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expert testimony would not be admitted. The decision was unclear on both points and has led to confusion in later cases. The question of whether particular conduct conforms to the standard of care is clearly one of fact and the court in *Gambert* was in error on this point.

At the time of *Gambert* expert testimony may have had little or no value on the issue of attorney negligence and though the reasoning in *Gambert* was unclear, the decision may have been correct. But in view of the specialized practice of law today, expert testimony should be admissible whenever the character of the alleged negligent conduct is not such as to come within the common knowledge of the trier of fact, whether this be judge or jury; and in proper cases such evidence should be required of the plaintiff to make out a prima facie case and avoid a non-suit.

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CLIENT'S STRATEGY FOR DAMAGES AGAINST THE MALPRACTICING ATTORNEY

Attorney liability for malpractice is but one facet of the broad field of tort liability for negligence. Thus the general principles of tort law apply in a suit against a negligent attorney, and the broad outlines may be painted by utilizing such concepts as duty, standard of care, proximate cause, and damages. The element of damages merits closer analysis for it presents several interesting and significant questions: whether the action should be brought in tort or in contract, the choice or strategy in electing between these actions, and the difficulty of pleading and proving proximity of damages. These questions will be considered at some length below.[1]

Suit in Tort or Contract for Attorney Negligence

There were two theoretically separate and distinct bases for imposing liability upon a negligent attorney at common law,[2] *ex delicto* and *ex contractu.* Liability *ex delicto* has its roots in the concept that an individual may owe a duty to another to act with reasonable care so as not to harm his interests, this duty being imposed as a matter of law for reasons of social policy and not because of any agreement between the parties.[3] This is the general tort duty for breach of which an action in negligence would lie. The second liability, *ex contractu,* arises not as a matter of law but out of

[1] Since the question of damages will always be ancillary to a finding of negligence, it will be assumed that there has been found an act of negligence by the attorney.

[2] Boorman v. Brown, 3 Q.B. 511, 525, 114 Eng. Rep. 603, 608 (1841):

> That there is a large class of cases in which the foundation of the action springs out of privity of contract between the parties, but in which, nevertheless, the remedy for the breach, or non-performance, is indifferently either assumpsit or case upon tort, is not disputed. Such are actions against attorneys, surgeons, and other professional men, for want of competent skill or proper care in the service they undertake to render . . . .

[3] See PROSSER, TORTS 478 (2d ed. 1955).

the agreement of the parties that they shall be bound.[4] Such an agreement exists where an attorney expressly engages to act with care, thereby subjecting himself to contract liability for breach of his promise. In addition, the common law implied a promise to exercise due care in certain employment agreements: "So, in the case of one who holds out a certain profession, the law supposes him to be of competent skill, and he is responsible for any failure in that respect. . . . From the holding out, the law implies a contract or a duty to exert competent and reasonable skill."[5]

The California courts have had occasion to consider this dual aspect of liability not only in attorney malpractice, but also in medical malpractice,[6] accountant negligence,[7] and common carrier negligence cases,[8] where both tort and contract duties could be rationalized. The distinction between the two actions becomes relevant when conflicting rules of pleading,[9] of law,[10] and of damages[11] are pressed by the litigants. The California decisions considering conflicting rules when there is a dual basis of liability have in the past been far from consistent.[12] However, these apparently conflicting holdings more recently have been aligned and distinguished with the result that actions involving personal injury, although containing features of both contract and tort, are regarded as delictual actions, since negligence is considered the gravamen of the action; actions which concern only pecuniary losses with no personal injury may be brought in either contract or tort.[13] Attorney malpractice cases fit into this category of "cases which relate

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[4] See 1 CORBIN, CONTRACTS § 9 (1963).

[5] Erle, C. J., in Fish v. Kelly, 17 C.B. (N.S.) 194, 206, 144 Eng. Rep. 78, 83 (C.P. 1864).

[6] Huysman v. Kirsch, 6 Cal. 2d 302, 57 P.2d 908 (1936); Marty v. Somers, 35 Cal. App. 182, 169 Pac. 411 (1917).

