LIABILITY OF A LAWYER FOR NEGLIGENCE IN THE CONDUCT OF LITIGATION†

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Introduction

To what extent is a lawyer liable to his client for his negligence in conducting litigation? This is a question which has confronted Canadian courts infrequently and to which no authoritative answer has yet been established.

This article attempts an examination of the issues which will arise when the court is confronted with that question. These issues can be elucidated by making the following investigations:

> Does a lawyer in Canada enjoy immunity from liability in damages for negligence in conducting his client's case?
>
> What is the extent of any such immunity, and, conversely, what is the nature and extent of the lawyer's liability?

Rondell v. Worsley

The issue of immunity arises because of the decision of the House of Lords in *Rondel v. Worsley*.[1]

The question in *Rondel v. Worsley* was whether a barrister could be held liable in damages for negligence. The question was raised by one Rondel who in 1959 had been charged with causing grevious bodily harm. At the arraignment Rondel selected Worsley, a barrister of four years standing, to defend his case on a dock brief. After a day's adjournment, Worsley presented Rondel's defence. The jury found Rondel guilty and he was sentenced to eighteen months imprisonment. Rondel sought leave to appeal to the Court of Criminal Appeal, his application being based, *inter alia*, on the alleged negligence of Worsley in the conduct of the case; the application was refused.

Six years later, in 1965, Rondel issued a writ against Worsley claiming damages for professional negligence. Rondel's claim came before Lawton, J. on the question of whether the pleadings disclosed a cause of action. Mr. Justice Lawton found that two of the complaints raised by Rondel might reveal a case of negligence, if supported by evidence. Rondel alleged that his counsel had been negligent in failing to cross-

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† Prepared under a grant from the A. Montague Israels, Q.C. Scholarship Fund, established by Members of the Bar and friends, in honour of Mr. Israels, first Director of the Bar Admission Course of the Law Society of Manitoba.

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1. [1967] 3 All E.R. 993 (H.L.); for comment see Jolowicz, (1968), 26 Camb. L.J. 23; Wilkinson, (1968), 31 Mod. L. Rev. 329; Note, (1968), 84 L.Q. Rev. 145; for Commonwealth comment see Catzman, (1968), 46 Can. Bar Rev. 506; Heerey, (1968), 42 Aust. L.J. 3; Harding, (1968), 8 U. Western Aust. L. Rev. 242; Note, [1968] Auck. U.L. Rev. 82.

examine a witness thoroughly and in neglecting to call certain other witnesses. However, Lawton, J. concluded that a suit for negligence could not be brought against a barrister, and, therefore, Rondel had no cause of action.[2] Rondel's appeal to the Court of Appeal was dismissed unanimously.[3]

The House of Lords granted Rondel leave to appeal. Although their lordships regarded Rondel's claim as one devoid of merit and without hope of success, the House was willing to review the case because it involved a question of law of general importance.[4]

At first glance, the law appeared settled. There was long-standing authority for the proposition that a barrister could not be sued for negligence in carrying out his professional functions. The immunity of the English bar had gone unchallenged for over one hundred years. However, the House of Lords was unable to mechanically apply the long-accepted rule to preclude Rondel's cause. The foundation of the rule had been undermined by modern developments in the general law. In particular, the rationale of the old rule had been called into question by the decision in *Hedley Byrne v. Heller*.[5]

The generally accepted basis for the immunity rule was that the absence of a contractual relationship between barrister and client precluded liability for negligence. As a corollary to the rule that a barrister could not sue for his fees, the client could not sue for the barrister's professional default. Blackstone[6] and Halsbury[7] accepted this rationale. The immunity rule was firmly entrenched by two decisions which denied liability for negligence because of the absence of contract.[8] The incapacity to contract was seen as distinguishing the barrister from his colleague, the solicitor, who could contract and who could be sued for breach of contract arising out of his lack of professional diligence and skill.

By 1965, the apparently conclusive rationale of no contract was susceptible to attack. The old cases denying a cause of action had not considered negligence in its modern sense. The concept of duty of care was subsequently formulated in *Donoghue v. Stevenson*[9] to exist independent of contract. This was brought home to professionals in *Hedley Byrne v. Heller,*

2. [1966] 1 All E.R. 467 (Q.B.); see Hall, (1966), 116 New L.J. 367.
3. [1966] 3 All E.R. 657 (C.A.), see Jolowicz, (1967), 25 Camb. L.J. 10; Wilkinson, (1967), 30 Mod. L. Rev. 194.
4. See, *supra* n. 1, at 998, per Lord Reid; at 1016-18, per Lord Pearce.
5. [1964] A.C. 465 (H.L.).
6. 3 *Commentaries*, at 26-29.
7. 3 *Halsbury's Laws* (3rd ed.), at para. 62.
8. *Swinden v. Lord Chelmsford* (1860), 5 H. & N. 890, 157 E.R. 1436 (Exch.); and *Kennedy v. Brown* (1863), 13 C.B. (N.S.) 677; 143 E.R. 268 (C.P.).
9. [1932] A.C. 562 (H.L.).

where the premise that professional duties of care and skill depend upon the payment of fees was rejected. Lord Morris stated:

> If someone possessed of a special skill undertakes, *quite irrespective of contract,* to apply that skill for the assistance of another person who relies upon such skill, a duty of care will arise.[10]

In *Rondel v. Worsley* the majority of the House of Lords recognized the frailty of the no contract rationale and rejected it.[11] However, in rejecting the rationale, the House did not reject the rule. Instead their lordships proceeded to reformulate the rule on the basis of public policy considerations. The reformulated rule declared that the court will not permit an action against a barrister in respect of lack of care or skill in the conduct of litigation. The new rule found support in three propositions. First, the interests of the administration of justice require that the barrister fulfill his duty to the court fearlessly and independently, uninhibited by the fear of subsequent suits by dissatisfied clients.[12] Second, an action for negligence against a barrister would involve retrying the original case on its merits, and would lead to a multiplicity of actions.[13] Third, the position of a barrister is distinguished from that of other professionals in that he is bound to accept any client however distasteful.[14]

Reliance on these propositions led the House of Lords to reformulate the rule. The old rule had conferred immunity from suit upon the barrister *per se* in respect of all his work. The policy in *Rondel* focused upon the barrister's role in the litigation process. Therefore, the immunity was limited to work involved in the conduct of litigation; a barrister could be sued for negligence in performing non-litigious functions.[15] Another consequence of the new rationale was the logical extension of immunity to solicitors acting as advocates in trials.[16]

Canadian Authority

While the English position has been clearly and recently stated, the Canadian position is uncertain. There are very few instances where the question of the immunity of counsel from suit in negligence has been raised. With one exception[17], these

