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Negligent conduct by an attorney may, at times, injure persons outside the attorney-client relationship. Until recently a negligent attorney has been able to hide behind the shield of "privity" and thereby avoid liability to these persons. Professor Averill discusses the history of the privity rule as applied to attorneys and analyzes some recent cases abolishing the rule. He concludes that policy considerations demand that, within reasonable guidelines, actions by third persons against attorneys be recognized.

## ATTORNEY'S LIABILITY TO THIRD PERSONS FOR NEGLIGENT MALPRACTICE

*Lawrence H. Averill, Jr.\**

### INTRODUCTION

**N**EGLIGENT malpractice<sup>1</sup> actions have always been a cause of concern for the professional. This concern derives part of its existence from the professional's desire to maintain a good public image or reputation in the particular community in which he practices. A negligent malpractice action against a professional, it is said, will destroy public confidence in this person.<sup>2</sup> This is especially applicable to the practicing attorney who, in the daily activities of his business, is in constant contact with lay individuals in the community.<sup>3</sup>

Most negligent malpractice litigation against attorneys has sprung directly from the attorney-client relationship.

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1. The general term "malpractice" when applied to the legal profession includes fraud, breach of fiduciary duty and negligence. Note, *Attorney Malpractice*, 63 COLUM. L. REV. 1292 (1963). See Note, *The Bases of the Attorney's Liability to His Client for Malpractice*, 37 VA. L. REV. 428 (1951). Since this article is concerned only with a malpractice action brought for negligent conduct, it is necessary that the general term be refined.
2. The use of the term "malpractice" could very well be a material cause for this conclusion. See Wade, *The Attorney's Liability for Negligence*, in PROFESSIONAL NEGLIGENCE 217, 237 (Roady & Anderson eds. 1960). Dean Wade argues that if the action were termed as "negligence," such a conclusion would not be as valid. *Ibid.*
3. The size of the community where the attorney practices may be important in determining the degree to which the public confidence is affected.

Generally, attorney-defendants have been extremely successful in escaping liability from the unhappy client's claim. This has been particularly true when the alleged negligence has occurred during a trial.<sup>4</sup>

Another area in which attorney-defendants have been successful is when a person outside the attorney-client relationship brings the action. For, until recently, the rule of non-liability of an attorney to third persons has been immutable.<sup>5</sup> This article will attempt to examine a slight but important change in attitude toward this position.

Before this discussion begins, a brief survey of the basic elements of any negligent malpractice action is provided for background information.<sup>6</sup> These elements are the form of action and the bases of liability.

### Form of Action

The authorities agree that a negligent malpractice cause of action falls within the "gray area" between an action *ex contractu* and an action *ex dilecti*.<sup>7</sup> In any such cause of action there can be seen a contract, either express or implied,

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4. See Annot., 45 A.L.R.2d 5 (1956). See also discussion, p.p. 383-84, *infra*. There is a very good reason for this. In most every litigation there is a losing party. Rather than saying the case was lost because the other side was right, the losing party frequently blames his attorney. Obviously an attorney should not be liable to his clients for every case he loses. All courts agree that an attorney is not a guarantor of a result in litigation.
  5. See, e.g., *Jacobsen v. Overseas Tankship Corp.*, 11 F.R.D. 97 (E.D. N.Y. 1950).
  6. For a more complete analysis of the elements of a negligent malpractice action see, e.g., Blaustein, *Liability of Attorney to Client in New York for Negligence*, 19 BROOKLYN L. REV. 233 (1953); Coggin, *Attorney Negligence—A Suit Within a Suit*, 60 W. VA. L. REV. 225 (1958); Gardner, *Attorney's Malpractice*, 6 CLEV.-MAR. L. REV. 264 (1957); Hutcherson, *Lawyers, How Is Your Malpractice?*, 30 INS. COUNSEL J. 423 (1963); Isaacs, *Liability of the Lawyer for Bad Advice*, 24 CALIF. L. REV. 39 (1935); Wade, *The Attorney's Liability for Negligence*, in PROFESSIONAL NEGLIGENCE, 217 (Roady & Anderson eds. 1960), [reprinted in 12 VAND. L. REV. 755 (1959)]; Comment, *Attorney Malpractice*, 63 COLUM. L. REV. 1292 (1963); Notes, *Liability of an Attorney in the Conduct of Litigation*, 12 SYRACUSE L. REV. 494 (1961); Comment, *Malpractice at the Bar*, 26 TENN. L. REV. 525 (1959); Note, *The Bases of the Attorney's Liability to his Client for Malpractice*, 37 VA. L. REV. 429 (1951); 7 C.J.S. *Attorney & Client* §§ 140-46, 155-57 (1937); AM. JUR. 2D *Attorneys at Law* §§ 167-90 (1963).
  7. PROSSER, *The Borderland of Tort and Contract*, in SELECTED TOPICS IN THE LAW OF TORTS 380 (1954); Thornton, *The Elastic Concept of Tort and Contract as Applied by the Courts of New York*, 14 BROOKLYN L. REV. 196 (1948). See Page, *Selecting the Remedy*, 3 AM. JUR. TRIALS 648-52 (1965).

gratuitous<sup>8</sup> or for consideration. A negligent performance of such a contract is, of course, a breach of contract. However, in the title of the action itself there appears the word negligent which sounds in tort. The courts have never discussed the problem to any great extent<sup>9</sup> but instead have used the various concepts of a contract or tort action in order to arrive at a desired result, *e.g.*, to bar or to promote recovery. Statute of limitations problems probably represent the best illustration of this.<sup>10</sup> Normally the contract limitation is longer than the tort limitations.<sup>11</sup> If the length of time between the negligence and the commencement of the action is between the two limitation periods, one court might promote recovery by holding the action sounds in contract; whereas another court may find the action sounds in tort and permanently prevent recovery. Before passing on, it should be noted that some courts permit the plaintiff to elect the form of action.<sup>12</sup>

The modern procedure rules have eliminated much of the problem in this area.<sup>13</sup> The plaintiff need only state facts upon which relief may be granted. In addition, alternative pleading is permitted so that, if in doubt, the plaintiff can form his pleading in breach of contract and in tort.<sup>14</sup>

There may be problems, however, when such concepts, as assignment in contracts and contributory negligence in tort, do not have their counterpart in the other action. In addition the statute of limitations problem is still present. The importance of these factors will necessarily vary according to the facts of each case.

If the cause of action is framed in tort, the plaintiff will have to prove the necessary elements of negligence, *i. e.*, duty,

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8. The fact that services are rendered gratuitously has not prevented an attorney from being held liable for negligence. *E.g.*, *Stephens v. White*, 2 Wash. 203 (Va. 1796). But the attorney is not liable for incorrect advice given casually to a friend or acquaintance. *Fish v. Kelly*, 17 C.B. (N.S.) 194, 144 Eng. Rep. 78 (C.P. 1864).
  9. See generally PROSSER, *supra* note 7.
  10. Other material differences between the two actions include, for example, survival of the cause of action, conflict of laws rules, municipal or charitable immunity and damages. See generally Page, *supra* note 7, at 652-68. See also PROSSER, *supra* note 7, at 429-50.
  11. Compare WYO. STAT. § 1-18 (1957) (Four year limitation for tort, with Wyo. STAT. § 1-17 (1957) (Eight year limitation for contract not in writing).
  12. *E.g.*, *Lucas v. Hamm*, 15 Cal. Rptr. 821, 824 n.2, 364 P.2d 685, 688 n.2, cert. denied, 368 U.S. 987 (1961).
  13. 7 AM. JUR. 2D *Attorneys at Law* § 182 (1963). But see PROSSER, *supra* note 7, at 429-33.
  14. See, *e.g.*, *Lucas v. Hamm*, *supra* note 12.