[7] L. B. Laboratories, Inc. v. Mitchell, 39 Cal. 2d 56, 244 P.2d 385 (1952).

[8] Basler v. Sacramento Elec., Gas & Ry. Co., 166 Cal. 33, 134 Pac. 993 (1913).

[9] Von Goerlitz v. Turner, 65 Cal. App. 2d 425, 150 P.2d 278 (1944).

[10] Lubert v. Chauviteau, 3 Cal. 458 (1853).

[11] Miller v. Van Tassel, 24 Cal. 459 (1864).

[12] See PROSSER, *The Borderland of Tort and Contract*, SELECTED TOPICS ON THE LAW OF TORTS 434 (1953), where the author states that the cases considering election between contract and tort "are in what can only be described as a snarl of utter confusion, from which no generalization can be derived except that there is almost complete disagreement." In Jones v. Kelly, 208 Cal. 251, 280 Pac. 942 (1929), the court said that the plaintiff may make an election because both contract and tort duties had been breached; see also Williamson v. Pacific Greyhound Lines, 67 Cal. App. 2d 250, 153 P.2d 990 (1944), where it was said that the plaintiff may *not* make an election because to allow such would lead to "utter chaos"; in Peterson v. Sherman, 68 Cal. App. 2d 706, 157 P.2d 863 (1945), the court said that where there are both duties present, the presumption is that the pleadings sound in contract; and Basler v. Sacramento Elec., Gas & Ry. Co., 166 Cal. 33, 134 Pac. 993 (1913), stated that whether tort or contract principles are applicable will be determined by the gravamen of the harm sustained by the plaintiff.

[13] Comunale v. Traders & General Ins. Co., 50 Cal. 2d 654, 663, 328 P.2d 198, 203 (1958):

> [I]t is the rule that where a case sounds both in contract and tort the plaintiff will ordinarily have freedom of election between an action of tort and one of contract. . . . An exception to this rule is made in suits for personal injury caused by negligence, where the tort character of the action is considered to

to financial damage" (with perhaps one exception—mental suffering resulting from attorney negligence), and it should follow that a client has a free election to sue in either tort or contract.

California attorney malpractice cases appear to bear out this general rule. To date the actions which have been sustained have all been brought in tort. While there has been no case squarely holding that an injured client can elect to sue for breach of contract, there have been dicta indicating that such is the rule.[14] In the *Lucas v. Hamm*[15] case it was alleged that an attorney had negligently drawn a will in an action by the disappointed intended legatees as third party beneficiaries of his employment contract with the testator. Recovery was denied because the court found that the attorney's acts did not constitute negligence. However, the court stated: "We conclude that intended beneficiaries of a will who lose their testamentary rights because of failure of the attorney who drew the will to properly fulfill his obligations under his contract with the testator may recover as third party beneficiaries."[16] Such a conclusion necessarily implies that the attorney is liable in contract for his negligence. The court stated further that "the attorney, by accepting employment to give legal advice or to render other legal services, impliedly agrees to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake. . . . These principles are equally applicable whether the plaintiff's claim is based on tort or breach of contract."[17] These statements by the highest California court indicate that the client may sue in either tort or contract.

Criteria for Election

What difference does it make whether the contract or the tort action is brought? The possibility of recovering a larger sum in damages in tort will generally suggest that it is the better action. The purpose of allowing recovery in tort is to compensate the plaintiff for all losses suffered by him, the only restriction being that the damages must be proximately caused.[18] However, in contract actions for damages the purpose of recovery is to give the plaintiff the benefit of the contract, and accordingly a further restriction is added.[19] Applying the familiar rule of *Hadley v. Baxendale*,[20]

prevail . . . but no such exception is applied in cases . . . which relate to financial damage.

[14] Floro v. Lawton, 187 Cal. App. 2d 657, 10 Cal. Rptr. 98 (1960); Moser v. Western Harness Racing Ass'n, 89 Cal. App. 2d 1, 200 P.2d 7 (1948); Armstrong v. Adams, 102 Cal. App. 677, 283 Pac. 871 (1929).

