Cleveland State Law Review

Volume 21
Issue 2 *Legal Profession Problems Symposium*

Article 4

1972

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IN THE NEW YORK TIMES of November 28, 1971, appeared the following headline: "COMPLAINTS RISE ABOUT LAWYERS". The news item stated that, according to a report released by the Grievance Committe of the Association of the Bar of the City of New York, complaints filed against lawyers in the Boroughs of Manhattan and the Bronx jumped 10% in the year's time, bringing the rate to one complaint for every twelve lawyers. The report further stated that the volume of complaints by lawyers' clients has been rising steadily since the end of World War II. Although no satistics are presently available, we know from our own experience that there is an ever increasing number of attorney-malpractice cases brought each year, and many of these cases follow the complaints made by clients to the Bar Association.

Until recently, when we spoke of malpractice we invariably meant medical malpractice.[1] Less than 20 years ago only a handful of lawyers carried professional liability (malpractice) insurance. This is no longer true.[2] Attorneys who practice in large metropolitan areas are now keenly aware of the importance and necessity of having this insurance coverage; and in no segment of the legal profession is this more urgent than amongst trial lawyers—for much like surgeons in the medical field, trial lawyers are the most vulnerable in attorney-malpractice lawsuits.

Standard of Care

Broadly stated, an attorney is expected to possess and use the ordinary skill, knowledge and diligence possessed and used by other members of the legal profession.[3] In New York the rule is thus stated:

> An attorney who undertakes to represent a client impliedly represents that he possesses a reasonable degree of skill, that he is familiar with the rules regulating practice in actions of the type which he undertakes to bring and with such principles of law in relation to such actions as are well-settled in the practice of law in the locality where he practices, and that he will exercise reasonable care . . . . However, he is not a guarantor of the result of the case.[4]

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[1] For example, prior to 1963 the New York Statute of Limitations for malpractice was held to apply only to the medical profession. Errors by lawyers, accountants, architects, engineers, etc. were not included. Under the New York Civil Practice Law and Rules, effective September 1, 1963, the limitation period (now 3 years) for actions in malpractice was construed to apply to all professionals.

[2] Rothstein, *Trends and Techniques of Malpractice,* Vol. 65, No. 22, N.Y.L.J. (Feb. 2, 1971).

[3] The vast majority of attorney-malpractice suits are not based upon the attorney's lack of knowledge, skill or ability, but rather as a result of the attorney's simple negligence.

[4] Comm. on Pattern Jury Instructions, New York Pattern Jury Instructions, § 2:152 (A committee of N. Y. Supreme Court Justices).

The standard of care applicable to lawyers was well stated by a North Carolina court[5] which held that a lawyer

> is answerable in damages for any loss to his client which proximately results from a want of that degree of knowledge and skill ordinarily possessed by others of his profession similarly situated, or from the omission to use reasonable care and diligence, or from the failure to exercise in good faith his best judgment in attending to the litigation committed to his care.

There appears to be a dearth of case law with respect to the standard applicable to a lawyer who holds simself out as a specialist in some particular branch of law, such as taxes, bankruptcy, negligence, etc. With the ever-increasing trend toward specialization in the law, it has been urged that an attorney-specialist should be held to the standard of a specialist in his field rather than that of a general practitioner,[6] and such higher standard makes good legal sense.

Statute of Limitations

We often hear of the "conspiracy of silence"[7] among medical men, referring to the difficulty in getting a doctor to testify as an expert witness against a defendant doctor in a medical malpractice case. Not so with lawyers. They show not the slightest hesitancy in coming forth to testify to acts of misconduct committed by their legal brethren. And this is as it should be.

It has been our experience that errors and omissions in litigated matters give rise to perhaps 80% of all malpractice actions against lawyers. The pitfalls for the lawyer-litigator are many and deep. Heading the list is the statute of limitations. Designed as a statute of repose, this statute has caused attorneys more unrest and uneasy moments than all other statutes combined, as any lawyer who has handled a substantial amount of litigated matters will readily testify. Especially is this so where very short statutes of limitations are involved, i.e., suits or claims against municipalities or against transit authorities, or in uninsured motor vehicle cases, or in cases where the contracts[8] contain extremely limited time periods in which to sue.