breach of duty, a casual relationship and damage.<sup>15</sup> If the cause of action is framed in contract, the plaintiff must prove the contract, express or implied,<sup>16</sup> and show that the attorney did not exercise the necessary degree of care, skill and knowledge in the performance of the contract.<sup>17</sup> The latter element will be based upon the negligence standard.<sup>18</sup>

### Bases of Liability

Although there are a multitude of ways to express the standard of care, generally an attorney, who undertakes to provide legal services for a client, is liable "for the want of such skill, care and diligence as men of the legal profession commonly possess and exercise in such matters of professional employment."<sup>19</sup> Whether or not an attorney has failed to meet this standard is normally determined by the jury<sup>20</sup> although courts have sometimes taken it upon their own to decide this problem as a matter of law.<sup>21</sup>

An important factor to consider is the circumstance under which the alleged negligence occurred.<sup>22</sup> For example, did the negligent conduct or omission occur in the court room, in advising a client, or in drafting and preparing legal documents. Although in retrospect it is erroneous, a decision or judgment, which must be made quickly without time for con-

15. RESTATEMENT (SECOND) OF TORTS § 281 (1965).

16. RESTATEMENT OF CONTRACTS § 1 (1932).

17. *Id.* § 318.

18. *See* Wade, *supra* note 6, at 218.

19. Savings Bank v. Ward, 100 U.S. 195, 199-200 (1879). A "general" rather than a "community" standard has generally been applied. Wade, *supra* note 6, at 224 n.40. A trend toward the "community" standard may be occurring. Collins v. Wanner, 382 P.2d 105, 108 (Okla. 1963) ("that degree of care, skill and diligence which is commonly possessed and exercised by attorneys practicing in the jurisdiction in which the clients cause of action arose . . ."); RESTATEMENT (SECOND) OF AGENCY § 379 (1958); RESTATEMENT (SECOND) OF TORTS § 299A (1965). *Cf.* Gleason v. Title Guarantee Co., 317 F.2d 56 (5th Cir. 1963).

20. Wade, *supra* note 6, at 228.

21. *Ibid.* *See, e.g.,* Lucas v. Hamm, 15 Cal. Rptr. 821, 826, 364 P.2d 685, 690, *cert. denied*, 368 U.S. 987 (1961) when the Supreme Court of California stated:

In view of the state of the law relating to perpetuities and restraints on alienation and the nature of the error, if any, assertedly made by defendant in preparing the instrument, it would not be proper to hold that defendant failed to use such skill, prudence and diligence as lawyers of ordinary skill and capacity commonly exercise.

The trial court's dismissal denying leave to amend was affirmed. This part of the Lucas opinion was criticized in 75 HARV. L. REV. 620, 622 (1962); 14 STAN. L. REV. 580, 582 n.9 (1962).

22. Wade, *supra* note 6, at 227. *Cf.,* Byrnes v. Palmer, 18 App. Div. 1, 45 N.Y.S. 479 (2d Dept. 1897) (The court made a distinction between a lawyer conducting litigation and a lawyer certifying title to real estate).

temptation or reflection such as during the course of a trial may not make the attorney liable whereas one which is made with time for deliberation such as in drafting a will may.

Another consideration should be the amount of expertise which the attorney has on the legal question involved.<sup>23</sup> For example, an attorney who represents or is known to be an expert in the field of taxation might be liable for failing to know or learn of a peculiar or intricate rule in this area of the law whereas the one not so skilled might not be.

Regardless of the above factors, the attorney is not liable for a mere error in judgment when a question of the proper law to use, or the proper action to take, is confused or unsettled.<sup>24</sup> Also, when such a state of doubt exists, he is not to be second-guessed.<sup>25</sup>

The burden of proof has consistently been held to be on the client alleging negligence.<sup>26</sup> In addition, he has not had the advantage of such doctrines as *res ipsa loquitur* and negligence per se.<sup>27</sup> Contrary to the general procedure in medical malpractice actions, normally expert witnesses have not been required and sometimes have even been excluded.<sup>28</sup>

Unless the attorney guarantees a favorable result or the correctness of his product, the client who sues his attorney must prove that the harm he suffered was caused by the attorney's failing.<sup>29</sup> This requirement is true whether the client's claim is based on contract or tort. In the majority of the situations this is no more than any plaintiff must do. However, in an action brought by a client against an attorney for failing to properly present a claim or defense, he is also required

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23. Wade, *supra* note 6, at 238; Hutcheson, *supra* note 6, at 429-30. Cf., RESTATEMENT (SECOND) OF TORTS § 299A, comment *d* (1965) and RESTATEMENT (SECOND) OF AGENCY § 379(1), and comment *d*, at 180 (1958).

24. See, e.g., Lucas v. Hamm, 15 Cal. Rptr. 821, 364 P.2d 685 (1961); Savings Bank v. Ward, 100 U.S. 195 (1879).

25. See, e.g., *ibid.*

26. Wade, *supra* note 6, at 228; AM. JUR. 2D Attorneys at Law § 188 (1963).

27. Wade, *supra* note 6, at 228-29.

28. Notes, *Use of Expert Testimony in Attorney Malpractice Cases*, 15 Hastings L. Rev. 584 (1964). See Gambert v. Hart, 44 Cal. 542 (1872). But see Dorf v. Relles, 355 F.2d 488 (7th Cir. 1966) (Expert witness required to prove prima facie case against attorney for negligence).

29. Wade, *supra* note 6, at 231. "The measure of damages is not the amount of the attorney's fee, but is instead compensation for the injury which the plaintiff received and may be more or less than the fee; and the burden is on the plaintiff to prove the damages." *Id.* at 233. See also Coggin, *supra* note 6, at 234-35.

to prove that that claim or defense was valid.<sup>30</sup> In other words, the proof of causation entails a "suit within a suit."<sup>31</sup> This additional aspect of causation has often proved to be a difficult burden upon the client.<sup>32</sup>

The remainder of this article will discuss and analyze a problem which recently has become of interest to the legal profession—who, if anyone, outside of the attorney-client relationship may sue the attorney.

### THE THIRD PARTY ACTION Historical Background

The historical analysis of the third party action against an attorney centers around a judicial sextet.<sup>33</sup> These six decisions by three courts not only represent the past and the present law, but also will materially influence the future law on this subject in the United States.

The Supreme Court of the United States was the first appellate court in this country to face the problem when in 1879 it decided the landmark case, *Savings Bank v. Ward*.<sup>34</sup> Its facts concerned an action by a bank against an attorney for negligent malpractice. Plaintiff alleged that the attorney had negligently investigated the title to a piece of real estate and that plaintiff had relied upon the attorney's certificate of title. This title investigation had been requested and paid by the supposed owner of the property for the purpose of obtaining a loan. Plaintiff, on the faith of attorney's certifi-

30. *E.g.*, *Better Homes, Inc. v. Rodgers*, 195 F. Supp. 93 (D.C. W.Va. 1961); *Gross v. Eannace*, 44 Misc. 2d 797, 255 N.Y.S.2d 625 (Sup. Ct. 1964); *Gay & Taylor, Inc. v. American Cas. Co.*, 381 S.W.2d 304 (Tenn. Ct. App. 1964).

31. *Coggin*, *supra* note 6, at 233-38.

32. *See Wade*, *supra* note 6, at 231-32.