10. *Supra* n. 5, at 502 (emphasis added).
11. *Supra* n. 1, at 1001, per Lord Reid; at 1033, per Lord Upjohn; at 1038, per Lord Pearson. Lord Morris expressed no opinion; Lord Pearce appears to have retained the old rationale, at 1021.
12. *Supra* n. 1, at 998-999, per Lord Reid; at 1013-16, per Lord Morris; at 1027-28, per Lord Pearce; at 1033-34, per Lord Upjohn; at 1038-40, per Lord Pearson. The policy considerations are discussed and critized *infra*.
13. *Supra* n. 1, at 1000, per Lord Reid; at 1011-12, per Lord Morris.
14. *Supra* n. 1, at 1029, per Lord Pearce; at 1033, per Lord Upjohn; at 1040, per Lord Pearson.
15. *Supra* n. 1, at 1001, per Lord Reid; at 1010, per Lord Morris; at 1036, per Lord Upjohn; at 1041, per Lord Pearson; *contra*, at 1030, per Lord Pearce.
16. *Supra* n. 1, at 1001, per Lord Reid; at 1024, per Lord Pearce; at 1035, per Lord Upjohn; Lords Morris and Pearson, while expressing no final opinion, appear to favour immunity for the solicitor-advocate.
17. *Banks v. Reid* (1974), 6 O.R. (2d) 404 (H.C.); discussed *infra*.

few cases were decided before 1900, at a time when the fusion of the legal profession was not complete.[18]

The leading decision addressing the question of negligence in the conduct of litigation is *Leslie v. Ball,*[19] decided by the appeal court of Upper Canada in 1863. Ball, a barrister and solicitor, had been engaged to conduct a suit on behalf of Leslie. The defendant in that suit pleaded a set-off claim against Leslie. Although he was aware of a complete defence to the set-off, Ball did not seek to amend the pleadings or to call certain material witnesses to prove the defence. As a result, the set-off was successful and Leslie's award in the suit was reduced accordingly. Leslie brought an action against Ball, alleging negligence in failing to seek an amendment in pleadings and in failing to call material witnesses. Ball defended that there was no cause of action because "a counsel cannot be liable in an action for his conduct when at a trial."[20]

The Upper Canada Court of Queen's Bench held that Leslie was entitled to recover. Two judgments were delivered. Mr. Justice Hagarty perceived the question as one of negligence in the performance of duties *qua* solicitor. Ball was liable as a solicitor for failing to instruct counsel properly:

> The peculiar position of the profession in Canada, where the attorney may be and often is the counsel for a party in the suit, leaves this case with little illustration from English authority. I think, however, we are safe in holding that if the same gentleman acts in both characters, he in no way evades or diminishes any liability properly attachable to him as such attorney. It is conceded that omitting properly to instruct counsel is a good ground of action. If a Canadian attorney, having full knowledge of certain material facts, or the existence of material evidence, uses his privilege of acting as counsel himself, and wholly omits urging such facts or calling such evidence, I think he cannot complain if he be treated exactly as if he had omitted properly to instruct counsel.[21]

The effect is to split the lawyer into two personalities: Ball as solicitor failed to instruct Ball as barrister to pursue the defence. It is practically impossible to apply Hagarty, J.'s approach to the modern Canadian lawyer who hour by hour changes roles, from "solicitor" to "barrister" to "solicitor." Attempting to discern the lawyer's mental processes is patently absurd. Why not assume that the lawyer as solicitor has given proper instructions but the lawyer as counsel has neglected to follow them?

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18. See Arnup, "Fusion of the Professions" (1971), 5 L.S.U.C. Gazette 38, for a brief discussion of the history of the fusion of the professions in Ontario (Upper Canada), the jurisdiction in which most of the cases arose.

19. (1863), 22 U.C.Q.B. 512.

20. *Id.*, at 514.

21. *Id.*, at 515 - 16.

Mr. Justice Adam Wilson recognized the difficulty of separating the functions of the lawyer:

> The joinder of the two professions of attorney or solicitor and barrister may, while they are united, be a sufficient reason for the distinction here, for it certainly must be in many cases, as the one now in court illustrates, an exceedingly difficult matter to separate the responsibility between the two professions exercised by and combined in the one person — to say where the responsibility of the attorney ends and that of counsel might be supposed to begin; and therefore it may, while this united exercise of the two degrees or branches of the law exists, be better for the client that the attorney and counsel, while making a two-fold profit in each of these capabilities, should not be held to have a responsibility in but one of these characters, and a total exemption from accountability in the other, and perhaps the most profitable of them, and in which he might not have been employed at all if it had not been for his qualification and practice as an attorney.[22]

Adam Wilson, J. concluded that Ball was liable because he had failed in "his duty as attorney and counsel, both of which characters he filled, and from neither of which can he properly be dissociated."[23]

A counsel could be held liable, at least in circumstances where an attorney would be liable.[24] Adam Wilson, J. doubted the English law which gave counsel immunity from suit. He observed that the expressed rationale of the English rule, the incapacity of an English barrister to contract, did not apply to the lawyer in Upper Canada.[26]

What does *Leslie v. Ball* stand for? There are three possible interpretations. First, it may be argued that the case was one of solicitors' negligence only, the view adopted by Hagarty, J. and by the trial judge.[27] Thus, the case offers no guidance with respect to the liability of a lawyer *qua* barrister. Second, the judgment of Adam Wilson, J. may be interpreted as a rejection of barristers' immunity and the imposition of liability on a lawyer operating within a joined profession.

A third interpretation attempts a reconciliation of the two judgments. Admitting that the duty arose out of the lawyer's functions as a solicitor, that duty was to show care and skill in conducting the trial. Ball was held liable for his negligent conduct of the litigation. Hagarty, J., who was reluctant to discard the barrister-solicitor distinction, and Adam Wilson, J., who doubted the distinction, both concluded that a lawyer could be held liable for what he failed to do in conducting the trial.

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22. *Id.*, at 518 - 19.
23. *Id.*, at 519.
24. *Id.*, at 519.
25. See *Swinfen v. Lord Chelmsford*, *supra*, note 8.
26. *Supra* n. 19, at 518.
27. *Supra* n. 19, at 517, per Adam Wilson, J.: ". . . the learned judge also determined that it sufficiently appeared that the defendant was charged as an attorney and not as counsel . . ."

