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# An Attorney's Liability to Third Perties: The Expanding Field of Malpractice

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## Abstract

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**KEYWORDS:** field, malpractice, liability

# An Attorney's Liability to Third Parties: The Expanding Field of Malpractice

Malpractice suits against attorneys have increased dramatically in the last decade. In Florida, they have more than tripled in the last three years alone (Chart 1). As a consequence of the overwhelming amount of litigation resulting from such suits and the substantial judgments awarded to winning plaintiffs, professional liability insurance premiums for Florida attorneys have almost quadrupled since 1973 (Chart 2). This expanding field of liability has become of justifiable concern to members of the legal profession.

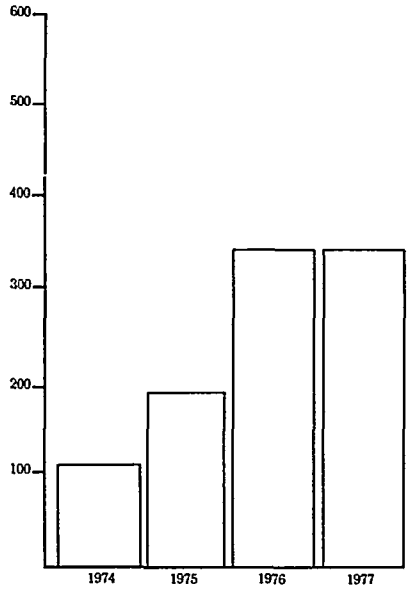


**Chart 1. Number of malpractice suits brought against attorneys. (Courtesy of Poe Insurance Company, Tallahassee Florida.)**

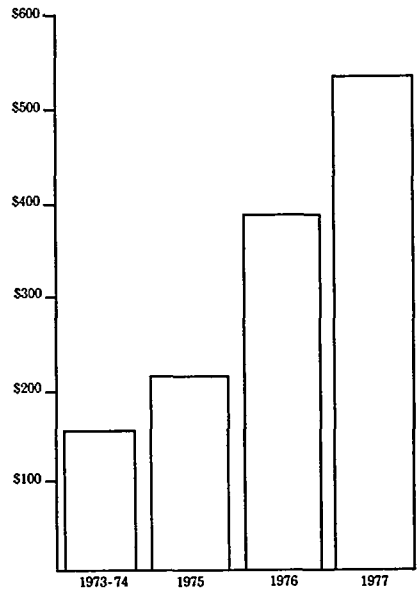


**Chart 2. Average yearly premiums for professional liability insurance. (Courtesy of Poe Insurance Company, Tallahassee, Florida.)**

[The authors wish to express their appreciation to Mr. Jack Driscoll, Poe Insurance Company, Tallahassee, Florida, for his generous assistance in providing the statistical data for the charts.]

In this country, the overabundance of lawsuits against attorneys has not emanated from clients alone, but also from third parties who lack privity or any contractual relationship with the attorney. Although the question of an attorney's duty to one other than his client has already been settled in two leading jurisdictions, New York and California,[1] Florida only recently decided the issue as one of first impression.[2] Consequently, the question of an attorney's liability to third parties remains a controversial and speculative issue.

The purpose of this article is to provide an overview of past and current professional malpractice litigation by third parties as it has occurred in other states, and to offer insight into the recent developments in Florida, including a discussion of related Florida statutes.

## 1. HISTORY IN OTHER JURISDICTIONS

Historically, there has been widespread agreement in the legal community that an attorney will not be held liable to third persons for acts committed in good faith.[3] Consequently, an attorney's negligence in the performance of an obligation to a client will not provide a third party with a cause of action against the attorney.[4]

Early in this century, the United States Supreme Court struggled with the question of where an attorney's liability should end. In *National Savings Bank of the District of Columbia v. Ward*,[5] an attorney negligently certified that his client held good title to a certain piece of property when, in fact, the client had conveyed it to another individual. The bank, relying on the certificate, made a loan to the client. When the client later defaulted on the loan payments and the bank discovered it was unable to foreclose on the property, it brought suit against the attorney, claiming he owed it a duty to make a careful title search.