33. *Savings Bank v. Ward*, 100 U.S. 195 (1879); *Buckley v. Gray*, 110 Cal. 339, 42 Pac. 900 (1895); *Glanzer v. Shepard*, 233 N.Y. 236, 135 N.E. 275 (1922); *Ultramares Corp. v. Touche*, 255 N.Y. 170, 174 N.E. 441 (1931); *Biakanja v. Irving*, 49 Cal. 2d 647, 320 P.2d 16, 65 A.L.R.2d 1358 (1958); *Lucas v. Hamm*, 15 Cal. Rptr. 821, 364 P.2d 685, *cert. denied*, 368 U.S. 987 (1961).

It is felt that these six cases best represent the development of the law in this area. There are other cases, however, which are important. *See, e.g.*, *Weintz v. Kramer*, 44 La. An. 35, 10 So. 416 (1892) (Notary held liable to legatee for negligent execution of a will); *Lawall v. Groman*, 180 Pa. 532, 37 Atl. 98 (1897) (Attorney held liable to third person for negligent title certificate); *Schirmer v. Nethercutt*, 157 Wash. 172, 288 Pac. 265 (1930) (No privity between plaintiff and defendant attorney but the court did not consider the problem); *Ward v. Arnold*, 52 Wash. 2d 581, 328 P.2d 164 (1958) (Attorney held liable to disappointed legatee but legatee had paid the attorney's fee).

34. 100 U.S. 195 (1879).

cate, loaned the owner \$3,500 and the latter executed a trust-deed in plaintiff's favor. The trust-deed turned out to be valueless since the owner had transferred title to the property prior to the loan. It was conceded that had the attorney properly investigated the owner's title, he would have discovered a prior recorded deed by the supposed owner. Significantly, the Court found as a matter of fact that there had been neither a contract nor any communication between the plaintiff and the attorney. The attorney succeeded in persuading the trial judge to direct the jury to give a verdict in his favor. Judgment was rendered accordingly.

The primary concern of the Court was the question of privity of contract between the parties. Relying upon English precedent<sup>35</sup> as his principal authority, Justice Clifford, for the majority, held:

[T]he 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.<sup>36</sup>

Since the Court found no special circumstances,<sup>37</sup> it, therefore, affirmed the trial court's judgment in favor of the attorney. The principal reasons the Court propounded for the requirement of privity were those embodied in the infamous case *Winterbottom v. Wright*.<sup>38</sup> Quoting the significant language from *Winterbottom*, the Court expressed fear of "ab-

35. *Fish v. Kelly*, 144 Eng. Rep. 78 (C.P. 1864); *Robertson v. Fleming* (1861), 4 Macq. H. of L. Cas. 167. Both cases were directly in point. Attorneys were held not to be liable for negligence to parties outside the attorney-client relationship.

The Court in the *Savings Bank* case cites one earlier decision by an American Court which deserves mention. New Jersey's high court in *Kahl v. Love*, 37 N.J.L. 5 (Sup. Ct. 1874), held that a purchaser of real estate could not sue a tax collector for damages due to the negligence issuance of a receipt for taxes paid to the vendor. The court stated, in dictum, "that the person occasioning the loss must owe a duty, arising from a contract or otherwise, to the person sustaining such loss." *Id.* at 8. This duty was not found because of a lack of a direct relationship between the purchaser and the tax collector. *Id.* at 10.

36. 100 U.S. at 200. *But see* Chief Justice Waite's dissent, 100 U.S. at 207-08.

37. The special circumstances discussed by the Court included fraud and collusion (100 U.S. at 203) and when an act of negligence is imminently dangerous to the lives of others (100 U.S. at 203-04).

38. 152 Eng. Rep. 402 (Ex. 1842).

39. *Id.* at 405 (Lord Abinger's opinion).

40. *Ibid.* (Baron Alderson's opinion).



surd consequences”<sup>39</sup> and of “no point at which such action will stop”<sup>40</sup> if privity of contract was not required.<sup>41</sup>

Sixteen years later the Supreme Court of California in *Buckley v. Gray*<sup>42</sup> considered a similar problem. This time the attorney’s negligence involved the execution of a will. Plaintiff would have been a substantial legatee under his mother’s will if the defendant-attorney had not caused plaintiff to witness it. As a subscribing witness and a beneficiary under the will, the provision in plaintiff’s favor was void. Plaintiff alleged damages amounting to \$85,000. It was found, however, that defendant had been employed and apparently paid by plaintiff’s mother, the testatrix. Consequently, defendant’s demurrer to plaintiff’s complaint was sustained and the supreme court affirmed.

This court relied primarily upon the *Savings Bank* case and the authorities cited therein by Justice Clifford.<sup>43</sup> The court repeated the same fears which the Supreme Court had found in the *Savings Bank* case determinative of the issue.<sup>44</sup> Privity would be required.

A significant feature of the *Buckley* decision is its discussion of the attorney’s liability on a third party beneficiary contract theory.<sup>45</sup> This theory, of course, is one method by which courts have circumvented the privity requirement.<sup>46</sup> Plaintiff’s basis for the use of this concept was that since he was the natural object of his mother’s bounty, her will had been drawn for his benefit.<sup>47</sup> The court, however, did not suffer difficulty in discounting plaintiff’s argument. Plaintiff was found to have been clearly an incidental beneficiary;

41. 100 U.S. at 203. The fate of the *Winterbottom* decision is now nearly history as far as the products’ liability is concerned. See generally PROSSER, TORTS §§ 96-97, at 658-85 (3d ed. 1964).

42. 110 Cal. 339, 42 Pac. 900 (1895).

43. *Supra* note 35. The court also quoted from a Missouri case. Roddy v. Missouri Pac. Ry., 104 Mo. 234, 15 S.W. 1112 (1891). This was a products’ liability action brought by a railway employee allegedly injured because of a defective car sold to plaintiff’s employer by the defendant. Because of a lack of privity a verdict in favor of plaintiff was reversed. The court feared that if liability was permitted, there would not only be the complications foreseen in the *Winterbottom* case but also a serious restriction upon the concept of voluntary association in making contracts. *Id.*, 15 S.W. at 1114.

44. 42 Pac. at 901.

45. See generally 4 CORBIN, CONTRACTS §§ 772-81 (1951).

46. *Id.* § 779J, at 59-61. The third party beneficiary is considered to have a “contract right” of his own; it is not correct to say that he is in “privity” to the contract. *Ibid.*

47. *Buckley v. Gray*, 110 Cal. 339, 42 Pac. 900, 901 (1895).

therefore not within the rule which, the court stated, required a "contract expressly made for his benefit."<sup>48</sup>

This plaintiff, therefore, was accorded no better fate before the California Supreme Court than was the bank before the Supreme Court of the United States. As a result of these two decisions the non-liability to third parties of an attorney for negligence was now firmly established by important precedent. The privity rule as far as attorneys were concerned would not be successfully challenged for almost two-thirds of a century.<sup>49</sup>

In interim years there appear three non-attorney cases of significance. Two, *Glanzer v. Shepard*<sup>50</sup> and *Ultramares Corp. v. Touche*,<sup>51</sup> were promulgated by the Court of Appeals of New York; Cardozo was their author. One, *Biakanja v. Irving*,<sup>52</sup> decided by the Supreme Court of California, will be discussed separately *infra* page 392.

In the *Glanzer*<sup>53</sup> case, defendants were engaged in business as public weighers. Hired by a merchant to weigh 905 bags of beans sold to the plaintiff, the defendants performed the weighing as requested and executed a return certifying the weight. The return recited that it was made at the request of the seller for the plaintiff. The actual weight turned out to be less than certified, and plaintiff sued defendants for the amount he overpaid the seller. The trial court directed a verdict for the plaintiff; the Court of Appeals affirmed.<sup>54</sup>

Judge Cardozo indicated that the facts of this particu-

48. *Ibid.* California had a statute which read: "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.