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

[16] *Id.* at 591, 15 Cal. Rptr. at 825, 364 P.2d at 689.

[17] *Ibid.*

[18] McCormick, *Contemplation Rule as a Limitation Upon Damages for Breach of Contract*, 19 MINN. L.R. 497 (1935).

[19] *Ibid.*

[20] 9 Exch. 341, 23 L.J. Ex. 179, 23 L.T.O.S. 69 (1854). The owner of a grist mill sued a carrier for delay in delivering to a manufacturer broken pieces of a shaft. The grist mill was shut down pending arrival of the new shaft to be modeled after the broken pieces. The court held that the mill owner could not recover from the carrier for damages caused by the shut-down because the carrier was not apprised that mill

the damages must be such as reasonably could have been contemplated by the parties at the time they contracted. In many of the problems which an attorney is hired to solve, the harm which would result from negligent performance would be not only proximate but also contemplated by the parties, so that recoverable damages would be the same in both actions. Examples might be where an attorney is hired to litigate a case, to make collections, to prosecute an appeal, or to file a security lien. In each case, the harm which would proximately result from the negligence would be the amount contemplated by the parties, and the damages recoverable would be the same in either action.

If the problem presented to the attorney concerned the drafting of a contract, however, negligence in its preparation might lead to greater proximate damage than was within the reasonable contemplation of the parties when they made the contract. For example, the attorney might be requested by the client to draw a contract for the purchase of real property. Through the negligence of the attorney the contract is not effective and the client does not obtain the property. The property has in the meantime unexpectedly appreciated, resulting in substantial lost profits to the client. The damages would be proximate but might not be contemplated; in this situation the client should obviously pursue a tort rather than the alternative contract remedy. The contemplation rule is a narrower restriction than the proximate result rule. The conclusion is that while tort damages possibly might amount to more, they would never be less than contract damages. The action would best be brought in tort unless one of the factors noted below suggests the alternative contract remedy.

Contributory Negligence

One aspect of a case which might induce a client to sue the negligent attorney in contract rather than tort is a factual situation suggesting that contributory negligence of the client will be an issue.[21] Withholding information, misinforming, refusing to cooperate, or failing to follow the directions of the attorney might constitute contributory fault. This defense was held to be available to a negligent attorney in the case of *Theobald v. Byers*,[22] the court drawing analogy to medical malpractice cases where contributory negligence is a proper defense.[23] Although holding that there had been no contributory negligence as a matter of law (reversing the lower court's finding of fact), the upper court said that "there would seem to be no reason whatever why the same rule should not be applicable in a legal malpractice action where there is evidence that a client chose to disregard the legal advice of his attorney. In our opinion, any other rule would be grossly unfair. The trial court was correct in holding that contributory

operation depended on delivery of the shaft. Liability will not be imposed for damage which was not contemplated by the parties at the time they made the contract. *Accord*, Hunt Bros. Co. v. San Lorenzo Water Co., 150 Cal. 51, 87 Pac. 1093 (1906).

[21] See Annot., 45 A.L.R.2d 17 (1960).

[22] 193 Cal. App. 2d 147, 13 Cal. Rptr. 864 (1961).

[23] See Preston v. Hubbell, 87 Cal. App. 2d 53, 196 P.2d 113 (1948); Sales v. Bacigalupi, 47 Cal. App. 2d 82, 117 P.2d 399 (1941); Rising v. Veatch, 117 Cal. App. 404, 3 P.2d 1023 (1931).

negligence could properly be considered a defense in the instant case."[24]