The failure to commence a timely action or to present a timely claim inevitably results in the loss of the client's cause of action, for which the lawyer is held legally liable in damages. Such failure is generally prima facie evidence of malpractice by the lawyer-litigator; but before the plaintiff-client can recover for his lawyer's negligent conduct he must show that he sustained actual damages, and that

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[5] Hodges v. Carter, 239 N.C. 517, 80 S.E.2d 144 at 146 (1954).

[6] Kaufman, *Problems in Actions Against Attorneys for Malpractice* (unpublished 1971); Wade, *The Attorney's Liability for Negligence*, 12 VAND. L. REV. 776 (1959); Gardner, *Attorneys' Malpractice*, 6 CLEV.-MAR. L. REV. 264 (1957).

[7] Note, *Conspiracy of Silence of Medical Profession*, 30 NACCA L. J. 93 (1964).

[8] Usually found in contracts with banking institutions, insurance companies, railroad and shipping companies, etc.

the attorney's negligence was the proximate cause of the damages.[9] We are now dealing with "a suit within a suit"[10] and the client must prove that had the original action been timely commenced and diligently prosecuted, (a) it would probably have been concluded by a judgment in favor of the client;[11] (b) that the judgment would have been for a sum certain;[12] and (c) that the judgment would have been collectible.[13] All three factors must be established by the plaintiff-client before he can succeed in the malpractice action against the defendant-attorney. It is interesting to note that although evidence as to a defendant's insurance policy is generally not permitted in a negligence action, such evidence may be introduced in an attorney-malpractice case on the issue of collectibility of the judgment, if that issue is raised.[14]

Another nice problem arises with respect to the malpractice statute of limitations. When does a cause of action in attorney-malpractice accrue? Normally, it would accrue when the client suffers any damage as a result of his attorney's error. Sometimes, however, the client does not become aware of his lawyer's negligent conduct until much later, and by the time he learns of the loss of his original cause of action the malpractice statute of limitations may have run against him and time-bar his action.

This brings about a harsh and certainly inequitable result to an innocent client. The courts first wrestled with this problem in medical malpractice cases where the client was unaware of his doctor's mistake until after the limitation period in which to sue had expired. Thus was born the "continuous treatment" principle under which the courts held that the statute of limitations in medical malpractice cases did not accrue until the date when the physician last treated the client for his illness.[15]

This continuous treatment theory was recently adopted by a New York court in an attorney-malpractice suit,[16] again to avoid the obvious unfairness of the general rule that the cause accrues when the lawyer's error is committed. In that case the attorney neglected to file a timely claim for uninsured motorists' coverage in behalf of his client. However, the issue of untimeliness was liti-

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[9] Piper v. Green, 216 Ill.App.590 at 592 (Ct.App. 1920).

[10] Coggin, *Attorney Negligence—A Suit Within a Suit,* 60 W. VA. L. REV. 225 (1958).

[11] Piper v. Green, 216 Ill.App.590 at 592; Niosi v. Aiello, 69 A.2d 57 (Mun. App. D.C. 1949); General Accident Fire & Life Assur. Corp. v. Cosgrove, 257 Wis. 25, 42 N.W. 2d 155 (1950); Johnson v. Haskins, 119 S.W.2d 235 (Mo. Sup. Ct. 1938); Lamprecht v. Bien, 125 App. Div. 811, 110 N.Y.S. 128 (1908).

[12] W. L. Douglas Shoe Co. v. Rollwage, 187 Ark. 1084, 63 S.W.2d 841 (1933).

[13] Piper v. Green, 216 Ill.App.590 at 592 (1920); Sitton v. Clements, 257 F. Supp. 63 (E.D. Tenn. 1966).

[14] Hammons v. Schrunk, 209 Ore. 127, 305 P.2d 405 (1956).

[15] Thatcher v. DeTar, 351 Mo. 603, 173 S.W.2d 760 (1943); Hammer v. Rosen, 7 N.Y.2d 376, 165 N.E.2d 756 (1960); Hotelling v. Walther, 169 Ore. 559, 130 P.2d 944 (1942).

[16] Siegel v. Kranis, 29 App. Div.2d 477, 288 N.Y.S.2d 831 (1968).

gated vigorously and over a long period of time by the attorney in behalf of his client, in an attempt to save the client's cause of action. Ultimately, he lost. By this time some six years had elapsed since his neglect to give timely notice.