49. *See* Lucas v. Hamm, *supra* note 33, discussed at p. 394, *infra*.

It is interesting to note a different approach taken by some courts dealing with the liability of abstract companies. These companies have been held liable to third persons who relied on their title certificates. *E.g.*, Dickel v. Nashville Abstract Co., 89 Tenn. 431, 14 S.W. 396 (1890); Brown v. Sims, 22 Ind. App. 317, 53 N.E. 779 (1899); Anderson v. Priestersbach, 69 Wash. 393, 125 Pac. 166 (1912); Murphy v. Fidelity Abstract & Title Co., 114 Wash. 77, 194 Pac. 591 (1921). *But see, e.g.*, Dundee Mortgage & Trust Inv. Co. v. Hughes, 20 Fed. 39 (C.C.D. Ore. 1884); Thomas v. Guarantee Title & Trust Co., 81 Ohio St. 432, 91 N.E. 183 (1910); Phoenix Title & Trust Co. v. Continental Oil Co., 43 Ariz. 219, 29 P.2d 1065 (1934).

50. 233 N.Y. 236, 135 N.E. 275 (1922).

51. 255 N.Y. 170, 174 N.E. 441 (1931).

52. 49 Cal. 2d 647, 320 P.2d 16, 65 A.L.R.2d 1358 (1958).

53. 233 N.Y. 236, 135 N.E. 275 (1922).

54. *Ibid.* The trial court's verdict had been reversed by the Appellate Term because plaintiff had not proved a contract with defendant. This decision was, in turn, reversed by the Appellate Division; the verdict was reinstated. Defendant then appealed to the Court of Appeals. *Ibid.*

lar case made the decision an easy one. He stated: "The plaintiffs' use of the certificates was not an indirect or collateral consequence of the action of the weighers. It was a consequence which, to the weighers' knowledge, was the *end and aim of the transaction*."<sup>55</sup> The question at bar was a matter of duty and the duty need not be stated "in terms of contract or of privity."<sup>56</sup> This duty was stated to arise not because of the character of the act's consequences but from the proximity or remoteness of these consequences in the mind and design of the actor.<sup>57</sup> Cardozo distinguished the *Savings Bank* case on this principle, *i. e.*, the Supreme Court had stated that the particular consequence sued upon was not within the attorney's anticipation.<sup>58</sup> Having reached the conclusion that plaintiff had shown a breach of duty by defendants, the court felt there was no necessity to discuss other rationales for liability. In this regard, the court mentioned the third party beneficiary<sup>59</sup> theory and the expanded theories of agency.<sup>60</sup>

Unquestionably, this decision is a landmark. The most respected, if not most influential, high state court in the land had extended its own decision of *MacPherson v. Buick Motor Co.*<sup>61</sup> beyond products' liability to the point where "One who follows a common calling may come under a duty to another who he serves, though a third may give the order or make payment."<sup>62</sup> Clearly under appropriate circumstances this could apply to an attorney.

Nine years later Chief Judge Cardozo and the majority of the New York Court of Appeals again discussed the privity concept. Its 1931 decision, *Ultramares v. Touche*,<sup>63</sup> concerned a calling very similar to the legal profession, *i. e.*, accounting. Defendants were public accountants doing business un-

55. *Ibid.* (emphasis supplied).

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

57. *Ibid.*

58. *Ibid.* Quoting *Savings Bank v. Ward*, 100 U.S. 195, 199 (1879). Note the dissent in *Savings Bank v. Ward* came to the opposite conclusion. 100 U.S. at 207-08 (Dissent).

Judge Cardozo then cited numerous cases dealing with abstractors held liable to third parties because of the abstractors' knowledge of the intended use of their abstract certificates. 135 N.E. at 276.

59. 135 N.E. at 277.

60. *Ibid.* For example, when the sender of a telegram is treated as the agent of the receiver. *Ibid.*

61. 217 N.Y. 382, 111 N.E. 1050 (1916).

62. 135 N.E. at 276.

63. 255 N.Y. 170, 174 N.E. 441 (1931).

der the firm name of Touche, Niven & Co., a partnership. They had been employed by a corporation, Fred Stern & Co., Inc. to certify the validity of a balance sheet exhibiting the financial condition of the business as of a particular date. After an audit, defendants certified that the balance sheet correctly showed capital and surplus intact. Actually the corporation was insolvent and one year later went into bankruptcy. The court found that defendants knew their certificate would be used for the purpose of obtaining credit. Plaintiff, a corporation, relied on this certificate and loaned the Stern Company substantial sums of money. When the loans proved to be uncollectible, they sued defendants for their loss.

The procedural history of the case is complex. Plaintiff's original complaint alleged only negligence, but a fraud action was added at the trial. The trial judge dismissed the fraud action and the jury found in favor of plaintiff on the negligence action. The trial judge, however, granted defendants' motion to dismiss which he had previously reserved. The Appellate Division affirmed the dismissal of the fraud action but reinstated the jury's verdict on the action for negligence. Both plaintiffs and defendants appealed. The Court of Appeals reversed the Appellate Division on both points. It was held that the fraud action stated a cause of action, but that the negligence action did not.

Chief Judge Cardozo found the evidence supported the finding that the defendants' audit had been negligently performed.<sup>64</sup> The concept of duty, therefore, was again the key to whether or not defendants were liable for negligence. In one of Cardozo's more famous phrases, he asserted: "The assault upon the citadel of privity is proceeding in these days apace."<sup>65</sup> As the result of this decision shows, however, all assaults are not successful.

Plaintiff contended that three decisions of this court pointed to liability of the defendants: the previously discussed *Glanzer*<sup>66</sup> opinion, *International Products Co. v. Erie R.R.*<sup>67</sup> and *Doyle v. Chatham & Phenix Nat'l Bank*.<sup>68</sup> All

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64. *Id.*, 174 N.E. at 443.

65. *Id.*, 174 N.E. at 445.

66. *Glanzer v. Shepard*, 233 N.Y. 236, 135 N.E. 275 (1922).

67. 244 N.Y. 331, 155 N.E. 662 (1927).

68. 253 N.Y. 369, 171 N.E. 574 (1930).

three, the court found, were easily distinguished. *Glanzer's* facts were said to show a very close relationship between plaintiff and defendants—defendants knew that *the* plaintiff would rely.<sup>69</sup> The mere reference in the *Glanzer* opinion to the third party beneficiary concept was now felt to be a significant part of the holding.<sup>70</sup> The *International Products Co.* case was found to be distinguished because of a bailor-bailee relationship between defendant and plaintiff.<sup>71</sup> The *Doyle* case was distinguished, as was *Glanzer*, on the fact that the representation made by the defendant was the “end and aim” of shaping this plaintiff’s conduct.<sup>72</sup>

The facts in *Ultramares* were said to show merely a negligent misstatement. This was said to further distinguish the *Glanzer* case which was characterized as an instance where the negligent service, not the certificate, was the key to plaintiff’s cause of action.<sup>73</sup> The court stated that to extend the concept of duty to the defendant in this case would be in effect make an action for negligent speech nearly “coterminous with that of liability for fraud.”<sup>74</sup> Liability of an accountant, therefore, for mere negligence in the performance of an audit would only ensue between the parties to the contract.<sup>75</sup>

Mentioning lawyers and title insurance companies, Cardozo also expressed the fear that if this case were decided differently, other callings would also be subject to liability to an indefinite and indeterminant number of beneficiaries for negligent speech.<sup>76</sup>

It is difficult to fully agree with the distinction made between the *Glanzer* decision and the *Ultramares* decision. The public weigher in *Glanzer* probably would have been held liable even if he had not known the exact purchaser or if there were more than one purchaser. At least it would not seem unfair to have held so. The *Ultramares* decision, however, distinguished *Glanzer* on this very point. The defendant is ap-

69. *Ultramares Corp. v. Touche*, *supra* note 63, 174 N.E. at 445.