While facts entitling the attorney to this defense would be sufficient to bar completely any recovery in tort,[25] they might not have this effect in a contract action. Suppose, for example, the client has withheld information or evidence from his attorney which has contributed to the loss of the case. To the attorney's promise of due care there should be an implied counter-promise of co-operation by the client that he will disclose all the facts.[26] The effect of a failure to comply with this promise could be resolved in several ways. First, as suggested by Williston, it might be said that a client cannot recover damages "because of a doctrine which suggests both contributory negligence and a requirement of equity. One who is himself guilty of a wrong for breach of a contract, it may be said, should not seek to hold his counter-promisor liable."[27] Secondly, the counter-promise might be treated as a condition, *i.e.*, the attorney's duty of performance is conditioned upon the client's co-operation.[28] If the act by the client was a material breach of his implied promise of co-operation, then under either tort or contract doctrine the attorney would be excused from liability.[29] However, a non-material breach by the client would be a complete defense in a tort action (contributory negligence) while in a contract action it would go merely to reduce the damages proximately attributable to the attorney.[30] Third, the two implied promises might be enforced as independent obligations, no effect as a defense being given them.[31] The attorney would be liable only for that amount which he proximately caused, regardless of whether the breach was material.

It is clear that the contract action leaves more latitude for arguing that the attorney should be liable even in the presence of contributing fault by the client. The client might be well advised to preclude the complete defense of contributory negligence, where it is an issue, by suing in a contract action.

Survival of Actions

The common law rule concerning survival of actions was that a contract action could be maintained even after the death of either of the parties to the contract, while an action for personal injuries was abated by the death of either the injured party or the tortfeasor.[32] California has provided by statute that "no cause of action shall be lost by reason of the death of any person but may be maintained by or against his executor or administrator."[33] Thus survival of actions, a once important distinction between tort and contract, is now of no import and should not bear upon the choice of actions in suing the negligent attorney.

[24] 193 Cal. App. 2d at 150, 13 Cal. Rptr. at 866.
[25] PROSSER, TORTS 284 (2d ed. 1955).
[26] See 6 WILLISTON, CONTRACTS § 887 (3d ed. 1962).
[27] *Id.* § 813. See also 4 CORBIN, CONTRACTS § 947 (1951).
[28] 6 WILLISTON, CONTRACTS § 887 (3d ed. 1962).
[29] *Id.* § 814; 4 CORBIN, CONTRACTS § 946 (1951).
[30] 4 CORBIN, CONTRACTS §§ 946, 1253 (1951).
[31] 6 WILLISTON, CONTRACTS § 813 (3d ed. 1962).
[32] PROSSER, TORTS 706 (2d ed. 1955); Annot., 65 A.L.R.2d 1211 (1960).
[33] CAL. PROB. CODE § 573.

Venue

The possibility of determining venue by choice of action, while somewhat limited, might be a factor militating in favor of electing a contract remedy. The advantages to be gained by an alternative venue could include, among others: a minimization of one's own and maximization of the opposition's expense and inconvenience; advantages of trial in familiar surroundings in the presence of known judicial personnel; availability of compulsory process, thereby securing greater effectiveness of live testimony as compared with deposition evidence; and delay.

In a tort action, venue is that of the defendant's residence unless there is physical injury;[34] if there is physical injury the plaintiff will have the option of maintaining the action in the venue where the injury occurred.[35] Since physical injury is not usually present in a malpractice suit against an attorney, the client is limited in a tort action to a venue set by the defendant's residence.

In a contract action, however, the client conceivably could choose among three different venues: (1) where the defendant resides, (2) where the contract is to be performed, and (3) where the contract for retaining the attorney is entered into—but where the contract is entered into is deemed to be the same as where the contract is to be performed unless there is a special term in the contract to the contrary.[36] The client-attorney contract likely would not have such a term, but the client is still left with a venue choice not available in a tort action, that of the county where the contract is to be performed. If this varies from where the defendant-attorney resides, therein lies a possible advantage for the client in choosing a contract action over the tort action. While seemingly a small difference, under the proper factual situation such a difference might be a determining factor in the choice.

Attachment

The rule has been well established that attachment will not issue in a tort action.[37] Further, this provisional action will not be permitted in a contract action unless, as provided by statute, the contract (express or implied) sued upon is "for the direct payment of money."[38] The contract on which the client would base his action is one of due care and not one for the payment of money, and therefore attachment would not be available.[39] Could it be argued for the sake of securing attachment that the promise to use due care contains an implied promise of indemnity for any damages which result from failure to use due care? If so, then perhaps

[34] CAL. CODE CIV. PROC. § 395.