When the client brought suit against his former lawyer for malpractice, the attorney-defendant raised the malpractice statute of limitations as an affirmative defense, and promptly moved to dismiss the complaint. The court at Special Term granted the motion, holding the action to be time-barred. On appeal, however, the court reversed, likening this case to the situation where a physician continued to treat his patient, thereby extending the accrual date of the statute of limitations from the date of the last treatment. Said the appellate court, in part:

> The fairness of applying the "continuous treatment" doctrine to the attorney-client relationship is strikingly demonstrated in this appeal. The negligence which the plaintiffs assert could not come to light until the conclusion of that litigation, that is, when the permanent stay of arbitration resulted because of the late service of the notice of claim. Surely it would be premature and even presumptuous of the plaintiffs to institute an action against the defendant prior to the definitive determination through the process of the court of the defect in complying with the statutory mandates.
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> We note, too, that a contrary rule concerning the accrual of a cause of action against an attorney for malpractice in the management of litigation might well lead to procrastination by the attorney to postpone the inevitable event of defeat. The author of the disaster should not be enabled to chart the strategy to avoid the liability for his own negligence. Otherwise, negligence could be disguised by the device of delay, and an attorney rewarded by immunity from the consequence of his negligence.

This is a well-reasoned decision and we would expect other jurisdictions who have adopted the "continuous treatment" principle in medical cases to apply it equally in actions against lawyers. It gives the client or patient a greater degree of protection against the delinquent attorney or physician.

With its usual forward looking view, California, among others, has taken an even more acceptable position on the question of accrual date in attorney-malpractice cases. It has adopted the "discovery" rule, thus holding that where the client is unaware of his attorney's error, the starting date of the statute of limitations is the date of discovery or the date when the client in the exercise of due diligence, should have discovered the lawyer's negligent act.[17] A giant step forward, indeed.

[16a] *Id.* at 835.

[17] Neel v. Mangana, 14 Cal. App.3d 813, Cal. Rptr. 814 (1971); Mumford v. Staton, 254 Md. 697, 255 A.2d 359 (1969).

We would like to see some uniformity in malpractice statutes of limitation throughout the country. There should be a limitation period set specifically for malpractice actions. Also, a plaintiff should have a reasonable opportunity to discover the professional's error. In our opinion, a model malpractice statute would have a limitation period of two to three years from the date of damage or injury to the plaintiff with the proviso that if the cause of action is not discovered and could not reasonably have been discovered in such period, the action may be commenced within six months from the date of discovery, and further provided that in no event may such action be commenced later than five years from the date the damage or injury was sustained.

Damages

If the plaintiff-client is successful in proving that his original cause of action was valid and would have resulted in a judgment in his favor, his measure of damages is the amount that he would have recovered in the original action.[18] Let us assume, for example, that the client had a valid cause of action in negligence against a prospective defendant, and that had the attorney properly handled the plaintiff's case he would have recovered a judgment of $10,000. Out of this sum, the attorney would have received a fee of perhaps 33-1/3% for his services, leaving the client with a *net* recovery of only $6,667.

In this country, unlike in England, we do not reimburse successful plaintiffs for their out-of-pocket expenses incurred in bringing a lawsuit. Moneys spent for attorneys' fees, investigative work, preparation of exhibits, etc., are not taxable as costs except in certain cases where a special statute specifically allows them to be so taxed. The plaintiff who sues his debtor for the repayment of a $10,000 loan may recover a judgment in said amount but he is out-of-pocket monies spent for legal fees, so that his net recovery will be less than the amount of the judgment.

In the negligence case referred to above, the plaintiff-client's damages would have been $6,667 of the suit were brought in New York,[19] and $10,000 if the action were in California.[20]

Where the litigant is a defendant and his attorney negligently fails to plead and prove a valid defense which would have completely defeated plaintiff's cause of action, the attorney is responsible for the loss of the case. Thus, if the statute of limitations were a complete bar to an action, or if the statute of frauds were a valid defense, or if the defense of illegality could have been successfully interposed in a contract case, etc., the attorney's failure to set up such proper

[18] Vooth v. McEachen, 181 N.Y. 28, 73 N.E. 488 (1905).
[19] Childs v. Comstock, 69 App. Div. 160, 74 N.Y.S. 643 (1902).
[20] Benard v. Stern, 272 Cal. App.2d 595, 77 Cal. Rptr. 544 (1969).

defense to defeat the plaintiff's claim, is malpractice.[21] In such case, the plaintiff-client's damages in an action against his attorney would be the total amount that the client was compelled to pay to the plaintiff under the judgment in the original action.