After considering whether the bank was a beneficiary of the attorney's actions, the Court ruled that the suit failed to state a cause of action, since "[w]here there is neither fraud, falsehood nor collusion, the obligation of the attorney to exercise reasonable care and skill in the performance of a designated service is to the client and not to a third

1. *See* text accompanying notes 8-32 *infra.*
2. McAbee v. Edwards, 340 So. 2d 1167 (Fla. 4th DCA 1976).
3. 7 C.J.S. *Attorney and Client* § 52 (1948).
4. *Id.*
5. 100 U.S. 195 (1879).

party."[6] This lack of privity proved to be a barrier to any actions the bank sought to bring against the attorney. The case exemplified the general principle that a person who is not a client can still be substantially affected by an attorney's actions or advice. Therefore, it became necessary to establish a realistic limit to the attorney's liability. Without privity, the Court reasoned, no duty existed and, with no duty, no cause of action could arise.[7]

In the years following *Ward,* privity again became a focal point in determining the liability of individuals to third persons. Mr. Justice Cardozo authored two often-quoted opinions which set the standards for many courts.[8] In the first, when faced with a plaintiff claiming to be a third-party beneficiary to a contract, Cardozo stated that the requirement of privity in order to bring suit was a necessity, for to allow otherwise would mean that "[e]veryone making a promise having the quality of a contract will be under a duty to the promisee . . . but under another duty apart from the contract, to an indefinite number of potential beneficiaries. . . ."[9]

Two years later, the New York Court of Appeals heard the second case involving an action brought against an accounting firm that had negligently prepared a financial statement for an individual who had applied to the plaintiff for a loan.[10] In his complaint the plaintiff demanded damages, alleging that the firm should be liable because it knew that creditors like the plaintiff would rely on the financial statement. However, the court refused to allow the plaintiff to sue because he lacked privity with the accountants. The court feared that allowing such a suit would "expose accountants to a liability in an indeterminate amount for an indeterminate time to an indeterminate class."[11] The court felt the "assault upon the citadel of privity" was growing at such a rate that it had to be contained before the consequences of such suits outweighed the remedy they sought to provide.[12] The danger Cardozo foresaw—that of unlimited liability—has remained in the minds of many courts to this day. The New York courts have remained steadfast

6. *Id.* at 198.
7. *Id.* at 199.
8. H. R. Moch Co. v. Rensselaer Water Co., 247 N.Y. 160, 159 N.E. 896 (1928); Ultrameres Corp. v. Touche, Niven and Co., 255 N.Y. 170, 174 N.E. 441 (1931).
9. 159 N.E. at 899.
10. 255 N.Y. 170, 174 N.E. 441.
11. *Id.* at 444.
12. *Id.* at 445.

in their belief that attorneys should not be subjected to suits by third parties lacking privity.

In *Victor v. Goldman,*[13] an attorney was sued by a relative of a deceased client who claimed that the attorney negligently failed to change provisions in the decedent's will, as the latter had instructed, naming the plaintiff as the beneficiary of the right of first refusal to purchase the decedent's estate. The court, in dismissing the case, stated that "an attorney owes no duty to third parties for acts committed *bona fides* in the performance of an obligation to his client . . . and this remains the rule even where negligence results in damage to the third party."[14]

Recently, a New York court reiterated its stand on attorney liability in *Drago v. Buonagurio,*[15] where a doctor who had been unsuccessfully sued for malpractice filed a countersuit against the attorney alleging that the action had been frivolous and that, due to the attorney's negligence in failing to check out the facts, the doctor had been financially damaged. The issue at bar was whether an attorney who instituted a frivolous malpractice suit on behalf of a client could be held liable for damages to the doctor against whom he instituted the lawsuit. Deciding that he could not, the court said:

> The Courts of this state have consistently held that an attorney is not liable for the negligent performance of his obligations to a client, even where such negligence results in damage to a third party . . . and there is no indication that such a rule would be adopted in this state.[16]

To do so, the court feared, would unquestionably discourage the use of the courts as a means of resolving conflicts, and thus be "contrary to public policy."[17] Clearly, the New York courts believe that an extension of an attorney's liability to third parties would be a fatal blow to the attorney's role as advocate, since the fear of personal liability could overshadow the attorney's duty to practice law in the best interests of his client.