70. *Id.* at 446.

71. *Ibid.* Also mentioned was the fact that the representation defendant made was solely within his knowledge. *Ibid.*

72. *Ibid.*

73. *Ibid.*

74. *Id.* at 447.

75. Note, however, the court did find that plaintiff’s stated a good cause of action for fraud. In addition, proof of negligence could be used as evidence to sustain an inference of fraud. *Id.* at 449.

76. *Id.* at 448.

parently protected by the "privity" rule unless he knows that the particular third person may be injured. Knowledge that a class of persons will rely does not prevent the privity defense.

There is, however, another difference between the two cases. One must compare the extent of liability. In *Glanzer* damages alleged were relatively small and would always be within the direct control of defendants; however, in *Ultramares* the damages alleged were considerable and not within the control of the defendants.<sup>77</sup> Chief Judge Cardozo was apparently fearful that liability would be so extensive it would put too great a burden on the accounting and other professions.<sup>78</sup>

Considering that plaintiff was found to be within the group of persons who defendants knew would rely on their certificate, that plaintiff was not at fault in doing so, and that the defendants had been negligent, it would not seem unreasonable to hold defendants liable.<sup>79</sup>

Notwithstanding this thesis, the *Ultramares* decision, if it did not kill the effectiveness of *Glanzer*, certainly took the punch out of it.

77. Damages alleged in *Glanzer* amounted to \$1,261.26 (135 N.E. 275); in *Ultramares*, however, a judgment for \$203,058.97 had been entered in plaintiff's favor (174 N.E. 441). In addition there may, and probably were, other persons who would have sued Touche had *Ultramares* been successful.

78. As far as registration statements are concerned, section 11 of the Securities Act of 1933 holds accountants liable to third persons. The pertinent parts of the section state:

(a) In case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security (unless it is proved that at the time of such acquisition he knew of such untruth or omission) may, either at law or in equity, in any court of competent jurisdiction, sue—

(4) every accountant, engineer, or appraiser, or any person whose profession gives authority to a statement made by him, who has with his consent been named as having prepared or certified any part of the registration statement, or as having prepared or certified any report or valuation which is used in connection with the registration statement, with respect to the statement in such registration statement, report, or valuation, which purports to have been prepared or certified by him . . . .

48 Stat. 82 (1933), as amended, 15 U.S.C. § 77k(a) (1964).

An attorney would also fall within the phrase "any person whose profession gives authority to a statement made by him." See Isaacs, *Liability of the Lawyer for Bad Advice*, 24 CALIF. L. REV. 39 (1935).

79. See RESTATEMENT (SECOND) OF TORTS § 552, Note to Institute at 177-78 (Tent. Draft No. 10, 1964).

In 1958 the Supreme Court of California again considered the privity question. That court in *Biakanja v. Irving*<sup>80</sup> had a most interesting set of facts before it. Defendant was a notary public who agreed and undertook to prepare a valid will for the decedent, one John Marovich. Not being a lawyer, the defendant apparently thought that the signature of the testator accompanied by a notarial seal was sufficient execution. At least this was the extent of the execution formalities performed in defendant's office.<sup>81</sup> The will, of course, was found to be invalid.

Plaintiff was decedent's sister and had been the sole beneficiary under her brother's invalid will. She sued defendant for negligence. The measure of damages alleged was the amount which she would have taken under the will less the sum she received under the statutory laws. It was admitted that she had no direct contact with defendant. Clearly, plaintiff's cause of action raises the question of privity. The trial court found in favor of the plaintiff and this judgment was affirmed by the district court of appeal and by the California Supreme Court.

The opinion of the district court of appeal was very limited in scope. This court based its conclusion solely on the fact that since defendant had violated section 6125 of the California Business and Professions Code by his unauthorized practice of law and since plaintiff was one of the class of persons the section intended to protect, plaintiff would be permitted a civil remedy.<sup>82</sup>

The California Supreme Court decision, however, was not so limited. The unanimous decision went to the heart of the matter—privity. Chief Justice Gibson, who wrote the opinion, noted the rapid developments in the law on this problem.<sup>83</sup> Liability to third persons for negligence in the manufacturing of goods was found to have been clearly established both for injuries to the person and to property.<sup>84</sup> Although admitting that liability to third persons for injury

80. 49 Cal. 2d 647, 320 P.2d 16 (1958).

81. Decedent apparently had two witnesses sign the will later, but they did not sign in the presence of each other nor with acknowledgment of decedent's signature. *Id.* at 17.

82. 310 P.2d 63 (Cal. Dist. Ct. App. 1957).

83. 320 P.2d at 18.

84. *Ibid.*

to an intangible interest was not so well established,<sup>85</sup> the court found a rule to follow. "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 . . ."<sup>86</sup> The following six factors to be considered were set out:

- (1) the extent to which the transaction was intended to affect the plaintiff;
- (2) the foreseeability of harm to him;
- (3) the degree of certainty that the plaintiff suffered injury;
- (4) the closeness of the connection between the defendant's conduct and the injury suffered;
- (5) the moral blame attached to the defendant's conduct; and
- (6) the policy of preventing future harm.<sup>87</sup>

The court found that no balancing was really necessary in *Biakanja* since the facts clearly favored plaintiff on all six factors.<sup>88</sup> It should be noted that the opinion made no direct mention of a possible third party beneficiary action; duty was the sole basis of liability.

Significantly, *Buckley v. Gray*<sup>89</sup> and a year old district court of appeal decision, *Mickel v. Murphy*,<sup>90</sup> were reversed so far as they were inconsistent with *Biakanja*.

Undoubtedly, the factors which the court propounded were primarily the result of an attempt to mold together the requirements set out in *Glanzer v. Shepard* and *Ultramares Corp. v. Touche*. Emphasis was necessarily placed on *Glanzer*. The "end and aim" of the transaction concept was a material element to finding liability, *i. e.*, "the transaction was to provide for the passing of Marovich's estate to plaintiff."<sup>91</sup> The foreseeability of the *particular* plaintiff was far from forgotten, however, *i. e.*, "Defendant must have been aware from

85. *Id.* at 18-19.

86. *Id.* at 19.

87. *Ibid.*

88. *Ibid.*

89. 110 Cal. 339, 42 Pac. 900 (1895).

90. 147 Cal. App. 2d 718, 305 P.2d 993 (Dist. Ct. App. 1957).

91. 320 P.2d at 19.



the terms of the will itself that, if faulty solemnization caused the will to be invalid, *plaintiff* would suffer the very loss which occurred.<sup>92</sup>

In spite of the negative implications of the *Ultramares* case being included within the *Biakanja* decision, the California Supreme Court had written a most significant opinion. One possible serious limitation on the opinion was soon quashed by the same court—that the holding would be limited to an instance when the defendant was violating a statute such as practicing law without a license.