In the handling of a plaintiff's lawsuit, the attorney inevitably becomes involved in settlement negotiations. It behooves the attorney to keep his client fully advised as to the status of such negotiations, as well as to the attorney's evaluation of liability and damages so that the client may be able to make an informed decision whether to accept or reject a particular offer.[22] If the attorney representing a plaintiff fails to inform his client of a pending offer and thereby forecloses the client's opportunity to accept such offer, the lawyer will undoubtedly be held liable for damages in the amount of said offer where the case is ultimately lost after trial. Similarly, if in representing a defendant the attorney has received a demand from plaintiff's attorney so that he knows the case can be settled for a certain limited sum, he is duty bound to make full disclosure of same to the client, thus giving his client the option of settling the lawsuit. Failure to pass on this information to the client may render the attorney liable in damages if there is a subsequent recovery in excess of the proposed settlement figure.[23] Nor may an attorney settle his client's case without first obtaining the client's consent to such settlement.[24]

Where a lawyer undertakes to represent a client in litigation and commences an action in his behalf, he may not unilaterally withdraw from such case without the court's consent. Should he step out of the case at a critical juncture, he will be liable in damages to his client for abandonment.[25]

Failure To Take An Appeal

Statutes throughout the country uniformly require an appeal to be filed within a relatively short time, usually 30 days after the appellant is served with a copy of the order or judgment with a notice reciting that said order or judgment has been entered by the clerk. Far too often does counsel for the appellant fail to file his appeal within the prescribed time limit. Sometimes, too, the attorney files a timely appeal and later finds himself confronted with a motion to dismiss the appeal for lack of diligent prosecution.

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[21] Niosi v. Aiello, 69 A.2d 57 (Mun. App. D.C. 1949); Utterback-Gleason v. Standard Accident & Ind. Co., 193 App. Div. 646, 184 N.Y.S. 862, 135 N.E. 913 (1920).

[22] This is much like the doctrine of "informed consent" in medical malpractice law, Rothstein, Supra note 2.

[23] Lysick v. Walcom, 258 Cal. App.2d 136, 65 Cal. Rptr. 406, (1908) (excess verdict of $225,000).

[24] Kreling v. Walsh, 77 Cal. 821, 176 P.2d 965 (Dist. Ct. App. 1947); In re Cusimano, 174 Misc. 1068, 22 N.Y.S.2d 677 (Sur. Ct. 1940).

[25] Perkins v. Sykes, 63 S.E.2d 133 (N.C. Sup. Ct. 1951); Howard v. McCarson, 215 Ala. 251, 110 So.2d 296 (1926).

We have seen many cases where counsel for the appellant, prior to recommending and obtaining the client's consent to the filing of an appeal, informs his client in no uncertain terms that the lower court committed reversible error in arriving at the order or judgment. Having thus stirred up new hope in the client's breast and then having failed to bring on the appeal before the appellate court, is it any wonder that the client turns against his delinquent lawyer and sues him in malpractice! In these circumstances where the attorney has already given strong assurances of a reversal, what defense can be set up when charged by his former client with failure to take a timely appeal?

Clearly, the failure to file a timely notice of appeal is negligent conduct since an attorney is charged with knowledge of proper appellate practice and procedure.[26] However, such negligence does not doom the attorney's defense in the malpractice suit. The fact that the attorney advised his client that he believed the order or judgment would be reversed on appeal is neither material nor relevant. *The only issue in such case is whether there would have been a reversal had the appeal been taken and brought before the appellate court.*[27] And this issue is solely one of *law* to be decided by the trial court who is now sitting, in effect, as an appellate court.[28]

