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liable, as a matter of policy, to discourage negligence and deter future harm. The burden arising from the potential duration of liability is offset not only by the policy of discouraging negligence, but also by the fact that the architect enters into an undertaking for personal profit that may affect the interests of others, with full realization of the possible consequences.

Considering the *Montijo* case and its predecessors, and projecting its ramifications, it seems reasonably certain that the California courts will hold an architect liable to third persons injured as a result of his negligence in the preparation of plans and specifications. Holding the architect to a duty of care to foreseeable plaintiffs would seem the sensible method of placing the loss on the party at fault. But the architect does not warrant to the world that his work is sufficient in all respects. He is liable only for those defects which result from his failure to exercise ordinary care—"the care ordinarily exercised in like cases by reputable members of his profession practicing in the same locality."[38]

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[38] Paxton v. Alameda County, 119 Cal. App. 2d 393, 398, 259 P.2d 934, 938 (1953).

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USE OF EXPERT TESTIMONY IN ATTORNEY MALPRACTICE CASES

Although attorney liability for negligence has been frequently litigated,[1] the use of expert opinion evidence has been minimal. In most jurisdictions expert testimony is admissible when offered, but apparently neither party has often thought such testimony useful. Perhaps in part this has been because the attorney's skills have been considered more within the ambit of the layman's experience and knowledge than the skills of other professionals.[2] As a result, in most cases the layman has been thought as well qualified to pass judgment on the conduct of an attorney as one who is experienced in the practice of law. Although this may have been reasonable in the past, when the practice of law was relatively uncomplicated, the laymen cannot of his own knowledge and experience judge what conduct is reasonable for the attorney trained and experienced in the involved and often highly specialized practices of today.

While the use of expert testimony in attorney malpractice litigation has not been extensive in most jurisdictions,[3] it has been non-existent in Cali-

[1] See Annot., 45 A.L.R.2d 14 (1956).

[2] Expert testimony has been held admissible to show that specified conduct does or does not breach the standard of care for other professionals and quasi-professionals. See L. B. Laboratories, Inc. v. Mitchel, 237 P.2d 84, *reversed on other grounds*, 39 Cal. 2d 56, 244 P.2d 385 (1952) (C.P.A.); Huffman v. Lindquist, 37 Cal. 2d 465, 234 P.2d 34, 29 A.L.R.2d 485 (1951) (doctor); Paxton v. County of Alameda, 119 Cal. App. 2d 393, 259 P.2d 934 (1953) (architect).

[3] See Annot., 45 A.L.R.2d 14 (1956).

fornia. The leading case in California, *Gambert v. Hart*,[4] held that the question of an attorney's negligence is one of law and that the testimony of another attorney as to whether the defendant's conduct was negligent is inadmissible. The reasons for both these results in *Gambert* are unclear and have led to confusion in later cases[5] and secondary research sources.[6] It is suggested that the court erred in saying that the issue of an attorney's negligence is a question of law for the court, and in view of the specialized nature of the legal profession of today, a re-examination of the view that expert testimony is inadmissible is in order.

In *Gambert* the negligence imputed to the defendant was, first, his failure to file and serve a proper notice of a motion for a new trial; second, his submission of the motion before the statement in support of it had been settled or agreed to. On appeal the California Supreme Court said, "The facts being admitted or proved, it was a question of law for the Court whether they establish negligence in the defendant."[7] Other cases have said that the question of an attorney's negligence is one of fact.[8] Neither statement is accurate since as in other negligence cases, the question is a mixed one of law and fact.[9] The broad question of whether particular conduct of an attorney is negligent requires an answer to two narrower questions: What is the standard of care? Has the conduct in question fallen short of that standard?

It is well recognized that the standard is always determined by the court as a matter of law.[10] Where a jury has not been waived the court will instruct that the defendant is to be held to a duty of ordinary care or extraordinary care under the particular circumstances.[11] Whether particu-

[4] 44 Cal. 542 (1872).

[5] *E.g.*, Floro v. Lawton, 187 Cal. App. 2d 657, 10 Cal. Rptr. 98 (1960). The court here decided that the question of attorney negligence was one of law for the court and that this was the law in California though a minority view.