While New York clings to its long-standing policy of privity as a requirement for attorney liability, California appears to have gone from

13. 74 Misc. 2d 685, 344 N.Y.S. 2d 672 (Sup. Ct. 1973).
14. 344 N.Y.S. 2d at 673.
15. 89 Misc. 2d 171, 391 N.Y.S. 2d 61 (Sup. Ct. 1977).
16. 391 N.Y.S. 2d at 63.
17. *Id.*

one extreme to the other. In 1895, the California Supreme Court[18] held that an attorney who negligently drafted a will would not be liable to an injured beneficiary solely because he lacked privity of contract. The court stated that the plaintiff was also precluded from bringing suit under the theory that he was a third-party beneficiary, since the purpose of the will was expressly for the client's benefit.[19]

However, the requirement of strict privity began to erode with the case of *Biakanja v. Irving*.[20] Here, a notary public, in preparing a will, had failed to have it properly witnessed, rendering it invalid. The California Supreme Court reversed a lower court's dismissal of the case, reasoning that the time had come to liberalize the privity requirements by permitting a third-party beneficiary of a will to recover his losses.[21] As a means of controlling suits and the conditions under which they are brought, the court stated that the allowance of such suits was "a matter of policy and involves the balancing of various factors . . ."[22] among which are the extent of the intended benefit to the third party, the risk of harm to him, the certainty of his injury, the proximity of the negligent party's conduct to the injury, the moral blame involved, and the need to prevent future harm.[23]

Although the *Biakanja* decision did not deal directly with attorneys and third parties, it took the court only a short time to include attorneys in the category of those who could be sued by third parties lacking privity. In *Lucas v. Hamm*,[24] the court determined that a beneficiary to a negligently drafted will could make the negligent attorney answer in damages for his mistakes. After listing the "balancing factors"[25] it set forth in *Biakanja*, the court held that such a cause of action could be founded in either contract or tort.[26] In addition, the court dealt with the

18. Buckley v. Gray, 110 Cal. 339, 42 P. 900 (1895).
19. 42 P. at 901.
20. 49 Cal. 2d 647, 320 P.2d 16 (1958).
21. 320 P.2d at 19.
22. *Id.*
23. *Id.*
24. 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961), *cert. denied*, 368 U.S. 987 (1962).
25. *See* text accompanying note 23 *supra.*
26. 15 Cal. Rptr. at 824. The court held, however, that plaintiff's claim for relief was not such as to allow recovery:

> The complaint . . . alleges that defendant drafted the will in such a manner that the trust was invalid because it violated the rules relating to perpetuities and restraints on alienation * * * In view of the state of the law relating to perpetuities

question of whether extending privity could impose an undue burden on the legal profession. Upon comparing the possibility of an undue burden on attorneys with the probability of harm to an innocent beneficiary, the court resolved the conflict by stating that "[s]ince, in a situation like those presented here . . . the main purpose of the testator . . . is to benefit the persons named in his will . . . this intent can [only] be effectuated, in the event of a breach by the attorney . . . by giving the beneficiaries a right of action."[27]

In 1971, a California Court of Appeals[28] extended the right to sue to all third-party beneficiaries, in addition to those whose claims arose from negligently drafted wills. In this case, the plaintiff had employed a collection agency to recover a debt owed to him. However, the plaintiff lost his chance to recover the debt when, due to the negligence of the agency's attorney, the action was dismissed for lack of diligent prosecution. Although a lower court dismissed the case, the appellate court ruled that the plaintiff had a cause of action on the theory that the agency's attorney fully realized that his services were for the benefit of a third party.[29] In its opinion, the court stated that "an attorney may be liable for damage caused by his negligence to a person intended to be benefited by his performance irrespective of any lack of privity of contract between the attorney and the party to be benefited."[30] The decision paved the way for a multiplicity of lawsuits against attorneys in that state and, at some point, limitations were required to reduce the ever-rising number of malpractice actions.

In one case that reached the California Supreme Court,[31] an attorney had negligently advised both his clients and the plaintiffs' attorney that the sale of certain stock by his clients to the plaintiffs would not be subject to a particular securities registration and tax regulation. The plaintiffs purchased the stock, subsequently learned it was not exempt,

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

364 P.2d at 690, 15 Cal. Rptr. at 826. The third count was also held not actionable in negligence. 364 P.2d at 692, 15 Cal. Rptr. at 828.

27. *Id.* at 825.

28. Donald v. Garry, 19 Cal. App. 3d 769, 97 Cal. Rptr. 191 (1971).

29. 19 Cal. App. 3d at 772, 97 Cal. Rptr. at 192.

30. 19 Cal. App. 3d at 771, 97 Cal. Rptr. at 192.