There are two other "old cases" which touch the question. One is *Wade v. Ball*,[28] where it was held that an action could lie in respect of the alleged negligence of a lawyer to call a material witness. The question of immunity did not arise.[29] The other case is *R. v. Doutre*,[30] a decision of the Privy Council on appeal from Quebec. Lord Watson, speaking *obiter*, examined the considerations of public policy[31] which supported the barrister's incapacity to sue for fees and his immunity from suit, and doubted whether "in an English colony where the common law of England is in force, they could have any application to the case of a lawyer who combines in his own person the various functions which are exercised by legal practitioners of every class in England."[32]

The question of the immunity of counsel appears to have not arisen again until after the decision in *Rondel v. Worsley*. In *Banks v. Reid*[33] the plaintiffs sought damages against their lawyer, alleging that he had been negligent in not including a certain party as defendant in a suit he had conducted on their behalf. Henry, J. found that the lawyer had been negligent in failing to put before his clients the issue of whether to include the party in question as a defendant. However, he dismissed the suit on the basis that the plaintiffs had suffered no loss as a result of their lawyer's negligence. Mr. Justice Henry went on to state that he would have dismissed the action in any event, on the basis of the principle in *Rondel v. Worsley:*

> . . .it appears to me that the plaintiffs would have considerable difficulty in overcoming the *rationale* of that judgment [*Rondel v. Worsley*]. The plaintiff's [sic] action is in respect of the framing of their original action on the pleadings. While fusion of the functions of solicitor and counsel in this Province tends to obscure those functions, it is as counsel (that is a barrister) that the legal adviser takes responsibility for the settlement of the pleadings. For the reasons carefully elaborated in the House of Lords, in England no action lies against a barrister based on his conduct of litigations for his client. This principle is one of public policy. As at present advised, I do not see that this principle is not applicable in this Province.[34]

Thus, at least one trial judge has been willing to adopt the reasoning and the rule of *Rondel v. Worsley*.

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28. (1870), 20 U.C.C.P. 302.
29. It was held that negligence was not proved; *supra*, note 28, at 304.
30. (1884), 9 App. Cas. 745 (J.C.P.C.)
31. The policy basis stated in *Kennedy v. Brown*, *supra* n. 8.
32. *Supra* n. 30, at 751-752. At least one Canadian commentator regards this decision as a basis for not applying the immunity rule in Canada; see Glasbeek, "Limited Liability for Negligent Misstatement," in Linden, ed., *Studies in Canadian Tort Law* (1968), at 123, fn. 27.
33. *Supra* n. 17.
34. *Supra* n. 17, at 418-19.

The most important feature of the Canadian authority is the lack of it. There is no compelling authority either for or against the immunity of counsel.

Policy Considerations

Given the state of the existing authority it is open to the Canadian courts to adopt or reject the rule in *Rondel v. Worsley*. The Canadian courts must make a conscious decision, on policy grounds, as to whether to adopt that rule. In doing so, the courts should consider and weigh the policy considerations both for and against allowing an action against counsel for negligence in the conduct of litigation.

In *Rondel v. Worsley* the House of Lords concluded that the effective administration of justice required that the legal practitioner be immune from suit in respect of his role in litigation. Their lordships enunciated a number of specific policy reasons, all of which are susceptible to criticism. The Canadian courts must rigorously test the validity of the *Rondel* reasoning and determine its applicability to Canadian circumstances.

The House of Lords concluded that liability for negligence was inconsistent with the duty owed by the barrister to the court. Lord Upjohn observed:

> while counsel owes a primary duty to his client to protect him and advance his cause in every way, yet he has a duty to the court which in certain cases transcends that primary duty.[35]

This overriding duty may oblige the barrister to bring forward evidence which is damaging to his client's case. Their lordships suggested that it would not be in the public interest if counsel were to hesitate to take a course of action which he regarded in the public interest for fear that his client might sue him on the ground that his own interest had been negligently disregarded. If the barrister's mind came to be directed exclusively to the peculiar interests of his client, the confidence and trust which exists between the bench and the bar would be undermined, if not destroyed.[36] As a result, the judge would have to rely more heavily upon his own investigations and research to ensure that every relevant fact and point of law were disclosed. It was suggested that clients would not appreciate that their counsel owed a duty of brevity to the court.[37] Their lordships foresaw that fear of suit would encourage counsel to expand cross-examination to inordinate length and bog down the trial with irrelevant details, unduly prolonging litigation. The House of

35. *Supra* n. 1, at 1034.
36. *Supra* n. 1, at 998 - 99, per Lord Reid.
37. *Supra* n. 1, at 999, per Lord Reid; at 1027 - 28, per Lord Pearce.

Lords concluded that the removal of immunity would submit barristers to inhibitions which would disrupt the efficient administration of justice.

The reasoning in *Rondel* fails to appreciate that if the barrister put first his duty to the court he would have nothing to fear. If a client complained that his barrister had breached his duty by failing to carry out certain instructions, would not the barrister have a complete defence if he could show that the instructions were contrary to accepted professional ethics or violated his duty to justice?[38] The standard of care demanded of a reasonably competent barrister should incorporate his duty to the court. For a barrister to fulfill that duty, even at the expense of his client's case, would then not be negligence.

The House of Lords proposed that in order that the barrister may fearlessly and independently fulfill his duty to the Court, not only should actions against him by dissatisfied clients not succeed, but they should not be brought. The barrister would be prone to excessive caution in order to avoid being subjected to vexatious actions by disgruntled clients. This reasoning is susceptible to two criticisms. First, in jurisdictions which permit lawyers to be sued in all respects there would appear to be no rash of vindictive suits.[39] The costs of proceedings and the dim hope of success are enough to discourage the vengeful client. Second, every other professional man faces the hazard of litigation which may call his reputation into question. This is not seen as justifying the denial of recovery of worthwhile claims by honest clients against negligent doctors, accountants, and solicitors.

The House of Lords viewed barristers' immunity as part of a general immunity accorded all participants in the litigation process.[40] For example, a witness cannot be sued if he gives false and malicious evidence. Similarly, the corrupt judge and the perverse juror are not liable to an injured party in the litigation. Lord Pearce questioned whether the barrister alone should be liable to be sued, and answered in the negative.[41]

What the House of Lords failed to appreciate was the special relationship between barrister and client. The barrister holds himself out to the public as a professional man capable of conducting litigation with reasonable skill and competence. The client's reliance on his barrister creates a special relationship which distinguishes the barrister's position vis-à-vis his client from that of the other participants. Therefore, it is not

38. See, Heerey, "Looking over the Advocate's Shoulder: An Australian View of *Rondel v. Worsley*" (1968), 42 Aust. L.J. 3. at 6.

39. See, *infra* n. 46.

40. *Supra* n. 1, at 999, per Lord Reid; at 1014, per Lord Morris; at 1025 - 26, per Lord Pearce.

41. *Supra* n. 1, at 1026.

anomalous to impose liability on the barrister qua professional man while simultaneously extending privileges and protection, such as immunity from defamation, to the barrister *qua* participant in the litigation process.