[6] In 7 AM. JUR. 2d *Attorneys At Law* § 189 (1963), the reporter states that "the degree of care required of an attorney is a question of law . . . but the care actually exercised in a given situation is a question of fact to be determined by the jury under proper instructions by the court." *Gambert* is cited as "exemplifying these principles." In Annot., 45 A.L.R.2d 14 (1956), it is stated that expert testimony in *Gambert* was excluded as testimony as to the ultimate fact in issue. Annot., 1917B L.R.A. 11, cites *Gambert* for the proposition that whether an attorney has been negligent in the performance of his duties is usually a question for the jury. See also Wade, *The Attorney's Liability for Negligence*, 12 VAND. L. REV. 755, 766 (1959), where the author cites *Gambert* as holding the question of attorney negligence to be one of law. The author dismisses the case as "rare" but cites no California cases as holding the question to be one of fact.

[7] 44 Cal. at 549.

[8] O'Neill v. Gray, 30 F.2d 776 (1929); Pinkston v. Arrington, 98 Ala. 489, 13 So. 561 (1892); Hampel-Lawson Mercantile Co. v. Poe, 169 Ark. 840, 277 S.W. 29 (1925); Olson v. North, 276 Ill. App. 457 (1934); Walpole's Adm'r v. Carlisle, 32 Ind. 415 (1869); Cochrane v. Little, 71 Md. 323, 18 Atl. 698 (1889); McCullough v. Sullivan, 102 N.J.L. 381, 132 Atl. 102 (1926); Werle v. Rumsey, 278 N.Y. 186, 15 N.E.2d 572 (1938); Hamsher v. Kline, 57 Pa. 397 (1868); Patterson v. Frazer, 100 Tex. 103, 94 S.W. 324 (1906); see also Annot., 45 A.L.R.2d 14 (1956).

[9] PROSSER, TORTS § 39 (2d ed. 1955); see Annot., 45 A.L.R.2d 14 (1956).

[10] *Ibid.*

[11] *E.g.*, Pennington v. Southern Pac. Co., 146 Cal. App. 2d 605, 304 P.2d 22 (1956).

lar conduct falls short of that standard is clearly a question of fact.[12] The determination of this fact is made by comparing the proven conduct of the defendant attorney with the approved conduct (the standard).

Historically all negligence cases have been so determined.[13] Attorney negligence cases should be no different in this respect, and a great majority of jurisdictions have so held.[14] This view was well expressed in *Cochrane v. Little*[15] where the Maryland Supreme Court said:

> In an action of this character [negligence] against an attorney, it is the duty of the court to instruct the jury for what species or degree of negligence or want of skill the defendant is properly answerable, and what duty is imposed upon him by law, and leave them to determine, upon all the facts and circumstances of the case, whether the defendant has performed his duty, and if not, whether the neglect or want of skill was of a character or degree such as to render him liable, according to the definitions furnished by the instructions of the court.[16]

It is not clear from the decision in *Gambert* whether the court meant that the question of attorney negligence could, in no event, be decided by a jury. Litigants are entitled to a jury trial as a matter of right under section 7 of article I of the California Constitution. But where the determination of the issue of negligence could not be the subject of difference among reasonable men the court should take the question from the jury and it is then determined as a matter of law.[17] The constitutional guarantee does not require strict adherence to the letter of the common law practice and new procedures better suited to the efficient administration of justice may be substituted, provided there is no impairment of the substantial features of a jury trial.[18] An essential element of such a trial is that the issues of fact are decided by a jury.[19]

The defendant in *Gambert*, having waived a jury trial,[20] was not denied his constitutionally guaranteed right to trial by jury. But if the court meant that the question of attorney negligence could in no event be decided by a jury, the result would be to deprive the attorney of his right to a jury trial. No case so holding has been found in California, since in attorney malpractice cases the jury has either been waived or the character of the alleged negligent conduct has been such that reasonable men could not differ as to its legal effect. The *Gambert* holding has not been questioned on this point because as a practical matter in most attorney malpractice suits a jury will be waived. The parties are influenced by the expense of

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[12] McMahon v. Kern County Union High School & College Dist., 150 Cal. App. 2d 218, 309 P.2d 465 (1957); see generally PROSSER, TORTS § 39 (2d ed. 1955); 2 WITKIN, SUMMARY OF CALIFORNIA LAW *Torts* § 213 (7th ed. 1960).

[13] See James, *Function of Judge and Jury in Negligence Cases*, 58 YALE L.J. 667 (1949); Thayer, *Law and Fact in Jury Trials*, 4 HARV. L. REV. 147 (1890).

[14] See note 8 *supra*.

[15] 71 Md. 323, 18 Atl. 698 (1889).

[16] *Id.* at 326, 18 Atl. at 701.

[17] *E.g.*, Warner v. Santa Catalina Island Co., 44 Cal. 2d 310, 282 P.2d 12 (1955).