[35] Mason v. Buck, 99 Cal. App. 219, 278 Pac. 461 (1929); see also WITKIN, CALIFORNIA PROCEDURE *Actions* §§ 213, 219 (1954).

[36] CAL. CODE CIV. PROC. § 395.

[37] Hill v. Superior Court, 16 Cal. 2d 527, 106 P.2d 876 (1940); San Francisco Iron & Metal Co. v. Abraham, 211 Cal. 552, 296 Pac. 82 (1931).

[38] CAL. CODE CIV. PROC. § 537(1).

[39] This is true if only the attorney is a resident. CAL. CODE CIV. PROC. § 537(2), (3) provide broader rights of attachment against non-residents in tort actions and also in contract actions not necessarily for direct payment of money.

this implied promise of indemnity could come within the code provision. While the decisions concerning the provision have liberally expanded its meaning,[40] to imply a promise of indemnity seems to go far beyond the legislature's intent to limit attachment.

Statute of Limitations

The California courts have uniformly held[41] that the statute applicable in an action against a negligent attorney is Code of Civil Procedure section 339, limiting to two years the time for bringing "an action upon a contract, obligation or liability not founded upon an instrument in writing,"[42] the cases making no clear distinction between a contract and a tort action. They have simply stated that under this section the cause of action is barred at the expiration of two years after the negligence occurred. It would seem unnecessary to determine, however, whether a negligence action against an attorney is considered as a breach of contract or as a tort in California. The word "liability" used in section 339 is interpreted to include all torts not involving personal injury or death and, therefore, either action would be governed by the two-year limitation.[43]

All the attorney malpractice cases which have dealt with the limitation problem have presumably based the duty owed and breached upon an oral contract. Some speculation must be indulged in to complete the statute of limitations picture since no cases have been found concerning written contracts. First, if the employment contract is a written instrument and contains a written condition that the attorney agrees to use care and skill, it clearly would seem that the contract would come within the four-year statute which applies to "an action upon any contract, obligation or liability founded upon an instrument in writing."[44] Hence, a contract action should be brought in the circumstances where the attorney has made a written condition of care and more than two years has elapsed since the negligent act. Secondly, this should be distinguished from the case where there is a written contract of employment with no express term of care and skill, this condition being implied by the court. Generally, the California position as regards the limitation applicable to an implied contract or term within a written contract is that while any written terms of the contract will come within the four-year provision of section 337, any implied term merely supported by that contract will fall within the two-year limitation of section 339.[45] It should be borne in mind that these represent the general rules

[40] Comment, 14 HASTINGS L.J. 38 (1962).

[41] Hays v. Ewing, 70 Cal. 127, 11 Pac. 602 (1886); Griffith v. Zavlaris, 215 A.C.A. 923, 30 Cal. Rptr. 517 (1963); DeGarmo v. Mayo, 4 Cal. App. 2d 604, 41 P.2d 366 (1935); Wheaton v. Nolan, 3 Cal. App. 2d 401, 39 P.2d 457 (1934); Jensen v. Sprigg, 84 Cal. App. 519, 258 Pac. 683 (1927).

[42] CAL. CODE CIV. PROC. § 339.

[43] Lowe v. Ozmun, 137 Cal. 257, 70 Pac. 87 (1902); Piller v. Southern Pac. Ry., 52 Cal. 42 (1877); Rubino v. Utah Canning Co., 123 Cal. App. 2d 18, 266 P.2d 163 (1954); Italiani v. Metro-Goldwyn-Mayer Corp., 45 Cal. App. 2d 464, 114 P.2d 370 (1941).

[44] CAL. CODE CIV. PROC. § 337.

