

1966

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D. Orville Lahy
University of Richmond

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Recommended Citation

D. O. Lahy, *Perpetuities, Privity and Professional Liability*, 2 U. Rich. L. Rev. 203 (1966).
Available at: <http://scholarship.richmond.edu/lawreview/vol2/iss4/3>

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Perpetuities, Privity and Professional Liability

D. ORVILLE LAHY

Caveat: Every attorney at law shall be liable to his client for any damage sustained by him by the neglect of his duty as such attorney. Va. Code Ann. 1950 §54-46 (Repl. Vol. 1958).

As the number of malpractice cases against members of all professions continues to increase, it seems appropriate to review several new developments which may be of considerable importance to the practicing lawyer with respect to his professional liability. The time has come to approach this delicate subject with some plain language about property law and the portentous responsibility of the legal profession in the context of the rule against perpetuities.

The liability of a lawyer for malpractice has long been sustained by the common law. The earliest cases were reported in England almost two hundred years ago wherein it was first established that a solicitor (attorney) was liable for his "culpable negligence" in the practice of law. At the same time, those early cases granted exoneration to a barrister (counsel) from all liability, and held that neither solicitors nor barristers were called upon to respond in damages for their mere professional "mistakes." Apparently on the theory that no member of the legal profession could be charged with a knowledge of all of the law, many lawyers then escaped liability for their incompetence. Such is not the status of the law today, and any lawyer may be held personally liable for the loss he causes by a mere mistake. It is suggested that a misunderstanding or a mistake in the modern practice of law can be as costly to the twentieth-century lawyer as was his "culpable negligence" two centuries ago. A rather recent case portends this ominous possibility.

It happened in California. An attorney had practiced law in the community for more than forty years after graduation from a well-known law school. His legal education had followed undergraduate technical studies and the award of an engineering degree from a large state university. He was probably a typical general practitioner with many years experience in the ramifications of property law, testamentary disposition, and estate planning. With this commendable professional background, he was made the defendant in a suit seeking \$90,000. in damages for malpractice, breach of contract in drafting a will, and negligence in the handling of an estate. The trouble began when this attorney entered into an oral contract with a client to draft a will. It appeared that he had served as counsel to this client for about thirty years, was thoroughly familiar with the client's estate, and understood the client's desire and direction that the plaintiffs were to receive specified portions of his estate. The will thereafter drafted and executed by the client contained a clause creating a residual testamentary trust in which the plaintiffs were named beneficiaries and provided that: "This trust shall cease and terminate at 12 o'clock noon on a day five years after the date upon which the order distributing the trust property to the trustee is made by the Court having jurisdiction over the probate of this will."

Shortly after the death of the client-testator, the will was admitted to probate and certain interested persons (blood relatives of the testator) instituted action to contest its validity. The same attorney, representing the executors, settled this dispute with the contesting parties whereby, for the payment of an agreed sum of \$10,000., the contest would be dismissed and appropriate releases executed by the contestants. The releases thereafter prepared by the attorney and duly executed by the contestants apparently failed to preclude the same con-

testants from making another subsequent attack on the specific clause in the will that created the residuary trust. In the malpractice action there was evidence that these releases had been approved by the court but that the attorney had failed to advise the court that their efficacy had been challenged by other counsel to whom they had been submitted for review and opinion.

The ultimate result was a further attack by the same contestants, this time directed at the validity of the clause that purported to create the residuary trust. The basis for the alleged invalidity was the rule against perpetuities. Once again the same attorney negotiated a compromise settlement, coupled with an apparent admission that the clause in question was indeed invalid under that rule. After explaining to the intended beneficiaries (the plaintiffs in the malpractice action) that they would be deprived of their entire inheritance because of the rule against perpetuities, he proceeded to suggest a \$75,000. settlement with the blood relatives of the testator, the contestants, pointing out to the beneficiaries that their inheritance of the trust property would thereby be reduced by that amount. It seems strange that the contestant blood relatives of the testator accepted this compromise; but they did, and their attack on the clause, founded on the rule against perpetuities, was also dismissed.