In *McAlleenan v. Massachusetts Bonding & Insurance Co.*[29] the attorney for the plaintiff's insurance company neglected to prosecute an appeal from a judgment against plaintiff after having assured him that an appeal would be taken because the record was "infected with error". As a result, plaintiff was compelled to pay the judgment in full, whereas he could have settled it for a considerably lesser sum. Plaintiff then sued the insurance carrier, as employer of the attorney, based upon the attorney's negligence in failing to follow through with the appeal. New York's highest appellate court held that merely because the defendant failed to take an appeal did not render it liable in damages to the plaintiff; the plaintiff would first have to establish that had the appeal been taken, it would have been successful and there would have been a reversal of the judgment. The Court of Appeals stated, in part:

> It is a fundamental rule that one seeking to hold another liable for neglect to perform some duty or obligation must show that the neglect has resulted in some loss or injury, and that as the result thereof certain damages have been suffered. While there seem to be some not very impressive expressions to the contrary (*Godefroy v. Jay, 7 Bing.* 413; *Wharton on Neg.* § 752), the great majority of authorities in

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[26] Note, *Attorney Malpractice,* 63 COLUM L. REV. 1295 (1963).

[27] General Accident Fire & Life Assur. Corp. v. Cosgrove, 257 Wis. 25, 42 N.W.2d 155 (1950); Pete v. Henderson 124 Cal. App.2d 487, 269 P.2d 78 (Cal. Dist. Ct. App. 1954); Sutton v. Whiteside, 101 Okla. 74, 222 P.2d 974 (1924).

[28] Pete v. Henderson, 124 Cal. App.2d 487, 269 P.2d 78 (1954).

[29] McAlleenan v. Mass. Bonding & Ins. Co., 232 N.Y. 199, 133 N.E. 444 (1921).

> this and other jurisdictions apply this rule to such an action as the present one and decide directly or indirectly, that one who seeks to hold another responsible for neglect in the conduct of litigation must show that the action which has been neglected would probably have been successful, and therefore that its neglect has directly resulted in damages measured by the value or amount of the rights which were lost by the default.
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> The agreement only extended to the consummation of the appeal and its proper prosecution. It did not guarantee success. It ought to be a matter of common knowledge that an agreement to prosecute an appeal is not equivalent to a warranty that the appeal will succeed.

Exercise of Judgment

During litigation an attorney is required to make decisions from time to time as to the tactics or strategy he shall employ in representing the client's cause. Whether to move against a defective but correctable pleading, whether to seek an examination before trial of an adverse party or of other witnesses, whether to take the deposition of one's own client to perpetuate his testimony for trial because of age or possible illness—these and other questions constantly arise in the course of litigation. It is for the attorney to make the decision whether the motion or proceeding should or should not be held. Since this is purely a matter of judgment, the attorney will not be held liable for any error in judgment. This same rule would apply to actual trial procedure, i.e., deciding how many witnesses shall be called, the order of presenting the witnesses, waiver of right to cross examination, etc. And where the state of the law is unsettled or sufficiently doubtful so that knowledgeable attorneys would disagree as to what the law is, an attorney will not be responsible if it should ultimately be determined that his legal opinion was not correct.[30]

Tort or Contract

The threshold question in an attorney-malpractice suit often is whether the cause of action is in tort or in contract, or in a twilight zone between the two.[31] In some jurisdictions there is a specific malpractice statute in which case the statute defines the time in which such action may be brought.[32] However, absent a special malpractice statute of limitations, the question as to the nature of the cause against the attorney-defendant may well determine whether or not the action is time-barred.

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[30] Wade, *The Attorney's Liability For Negligence,* 12 VAND. L. REV. 755 (1959); Citizens' Loan, Fund, & Sav. Ass'n. v. Friendly, 123 Ind. 143, 23 N.E. 1075 (1890); Rapuzzi v. Stetson, 160 App. Div. 150, 145 N.Y.S. 455 (1914); Hodges v. Carter, 239 N.C. 517, 80 S.E.2d 144 at 146. This would be an issue for the court to decide, it being purely a question of law.

[31] The courts throughout the country are not in agreement as to the nature of a cause of action in malpractice. *Supra* note 26.