[45] See O'Brien v. King, 174 Cal. 769, 164 Pac. 631 (1917); Thomas v. Pacific Beach Co., 115 Cal. 136, 46 Pac. 899 (1896); Ashley v. Vischer, 24 Cal. 322 (1864).

for written contracts and for implied contracts. The only cases which have specifically considered the statute of limitations in attorney malpractice suits have applied the two year limitation, presumably because the duty was based on an oral contract.[46]

Damages "Proximately Caused"

Whether the action is *ex delicto*[47] or *ex contractu*,[48] in order to state a cause of action and thereby recover a judgment, the client must show that he has sustained damages and that these damages were proximately caused by the attorney. It is this element of pleading and proving proximate causation which has proved to be a stumbling block for the client-plaintiff.

Pleading

The early cases of attorney malpractice required an overly strict pleading of proximate cause,[49] but this is no longer so. This requirement was a logical outgrowth of the way the proximate cause rule was stated. Rather than declaring that the attorney's negligence must be a "proximate cause," the early courts stated the rule in the familiar "but for" form.[50] The "but for" rule implies that nothing else shall have caused the damage, *i.e.*, that the harm must be caused solely by the attorney's negligence. This was clearly stated in *McGregor v. Wright*[51] where the rule was set down that the attorney's act must be the "sole and proximate cause" and that any loss suffered must be "caused solely" by his negligence. The effect of requiring the client to show that the damages resulted solely from the attorney's negligence or that he would not have suffered the loss but for the negligence is to suggest that the client must exclude and negative all other possible

See also McCarthy v. Mt. Tecarte Land & W. Co., 111 Cal. 328, 340, 43 Pac. 956, 959 (1896): "In order to be founded upon an instrument in writing, the instrument must, itself, contain a contract to do the thing for the nonperformance of which the action was brought." Scrivner v. Woodward, 139 Cal. 314, 316, 73 Pac. 863 (1903): "Promises merely implied by law, and not supported by any express promise or stipulation in the written instrument, do not fall within the provision of section 337, relating to contracts in writing."

[46] *E.g.*, Lattin v. Gillette, 95 Cal. 317, 30 Pac. 545 (1892); Hays v. Ewing, 70 Cal. 127, 11 Pac. 602 (1886); DeGarmo v. Mayo, 4 Cal. App. 2d 604, 41 P.2d 366 (1935); Wheaton v. Nolan, 3 Cal. App. 2d 401, 39 P.2d 457 (1934); Jensen v. Sprigg, 84 Cal. App. 519, 258 Pac. 683 (1927); Annot., 49 A.L.R.2d 1216, 1221 (1956).

[47] CAL. CIV. CODE § 3333.

[48] CAL. CIV. CODE § 3300.

[49] 1 WITKIN, CALIFORNIA PROCEDURE *Attorneys* § 76 (1954).

[50] In Hastings v. Halleck, 13 Cal. 204 (1859), it was held that in order to charge the defendant attorney with negligence in failing to set up a defense in a prior suit, the client must show the facts which would have constituted the defense, that these facts were provable, and that the case would have been won "but for" the attorney's negligence. In Lally v. Kuster, 177 Cal. 783, 787, 171 Pac. 961, 962 (1918), it was asserted that the attorney had negligently failed to bring an action to collect a debt; the court quoted 6 C.J. *Attorney & Client* § 260 (1916) saying the client must show that the attorney was negligent "and that, but for such negligence, the debt could, or would, have been collected."

[51] 117 Cal. App. 186, 196, 3 P.2d 624, 628 (1931).

causes for the damage which resulted.[52] This strict pleading requirement did not conform to the general rule that a plaintiff should not anticipate defenses in the complaint.[53] The result was to give the defendant-attorney a pleading advantage not given defendants in other types of negligence actions.

Not until 1954 in *Modica v. Crist*[54] was it held that allegation and proof of sole causation is not required and that the use of the "but for" clause in the previous cases was just one method of expressing the need of proximate causation. The court declared that the pleading of proximate cause in attorney negligence is the same as in any other negligence action, that is, that it may be pleaded generally. Since this case, the pleading of proximate cause in attorney negligence should present no greater problem than in other negligence actions.