31. Goodman v. Kennedy, 18 Cal. 3d 335, 556 P.2d 737, 134 Cal. Rptr. 375 (1976).

and, as a result, suffered heavy financial losses. In their case against the attorney, the plaintiffs alleged that they were third-party beneficiaries of the advice given by the attorney to his clients and, as such, it was foreseeable that the negligently rendered advice would cause them injury.

In a lengthy opinion, the court held that the plaintiffs were not third-party beneficiaries and, more important, that the liability of an attorney to third parties had discernible bounds.

> The attorney's preoccupation or concern with the possibility of claims based on mere negligence . . . by any with whom his client might deal "would prevent him from devoting his entire energies to his client's interests." The result would be both "an undue burden on the profession" and a diminution in the quality of the legal services received by the client.[32]

## 2. FLORIDA DECISIONS

In 1976, Florida dealt with the issue of third-party liability in the case of *McAbee v. Edwards*.[33] Here, a trial court had dismissed a malpractice suit against an Orange County attorney who, in response to a request from his client, had failed to inform her that subsequent to her remarriage certain provisions in her will would have to be altered to ensure that her daughter would inherit her estate as sole beneficiary. When the woman died and her second husband successfully claimed a portion of the estate, the daughter brought suit against the attorney alleging that his negligence prevented her from succeeding to the entire estate. The attorney's main defense to the action was that even though the plaintiff was a beneficiary, she lacked privity of contract with the attorney and thus did not have standing to sue. Furthermore, he claimed, a Florida attorney owes a duty only to his client.

In an opinion which indicated that this was a case of first impression, the appellate court squarely addressed the question of whether a person without privity of contract may bring a malpractice action against an attorney. The court's research led it through three California cases[34] which had decided this issue some years ago. Citing the Califor-

32. 18 Cal. 3d at 344, 556 P.2d at 743, 134 Cal. Rptr. at 381.

33. 340 So. 2d 1167 (Fla. 4th DCA 1976).

34. Heyer v. Flaig, 70 Cal. 2d 223, 449 P.2d 161, 74 Cal. Rptr. 225 (1969); Lucas v. Hamm, 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961), *cert. denied*, 368 U.S. 987 (1962); Biakanja v. Irving, 49 Cal. 2d 647, 320 P.2d 16; *see also* text accompanying notes 20-27 *supra*.

nia opinions extensively, the court held that a third-party beneficiary to a will can sue the attorney who drafted it, if his negligence resulted in a loss to the intended beneficiary.[35]

The Florida court fully agreed with the California courts' contentions that an attorney who is employed to draft a will takes on a relationship with the beneficiaries as well as his client, since it is readily foreseeable that the purpose of the will lies more in benefiting the beneficiary than it does in benefiting the client. Equally important, the court felt, was the fact that an attorney holds himself out as one having training and knowledge superior to that of the layman and, therefore, assumes a duty to avoid the foreseeable consequences of his own negligence.[36] Unfortunately, the Florida Supreme Court was unable to rule upon what could have been the test case for setting the state standard, since the parties reached a settlement after the appellate court remanded it for a hearing on the merits. But for now, the case stands out as an indication of the direction which Florida courts may take in terms of expanding the liability of attorneys. The bulk of the court's opinion in this case was quoted from prior California cases, and it is puzzling why the court failed to establish its position using existing Florida case law. As will be evident below, had the court wished to do so, it could have reached the same conclusion by other means.

## 3. THIRD-PARTY BENEFICIARIES

The courts of this state follow the well-accepted rule that, when a contract has been created solely for the benefit of the contracting parties, a third party—even though he receives some incidental benefit—cannot sue for the negligence of the parties in the performance of their contractual duties.[37] However, Florida has long recognized that third-party beneficiaries have standing to sue on a contractual duty. As early as 1887, the Florida Supreme Court stated that third parties could bring suit where there was a "clear intent" for the third party to be benefited.[38] The mere fact that he might be benefited, held the court,

35. 340 So. 2d at 1170.

36. *Id.*, citing Heyer v. Flaig, 70 Cal. 2d 223, 449 P.2d 161, 74 Cal. Rptr. 225.