This brings us to *Lucas v. Hamm*<sup>93</sup> the last of the sextet of cases discussed. After sixty-six years an attorney's liability to third persons for negligence was again before the Supreme Court of California. Defendant, a practicing attorney with forty years experience, had been employed and paid by the testator to draft the latter's will. Plaintiffs were the beneficiaries under a residuary trust set up in the will. After the death of the testator, defendant informed the plaintiffs that the trust provision he had drafted violated California's Civil Code sections on restraints upon alienation, on the rule against perpetuities and on the suspension of the power of alienation.<sup>94</sup> He advised the plaintiffs to settle an attack made on the trust. The settlement, to which the parties finally agreed, reduced the plaintiffs' share under the trust by \$75,000. This amount they alleged as their damages. Plaintiffs' complaint contained, *inter alia*, both a tort cause of action and a breach of contract cause of action based upon the third party beneficiary theory. The trial court sustained defendant's demurrer to plaintiffs' second amended complaint without leave to amend. The district court of appeal reversed and remanded.<sup>95</sup> On the appeal to the supreme court, Chief Justice Gibson again spoke for an unanimous court. He affirmed the trial court's dismissal on the ground that as a matter of law the attorney-defendant's error was neither negligent nor in breach of contract.<sup>96</sup> In addition, however, he

92. *Ibid.*

93. 15 Cal. Rptr. 821, 364 P.2d 685, *cert. denied*, 368 U.S. 987 (1961).

94. *See Id.* at 822 n.1, 364 P.2d at 686 n.1.

95. Some of the facts mentioned above will be found in 11 Cal. Rptr. 727 (Dist. Ct. App. 1961).

96. This aspect of the case has been severely criticized. *See supra* note 21.

found upon the facts of this case that the lack of privity between plaintiffs and defendant did not preclude the former from maintaining an action in tort against the latter and that the plaintiffs were also third party beneficiaries for the purpose of maintaining their action in contract against the defendant.<sup>97</sup>

On the tort cause of action the court reaffirmed its test as set out in *Biakanja*. Five of the same factors to be considered were repeated.<sup>98</sup> "[T]he moral blame attached to the defendant's conduct" was omitted, indicating that it was included solely because of the violation of statute problem involved in *Biakanja*. A new factor, however, was added in its place, *i. e.*, "whether the recognition of liability to beneficiaries of wills negligently drawn by attorneys would impose an undue burden on the profession."<sup>99</sup>

As in *Biakanja*, the facts, when examined in view of the original five factors, were summarily found to point toward liability.<sup>100</sup> The new sixth factor received special attention by the court. The court found nothing unusually meritorious about the argument that liability might be large and unpredictable as applied to this situation.<sup>101</sup> When viewed in the light that a contrary decision would mean the innocent beneficiary would have to bear the loss, the court stated that holding an attorney liable is not too much of a burden on the profession.<sup>102</sup> The fact, that in *Biakanja* defendant was a no-

97. Technically, these two findings are dicta, but several factors indicate that the court meant them to have the force of holdings. For one thing, the opinion was unanimous not only in result but also in that there were no limiting concurring opinions. Another factor is that *Lucas* followed *Biakanja* by less than four years. This would seem to indicate that the court did not want *Biakanja* to be limited to its facts, more specifically, to the fact that the notary had violated a statute by his unauthorized practice of law.

98. 15 Cal. Rptr. at 823, 364 P.2d at 687.

99. *Id.* at 824, 364 P.2d at 688.

100. *Ibid.*

101. *Ibid.* Not specifically discussed by this court but relevant to this argument is the question of who should be required to be insured against the loss suffered. 2 HARPER & JAMES, TORTS § 18.6, at 1052 (1956). If the availability of insurance will be considered as a factor in allocating the risk of loss, obviously in the present situation the attorney should be the one required to bear the loss. The attorney may purchase insurance easily and at a reasonable cost. On the other hand, one cannot buy insurance to protect from the loss of legacies in another's will.

102. 15 Cal. Rptr. at 824, 364 P.2d at 688.

The fact that an innocent person will have to bear the loss is material to the factor of "the policy of preventing future harm." In a situation such as involved in *Lucas*, plaintiff will not be able to bring an action against anyone but the attorney. Furthermore, if the attorney is not liable to the disappointed beneficiary, he is not going to be liable to anyone to

tary public and had been guilty of unauthorized practice of law, was found to be an immaterial or minor consideration to the finding of liability. It was said to be unjustified to distinguish the cases on this point.<sup>103</sup>

The lack of privity, therefore, would not make plaintiffs' tort action fail. *Buckley's* requirement of privity was now conclusively overruled.

With reference to plaintiff's contract action, the chief justice held that plaintiff's were more incidental or remote beneficiaries.<sup>104</sup> The court stated:

Since . . . the main purpose of the testator in making his agreement with the attorney is to benefit the persons named in his will and this intent can be effectuated, in the event of a breach by the attorney, only by giving the beneficiaries a right of action, we should recognize, as a matter of policy, that they are entitled to recover as third-party beneficiaries.<sup>105</sup>

*Buckley* is now overruled on both points of law.

#### Bases and Extent of Liability—Duty

The *Biakanja* and *Lucas* decisions should have a material negative effect upon the requirement of privity in an action for negligent performance of a contract when the risk of harm is only to an intangible interest. They could very easily become as well known to attorneys who handle similar cases as *MacPherson v. Buick*<sup>106</sup> is to attorneys handling cases concerning products liability for negligence. Regardless of this futurity, *Lucas* must surely be one of the most significant decisions ever rendered concerning an attorney's liability for

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any substantial extent. *Licata v. Spector*, 26 Conn. Supp. 378, 225 A.2d 28 (C.P. Windham County 1966) (Attorney liable to administrator but probably only for nominal damages). If it is important to prevent future harm, then the attorney should be liable for his negligence to these injured third persons.

103. 15 Cal. Rptr. at 824, 364 P.2d at 688.

104. *Id.* at 825, 364 P.2d at 689.

105. *Ibid.* Section 1559 of the Civil Code had been held determinative of the third party beneficiary contract action in *Buckley*. *Supra* note 48. This same section was construed in *Lucas* to mean that only incidental or remote beneficiaries could be excluded. Since the plaintiffs, here, were held not to be within these categories, the section was inapplicable. *Ibid.*

106. 217 N.Y. 382, 111 N.E. 1050 (1916).

negligence.<sup>107</sup> A highly respected court has now expressed the belief that an attorney may owe a duty to persons outside the immediate attorney-client relationship and that such an action is not an undue burden on the legal profession.

In the five and one-half years since the *Lucas* opinion there has not been a rash of litigation on this problem. In fact only one other state has approved and followed the case's holding.<sup>108</sup> It is inevitable, however, that more courts will be asked to, and will, accept the reasoning laid down by the California Supreme Court. A thorough analysis of the decision would, therefore, seem proper.

Briefly, the court found that liability is a "matter of policy" to be determined by balancing several factors. Obviously the court was not holding that every person, who might be touched by an attorney's advice or conduct, is to have a cause of action. 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.

For the purpose of this article the significant factors are the ones concerned with what persons, outside the attorney-client relationship, are within the scope of the attorney's duty.<sup>109</sup> Two factors are particularly material in this regard. They are "the extent to which the transaction was intended to affect the plaintiff, [and] the foreseeability of harm to him . . ."<sup>110</sup> These factors were intended to set the party limits of an attorney's liability.

The first factor is directed toward the purpose which the attorney's client had in calling upon him to perform legal services. In any situation in which the client calls upon an attorney to draft his will the purpose is relatively clear. Presumably the client's purpose is to pass his property at

107. For what it is worth, *Lucas* was noted by ten law reviews: 4 ARIZ. L. REV. 100 (1962); 42 BOSTON U. L. REV. 256 (1962); 30 FORDHAM L. REV. 369 (1961); 75 HARV. L. REV. 620 (1962); 22 MD. L. REV. 161 (1962); 34 ROCKY MT. L. REV. 388 (1962); 14 STAN. L. REV. 580 (1962); 40 TEXAS L. REV. 1046 (1962); 64 W. VA. L. REV. 361 (1962); 16 RUTGERS L. REV. 475 (1962).