[32] Several states with special malpractice statutes do not permit contract actions, i.e., Minnesota, Kentucky, Colorado, Missouri, Ohio. *Contra,* Michigan

Normally, the tort limitation period is considerably shorter than in contract, and if this shorter statute has already run the client will surely seek to sue in contract so as to stay in court with his malpractice lawsuit. In such case, he will claim that the defendant-lawyer failed to use the skill and diligence usually possessed and used by other members of the legal profession, thus breaching his contract of retainer. Whether an attorney-malpractice suit may be brought for breach of contract where the gravamen of the cause of action is in negligence, will depend upon the case law in the particular jurisdiction. New York has held, and we think properly, that the tort and not the contract limitation should apply in attorney-malpractice cases.[33] However, there is an exception to this rule: where the complaint charges that the defendant-attorney guaranteed a specific result, such as promising to win the case or assuring the client he would recover a specified minimum amount, a cause of action for breach of contract will lie against the attorney.[34] Needless to say, the plaintiff-client must prove such guarantee at the trial, in default of which he cannot recover. Where breach of contract is established, the defendant-attorney will be liable in damages to the client regardless of how skillful or how knowledgeable or how diligent he was in handling the client's litigation. In a breach of contract suit, the attorney's skill or diligence is irrelevant, because this is not a true malpractice cause of action.

Actions Against Attorney By Third Party

May a creditor of the litigant bring a malpractice suit against the litigant's attorney on the theory that if the attorney had properly handled the lawsuit a recovery would have been had so as to enable the creditor to satisfy his claim against the litigant? The New York rule is that a third party, such as a creditor, may not hold the attorney liable in simple negligence; he must establish that the attorney's conduct was fraudulent, collusive, malicious or tortious, in order to recover.[35]

> New York authorities do not extend liability to an attorney whose negligence may bring harm to a third party with whom he has no privity provided the charge is simple negligence. An attorney is not liable to a third party for acts performed in good faith and *mere negligence on the part of the attorney is insufficient to give a cause of action to the injured third party.* He is liable to a third party only when he is guilty of fraud or collusion or of a malicious or tortious act (*3 N.Y.*

[33] Glens Falls Ins. Co. v. Reynolds, 3 App. Div.2d 686, 159 N.Y.S.2d 95 (1957); *Contra,* Benard v, Stern, 272 Cal.App.2d 595, 77 Cal.Rptr.544 (Ct. App. 1969).

[34] Glens Falls Ins. Co. v. Reynolds, 3 App. Div. 2d 686, 159 N.Y.S.2d 95 (1957).

[35] Maneri v. Amodeo, 38 Misc.2d 190, 238 N.Y.S.2d 302 (Sup.Ct.1963). The cases which permit a third party to hold liable an attorney are cases which invariably stem from faulty will drafting. Where a devisee under a will loses all or part of the bequest given in the will, his cause against the attorney-draftsman is actually based upon the well established third party beneficiary doctrine which has long been accepted as an exception to the privity rule.

Jur., Attorney and Client, § 52*b*; *in re Cushman,* 95 *Misc.* 9, 160 *N.Y.S.* 661; *Dallas v. Fassnacht,* 42 *N.Y.S.2d* 415).

There is, in the court's opinion, no reason to extend the liability of an attorney as presently defined under the New York rule and since the complaint makes no allegation of fraud, collusion or of a malicious or tortious act, the complaint can not be sustained. (Emphasis added)

In this age of specialization we find lawyers referring actions to trial or associate counsel for handling. The Canons of Ethics require that referring counsel participate in the legal work to be entitled to a share in the legal fee. Aside from the ethical aspects of this arrangement, it is important for referring counsel to oversee (not overlook) the work of his trial counsel so that he may be kept advised at all times as to the status of the case. He should make certain that the summons and complaint are timely served, even though that task may have been assigned to trial counsel. Also, he should check the pleadings and follow the case as it progresses to see that it is not dismissed for unreasonable delay in prosecution. He owes this minimum obligation to the client who hired him, and this obligation survives the transfer of the case for handling by other counsel.

We might note, parenthetically, that where there has been a failure to make timely service of the summons, or where the action has been dismissed for want of prosecution, a malpractice action will usually be brought against *both* the original counsel retained by the plaintiff as well as trial counsel subsequently brought into the case. If, for example, the cause of action was lost because of failure to make timely service of the summons, and if the duty of preparing and serving such summons had been assigned to trial counsel, both counsel may be held liable to the client. However, as between the lawyer originally retained by the client and trial counsel subsequently retained by the lawyer, it would seem that trial counsel would be guilty of *active* negligence and referring counsel guilty of *passive* negligence, thus enabling the latter to crossclaim against and seek common law indemnification from trial counsel. On the other hand, if the agreement between counsel was that the referring attorney would cause the summons to be prepared and served, no liability would attach to trial counsel. The same principles would apply to a client's cause of action which had been lost because of failure to prosecute. Normally, it would be *trial* counsel's obligation to move the case along without delay, and although both counsel would be liable in malpractice to the client, trial counsel, as the active tortfeasor, would be answerable to the referring attorney.