After all contests were concluded by negotiation and compromise, the intended beneficiaries of the residuary trust brought suit against the attorney seeking to recover \$75,000. damages for malpractice and breach of contract to draft the will for the testator, and to recover an additional \$15,000. damages founded on negligence in the drafting of releases concerned with the first attack on the validity of the will itself. The defendant-lawyer interposed a demurrer which was sustained by the trial court. However, the plaintiffs appealed and the inter-

mediate California appellate court, finding adequate facts necessary to constitute a cause of action, remanded the case to the trial court. *Lucas v. Hamm*, 11 Cal. Rptr. 727 (1961). Thereafter, the defendant-lawyer carried an appeal on the order of remand to the highest court of the state where he finally prevailed, and the judgment of the trial court sustaining his demurrer was affirmed. *Lucas v. Hamm*, 15 Cal. Rptr. 821, 364 P. 2d 685 (1961). In that portion of the opinion concerned with the attorney's alleged negligence in considering the rule against perpetuities when drafting the will, there is no doubt that the Supreme Court of California went to extremes to rescue the legal profession from a precarious area of professional liability. However, at the same time the court introduced and established an entirely new base for such an action and departed from several centuries of precedent as to the foundation for malpractice actions against attorneys.

It has been long established that the liability of a lawyer for negligence originates in the contractual relationship between the lawyer and his client. With this foundation in contract law, an action against an attorney has been said to spring from an implied promise by the lawyer to render services equated in terms of care, skill and knowledge to the standard of negligence. Therefore, whether or not such an action sounds in tort is not material, even though the action is necessarily based at its outset on the contractual relationship. Indeed, more than a century ago, it was suggested in England with reference to "actions against attorneys, surgeons and other professional men, for want of competent skill or proper care in the service they undertake to render" that such actions spring out of privity of contract between the parties but that the remedy for a breach thereof may sound either in contract or tort. *Boorman v. Brown*, 3 Q. B. 511, 525, 114 Eng. Rep. 603, 608 (1842). Therefore,

the cornerstone for any malpractice action has long been laid in a contractual setting, with "privity of contract" as the legal concept holding it in place. Absent "privity of contract," no such action for damages could be brought.

The requirement for "privity of contract" between attorney and client as the basis for a malpractice action was established in this country by the United States Supreme Court in a leading case that came up from the District of Columbia. Therein, action was brought by a banking institution against an attorney who it was alleged had negligently examined a real property title. A borrower who claimed ownership of the property had engaged the attorney to search its title and then presented the attorney's certificate of title to mortgage brokers employed by the borrower to negotiate a loan. The brokers proceeded to obtain the loan from the plaintiff bank, and the evidence showed that the attorney had no relationship, no "privity of contract" whatsoever, with either the brokers or the bank. Upon ultimate default and attempted foreclosure, it was discovered that the borrower had no title to the property, having previously made a valid conveyance in fee simple by a recorded deed. The bank then attempted to recover its loss in a malpractice action against the attorney. In affirming the judgment of the trial court in favor of the attorney-defendant, Justice Clifford found no difficulty in sustaining the attorney's liability for negligence, but held that the bank could not recover because the attorney's obligation to use reasonable care and skill in the performance of his services was *to his client*, and not to a third party. With citations to several English cases, the gravamen of the court's conclusion was that an attorney was not liable for negligence to anyone with whom the attorney-client contractual relationship does not in some manner exist. *National Savings Bank v. Ward*, 100 U. S. 195, 25

L. Ed. 621 (1880). The opinion, however, was not unanimous. Chief Justice Waite, in a rather brief but forceful dissent, expressed the viewpoint that the attorney should be liable to *anyone* who he knows or ought to know would use his certificate of title in a business transaction. In substance, the dissent suggested that the absence of "privity of contract" should not shield the lawyer from liability for his own lack of ordinary professional care and skill.