108. *Licata v. Spector*, 26 Conn. Supp. 373, 225 A.2d 28 (C.P. Windham County 1966). *Lucas* was rejected as not the law in New York in *Maneri v. Amodio*, 38 Misc. 2d 190, 238 N.Y.S. 2d 302 (Sup. Ct. 1963).

109. Two factors not specifically discussed in this article are concerned with other elements of tort liability. They are "the degree of certainty that the plaintiff suffered injury, [and] the closeness of the connection between the defendant's conduct and the injury . . ." 15 Cal. Rptr. at 823, 364 P.2d at 687.

110. *Ibid.*

death to certain persons rather than have his property pass by the laws of intestacy. Although it may be stretching the point to say that the client's primary purpose is to benefit these persons, it is not difficult to see that his purpose certainly is intended to affect their rights in his property at death. Any attorney should realize this fact. It may therefore be maintained that any intended beneficiary under a will made for the client should come within the scope of this factor.

It is to be noted that the *Lucas* court never mentions reliance; however, reliance should be relevant to the problem.<sup>111</sup> The words "intended to affect" should include situations in which the client's purpose for the attorney's services is to induce a third person to rely on the result. Such a situation is exhibited by the facts of the *Savings Bank*<sup>112</sup> case. It would seem that if the attorney knows or should know the landowner is going to use the certificate for the purpose of inducing other persons to shape their acts in reliance, the scope of this factor should cover these persons. Purchasers or persons loaning money on the property should be protected. Many times they are the only ones to lose and the attorney is the only one from whom they could recover. This proposition, of course, has broader ramification than just in title certificate situations. The rule should apply anywhere the attorney knows or should know the client intends to use his work in order to induce relying persons to act in a particular way. The specific purpose need not be known by the attorney, so long as the client's purpose is reasonably foreseeable. To use a title certificate in order to aid in selling or in borrowing money is certainly reasonably foreseeable.

The relationship between the client and the third person becomes relevant. The "intended to affect" factor is also necessarily limited by the "foreseeability" of harm factor. The inclusion of the latter by the court was obviously influenced by the *Ultramares*<sup>113</sup> case. Justice Cardozo found

111. It must be noted that the two decisions which have held an attorney liable to third persons have dealt with disappointed legatee situations. Reliance, of course, is not present in these situations. In the *Glanzer* case, however, reliance was a material element. *Glanzer v. Shepard*, 233 N.Y. 236, 135 N.E. 275 (1922). See RESTATEMENT (SECOND) OF TORTS § 552 (Tent. Draft No. 10, 1964).

112. 100 U.S. 195 (1879).

113. *Ultramares Corp. v. Touche*, 255 N.Y. 170, 174 N.E. 441 (1931).

that reasonable reliance by the third person was not enough; that the third person must be ascertainable by the defendant. In other words, the harm to the particular plaintiff was not foreseeable by the defendant. Hopefully the implications of *Ultramares* is but an influence and not a severe limitation on the *Biakanja* and *Lucas* decisions. To require that the attorney know the *particular* third person who might be damaged by negligence would materially dilute the apparent scope of these opinions. Again this is not to mean that any person who happens to be damaged by an attorney's negligence should recover. There is a middle ground.

The court talked in terms of foreseeability of harm to the plaintiff. This, of course, includes a specific person of whom the attorney knows will be affected by his negligence. It should also include any member of a class of persons who the attorney knows or should know will be affected.<sup>114</sup> For example, all beneficiaries under a will whether they be named or unnamed should be entitled to sue the negligent attorney. Also, any purchaser who properly relied on an attorney's title certificate should be able to sue. It is interesting to note that this position was advocated by the dissent in *Savings Bank v. Ward*.<sup>115</sup> There Chief Justice Waite stated:

I think if a lawyer, employed to examine and certify to the recorded title of real property, gives his client a certificate which he knows or ought to know is to be used by the client in some business transaction with another person as evidence of the facts certified to, he is liable to such other person relying on his certificate for any loss resulting from the failure to find on record a conveyance affecting the title, which, by the use of ordinary professional care and skill, he might have found.<sup>116</sup>

It should be apparent that the range of third persons who may sue an attorney is not unreasonable. At most the above discussion applies present concepts of negligence liability<sup>117</sup> to the negligent malpractice by attorneys.

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114. Cf. RESTATEMENT (SECOND) OF TORTS § 552, Note to Institute at 177-78 (Tent. Draft No. 10, 1964).

115. 100 U.S. 195, 207 (1879).

116. *Ibid.*

117. See, e.g., PROSSER, TORTS § 96, at 662-63 (3d ed. 1964); RESTATEMENT (SECOND) OF TORTS § 552 (Tent. Draft No. 10, 1964).

### Bases and Extent of Liability—Third Party Beneficiary Contract

The *Lucas* decision was two fold. Plaintiffs were found not only to be appropriate parties for action in tort but also to be such for an action in contract. The court stated that a legatee under a will is proper third party beneficiary for purposes of maintaining a contract action.<sup>118</sup> This reasoning is in line with the trend toward expanding the concept of the third party beneficiary contract action.<sup>119</sup>

The basis of this finding is concerned with "intent to benefit."<sup>120</sup> The California Supreme Court found that the main purpose of the testator writing a will was to benefit the persons therein named.<sup>121</sup> It was also stated that no specific manifestation of an intent to benefit the third person is required by the provision.<sup>122</sup> From these conclusions a disappointed legatee is clearly a third party beneficiary.

The use of the third party beneficiary theory by third persons against attorneys will apparently be limited to situations closely related to the facts in the *Lucas* case. The factor of "reliance" by the third person upon the performance of the contract between the client and the attorney has no significance to the third party contract action. If the plaintiff is neither a creditor beneficiary nor a donee beneficiary he has no rights on the contract.<sup>123</sup>

Although limited in its application, the third party beneficiary contract action is not entirely useless. When applicable, it might not only provide the best remedy but also the only remedy.<sup>124</sup>

### A Road Block—Statute of Limitations

The immediate preceding discussion would appear to paint a rosy picture for a third person suing an attorney.

118. *Lucas v. Hamm*, 15 Cal. Rptr. 821, 364 P.2d 685 (1961).

119. 4 CORBIN, CONTRACTS § 772, at 2-4 (1951).

120. *See Id.* § 776, at 14-24.

121. 15 Cal. Rptr. at 824, 364 P.2d at 688.

122. *Ibid.*

123. 4 CORBIN, CONTRACTS § 779B, at 38-39 (1951).

124. For example, the statute of limitations for contracts is normally longer than the tort limitation. If the statute of limitations has run for a tort action, the contract action may be the only one available. *See generally Page, Selecting the Remedy*, 3 AM. JUR. TRIALS 652-64 (1965).

This is not necessarily the case. Notwithstanding the fact that only two jurisdictions presently recognize the action, the third party plaintiff will in many cases run afoul of the statute of limitations. The plaintiff will not learn or discover the negligence for many years after the attorney-client relationship has ceased to exist. This is particularly true in situations involving the negligent writing or execution of a will. A will is not effective until the death of the testator and this may not occur for ten or twenty years after it was drafted by the attorney. As the following discussion will illustrate, this factor of time may materially limit the success of actions by third persons.

The statutes of limitations for tort actions are usually relatively short.<sup>125</sup> Generally, the limitation runs from one to four years. In addition, it has frequently been held that the statute runs from the time the negligence occurred.<sup>126</sup> In the will's situation mentioned above this could conceivably be twenty years before the testator's death.