37. Muravchick v. United Bonding Ins. Co., 242 So. 2d 179, 180 (Fla. 3d DCA 1970).

38. Wright v. Terry, 23 Fla. 160, 2 So. 6 (1887), where Terry contracted with Wright to have logs "driven" down a river to a designated place and, upon their arrival, Wright was to pay Terry's employees for their work. Terry's employees were deemed

is not enough.[39]

In order for a plaintiff to bring a suit as a third-party beneficiary, stated the court in *Weimar v. Yacht Club Point Estates,*[40] his pleading must allege that the contract was one created "expressly for his benefit and one under which it clearly appears that he was a beneficiary."[41] Here, although the court pointed out that it was in no way relaxing the requirement of privity in order for a plaintiff to sue on a contract, it found that the status of a third-party beneficiary was sufficient to create the privity necessary for such an action.[42] But the Florida courts have placed definite limits on the types of people they consider to be third-party beneficiaries. For instance, in the case of a plaintiff who was not in privity with an abstract company,[43] but relied on its title search, the court held that "the liability of a title abstractor extended only to the person employing him or one who is a party or privy to the contract of employment"[44] and not to a party who might subsequently rely on the abstract.

In a more recent case,[45] an action was brought against an accountant who had prepared a financial statement for lenders that was subsequently relied on by the plaintiff in making a loan. The plaintiff suffered a loss and sued, alleging that the accountant was negligent in preparing the statement. But the court of appeals held that in order for the plaintiff, a third party who had not employed the accountant, to recover from the accountant, he had to show either that the accountant was guilty of gross negligence or that he knew the plaintiff intended to rely on the statement.[46]

To date, the most far-reaching decision on third-party liability in Florida was made in a case involving a contract between plaintiff's employer and the defendant,[47] whereby the defendant was to make

by the court to be third-party beneficiaries of the contract between Terry and Wright.

39. *Id.* at 8.

40. 223 So. 2d 100 (Fla. 4th DCA 1969), where a plaintiff homebuyer would have been allowed to bring suit against a subcontractor who was involved in building the home, even though the plaintiff's only privity lay with the general contractor, if the plaintiff's pleadings had been drafted correctly.

41. *Id.* at 102.

42. *Id.* at 103.

43. Sickler v. Indian River Abstract and Guar. Co., 142 Fla. 528, 195 So. 195 (1940).

44. *Id.* at 198.

45. Canaveral Capital Corp. v. Bruce, 214 So. 2d 505 (Fla. 3d DCA 1968).

46. *Id.*

47. Gallichio v. Corporate Group Serv., Inc., 227 So. 2d 519 (Fla. 3d DCA 1969).

safety inspections of a drydock. He conducted his inspections negligently and, as a result, the plaintiff was injured. The court found the plaintiff to be a third-party beneficiary of the contract and held that "one who may foreseeably be injured by the negligent performance of a contractual duty has the right to maintain an action against the negligent performer, even though he is not in privity with the performer."[48]

In matters involving beneficiaries under wills, it is apparent that such persons fall into the category of third-party beneficiaries within the meaning given to the term by the courts of this state.[49] Unquestionably, the intent of the contracting parties, the attorney and his client, is to create an instrument capable of passing a portion of an estate into the hands of the beneficiary upon the death of the testator. Moreover, it will be clear on the face of the instrument that the concern of the contracting parties is for the protection of those rights which they vested in the beneficiary. In accepting employment to draft a will, the attorney also undertakes a duty to ensure that the document is carefully researched and skillfully prepared, so that the party's interests as a third-party beneficiary will be protected. Thus, under existing case law, the plaintiff in *McAbee* had the right to sue for the alleged negligent advice the attorney had given his client.[50]

## 4. THE FLORIDA LEGISLATURE'S ATTEMPT TO CONTROL PROFESSIONAL LIABILITY

In 1975, the Florida legislature took notice of the unprecedented rise in malpractice litigation against physicians.[51] Lawsuits had become so numerous, and malpractice insurance rates so high, that an outcry from both physicians and the public brought together a committee charged with creating legislation to help relieve some of the economic hardships physicians were facing.[52] The public's concern about doctors' rising malpractice insurance premiums was the inevitable result of high

48. *Id.* at 521.

49. *See* Auto Mutual Indem. Co. v. Shaw, 134 Fla. 815, 184 So. 852, 856 (1938); McCann Plumbing Co. v. Plumbing Industry Program Inc., 105 So. 2d 26, 27 (Fla. 3d DCA 1958); Di Camillo v. Westinghouse Elec. Corp., 122 So. 2d 499, 500 (Fla. 2d DCA 1960); Boston Old Colony Ins. Co. v. Guitierrez, 325 So. 2d 416, 417 (Fla. 3d DCA 1976).