[18] Dorsey v. Barba, 38 Cal. 2d 350, 240 P.2d 604 (1952).

[19] *Ibid.*

[20] Trial Record, Gambert v. Hart, 44 Cal. 542 (1872).

a jury trial and the fact that the judge, trained in the legal profession, will usually be in a better position to evaluate an attorney's conduct than a lay jury. So too, the defendant attorney will be influenced by the possibility of minimizing publicity by waiving a jury trial. Win or lose, such publicty is not favorable to the attorney.

The second issue decided in *Gambert* was that the use of expert testimony on the issue of attorney negligence is not admissible. The court merely said, "the witness was not called to prove any *fact* in the case, and his evidence, if admitted, would have been only an expression of his opinion as an attorney, that the alleged acts or omissions of the defendant amounted to negligence in law."[21] Since where expert testimony is admissible it is the expert's opinion that is sought,[22] the court could not properly exclude the evidence because it was merely an opinion of the witness. It appears that the court's reasoning was that since the question of an attorney's negligence is one of law and expert testimony is not admissible on questions of law, expert testimony is not admissible on the issue of attorney negligence. Since attorney negligence is not a pure question of law, if this was the basis for excluding the expert testimony, the court in so holding was again in error. The opinion being unclear as to the reason for the holding, the other possible bases for excluding the testimony should be considered before considering whether the result of excluding expert testimony is or is not desirable.

Since the question whether particular conduct of an attorney conforms to the standard is a question of fact it might be said that the court may take judicial notice of the fact.[23] The California courts have held that judicial notice may be taken of facts that are peculiarly within the knowledge of the bench and bar.[24] However, it is doubtful that the question whether particular conduct conforms to the standard of care is such a fact as could be judicially noticed. The mere fact that experts could differ on the question indicates that it entails such judgment as should preclude the court from taking judicial notice of what conduct conforms to the standard of care.[25]

A second possible rationale for the decision in *Gambert* is that since the judge is trained and experienced in the same field as the defendant, he is an expert in the field and there is no need to call expert witnesses. This view fails to recognize that although the judge may have a professional opinion as to whether certain conduct conforms to that of the reason-

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[21] 44 Cal. at 549.

[22] *E.g.*, People v. Flynn, 166 Cal. App. 2d 501, 333 P.2d 37 (1958); CAL. CODE CIV. PROC. § 1870(9); WITKIN, CALIFORNIA EVIDENCE § 184 (1958).

[23] Some writers have proposed that the question of constructing the professional standard of care ought to be a function of the court under an expanded theory of judicial notice; see Curran, *Professional Negligence—Some General Comments*, in PROFESSIONAL NEGLIGENCE 1 (Roady & Anderson eds. 1960); Morgan, *Judicial Notice*, 57 HARV. L. REV. 269 (1944).

[24] People v. Adamson, 34 Cal. 2d 320, 210 P.2d 13 (1949); Estate of Costa, 109 Cal. App. 2d 735, 241 P.2d 621 (1952).

[25] *Accord*, Varcoe v. Lee, 180 Cal. 338, 181 Pac. 223 (1919); see 20 AM. JUR. *Evidence* § 19 (1939).

able attorney, his opinion is worth no more than the opinions of other experts in the field.

Whether the parties in an attorney malpractice suit insist on a jury trial or waive the right and try their case before the judge, expert testimony should be not only admissible, but perhaps in some cases required. If the jury is to determine what conduct breaches the standard of care for attorneys it is obvious that in appropriate cases expert testimony should be admissible. A determination of the question whether a defendant has been guilty of conduct which creates an undue risk of harm to others requires that those who judge his conduct weigh the utility of his acts against the probability of harm which they create.[26] Therefore, whoever is to determine this question must in some way be apprised of what is reasonable conduct for one with the skills and experience of an attorney. Where the conduct is not within the common knowledge of the lay juror, expert testimony should be admissible in order that the jury be so informed. Indeed, where the alleged negligence arises out of the use of skills of the attorney with which the layman is unfamiliar, expert testimony should be required for the plaintiff to make out a case for the jury. Since the burden of proving negligence is on the plaintiff,[27] if he does not present expert testimony on matters not within the common knowledge of the jury, he ordinarily suffers a non-suit. In California it has been so held without question in medical malpractice suits.[28] Attorney malpractice suits should be no different in this respect.[29]

Although the courts have been slow to recognize that there are specialists in the practice of law, modern writers have pointed to specialists[30] and even the American Bar Association has recognized their existence.[31] The district court of appeal in *Lucas v. Hamm*[32] said, "the law today has its specialties and . . . the general practitioner in law, when faced with a

[26] See Bohlen, *Mixed Questions of Law and Fact*, 72 U. PA. L. REV. 111 (1924).