The second policy objection to the abrogation of barristers' immunity involved retrial. The House of Lords observed that an action against a barrister would call into question the decision in the original case. The court hearing the negligence action would have to determine whether the alleged negligence of the barrister caused an incorrect result in the original litigation. Their lordships were particularly concerned that convicted criminals would use an action against their barrister as a means of reopening the original conviction after the exhaustion of appeal. Their lordships concluded that the retrial of cases by collateral means must be discouraged.[42]

The policy against retrial is premised on the assumption that the finality of litigation is more important than the ultimate rightness of every decision. Admittedly the administration of justice would not be served if an unsuccessful litigant was allowed to challenge the decision an unlimited number of times. However, the courts have allowed exceptions: the possibility of retrial of criminal guilt has not been completely expunged. The doctrine in *Hollington v. Hewthorn*[43] provides that proof of a criminal conviction is not conclusive of guilt and may be challenged in an action for defamation. A similar exception could be made for an action against a barrister. The integrity of the administration of justice may be better served by allowing the alleviation of injuries caused by faulty decisions than by denying to recognize that the errors were ever made.

The third ground for the decision in *Rondel v. Worsley* focused on the peculiar constitution of the English legal profession. The House of Lords found that there was a need to protect the barrister against the unwelcome client. This stemmed from the obligation of the barrister to represent anyone who proffered the required fee. If there was a possibility of a disgruntled client harassing his barrister by bringing an action alleging negligence, the House of Lords foresaw that unpleasant clients would find it difficult to get representation.[44]

The House of Lords seems to be suggesting that since the barrister must take his client as he finds him, so must the client take the barrister as he finds him. This reasoning is inadequate to support immunity. If a barrister takes a brief at a proper fee he should perform the work with reasonable care and skill; if he

42. See, in particuar, *supra* n. 1, at 1012 - 13, per Lord Morris.
43. [1943] K.B. 587 (C.A.).
44. See, *supra* n. 1, at 1029, per Lord Pearce; at 1033, per Lord Upjohn.

does so, he has a complete defence to any action brought by his client. It seems improbable that a committed professional would select only clients whom he assessed would not pester him with an action for real or imaginary negligence. In any event, this policy has no application to Canada where the legal practitioner is under no legal obligation to accept every client who seeks his advice.

All three of the reasons of the House of Lords exhibit fear that the abrogation of barristers' immunity would give rise to a flood of bogus claims by disgruntled clients. In discussing the obligation to accept clients as a justification for immunity, Lord Pearce queried:

> Is one, then, to compel counsel to advise or to defend or conduct an action for such a person who, as anybody can see, is wholly unreasonable, has a very poor case, will assuredly blame someone other than himself for his defeat and who will, if it be open to him, sue his counsel in order to ventilate his grievance by a second hearing, either issuing a writ immediately after his defeat or brooding over his wrongs until they grow greater with the passing years and then issuing the writ nearly six years later (as in the present case)?[45]

Their lordships assumed that frivolous and vindictive actions would be characteristic if a negligence action could be brought.

This assumption points out one of the faults inherent in a decision based on public policy considerations. The House of Lords reached its conclusions without any empirical information as to the frequency and nature of the actions which would arise if immunity were removed. The House of Lords should have explored possible sources of information such as the experience of professional disciplinary bodies with client complaints. Their lordships could have considered the American experience which suggests that very few actions are brought against lawyers in respect of negligence in litigation.[46] The American commentators have not discovered any pernicious nuisance in such cases.[47] The policy reasons of the House of Lords suffer from a lack of foundation knowledge with respect to the number of potential claims and the nature of those claims. Proceeding upon the supposition that the claims would be numerous and frivolous, the House of Lords bolted the door against meritorious plaintiffs who have suffered at the hands of negligent advocates.

The House of Lords was called upon to decide the question of barristers' immunity in the context of an unmeritorious and hopeless case. Their lordships regarded Rondel's claim as

45. *Supra* n. 1 at 1029.

46. However, even in the United States information regarding the frequency and nature of complaints is inadequate: see Note, "Improving Information on Legal Malpractice," (1973), 82 Yale L.J. 590.

47. Wade, "The Attorney's Liability for Negligence," (1958), 12 Vand. L. Rev. 755; Blaustein, "Liability of Attorney to Client in New York for Negligence," (1953), 19 Brook. L. Rev. 233; Haughey, "Lawyers' Malpractice: A Comparative Appraisal," (1973), 48 Notre Dame Law. 888.

illustrative of the spurious complaints that would be unfairly alleged against barristers.[48] The real injured party in *Rondel v. Worsley* was not the plaintiff but the defendant. The weighing of the public policy considerations would have been more complicated if the House had been faced with a worthwhile claim of unmistakable negligence of a barrister.[49]

In *Rondel* the House of Lords defined the question in terms of a competition between the public interest and an individual's interest. The question, as Lord Reid saw it, was:

> Is it in the public interest that barristers and advocates should be protected against such actions? Like so many questions which raise the public interest, a decision one way will cause hardships to individuals while a decision the other way will involve disadvantage to the public interest.[50]

Their lordships concluded that the public interest, as they perceived it, overruled the interest of an individual to redress damage caused by his negligent barrister.

Is there not a public interest in holding counsel liable for their negligence? The Canadian courts should consider not only the public interest served by immunity, but also the public interest served by liability. An action for negligence does serve a social interest. On the most basic level, such an action compensates the client for a loss suffered at the hands of his lawyer. Imposing liability for negligence has a deterrent effect: a successful suit against an erring lawyer admonishes the entire profession. Judicial scrutiny through a negligence action would stimulate conscientious procedures and deter careless conduct of trials. A negligence action is a means of holding the legal profession to account, to justify their level of performance.

An action in damages against a lawyer for negligence in the conduct of litigation should be entertained in Canada. First, the policy reasons espoused in *Rondel*, when weighed against the public interest in allowing a negligence action, are not so compelling as to justify a deviation from the general principles of professional liability. Second, the fused nature of the profession in Canada renders immunity impractical. Even *Rondel* recognized the near impossibility of distinguishing functions in the conduct of litigation from the other functions of the barrister.[51] In Canada the problem is compounded because there is no historical distinction of functions *qua* advocate. Bora Laskin has remarked:

> Can or should a distinction be drawn in the case of a solicitor, who also acts as counsel in the case, between his liability in the one

48. See *supra* n. 1, at 1003, per Lord Morris; at 1029, per Lord Upjohn.

49. The subsequent applications of *Rondel v. Worsley* have been in cases where there would have been liability in any event: *Banks v. Reid*, *supra* note 17; *Rees v. Sinclair*, [1974] 1 N.Z.L.R. 180 (C.A.).

50. *Supra* n. 1, at 998.