The Virginia statute presented as a headnote to this commentary, and its almost identical counterpart in West Virginia [W. Va. Code Ann. §2860 (1961)], by the phrase "to his client" would seem only to spell out the existing common law to the effect that where there is privity of contract an attorney is liable for his neglect of duty. Even if such liability as indicated by these statutes is resolved on the basis of tort law, the underlying duty to use care is based on a lawyer's implied promise to exercise a degree of knowledge and skill in keeping with the standards of his profession. Furthermore, even in the absence of a binding attorney-client contract, an early Virginia case held that where an attorney's services were gratuitously rendered he was still liable for his negligence. *Stephens v. White*, 2 Wash. 203 (Va. 1796).

In the context of medical malpractice, it has long been established that the physician-patient relationship is the essential foundation for the action, a relationship that imposes a duty on the physician to exercise care, skill and diligence in the services rendered to his patient. Although the nature of the professional duty, and the liability for neglect thereof, seems to be pretty much the same for both the physician-patient relationship and the attorney-client relationship, the existence of privity of contract has never been significant as a requirement for a medical malpractice action. Indeed, many physician-

patient relationships come into existence where the contract employing the physician is made by a family member, or some other person, for the benefit of a third-party patient in whose behalf the services are to be rendered. In one such case, a physician-radiologist who never even had seen the claimant-patient was held liable for negligent interpretation of X-ray films, there being a total absence of privity between him and the claimant. *Harvey v. Silber*, 300 Mich. 510, 2 N. W. 2d 483 (1942). Many such cases never reach the appellate courts and are decided against the physician without any consideration as to the absence or presence of privity of contract with the patient. Why should it be any different when an attorney is the defendant in an action founded on alleged legal malpractice?

It is both interesting and significant to review the process of reasoning by which the California court jumped the privity barrier in *Lucas v. Hamm*, *supra*, and in so doing overruled an earlier California case which had applied what it referred to as "the stringent privity test." [cf. *Buckley v. Gray*, 110 Cal. 339, 42 Pac. 900, 31 L.R.A. 862 (1895)]. First, the court considered a matter of policy as to the extent to which the transaction was designed to benefit the plaintiff-beneficiaries of the residuary trust, and proceeded to find that one of the principal objects of the attorney-client relationship as created to draft the testator's will was to provide for a testamentary gift of the property to the plaintiffs. Then, contemplating the foreseeability of loss of the property to the plaintiffs, the court suggested that the prospective loss arising out of the invalidity of the bequest because of the rule against perpetuities was "clearly" foreseeable by the attorney. Next, directing its approach to the proximity between the attorney's conduct and the plaintiff's loss, the court found that when the testator died and the will was offered for probate, it then became a

certainty that the plaintiffs would have received the intended benefits had it not been for the negligence of the attorney. Finally, with the obvious objective to establish precedent, the court concluded that if the plaintiffs were not allowed to recover for their loss because of the attorney's negligence, no one would be able to do so and the policy of preventing future harm would be impaired. It would seem apparent that the California court established and applied principles of tort law to circumvent the old, and perhaps obsolete, concepts of privity of contract inherent in the attorney-client relationship. It is submitted that this approach could be similarly applicable in Virginia and West Virginia, and could be maintained outside and apart from the statutory pronouncements of the old common law liability for legal malpractice.

The fact that the defendant-attorney did prevail in *Lucas v. Hamm*, *supra*, and was rescued by the California court from the very brink of financial disaster is interesting, but the court's reasoning was far from conclusive. The attorney's salvation rested solely on the grounds that the court was unwilling to include an applicable knowledge of the rule against perpetuities as being within the requisite standards for the professional skill of an attorney. Such judicial protection for a fellow-member of the legal profession seems to be entirely without justification. It introduces a foul odor in the output of the fountain of justice and will inevitably evaporate in the arena of public opinion. There seems to be no sound reason why an attorney should be exonerated from liability for neglect of duty where he has failed to consider the impact of such a fundamental principle of property law as the rule against perpetuities in the drafting of a client's will.

