the result of the client's wish to delay the proceedings as long as possible so that he could avoid payment of the judgment. The court held that in such a situation, where there had never been any actual intention on the part of the client to appeal, a verdict in favor of the defendant attorney was proper.

In *Salisbury v. Gourgas*,⁶¹ where an attorney was charged with negligence in failing to defend an action, the attorney stated that he had no defense to make because his client had not given him the necessary information to do so. The judge thereupon instructed the jury that the attorney's statements were not evidence of the truth of the facts stated, but were admissible to show the surrounding circumstances that occurred at the time of the alleged negligence.

*Patterson & Wallace v. Frazer*⁶² concerned an action against attorneys for alleged negligence in failing to file a bond. As a result of said failure, the client's action was dismissed after the statute of limitations had run. The court held that an instruction was not objectionable in defining contributory negligence as a negligent act or omission on the part of the client which concurs or cooperates with a negligent act or omission on the part of the attorneys which was the proximate cause of the injury or damages complained of, providing that the members of the jury were otherwise instructed that if they believed that the client was in fact guilty of negligence in failing to secure the bond herself the verdict should be for the attorneys, as the client's contributory negligence was the proximate cause of the loss.

⁶² 93 S.W. 146 (Tex. Civ. App. 1906), *rev'd on other grounds*, 100 Tex. 103, 94 S.W. 324 (1906).

⁶¹ 51 Mass. (10 Met.) 442 (1845).

CONCLUSION

It goes without saying that the foregoing article necessarily leaves some unanswered questions in regard to an attorney's professional liability.

Although the medical-legal malpractice analogy will undoubtedly continue to be a guiding factor in the development of legal malpractice concepts, one must question the propriety and validity of such an analogy. Attorneys and physicians can both be classified as professional men, and both are required not only to exercise reasonable care in what they do, but to possess a standard minimum of special knowledge and ability as well. But to go beyond these points of comparison one must overlook significant differences between the medical and legal professions.

While medicine is a science, law is a practical art. In deciding how to best serve his client, an attorney must take into account a number of considerations that a physician need not be concerned with. Proper medical treatment does not vary with the peculiarities and prejudices of judges and jurors or the political, racial, and social characteristics of a particular community. An attorney, on the other hand, must weigh each of these variables carefully, and in many cases must give more weight to his client's financial situation than to all of the other variables combined.

These considerations, along with the constantly increasing volume and complexity of the law, require today's lawyer to maintain an ever higher level of expertise in order to meet the greater levels of care and skill required of him. For the lawyer who fails to meet these requirements, there is an increasing probability that he will find himself in a courtroom in a role to which he is not accustomed.

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