Dismissal For Lack of Prosecution

Many attorney-malpractice cases result in defendants' verdicts not because the trial judge or jury is unduly sympathetic toward the defendant-attorney. On the contrary, the sympathy generally lies in favor of the plaintiff-client who through no fault of his own has

been deprived of his cause of action without a trial. These defendants' verdicts occur because the *underlying* cause of action is often one of such very doubtful liability that the lawyer tends to neglect to commence a timely suit for the client. This may be because after having accepted the case he belatedly comes to the realization that, at best, he has an extremely difficult case to prove; and he does not relish the thought of spending considerable time, effort, and expense on such a case where the prospect of winning is heavily weighted against him.

This same case of doubtful liability, once having been started within the statutory period, often "gets lost" for similar reasons, as a result of which the case may be dismissed by the court for lack of diligent prosecution. Rarely does a defendant's attorney move to dismiss a case for lack of prosecution until he knows that a dismissal will result in a second action for the same relief being time-barred. In New York, we had a flood of such malpractice actions against lawyers when in December 1963, an appellate court laid down strict guidelines for the lower courts to follow in deciding motions to dismiss for lack of diligent prosecution.[36] The court noted that,

> There is an intimate relationship between the merit of an action and the fact that it has been neglected.

The result was the dismissal of scores of pending lawsuits and many members of the legal profession "got caught". A large number of attorney-malpractice cases was the inevitable result. This decision ultimately resulted in the enactment of a new civil practice rule which required that a plaintiff's attorney be served with a 45-day notice to calendar his case before defendant's counsel was permitted to move to dismiss the action for lack of prosecution. A similar 45-day rule should be a "must" in every jurisdiction in the country.

So, too, fair warning should be given to plaintiff's lawyer before the court proceeds to dismiss a case on its *own* motion, especially since defendant's counsel, too, is equally responsible for trial delays, but no similar punishment is meted out to him. The New York 45-day rule gives the plaintiff's attorney the needed protection.

The resulting injustice to litigants who lose their day in court because of procedural difficulties was denounced by the late Supreme Court Justice Black in the following language:

> I find it inconsistent with a fair system of justice to throw out a litigant's case because his lawyer, due to negligence, or misunderstanding, or some other reason, fails to satisfy one of many procedural time limits. If a pound of flesh is required because of negligence of a lawyer, why not impose the penalty on him and not his innocent client?[37]

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[36] Sortino v. Fisher, 20 App.Div.2d 25, 245 N.Y.S.2d 186 (Sup.Ct.App.Div. 1963).

[37] Pittsburgh Towing Co. v. Mississippi Valley Barge Line Co., 385 U.S. 32, 87 S.Ct. 195 (1966).

Of course, the ultimate penalty *is* imposed upon the lawyer and not upon the client who now has a remedy via an attorney-malpractice action.

In *Link v. Wabash R.R. Co.*[38] the plaintiff sustained personal injuries at a railroad crossing. His complaint was filed by his attorney in a Federal District in Indiana on August 24, 1954 and the defendant-railroad company filed an answer to the complaint shortly thereafter. The defendant then moved about seven months later for judgment on the pleadings and the motion was not argued until October 18, 1955. On November 30, 1955, defendant's motion was granted and plaintiff appealed. In October, 1956, the Circuit Court of Appeals reversed the District Court. On February 25, 1957, certiorari was denied by the Supreme Court.

At this posture, the case had been delayed 2-1/2 years by an erroneous ruling of the lower court, made upon defendant's application. The case was then remanded for trial for July 17, 1957. On June 17, a month before the scheduled trial date plaintiff moved to vacate the trial date with defendant's consent. On March 25, 1959 there was a hearing on the court's own motion to determine if the case should be dismissed. This resulted in a new trial date set for July 15, 1959. This time the defendant moved to vacate the trial date with the plantiff consenting. On March 11, 1960, defendant filed additional interrogatories and the plaintiff filed answers thereto within 45 days. Finally, on September 29, 1960, the court noticed both sides to attend a pretrial conference on October 12, 1960 at 1:00 P.M.