It has been seven years since this author undertook to explore in depth the subject of *Virginia's Drear Aridi-*

ties: Its Rule of Perpetuities and proclaim a new era of paradoxical absurdities with the rule against perpetuities. 1 U. Rich. L. N. 123 (1959). Absurd as they may be, the classic cases of the "unborn widow," the "fertile octogenarian," the "fertile decedent," and the "magic gravel pit" could still arise under Virginia's rule, with the additional complications where the "all or nothing" impact of class gifts is applied under the "take effect" doctrine of Virginia rather than the "vesting" concept of the common law rule. As long as Virginia's own rule against perpetuities continues to flourish without adoption of a complete *cy pres* concept, or the more modest "wait and see" approach of Pennsylvania, it is submitted that the professional liability of an attorney could be established upon negligence in his failure to understand and properly apply the rule. It could happen under the identical facts of the California case by way of a very elementary aspect of the "might have been" application of the rule.

Within the facts of *Lucas v. Hamm* from California, *supra*, the attorney's mistake was the inclusion in his client's will of a clause by which it was provided that a residuary trust was to terminate "on a day five years after the date upon which the order distributing the trust property to the trustee is made by the court." Under the "might have been" operation of the rule against perpetuities, there was no certainty that the five year period of time would start to run from a date that would cause the trust to terminate within the established period of the rule. The distant possibility that the order of the court distributing the trust property might be entered at a remote date with the result that the trust would terminate and distribution of the trust property be made to the plaintiff-beneficiaries outside the period of the rule, created the total invalidity of the gift by way of the "all or nothing" impact of the rule, and the benefi-

aries would have taken nothing had they not compromised their contest for the sum of \$75,000. There is, therefore, no reason to wonder why the beneficiaries sued the lawyer for \$75,000. plus an additional \$15,000. for his ineptitude in handling the releases of the original will contest.

The affirmative "might have been" impact of the rule against perpetuities is basically applied in a "might not have been" negative type of application of the rule where a so-called type of "administrative contingency" is present as in the instant case. Such clauses all too frequently appear in wills and trust instruments and provide for distribution of property "when debts are paid", "when the will is probated," or "when the estate is settled." Such clauses look innocent enough and indicate that the distribution of the property shall be made following a natural legal course of events. While they certainly do not, in themselves, usually import any contingency on the vesting of interest in the named beneficiaries, they certainly do contemplate a postponement of enjoyment, a delay in the Virginia concept of "taking effect" in possession. Therefore, such clauses will invalidate the entire gift under a rule of property law such as the rule against perpetuities, even though the resulting invalidity is entirely contrary to the express intent of the testator or settlor. Therefore, should it constitute neglect of professional duty where a lawyer either does not know, does not understand, or fails to foresee the impact of the rule against perpetuities when drafting a will or trust? The California court concluded that it did not, but reached that conclusion by some strange reasoning. It looked forward and backward at the same time, forward as to the elimination of the privity requirement, backward as to what comprised negligence on the part of an attorney.

Concerning itself with its own rule against perpetui-

ties as founded in the common law and modified by statutes, the court commented to the effect that few, if any, areas of the law have been fraught with more confusion or concealed more traps for the unwary draftsman, that every segment of the legal profession is prone to make errors in matters concerning the rule, and that the statutory enactments of California amending the common law rule had added further complexities for the bar. Then, examining in particular the invalid clause of the testator's will that prompted the malpractice action, the court concluded that an attorney of ordinary skill might have "fallen into the net which the rule spreads for the unwary," thus failing to recognize its invalidity, and that it would not be proper to hold the defendant liable for failure to use "such skill, prudence and diligence as lawyers of ordinary skill and capacity commonly exercise." This, in substance, suggests that a lawyer should not be held liable for a loss sustained by testamentary beneficiaries that could have been far in excess of \$75,000. as caused by negligence in drafting a client's will, merely because the particular rule of law which he should have been familiar with as a lawyer—the rule against perpetuities—is a difficult subject in the law of property. This might be compared to a suggestion that a physician-surgeon is not liable for malpractice where he negligently performs a very difficult operation, such as brain surgery, on his patient, for the reason that such an operation is considered very complex in the medical profession. However, by this reasoning, the court thus relieved the attorney from liability on the grounds that the rule against perpetuities is too difficult for the ordinary lawyer and that it only constitutes negligence where a lawyer fails to exercise professional skill in the practice of law involving "easy" legal principles. Such reasoning cannot long endure. In addition to the impossibility of differentiating between what is "easy" and what is