51. *Supra* n. 1, at 1036, per Lord Upjohn.

> character and his immunity in the other? ... What case law there is in the common law Provinces — and it is scanty — indicates that where a lawyer acts both as solicitor and counsel his negligence in the latter character will be as actionable as his negligence as solicitor. Difficult though it may be to raise errors of judgment into negligence, it is still more difficult to separate what a person knows or does or ought reasonably to know or do as a solicitor from what he knows or does or ought reasonably to know or do as a counsel, where he fills both roles.[52]

Third, the granting of immunity would discredit the legal profession, and thereby the administration of justice, in the eyes of the public. The trial judge in *Rondel* observed that

> at some time between the sixteenth and the eighteenth centuries barristers, with the connivance of the judges, built for themselves an ivory tower and have lived in it ever since at the expense of their clients.[53]

The Canadian public deserve a convincing explanation should their lawyers seek refuge in such a tower.

The Boundaries of Immunity

The rule in *Rondel v. Worsley* may or may not be adopted in Canada. If it is, the extent of the application of the rule will be relevant. The extent of the application of the rule is also relevant in the meantime, as it defines the boundaries between those cases within which doubt as to liability exists and those within which it does not.

The rule in *Rondel v. Worsley* has been broadly stated to the effect that an advocate cannot be held liable for negligence in the conduct of litigation. But there are limits upon that proposition: what constitutes the conduct of litigation? Litigation involves such varied functions as taking instructions to sue and examining witnesses at trial. In the latter situation, counsel would be immune from liability for his negligence in examining witnesses as in *Rondel v. Worsley*. In the former situation, the law is not so clear.

In *Rees v. Sinclair*[54] the New Zealand Court of Appeal adopted the rule in *Rondel v. Worsley* and proposed a test for its application in that jurisdiction; McCarthy, P. stated:

> ... I cannot narrow the protection to what is done in Court: it must be wider than that and include some pre-trial work. Each piece of before-trial work should, however, be tested against the one rule; that the protection exists only where the particular work is so intimately connected with the conduct of the cause in Court that it can fairly be said to be a preliminary decision affecting the way that cause is to be conducted when it comes to a hearing. The protection should not be given any wider application than is absolutely necessary in the

52. Laskin, *The British Tradition in Canadian Law* (1969) 25 - 26. Laskin concludes that "In sum *Rondel v. Worsley* is based on considerations which have no Canadian relevance," at 26.

53. *Supra* n. 2, at 479, per Lawton J.

54. [1974] 1 N.Z.L.R. 180 (C.A.); aff'g [1973] 1 N.Z.L.R. 236 (S.C.).

> interests of the administration of justice, and that is why I would not be prepared to include anything which does not come within the test I have stated.[55]

The Court went on to apply the test to the particular facts of the case. It was alleged that the lawyer had been negligent in failing to raise certain facts on an application for maintenance. The New Zealand Court of Appeal held that the decision not to raise such facts was a matter of tactics, intimately connected with the manner in which the case was to be conducted in court and fell within the protection of the immunity rule.

The test in *Rees v. Sinclair* was considered by the English Court of Appeal in *Saif Ali v. Sydney Mitchell & Co.*[56] There the plaintiff had been injured when the vehicle in which he was riding was struck by a vehicle, driven by one Mrs. Sugden, and owned by her husband. The plaintiff retained the defendant solicitor to prosecute his claim. The solicitor obtained an opinion from the defendant barrister, who advised that Mr. Sugden should be sued. The barrister subsequently settled a draft writ and statement of claim against Mr. Sugden, which was issued by the solicitor. Three years later, it was determined that Mr. Sugden could not be held liable. By then, the time had passed for commencing an action against Mrs. Sugden. The plaintiff sued his solicitor, who in turn claimed indemnity from the barrister, who himself was later added as a defendant. The barrister moved to strike out the third party notice and the statement of claim on the ground that they disclosed no reasonable cause of action.

The case progressed to the Court of Appeal where it was held that the statement of claim and third party notice were properly struck out as against the barrister. Lord Denning, M.R. found the test in *Rees v. Sinclair* "restrictive, perhaps unduly restrictive, of the barrister's immunity;"[57] and stated the immunity broadly:

> ... I think he should be immune for all advice that he gives on matters which may lead to litigation ... But suffice for today to hold that a barrister cannot be sued for negligence in any preliminary advice that he gives as to the parties to litigation or the prospects of success or any other matter connected with litigation pending or contemplated.[58]

Bridge, L.J. adopted the test in *Rees v. Sinclair* and found that the acts of negligence alleged fell within the test.[59]

It is difficult to imagine any part of counsel's work which would not fall within the broad statement by Lord Denning.

55. *Id.*, at 187.
56. [1977] 3 All. E.R. 744 (C.A.).
57. *Id.*, at 748.
58. *Id.*
59. *Id.*, at 750.

However Lord Denning has not been so generous in extending immunity when solicitors have been conducting the litigation. *Losner v. Michael Cohen Co.*[60] arose as the result of a complaint of dogs running loose. The plaintiff retained the defendant solicitor to prosecute his complaint. The complaint was dismissed on the ground that the person charged was not the owner of the dogs. The plaintiff sued his solicitor, alleging negligence in handling the proceedings. The case ultimately came to the Court of Appeal where the brief report discloses that Lord Denning said that

> . . . it was well settled that no action would lie against a solicitor for his conduct of a case in court so that no action could lie for anything after the hearing began. But the defendant had a duty of care in initiating proceedings to see that the proper defendants were brought before the court and to discover who owned the dogs. It was his failure in the duty of care by not making further enquiries about that which had led to the complete frustration of everything the plaintiff had sought to achieve by going to a solicitor[61]

and it was held that the plaintiff was entitled to damages. The only distinction between this case and that of *Saif Ali* appears to be the status of the advocate: solicitor, not barrister. However, it was proposed in *Rondel v. Worsley* that the status of the advocate was not relevant to the application of immunity.[62]

Another case where solicitors have failed to benefit from advocate's immunity is *Heywood v. Wellers*.[63] There the plaintiff retained the defendant solicitors to obtain an injunction against a man who had been annoying her. The solicitors made numerous mistakes: commenced proceedings in the wrong court, made unnecessary applications, failed to seek default judgment, wasted time on a summons for direction, and failed to bring the man before the court when the injunction was broken. The plaintiff recovered damages against the solicitors. Although *Rondel v. Worsley* was argued on the hearing of the appeal, no mention of advocate's immunity was made in the judgments of the Court of Appeal and liability was imposed upon the solicitors for their neglect in conducting the litigation.

The limits of the rule in *Rondel v. Worsley* remain uncertain. *Saif Ali* suggests a broad immunity for all work leading up to the litigation; *Heywood v. Wellers* suggests liability for tactical decisions made as to the procedural steps in the litigation.