50. *See* text accompanying note 35 *supra.*

51. *Medical Malpractice Reform Act,* Ch. 75-9, 1975 Fla. Sess. Law Serv. 13.

52. *Id.* at 14.

insurance rates, since, as rates went up, physicians passed the increased costs on to their patients in the form of higher charges for services. But insurance rates alone were not the cause of increased costs for medical care. A large part of the problem was that doctors, in order to protect themselves from the possibility of lawsuits, began practicing "defensive" medicine—ordering extra x-rays and tests, or hospitalizing parties who may have fared just as well if allowed to stay home.[53]

The legislative committee, whose recommendations eventually resulted in a far-reaching bill titled the "Medical Malpractice Reform Act"[54] (MMRA), included representatives of the Florida Bar, Florida Medical Association, and Trial Lawyers Guild. Their goal was to organize a system of checks and balances that would reward legitimate suits by patients, while limiting non-meritorious actions brought against Florida physicians.[55] The bill set up a study commission, a self-insurance program for doctors, medical liability mediation panels, and a two-year limitation on malpractice actions against physicians. An important feature of the section dealing with the statute of limitations was the statement that such malpractice actions were limited to "the health care provider and persons in privity with the provider of health care."[56]

Buried deep within the bill was an amendment to an already existing Florida statute of limitations.[57] The amendment created a new and distinct category of parties whose liability would be regulated by the new section and, more important, the amendment limited itself solely to physicians and other professionals. Although the word "professional" was left undefined in the statute itself, presumably the bill's sponsors intended it to cover any person licensed by the state, including attorneys.[58]

The new statute is divided into two sections, the first dealing with

53. *Id.* at 15.
54. *Id.* at 13.
55. *Id.* at 16.
56. *Id.* at 20, 21.
57. FLA. STAT. § 95.11 (1975).
58. A "professional" act or service within malpractice policy is one arising out of a vocation, calling, occupation, or employment involving specialized knowledge, labor, or skill, and the labor or skill is predominantly mental or intellectual, rather than physical or manual. Marx v. Hartford Acc. & Indem. Co., 183 Neb. 12, 157 N.W.2d 870, 872 (1961).

A "professional" is one engaged in one of the learned professions or in an occupation requiring a high level of training and proficiency. Reich v. City of Reading, 3 P. Comm. Ct. 511, 284 A.2d 315, 319 (1961).

actions "for professional malpractice other than medical malpractice,"[59] and the second for medical malpractice.[60] It is the first of these sections which is relevant to the present discussion, and it reads as follows:

> 95.11 STATUTE OF LIMITATIONS
> (4) WITHIN TWO YEARS.—
> (a) An action for professional malpractice, other than medical malpractice, whether founded on contract or tort; provided that the period of limitations shall run from the time the cause of action is discovered or should have been discovered with the exercise of due diligence; provided, however, that the limitation of actions herein for professional malpractice shall be limited to persons in privity with the professional.[61]

A problem as to the proper interpretation of the statute exists, because it is not clear if it was intended to limit the liability of an attorney to only those persons with whom he is in privity of contract.

In attempting to answer this question, the opinions of various attorneys in South Florida,[62] including those who had participated in the drafting of the MMRA, were solicited. There was one common thought linking the various interpretations of the statute: at some point during the drafting of the privity requirement for physicians, it was felt that it would be proper and justifiable to limit the liability of all professionals by making privity a prerequisite to bringing a malpractice action. In other words, under the statute, the *intent* of the draftsmen was to limit an attorney's liability to third parties. The point of disagreement is whether the wording of this section successfully carries out this intent.

Attorneys on one side of the issue feel that the phrase "the limitations of actions *herein* for professional malpractice"[63] means that the privity requirement is applicable only when a negligent attorney is sued under this particular two-year statute of limitations, but that a party lacking privity could still bring an action under the more general four-year "negligence" provisions of the statutes.[64] That is to say, those who

59. FLA. STAT. § 95.11(4)(a) (1975).
60. *Id.* at (4)(b).
61. *Id.* at (4)(a).
62. For the purposes of this section relating to the statute of limitations, the attorneys interviewed requested that they not be named in the article.
63. FLA. STAT. § 95.11(4)(a) (1975) (emphasis added).
64. "§ 95.11 Limitations other than for the recovery of real property.
(3) WITHIN FOUR YEARS.—
(a) An action founded on negligence."

hold this view feel that the legislature's intent to limit actions against attorneys to this section alone failed by the wording of the statute.