On October 11, plaintiff's counsel had business in a state court about 160 miles away, and on the morning of October 12 he telephoned long distance to the district judge to tell him that he was about four hours away, and to request an adjournment of the pretrial conference until the following day. The judge's secretary who answered the phone, said he would relay the attorney's request to the judge who was then on the bench. The district judge, apparently annoyed because this case had been on the calendar for six years (although more than half of the delay was surely attributable to defendant's counsel) dismissed the case that very day without further notice stating:

> Pursuant to the inherent powers of the court, and upon failure of plaintiff's counsel to appear at a pre-trial, which was scheduled for today, October 12, 1960, at 1:00 o'clock, pursuant to notice, under Rule 12, counsel having failed to give any good and sufficient reason for not appearing at said pre-trial, the cause is now dismissed.

Plaintiff appealed to the Court of Appeals for the Seventh Circuit. It was affirmed two to one with the dissenting judge stating:

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[38] Link v. Wabash R.R., 370 U.S. 626 (1962).

[39] Link v. Wabash R.R., 291 F.2d 542, at 543 (7th Cir. 1961), aff'd, 370 U.S. 626 (1962).

> The order now affirmed has inflicted a serious injury upon an injured man and his family, who are innocent of any wrongdoing. Plaintiff's cause of action . . . was his property. It has been destroyed. The district court, to punish a lawyer, has confiscated another's property without process of law, which offends the constitution. A district court does not lack disciplinary authority over an attorney and there is no justification, moral or legal, for its punishment of an innocent litigant for the personal conduct of his counsel. Because it was neither necessary nor proper to visit the sin of the lawyer upon his client, I would reverse.[40]

Further appeal was entertained by the Supreme Court of the United States, an dthere it was *affirmed* four to three! Justice Black's vigorous dissent which reviewed the facts in detail, ended with:

> It may not be of much importance to anyone other than the plaintiff here and his family whether this case is tried on its merits or not. To my mind, however, it is of very great importance to everyone in this country that we do not establish the practice of throwing litigants out of court without notice to them solely because they are credulous enough to entrust their cases to lawyers whose names are accredited as worthy and capable by their government. I fear that this case is not likely to stand out in the future as the best example of American justice.[41]

Let this case stand as a caveat to attorneys who may be tempted to deal lightly with pre-trial proceedings! Our highest court has spoken, although one may hope that this is not its final word on the subject. Attorneys who carry on a substantial litigation practice in a large city are particularly vulnerable due to the multitudinous calendars and the heavy demands of pretrial proceedings. What with calendar calls for pretrial conferences, reserve calendars, special calendars, and ready day calendars which require attorneys to be personally present in court, one wonders how a single practitioner manages to have so *few* cases dismissed.

Conclusion

As has been stated, an attorney malpractice case is a suit within a suit. Recently we handled an unusual case. It was a suit within a suit within a suit. This occurred where the plaintiff sustained personal injuries allegedly due to medical malpractice. Plaintiff then hired a prominent negligence attorney to prosecute her action against the doctor. Due to an inadvertent calendar dismissal of the action, plaintiff lost her remedy against the doctor. She promptly retained another attorney to bring an action in malpractice against her former attorney. This second suit resulted in a settlement with the consent and approval of the client. Some time later our litigious client decided that her second attorney had not disclosed the full facts to her, and

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[40] Link v. Wabash R.R., 370 U.S. 626, at 637 (1962).

[41] *Id.* Justices Warren and Douglas joined in the dissent, two other justices not voting.

that she would not have settled the case against her former lawyer had she been properly advised. Thereupon she engaged a third lawyer to sue the second lawyer for having settled with the first lawyer whose case against the negligent doctor had been inadvertently dismissed. This last action was ultimately dismissed for legal insufficiency. We never ascertained whether plaintiff ever sued her third lawyer.

Perhaps the best thing an attorney can do to avoid these pitfalls is to make a periodic check of each and every file in his office, and ascertain that no plaintiff's case is lying dormant. A lawyer's malpractice policy is not a bad thing to have, either.