The two Canadian cases considering *Rondel v. Worsley* do not reduce this uncertainty. In *Banks v. Reid*,[64] settling

60. (1975), 119 Sol. J. 340 (C.A.) [very briefly reported].
61. *Id.*, at 340 - 41.
62. See n. 16.
63. [1976] 2 W.L.R. 101 (C.A.).
64. *Supra* n. 17.

pleadings was held to be work coming within the protection of the immunity. In *Gouzenko v. Harris*,[65] Goodman, J. considered that should it apply in Ontario, negligence in failing to carry out discovery and to set down an action for trial would not come within the rule in *Rondel v. Worsley*.[66]

The Extent and Nature of Liability

There are Canadian cases in which lawyers have been held liable for negligence committed in some phase of litigation. The possible immunity of the advocate was not considered in these cases.[67] However, should the Canadian courts adopt the rule in *Rondel v. Worsley* it is unlikely that immunity would be extended to situations where liability has been established in the past.

Probably the most common situation involves the missed limitation period: where, by the fault of the lawyer, an action has not been commenced within the prescription period or some requisite notice has not been given in time and, as a result, the client has lost his cause of action.[68] As well, liability has been imposed in the following situations: for failing to conduct discovery and set down a case for trial as instructed, so as a result, the case was dismissed for want of prosecution;[69] for withdrawing from the case and failing to appear at trial, without notice to the client, so as a result, judgment was rendered against the client;[70] for failing to take out an order obtained, so as a result, the client lost the benefit of the order;[71] for failing to register a judgment obtained, so as a result, the client was unable to recover on the judgment.[72]

In these cases, as well as in cases of solicitors' negligence in non-contentious matters, the characteristics of the action against a lawyer for negligence have been developed. If immunity is rejected and an action allowed for negligence in the actual conduct of trials, that action will have similar characteristics.

The duty owed by a lawyer is to exercise such a degree of care and skill as would be exercised by a reasonably competent and diligent practitioner.[73] The law prescribes that the lawyer

65. (1976), 72 D.L.R. (3d) 293 (Ont. H.C.).

66. *Id.*, at 314 - 15.

67. Possibly the issue of immunity did not arise because these cases dealt with litigious work within the solicitor's responsibility and, prior to *Rondel v. Worsley*, no immunity of the solicitor-advocate was presumed.

68. See, for example, *Page v. A Solicitor* (1971), 20 D.L.R. (3d) 532 (N.B.S.C., App. Div.) aff'd without reasons (1974), 29 D.L.R. (3d) 386 (S.C.C.); *Fyk v. Millar*, [1973] 2 O.R. (2d) 39 (H.C.); *Quevillon v. Lamoureux (1975), 52 D.L.R. (3d) 476 (Que. C.A.); Prior v. McNab* (1976), 16 O.R. (2d) 380 (H.C.).

69. *Gouzenko v. Harris*, *supra* n. 65 .

70. *Kern-Hill Co-op Furniture Ltd. v. Shuckett* (1975), 58 D.L.R. (3d) 157 (Man. C.A.).

71. *Herr v. Toms* (1872), 32 U.C.Q.B. 423.

72. *Hett v. Pun Pong* (1890), 18 S.C.R. 290.

73. *Aaroe v. Seymour* (1956), 6 D.L.R. (2d) 100 (Ont. H.C.), aff'd on other grounds (1957), 7 D.L.R. (2d) 676 (Ont. C.A.); *Milliken v. Tiffen Holdings* (1967), 60 D.L.R. (2d) 469 (S.C.C.); *Cornell v. Jaeger* (1967), 59 W.W.R. 513 (Man. Q.B.), aff'd (1968), 63 W.W.R. 747 (Man. C.A.); *Brenner v. Gregory*, [1973] 1 O.R. 252 (H.C.).

must apply to his client's legal problems a certain minimum level of knowledge, skill, and diligence. The lawyer is expected to discover, understand and apply clearly defined rules of law, unambiguous statutory provisions and fundamental legal principles. However, misapprehension of the law will be excused where the case involves a complicated issue upon which the law is uncertain.[74] The lawyer must exhibit reasonable skill in pursuing his client's case. Usually, the lawyer will meet the standard if he follows the ordinary practices accepted by the profession. If the lawyer departs from the approved method of accomplishing an object and resorts to a novel technique he incurs greater risk of being found negligent unless he can show that the novel method was effectual for the purpose.[75] The client has a right to expect that his lawyer will be careful and diligent. For example, if the lawyer fails to read documents carefully, he may be liable for lack of professional diligence.[76]

The lawyer may defend an action for negligence by demonstrating that his actions were consistent with the usual practices in the profession. In *Grima v. MacMillan*,[77] the plaintiffs had retained a lawyer to prosecute an action arising from a motor vehicle collision. The lawyer issued a writ against a defendant, who had died prior to the date of the writ. The writ was therefore a nullity. The death of the defendant was not discovered until after the expiry of the limitation period, thus the plaintiffs lost their cause of action. The plaintiffs sued their lawyer, alleging he had been negligent in issuing the writ without searching to find out if the person to be named as defendant was alive. The defendant lawyer led evidence from experienced practitioners to the effect that it was not the usual practice to make such a search. The Court accepted this expert evidence, found that the defendant lawyer had acted no differently than any reasonably competent and diligent practitioner, and dismissed the suit.[78]

The courts have been slow to impose liability on an erring lawyer. Historically it took some elementary blunder, often characterized as "*crassa negligentia*," to attract liability.[79] The courts are prone to classify a lawyer's mistake as an "error of

74. *Meakins v. Meakins* (1910), 2 O.W.N. 150 (H.C.); *Howse v. Shaw* (1913), 4 O.W.N. 971 (H.C.); *Bell v. Green*, [1920] 3 W.W.R. 900 (B.C.S.C.).

75. *Winrob v. Street and Wollen* (1959), 28 W.W.R. 118 (B.C.S.C.); see also *Carrigan v. Andrews* (1849), 6 N.B.R. 485, 489 (S.C.).

76. *Roe v. Stanton* (1870), 17 Gr. 389 (Ont. Ch.); a case where costs to the solicitor were denied because of his negligence.

77. [1972] 3 O.R. 214 (H.C.).

78. *Id.*, at 221 ff.

79. See *Marriott v. Martin* (1915), 21 D.L.R. 463 (B.C.S.C.).

judgment" which does not constitute a breach of his duty of care. Negligence is more than a mere deviation from infallibility: a lawyer does not warrant the accuracy of his opinions.[80] The client has the burdensome task of showing that his lawyer's mistakes went beyond a mere error of judgment and became unforgivable negligence.