[27] Reese v. Smith, 9 Cal. 2d 324, 70 P.2d 933 (1937); *accord*, CAL. CODE CIV. PROC. §§ 1869, 1981.

[28] *E.g.*, Huffman v. Lindquist, 37 Cal. 2d 465, 234 P.2d 34, 29 A.L.R.2d 485 (1951).

[29] See Citizens Loan, Fund, & Savings Ass'n of Bloomington v. Friedley, 123 Ind. 143, 23 N.E. 1075 (1890) (dictum).

[30] See Dorwin, *Planning a Legal Career*, 42 A.B.A.J. 50, 51 (1956), where the author states, "there are many specialties in the legal profession today. Among other fields, the lawyer may specialize on (1) real estate, (2) wills and administration of estates, (3) commercial law, (4) antitrust, (5) taxation, (6) patents, (7) litigation, (8) trademarks, (9) admiralty, (10) corporate financing, (11) international law, (12) or some combination of these subjects."

[31] American Bar Association Canons of Ethics No. 45 provides: "The canons of the American Bar Association apply to all branches of the legal profession; specialists in particular branches are not to be considered as exempt from the application of these principles." *But see* Canon No. 46: "A lawyer available to act as an associate of other lawyers in a particular branch of the law or legal service may send to local lawyers only and publish in his local legal journal a brief and dignified announcement of his availability to serve other lawyers in connection therewith. The announcement should be in a form which does not constitute a statement or representation of special experience or expertness."

[32] 11 Cal. Rptr. 727, 731 (1961), *rev'd*, 56 Cal. 2d. 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961).

problem beyond his capacities, must turn to the expert in his profession to the end that his client is properly served."[33] The judgment for the plaintiff was reversed on appeal, the California Supreme Court holding that there was no evidence of negligence as a matter of law,[34] implying that even if there are specialists in the field there is no duty on the general practitioner to consult such a specialist on his client's case. Furthermore, since judges cannot be specialists in all fields, even though the case may be tried without a jury expert testimony should be admissible to enlighten the judge in the same manner as the lay jury is apprised of what is reasonable for an attorney possessing skills and knowledge unfamiliar to the jury members.

The discussion in the fairly recent case of *Floro v. Lawton*[35] reflects the confusion engendered by *Gambert*. Citing *Gambert*, the court in *Floro* intimated through dictum that expert testimony should not be admissible in attorney malpractice cases because of the danger of plaguing such litigation with the problems the courts and attorneys have met in the use of expert witnesses in medical malpractice cases.[36] However, none of these problems should be considered so serious as to preclude the use of expert opinion testimony in malpractice suits against attorneys. Though such problems as the "conspiracy of silence" are real,[37] they are not so serious as to make good expert testimony unavailable.

One of the most serious criticisms of expert witnesses is that only those witnesses whose testimony would be favorable are called. However, this shortcoming can be mitigated if the court will call its own impartial experts. In *Marin Water & Power Co. v. Railroad Comm'n of California*[38] the California Supreme Court said, "it is now conceded that the judicial tribunals have power to call and examine witnesses in the furtherance of justice and against the will of either party."[39] This position received statutory affirmance by the California legislature.[40] Under this procedure the court can call impartial witnesses and the witness so called could not be accused of identifying himself with either party.

Conclusion

In California expert testimony has not been admissible on the issue of attorney negligence[41] although such evidence is admissible in other jurisdictions that have passed on the problem.[42] The leading case of *Gambert v. Hart*[43] held the question of attorney negligence was one of law and that

[33] *Id.* at 731.

[34] Lucas v. Hamm, 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961).

[35] 187 Cal. App. 2d 657, 10 Cal. Rptr. 98 (1960).

[36] *Id.* at 675, 10 Cal. Rptr. 107.

[37] Swan, *The California Law of Malpractice of Physicians, Surgeons, and Dentists*, 33 CALIF. L. REV. 248 (1945).

[38] 171 Cal. 706, 154 Pac. 864 (1916).

[39] *Id.* at 714, 154 Pac. at 867.

[40] CAL. CODE CIV. PROC. § 1871.

[41] See Gambert v. Hart, note 4 *supra*, 44 Cal. 542 (1872).

[42] Olson v. North, 276 Ill. App. 457 (1934); Cochrane v. Little, 71 Md. 323, 18 Atl. 698 (1889).

[43] Note 4 *supra*, 44 Cal. 542 (1872).