“difficult” in the practice of any profession, it would seem that one who is duly licensed to practice law owes a duty to the public either to know every subject of the law in his field of practice, or to acquire that requisite knowledge in the process of serving a client, or to associate some other member of the bar who does have that knowledge. Failure to employ any of these alternatives should constitute actionable neglect of duty.

What are the requisite standards by which the professional duty of an attorney might be circumscribed? If there are any such standards, they can be found only in the cases that have been decided in the past. In 1890, the Virginia court suggested that a lawyer’s duty was “to give his client the benefit of his *best judgment*, advice, and exertions.” (emphasis added) *Thomas v. Turner*, 87 Va. 1, 12 S. E. 149, 168 (1890). A much later case suggested that in his relations with his client, a lawyer’s duty is “to exercise and maintain the utmost good faith, integrity, fairness and fidelity.” *Byars v. Stone*, 186 Va. 518, 529, 42 S. E. 2d 847, 852 (1947). A rather recent case imposes upon Virginia lawyers the duty to “execute the business intrusted to their professional management with a reasonable degree of care, skill and dispatch” and goes on to explain that an attorney “is not bound to extraordinary diligence, but only to use a reasonable degree of care and skill” with respect to the character of the business he undertakes to handle, and “is not answerable for every error or mistake.” *Glenn v. Haynes*, 192 Va. 574, 66 S. E. 2d 509, 26 A. L. R. 2d 1334 (1951). In a somewhat similar vein, the Supreme Court of Appeals of West Virginia has indicated that “an attorney owes to his client the high duty to diligently, faithfully, and legitimately perform every act necessary to protect, conserve, and advance the interest of his client.” *Bank of Mill Creek v. Elk Horn Coal Corp.*, 133 W. Va. 639, 57 S. E. 2d 736 (1950). To adopt a phrase

coined by the late Justice Cardozo, these decisions leave us "without compass" as to the extent of a lawyer's professional duty and bring us back to the broad scope of the viewpoint expressed by Dean Wade of the Vanderbilt University Law School, to the effect that the lawyer's duty is "to use care and skill and to display requisite legal knowledge." Wade, *The Attorney's Liability For Negligence*, 12 VAND. L. REV. 755, 757 (1959). If it is proper to conclude that the significance of "privity of contract" has lapsed, the phrase "to his client" in these cases is no longer meaningful and it is logical to conclude that "requisite legal knowledge" includes the use of care, skill and legal knowledge in the drafting of instruments in such a way as to avoid invalidity in whole or in part because of the rule against perpetuities. If the time has not yet arrived for this conclusion, there are many who believe that it will arrive in the future. As Professor Leach of Harvard Law School has indicated, courts outside California may soon leap the privity hurdle, and everywhere conclude that elementary acquaintance with the rule against perpetuities is a requirement for those members of the profession who engage in this branch of practice. Leach, *Perpetuities: The Nutshell Revisited*, 78 HARV. L. REV. 973, 987 (1965).

One available defense against a legal malpractice action arising out of mishandling of the rule against perpetuities may be available under the statute of limitations, and thereunder the applicable statutory period will usually vary as between contract and tort actions. Since the period for actions on a contract is often of longer duration, the plaintiff may elect to treat his action as sounding in contract, and this has been sustained where the plaintiff has clearly indicated such an intent. *Bland v. Smith*, 197 Tenn. 683, 277 S. W. 2d 377 (1955). However, as the old essential for privity of contract evaporates, it is proper for a court to conclude that a

legal malpractice action sounds in tort, the same as does a medical malpractice action, and that the statute of limitations applicable to wrongful acts or negligence should apply. *Alter v. Michael*, 48 Cal. Rptr. 14 (1965). It is suggested, nevertheless, that the application of the appropriate statute of limitations is secondary to the problem of when the statutory period begins to run.