The opposing viewpoint is that the word "herein" is insignificant, since this is the only place throughout the entire statute of limitations where a section has been exclusively tailored to professionals. Therefore, one who has a professional malpractice case is forced to bring suit only under the professional malpractice section of the statutes and not under the general "negligence" section. Those who support this interpretation also point out that it seems illogical that a person in privity would have only two years in which to bring an action, while one not in privity would have four years. Why should a person without a contractual relationship be allowed a longer period of time in which to bring a suit? Some argue that the longer period is necessary, since a party not in privity might not have the opportunity to discover the injury done to him and, therefore, should be entitled to a longer time in which to sue. However, the argument is moot in view of the general rule that statutes of limitations begin to run when the injury is discovered or should have been discovered.[65] Therefore, a party without privity is in no way disadvantaged and should not be given a longer period in which to bring an action.

## 5. PRESENT STATUS OF THE LAW

Throughout this article, an attempt has been made to present a broad overview of the historical development of a third party's ability to sue an attorney for his negligent performance of a contractual duty. Today this issue remains unresolved, as no uniform rule exists throughout the country. Two leading jurisdictions, New York and California, represent totally opposing viewpoints on the matter. New York courts continue to take the position that under no condition will an attorney be held liable to third parties; California insists that any legitimate third-party beneficiary should have a cause of action against a negligent attorney. Florida, in its first dealings with the subject, has followed the lead of the California courts in permitting a third party to bring an action. While these cases are representative of what has occurred in the past, they do not necessarily reflect what future decisions the courts will make. Will the courts strengthen the privity requirement so as to limit an attorney's liability? Or will they abolish the privity restrictions in

65. PROSSER, LAW OF TORTS, 144 (1971).

order to ensure that anyone injured as a result of an attorney's professional negligence can bring a malpractice action?

## 6. FUTURE TRENDS

As one might expect, there is a definite split of opinion regarding where the law is or should be headed, each view supported by socio-economic as well as legal reasons. On the one hand, as Chief Justice John Marshall stated in *Marbury v. Madison*,[66] there is a strong constitutional argument that every person who has been wronged is entitled to a viable remedy through the courts. Marshall wrote: "The very essence of civil liberty consists in the right of every individual to claim the [equal] protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection."[67] Keeping in line with the doctrine of *Marbury v. Madison,* the drafters of the Florida Constitution have provided the citizens of this state with a constitutional right "for redress of any injury, and justice . . . without sale, denial or delay."[68]

The innocent third-party beneficiary who is injured by the negligent performance of an attorney acting on behalf of a client deserves the opportunity to gain redress through the courts. If the law fails to provide the injured third party with access to the legal system, he will then be left abandoned and without a remedy. The California decisions and *McAbee* show that the courts recognize the potential injustice that can arise from such a situation and have begun to remove the age-old privity requirement as to third parties in the same way that they have abolished the privity requirement in other areas of the law.[69]

Consider that, in cases involving the growing field of products liability, the courts have recognized that a plaintiff who has been physically injured by a defective product may bring an action against either the retailer or manufacturer of the product, regardless of whether privity exists.[70] The law, in effect, now makes both retailer and manufacturer strictly liable for defective products they sell, or produce, that result in

66. 5 U.S. (1 Cranch) 137 (1803).

67. *Id.* at 163.

68. FLA. CONST., art. 1, § 21.

69. For instance, the concept of strict products liability no longer requires plaintiff-consumers to be in privity with the manufacturer; *see* notes 70-72 *infra.*

70. RESTATEMENT (SECOND) TORTS § 402A, B, Strict Liability.

physical injury.[71] However, at this point, the lifting of the privity requirement has been extended to only those cases dealing with physical injury, not with purely financial loss.[72] Logically, it seems that abolishing the privity requirement where physical injury has occurred is only the first step in abolishing the need for privity under other circumstances. Commercial loss can be just as devastating to an individual as a physical disability, and the right to bring an action should be made just as available. It is probably this attitude that has produced the California and *McAbee* decisions.