In Canada, there have been few cases defining the standard of care demanded of a lawyer in conducting litigation, no cases defining the standard demanded in conducting a trial. It is instructive to consider the American experience. In the United States the application of the general standard of care has varied with the activity of the lawyer.[81] Rarely has liability been imposed in respect of the lawyer's conduct of a trial.[82] The American courts have entertained causes of action where the allegations of negligence have included: the negligent preparation for and presentation of testimony,[83] the failure to call certain witnesses,[84] the failure to object to inadmissible evidence,[85] and the failure to make a proper closing argument.[86] However, complaining clients have met with little success. In *Byrnes v. Palmer* it was pointed out that:

> In a litigation a lawyer is well warranted in taking chances. The conduct of a lawsuit involves questions of judgment and discretion, as to which the most distinguished members of the profession may differ. They often present subtle and doubtful questions of law. If in such cases a lawyer errs on a question not elementary or conclusively settled by authority, that error is one of judgment, for which he is not liable.[87]

The tendency has been to characterize the lawyer's mistakes in litigation as errors of judgment. The American courts have recognized that a lawyer's "decisions concerning the introduction of evidence, the examination of witnesses, and the wisdom of appeal from an adverse decision involve tactical considerations that are not susceptible of precise evaluation and must usually be made in the heat of battle."[88] The courts have been wary of fettering the lawyer's discretion in conducting litigation.

Admittedly, the proper exercise of discretion should be free from liability imposed by hindsight. However, an exercise of

80. See cases, *supra* note 72. The classic English case is *Godefroy v. Dalton* (1830), 6 Bing. 460, 130 E.R. 1357, 467-68 (Bing.), 1360-61 (E.R.) (C.P.).

81. See *Byrnes v. Palmer*, 45 N.Y.S. 479 (App. Div., 1897), aff'd 55 N.E. 1093 (N.Y.C.A. 1899) (less rigourous application of standard of care to the conduct of a lawsuit than to conveyancing); see Wade, *supra* note 47, at 765; Blaustein, *supra* note 47, at 249-51; Haughey, *supra* note 47, at 899-903.

82. *Brock v. Fouchy*, 172 P. 2d 945 (Cal. C.A. 1946); *McLellan v. Fuller*, 108 N.E. 180 (Mass. S.C. 1915); see Annotation, (1956), 45 A.L.R. 2d 5.

83. *Dorf v. Relles*, 355 F. 2d 488 (7th Cir. 1966).

84. *Case v. Ricketts*, 41 A. 2d 304 (D.C. C.A. 1945).

85. *Meagher v. Kavli et al.*, 97 N.W. 2d 370 (Minn. S.C. 1959).

86. *Dorf v. Relles*, *supra* n. 83.

87. 45 N.Y.S. 479, 481 - 82, per Cullen, J. (full citation *supra* n. 81).

88. Note, "Attorney Malpractice" (1963), 63 Colum. L. Rev. 1292, at 1301.

discretion is not valid unless it is based upon all the relevant considerations. There are certain considerations which would be taken into account by the "reasonably competent lawyer" in exercising his discretion in similar circumstances. The court must look behind the mistake to investigate the lawyer's preparation and research. If, because of inadequate preparation, the lawyer has exercised his discretion without considering settled law or established procedures, he should be found negligent. The lawyer must take reasonable care to discover and consider all the factors relevant to his decision. His exercise of discretion will not be subject to attack in respect of the conclusion reached if he has weighed all relevant factors. Not every error can be dismissed as a poor judgment call. The court must be rigorous in its examination of why the mistake was made.

Once the client has succeeded in establishing that his lawyer did not meet the required standard of care, he is faced with the equally formidable task of proving causation. It must be shown that the lawyer's negligence was the cause of damage to the client. Where there has been negligence in the conduct of a trial the damage would be a trial decision unfavourable to the client. Therefore, the client must establish that the result would have been different except for the lawyer's fault. In the early case of *Wade v. Bell,*[89] a client alleged that his attorney had been negligent in failing to secure the attendance of a material witness at the trial of an action which ultimately failed. The trial judge instructed the jury that if the failure to call the witness was negligent, the client's case was made out. On appeal, a new trial was ordered on the ground that it had to be shown that the evidence of the witness would have secured a judgment for the client. Chief Justice Hagarty stated:

> It must be borne in mind that, before these defendants can be made liable for the amount sought to be recovered in *Wade v. Hoyt,* it must be found, with reasonable clearness, that but for the alleged neglect of the attorney, such amount would have been recovered. Practically, such a suit as the present may involve the trying over again of *Wade v. Hoyt.* This cannot be avoided.[90]

Similarly, in cases arising from missed limitation periods, the client must demonstrate the value of the lost cause of action to establish his loss.[91] As a result the court must "try" the hypothetical cause of action which has been lost and determine the probability of the success of that cause but for the negligence of the lawyer.[92] If the client would not have succeeded in the lost

89. *Supra* n. 28.

90. *Supra* n. 28 at 304.

91. Wade, *supra* n. 47, at 769-770; see also Coggin, "Attorney Negligence — A Suit within a Suit" (1958), 60 W. Va. L. Rev. 255.

92. *Fyk v. Millar,* (1973) 2 O.R. (2d) 39 (H.C.); *Kitchen v. Royal Air Forces Association,* [1958] 2 All. E.R. 241; *Prior v. McNab* (1976), 16 O.R. (2d) 380 (H.C.).

cause of action, he has suffered no loss and his claim against his lawyer will be dismissed.

The trial within the trial also determines the quantum of damages to be recovered by the client. The client is entitled to damages for his loss resulting from the breach of contract by his lawyer.[93] If he shows that he would have succeeded on the cause of action lost by his lawyer's negligence, he is entitled to recover damages equal to those he would have recovered had the lost cause of action been tried.[94] If it cannot be conclusively established that the client would have been successful in the lost cause, the court must determine what has been lost by evaluating the prospect for success.[95]

The client's loss is not always the damages he would have been awarded. In *Heywood v. Wellers*[96] the plaintiff had retained the defendant solicitors to obtain an injunction to restrain a man who was annoying her. Through the negligence of the solicitors the man was not restrained and the plaintiff suffered further molestation. At trial, it was held that the plaintiff could recover the money she had paid to the solicitors as costs, but no further damages.[97] On appeal, the plaintiff was awarded general damages for the molestation she had suffered, Lord Denning, M.R. stated

> So here Mrs. Heywood employed the solicitors to take proceedings at law to protect her from molestation by Mr. Marrion. They were under a duty by contract to use reasonable care. Owing to their want of care she was molested by this man on three or four occasions. This molestation caused her much mental distress and upset. It must have been in their contemplation that if they failed in their duty she might be further molested and suffer much upset and distress. This damage she suffered was within their contemplation within the rule in *Hadley v. Baxendale* (1854) 9 Exch. 341. Here the solicitors were employed to protect her from molestation causing mental distress — and should be responsible in damages for their failure.[98]