Several fictions, however, have sometimes been used in recent times, particularly in the medical malpractice cases, to soften the effect of this rule.<sup>127</sup> One fiction is that the statute does not begin to run until the negligence was discovered or should reasonably have been discovered.<sup>128</sup> Another doctrine is that the limitation does not run until the relationship ceases to exist.<sup>129</sup> Generally, both fictions have not been discussed by the courts dealing with attorney negligent malpractice cases.<sup>130</sup>

The third party beneficiary contract action does not provide a great deal more protection for the plaintiff. The limitations are longer but the alternative arguments are no more effective once it has run.<sup>131</sup>

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125. *E.g.*, note 11, *supra*.

126. *Sullivan v. Stout*, 120 N.J.L. 304, 199 Atl. 1 (Ct. Err. & App. 1938). See 54 C.J.S. *Limitations of Actions* § 135 (c) (1948). When held applicable to attorney malpractice actions, specific malpractice statutes have received the same interpretation. *Galloway v. Hood*, 69 Ohio App. 278, 43 N.E.2d 631 (1941). See Gardner, *Attorneys' Malpractice*, 6 CLEV.-MAR. L. REV. 264, 276 (1957).

127. See generally PROSSER, *TORTS* § 30, at 147-48 (3d. ed. 1964). See also, Notes, *The Statute of Limitations in Actions for Undiscovered Malpractice*, 12 WYO. L. J. 30 (1957).

128. *E.g.*, *Rosane v. Senger*, 112 Colo. 363, 149 P.2d 372 (1944).

129. See Lillich, *The Malpractice Statute of Limitations in New York and Other Jurisdictions*, 47 CORNELL L. Q. 339, 344-47 (1962).

130. *E.g.*, *Alter v. Michael*, 50 Cal. Rptr. 553, 413 P.2d 153 (1966).

131. 4 CORBIN, *CONTRACTS* § 820, at 278-81 (1951).



It is, therefore, obvious that the statute of limitations will be frequently a successful defense to a third party action. The nature of the fact situations which will support a third party action against an attorney indicate that there will often be a long period of time between the attorney's actionable act and the discovery of loss to the third person. This fact in itself could be considered sufficient to negate the argument that these actions are an undue burden on the profession.

### PUBLIC POLICY

Before concluding this article one factor mentioned by the *Lucas* court needs amplification and analysis. This is the question whether the recognition of liability to third persons would impose an undue burden on the profession. The court, as discussed above, held that it would not. It found that damages would not be anymore indeterminate or prohibitive than in an action by a client against his attorney and that otherwise the innocent third person would have to bear the loss.<sup>132</sup> There are more reasons than this, however, which should answer the question.

First, the above discussion concerning the bases and extent of the liability shows that liability is not to be unlimited. Both the purpose of the client's request for services and the persons who will be affected must be foreseeable. The use of the concept of foreseeability is not new in the law. Furthermore, the presumption in this discussion has been that the attorney has been negligent—this required element of proof by any third person should alone protect the attorney from fraudulent claims. Add to this the interpretations which the courts have generally given the applicable statute of limitations in attorney negligent malpractice actions and one can see that liability will not be overburdensome.

Second, there is an aspect of this problem which goes to the heart of the legal profession. The attorney holds a responsible position in the community. In a sense he has been given a monopoly. Only a select few who qualify may represent that they can perform the specialized tasks. Because of the attorney's status he must always maintain a high

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132. 15 Cal. Rptr. at 824, 364 P.2d at 688. See discussion in note 102, *supra*.

standard of conduct toward the court and the community.<sup>133</sup> One of the more recurring cries today is the need to improve the general reputation of and respect for the legal profession.<sup>134</sup> Unfortunately many laymen feel that there is one rule of law when they are the defendant and another when the attorney is. This is particularly true when the attorney is sued for negligence. An injured client in such litigation rather than having one attorney advocating his side of the case, one against him and one neutral seeking justice, in fact *might* feel that he is not only faced with one against him but also with two subconsciously hostile. This kind of attitude toward the bar must be changed.

Obviously, abolition of the privity rule is not going to change this attitude by itself. However, retaining this outdated rule as far as the liability of attorneys for negligence is concerned is certainly not going to improve the legal profession's reputation. The extent of the liability of an attorney should be permitted to develop consistently and concurrently with other areas of the law. He should no more be able to hide behind the privity requirement than should the automobile manufacturer.

The point of this discussion is that in permitting liability of an attorney to a third person in an appropriate case, rather than being an undue burden on the profession, may in one very small way become an asset. Such liability may remove a scar which has appeared on the face of the Bar in this country for almost one hundred years.

### CONCLUSION

It may be assured that liability of attorneys to third persons will not toll the end of the legal profession. The obvious escape from such liability is for an attorney to possess and exercise skill, care and diligence which the professional standard requires.<sup>135</sup> Admittedly no one is perfect. There are and

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133. *See, e.g.*, CANONS OF PROFESSIONAL ETHICS OF THE AMERICAN BAR ASSOCIATION, Preamble.

134. *See, e.g.*, Laub, A LAWYER'S PROFESSIONAL RESPONSIBILITY, 67 DICKINSON L. REV. 315 (1963).

135. Keeping up to date is probably the modern day attorney's most difficult task. In order to be able to do this it might be advisable for attorneys to frequently participate in or attend some of the numerous continuing education programs offered throughout the country. *See* Hutcheson, *Lawyers, How Is Your Malpractice?*, 30 INS. COUNSEL J. 423, 430 (1963).

will be negligent attorneys. It may, therefore, be advisable to carry malpractice insurance. Excellent policies may be obtained at a reasonable cost.<sup>136</sup> Reliance solely on insurance, however, is not the panacea;<sup>137</sup> it should be used only as a back-stop.

The attorney representing the third person against the negligent attorney also has an obligation. As in any malpractice action, personal vengeance or jealousy should not be a part of the action. An action brought for either of these reasons should be condemned as much as the intentional suppression of a valid malpractice action would be. It must be remembered that the money damages the attorney loses to a successful malpractice action against him may be only a small part of his actual loss: his reputation is at stake. All methods of conciliation should be employed so long as the injured client's justified rights are fully protected.<sup>138</sup>

The rapidity with which the third person liability concepts will spread cannot be predicted. Unquestionably, the *Lucas* decision is going to have a material affect upon any court considering the issue of privity. It is hoped that this article has adequately explained the issues involved. As far as its intent is concerned, may it only be interpreted to mean that "privity" is no longer a viable concept—even as applied to attorneys.

136. See Aman, *Professional Liability Insurance for Lawyers*, 6 PRAC. LAWYER, May, 1960, at 15. See also Aman, *Malpractice Insurance for Lawyers*, 64 CASE & COMMENT, March-April, 1959, at 12; Note, *Lawyer's Professional Liability Insurance*, 15 HASTINGS L. J. 574 (1964).

137. Actually such an attitude could be materially destructive to the profession. As Professor Meehan stated:

But widespread knowledge that lawyers are insured would probably promote promiscuous claims and herald the birth of a new negligence industry—setting lawyer against lawyer for a percentage of the insurance proceeds—an ugly prospect indeed. It is also conceivable that a lawyer, knowing that he is insured, might like some automobile operators fall into careless and complacent habits.

Meehan, *Careless Lawyers and Careworn Third Parties*, 28 BROOKLYN L. REV. 99, 105 (1961).

138. Curran, *Professional Negligence—Some General Comments*, in PROFESSIONAL NEGLIGENCE 1, 9-10 (Roady & Andersen eds. 1960).