The most serious concern of the courts, and perhaps the most valid reason for limiting an attorney's liability to third parties, is protection of the client. Should the scope of attorney liability expand, followed by an inevitable rise in malpractice actions, the increased cost of these lawsuits and judgments will be passed on to clients—much as physicians have passed costs on to patients. Thus, the cost of malpractice insurance for attorneys will ultimately be borne by the client. Of even greater potential concern is the fact that the attorney who is placed in the unenviable position of fearing personal lawsuits by third parties may tend to become overconservative, because his apprehension over the impact of his actions on third persons will have overshadowed his concern for taking the course of action most likely to benefit his client. If an attorney must focus upon interests other than those of his client, a devastating blow is dealt to the adequate representation of a client's best interests that an attorney is expected—and is under a duty—to provide.[73]

Ethically, the attorney who allows his representation of a client to be constrained or altered by third parties is violating the very Code of Professional Responsibility he has sworn to uphold. *Canon 5, EC-5-1* states that "[t]he professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free from compromising influences and loyalties."[74] In addition, the Canons

71. West v. Caterpillar Tractor Co., Inc., 336 So. 2d 80 (Fla. 1976) (manufacturer held liable to injured bystander); Matthews v. Lawnlite Co., 88 So. 2d 299 (Fla. 1956) (manufacturer liable to third party for negligent design); Marrilla v. Lyn Craft Boat Co., 271 So. 2d 294 (Fla. 2d DCA 1973) (privity not required to maintain action against retailer).

72. 336 So. 2d at 89.

73. "The attorney is under a duty at all times to represent his client and handle his client's affairs with the utmost degree of honesty, forthrightness, loyalty and fidelity." Smyrna Dev. Inc. v. Bornstein, 177 So. 2d 16, 18 (Fla. 2d DCA 1965).

74. ABA CODE OF PROFESSIONAL RESPONSIBILITY, EC 5-1.

point out that "[t]he obligation of a lawyer to exercise professional judgment solely on behalf of the client requires that he disregard the desires of others that might impair his free judgment."[75] Should an attorney suddenly be confronted with the threat of personal liability for a decision he has made with the best interests of his client in mind, he will surely, when faced with alternatives, choose the one least likely to expose himself to a lawsuit by third parties. No longer may he act as an undaunted advocate for his client's cause, or represent his client as zealously as possible within the bounds of the law.

Last year, a Florida District Court of Appeal placed limitations on an attorney's liability to third parties, using both pragmatic and ethical reasoning. In the case of *Adams v. Chenowith,*[76] the court concerned itself with the issue of whether an attorney representing the seller in the sale of a home owed a duty to the buyer. Here, the seller's attorney had completed a closing statement using incorrect figures given to him by the seller. The buyer was supplied with a copy of the statement prior to the closing, but failed to confirm the figures himself and, as a result, overpaid the seller. Upon learning of the overpayment, the buyer brought an action against the seller's attorney, alleging that the attorney's negligence in preparing the closing statement caused him subsequent financial injury.

The appellate court affirmed a lower court's dismissal of the case, holding that the attorney owed a duty to no one other than his client. In addition to the fact that this was an arm's-length business transaction, the buyer had the opportunity to verify the closing figures on his own. Moreover, the court pointed out that it was never intended for the seller's attorney to represent both parties to the transaction, since to do so would violate the Code of Professional Responsibility. Citing from *Canon 5, EC-5-14,* the higher court agreed that an attorney may not represent multiple clients with differing interests if such employment would adversely affect the attorney's judgment on behalf of, or loyalty to, a client.[77] In holding that the interests of a seller and buyer in the sale of a home are opposing interests that cannot properly be represented by the same attorney, the court said: "Here there are two sides, two interests to be protected and we cannot hold a lawyer responsible to all parties in a transaction. . . ."[78]

75. *Id.* at EC 5-21.
76. 349 So. 2d 230 (Fla. 4th DCA 1977).
77. *Id.* at 231.
78. *Id.*

For members of the legal community, it is not hard to imagine the burdensome impact an unqualified extension of third-party liability could have upon attorneys and the courts. Besides the endless amount of litigation that would result, such an expansion of liability could, conceivably, severely cripple the basic foundation of the legal system by preventing an attorney from trying to the best of his ability to represent the view of the client.

No one can seriously contend that attorneys should be provided with complete immunity for their actions. Attorneys must be made to answer to the same system of justice they represent. Yet, at the same time, logical and equitable restraints on a lawyer's personal liability, particularly to third persons, must be established and enforced. Now may be the time for the states to take an interest, as they have with physicians, in controlling, directing, and limiting the actions that can be brought against attorneys. Short of that, the courts must rely upon their own precedent-setting authority to ensure that the legal system, and those working within it, are given the opportunity to advocate the best interests of clients—now, and in the future.

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