Proof of Proximate Damages

Though it is no longer necessary to allege sole causation, the plaintiff-client still must be prepared to prove that the earlier trial or legal claim which the attorney negligently lost was meritorious. If the legal claim presented to the attorney by the client would not permit him to litigate it successfully, then even if he was negligent in handling the matter, the damages are a proximate result of the unmeritorious legal claim and not of the attorney's negligence. Only if there is a valid claim may the client suffer damage from the attorney's acts. Therefore, the trial court in the malpractice action will review the previous case, consider the earlier evidence, and apply the proper law to it to determine whether the client has lost a valid claim or defense or whether the case would have been lost on the merits or law regardless of any attorney negligence. It will involve, in a sense, a suit within a suit. Thus, where a client sued his attorney for the inconvenience and embarrassment suffered because the attorney negligently failed to put forward a defense available to the client in a contempt proceeding, the court reconsidered the original proceeding and held that since the defense which the attorney could have interposed was not susceptible of proof, the client could not recover against the attorney.[55]

The necessity of relitigating the issues in the previous case was clearly brought out in *Pete v. Henderson*.[56] The client asserted the negligence of the attorney in failing to file a notice of appeal in a previous action in which a judgment had been rendered against the client as a judgment debtor. The client attempted to show that the appeal would have been good and, therefore, that the damages which resulted were caused by the attorney's negli-

[52] See Feldesman v. McGovern, 44 Cal. App. 2d 566, 112 P.2d 645 (1941), where the client alleged that the attorney was negligent in failing to file a bankruptcy petition. The court held that the client failed to state a cause of action because he had not alleged that had the petition been filed, he would have been entitled to an adjudication of bankruptcy. The client failed to exclude other possible causes of the damage in his allegations.

[53] See generally 2 WITKIN, CALIFORNIA PROCEDURE *Pleading* § 195 (1954).

[54] 129 Cal. App. 2d 144, 276 P.2d 614 (1954).

[55] Frost v. Hanscome, 198 Cal. 550, 246 Pac. 53 (1926).

[56] 124 Cal. App. 2d 487, 269 P.2d 78 (1954).

gence in failing to appeal and not by the merits of the case. The judge emphatically refused to permit any discussion of evidence relating to the merits of the appeal in the original action, his position being that this would constitute a collateral attack on the judgment and that he could not consider what might have happened to the appeal if one had been perfected. This was held to be error on appeal, the court pointing out the need for a reconsideration of the original suit and indicating further that this was not a collateral attack.[57] An attorney malpractice action then, involves a suit within a suit, a reconsideration of the previous legal claim, and only by determining whether or not the original claim was good can proximate damages be determined.

Conclusion

It may be seen that one who has been financially injured by the negligent actions of his attorney may recover this amount by a suit for damages. The client may elect between a tort remedy or one in contract in order to maximize his recovery, but in this strategy he will want to consider the possible effects of venue changes, contributory negligence, and the statute of limitations. Further, while pleading should be no more difficult than in other negligence actions, proof that damages were proximately caused by the negligent attorney does require the client to be prepared to show that the previous claim was good. The client must prove, in effect, one suit within the other.

Suggesting in what way a client may obtain full damages against his attorney is not to be interpreted as a general encouragement of attorney malpractice suits. Yet an attorney should be subject to the same duty of care required of others and for his failure in this respect should have visited upon him the damages he has caused. Not only will this facilitate justice by shifting the loss from the innocent party, but further, it will serve to vindicate the integrity of the bar and encourage respect for the legal profession.

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[57] *Id.* at 490, 269 P.2d at 79:

> Such proof would not constitute a collateral attack on the judgment. The judgment in the first action, as between the parties to that action, is final. The purpose of the present action is not to reverse that judgment. It has been finally determined that the judgment creditor in the first action is entitled to that money. The appellant is not trying to regain recoupment from the judgment creditor. He is seeking to recover damages from his attorney, who is not a party to the first action, for his negligence in permitting the judgment to become final without taking an appeal. If he can prove that the judgment in that case is erroneous and would have been reversed, he should be permitted to do so. In that event he has proved damage proximately caused by the negligence.

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