The start of the running of the statutory period of limitations has long been unsettled in legal malpractice actions. Some of the older cases held that the time should date from the time of the attorney's alleged negligent conduct, while others have measured the time more logically from the date that the plaintiff sustained actual damages. Where an attorney has so drafted a will or trust instrument that one or more beneficiaries will not take the property because of his carelessness in considering the potential impact of the rule against perpetuities, the actual loss to the beneficiaries may not become reasonably ascertainable until many years have elapsed from the date the professional services were rendered. As the actions for legal malpractice continue to approach and identify themselves with medical malpractice actions, there is an obvious trend away from measuring the period of the statute of limitations from the date of the alleged act of negligence. *Waldman v. Rohrbaugh*, 215 A. 2d 825 (Md. 1966). In this recent case from Virginia's neighboring state involving alleged medical malpractice, the court held that the plaintiff's right of action should accrue from the time that the patient first knows or should know that he has suffered injury or damage. The reasoning therein, to the effect that in all malpractice cases it is difficult, if not impossible, for a layman to reasonably understand that harm has befallen him until long after the act of negligence has been committed, is as logically applicable under a will or trust

drafted by a lawyer as it is with respect to a physician's services to a patient.

There is some speculation that the suggested trend will not be followed in Virginia, and that the recent case of *Hawks v. DeHart*, 206 Va. 810, 145 S. E. 2d 187 (1966) is out of step with Virginia's neighboring states. That medical malpractice case can be distinguished on the facts because there was evidence therein that the plaintiff should have known of the possible existence of the alleged malpractice shortly after the surgery was performed by the defendant-physician. Seventeen years had elapsed between the alleged negligent act or acts of the physician and the date on which the plaintiff's action was instituted. The court was probably correct in its conclusion that such delay should not have tolled the running of the statute of limitations because the plaintiff's physical condition immediately after the operation indicated possible neglect of professional duty in the physician's failure to make a skillful diagnosis of the plaintiff-patient's post-operative complaints. Without any prior Virginia malpractice cases as controlling, the court reached for authority in the normal type of personal injury cases and was unwilling to adopt the indicated trend that as recently as 1965 had been followed in West Virginia, another neighboring state. *Morgan v. Grace Hospital, Inc.*, 144 S. E. 2d 156 (W. Va. 1965). The Virginia decision also relied in part upon textual authority quoted from §13.06, Louisell and Williams, TRIAL OF MEDICAL MALPRACTICE CASES 369 (1960), and in quoting somewhat out of context with the entire section seems to have overlooked the authors' introductory comment which pointed out that "the theory of the plaintiff's case . . . will often determine which facts are the significant ones that cause the statute to begin to run." *supra*, p. 368. Furthermore, the court seems to have given no consideration to its quoted text which suggests that the more antiquated

majority rule has been applied only "in the absence of special circumstances that are common to various types of cases." Certainly, the fundamental theory that supports a plaintiff's legal malpractice case, coupled with special circumstances peculiar to a lawyer's professional skill in considering the rule against perpetuities, should come within this exception to toll the running of the statute of limitations until such time as the plaintiff knows or should reasonably know of the loss precipitated by the attorney's neglect of duty.

CONCLUSION

The statutory *caveat* in the headnote to this commentary seems therefore to be much broader in scope than might first appear from a casual glance. It is herein concluded that the professional liability of a lawyer may now extend to anyone who sustains damages arising out of professional services negligently rendered, and that such liability is not necessarily limited by such a statute solely "to his client"; it is further concluded that "neglect of duty" by an attorney may include negligence in the handling of both "easy" and "difficult" problems of law, it being agreed by almost every member of the profession that the rule against perpetuities belongs in the latter category.