Janes, L.J. distinguished *Cook v. Swinfen*,[99] where it had been held no recovery could be made for the injured feelings, anger, and mental stress suffered as the result of the failure of litigation owing to solicitor's negligence. He stated:

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93. The action for negligence is an action for breach of contract; see *Winrob v. Street and Wallen*, *supra* n. 75; *Schewebel v. Telekes*, [1967] 1 O.R. 541 (C.A.); *Rowswell v. Pettit*, [1968] 2 O.R. 81 (H.C.), aff'd *sub nom Wilson v. Rowswell*, [1970] S.C.R. 865; *Fohrenkamm v. Plaxton*, [1973] 2 O.R. 518 (H.C.). The leading English cases to the same effect are *Groom v. Crocker*, [1939] 1 K.B. 194 (C.A.); *Clark v. Kirby-Smith*, [1964] Ch. 506 (Ch. D.); *Cook v. Swinfen*, [1967] 1 W.L.R. 457 (C.A.).

94. *Fyk v. Millar*, *supra* n. 92; see *Page v. A. Solicitor*, *supra* n. 68, at 537 where after finding that the quantum of damages in the lost cause of action would have been $42,000, the Court awarded only $35,000 on the basis that that was all the funds that the defendant in the hypothetical cause was proved to have available to pay any judgment in the hypothetical cause.

95. *Fyk v. Millar*, *supra* n. 92, at 383.

96. *Supra* n. 63.

97. *Supra* n. 63, at 105 - 06.

98. *Supra* n. 63, at 111.

99. *Supra* n. 93, at 461 - 62.

> That case is very different on its facts from the present. In the present case the application of "good sense" makes it abundantly clear that the client wanted action taken which would rid her of molestation and annoyance. It is in relation to that action that her contract with the solicitors required the exercise of proper skill and care on their part. Good sense indicates that it was foreseeable at the time of the contract that failure to enforce any remedy obtained to stop the molestation and annoyance would result in its continuance or the risk of repetition. Vexation, frustration and distress were therefore likely to result from a breach of contract in this case. Further, the feelings of the plaintiff are not merely the feelings of an unsuccessful litigant who is disappointed or annoyed at the outcome of the case which would not sound in damages. In my judgment the plaintiff brings herself within those circumstances in which damages under this head are recoverable.[100]

Other Remedies

Suing for damages is not necessarily the only remedy available to the client aggrieved by his lawyer's negligent conduct of litigation.

The court can manipulate the awarding and denial of costs as a technique in dealing with negligence by a lawyer in the conduct of litigation. There are two possibilities: the court may award party and party costs against the negligent lawyer and it may deny the lawyer solicitor-client costs.

Party and party costs are usually awarded against the unsuccessful litigant. Where a client's cause has been unsuccessful because of his lawyer's negligence, the liability for party and party costs is one of the items of damage which the client would claim against the lawyer in a negligence action. Where litigious negligence is involved, the client has to prove that but for the lawyer's negligence he would have won the suit and would not have been liable for the other party's legal costs.[101] Therefore, the question of party and party costs involves the same difficulties for the client as does the negligence action generally.

The court could use its discretion with respect to costs more creatively. The court is free to award party and party costs in whole or in part against the negligent lawyer.[102] Where the client would have lost the case anyway, the expenses of the trial on both sides may have increased due to the negligent errors by the lawyer. The court should hold the lawyer liable for costs to the extent that they are attributable to his negligence. The court

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100. *Supra* n. 63, at 114; see Bridge, L.J. to the same effect, at 115 - 116; Lord Denning suggested that *Groom v. Crocker* and *Cook v. Swinfen* may have to be reconsidered, at 111.

101. *Gola v. Zaporanik*, [1925] 1 D.L.R. 34 (Sask. C.A.).

102. See the Queen's Bench Act, R.S.M. 1970, c. C280, s. 102(1) which provides "... the court or judge has full power to determine by whom, and to what extent, the costs shall be paid." The awarding of costs against a solicitor was approved in *Myers v. Elman*, [1940] A.C. 282, at 289 (H.L.). However, *Re Hawrish* (1964), 49 D.L.R. (2d) 464 (Sask. C.A.) suggests that the court has the power to order a solicitor to pay the costs of proceedings personally, but only where there is a serious dereliction of duty beyond "mere negligence."

could focus on specific items of cost, thereby avoiding the issue of "but for" causation with respect to the ultimate success of the trial. In the result, neither party to the suit would be expected to bear expenses caused by an incompetent lawyer.

The question of negligence will arise where the lawyer seeks to recover his fees and expenses from the client. A client who has suffered at the hands of his negligent lawyer will be reluctant to pay the bill. If the lawyer sues for his fees, the client may raise negligence as a defence.[103] However, the more common situation arises when the client has his lawyer's bill taxed and alleges that the bill should be reduced because of the lawyer's negligence in performing his duties.

There has been some dispute as to whether the taxing officer can consider the alleged negligence of the lawyer. It has been suggested that the taxing officer is precluded from considering an allegation of negligence which could give rise to other proceedings.[104] However, the better authority gives the taxing officer the power to investigate and dispose of questions of negligence insofar as they affect the lawyer's right to costs. In the early case of *Thomson v. Milliken*, Mowat, V.C., said:

> ... I am of opinion that, on the common order obtained by a client for the taxation of his Solicitor's bill, the Master may take into consideration alleged negligence of the Solicitor, as having occasioned the suit for which the costs are charged, or rendered it useless; and if he finds such negligence established, it is his duty to disallow the whole bill; and if the alleged negligence is as to parts only of the bill, such parts are to be disallowed. But this rule would not sanction the Master's assessing unliquidated damages, when claimed by the client against his solicitor.[105]

In determining negligence, the taxing officer would employ the standard of care used in court actions.[106] However, the client would not be called upon to discharge the onus of showing that his lawyer's negligence caused an adverse ultimate result in the original litigation. Allowing the taxing officer discretion to deal with negligence would relieve the client of the frustration of paying the negligent lawyer for his worthless services.

The combined effect of awarding party and party costs against the lawyer and denying the lawyer solicitor-client costs

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103. *Roe v. Stanton*, *supra* n. 76.

104. *Re Solicitor*, [1960] O.W.N. 260, 263 (Taxing Officer).

105. (1867), 13 Gr. 104, 106 (Ont. Ch.); foll'd *Re Solicitor*, [1971] O.R. 138 (Taxing Officer); *Hamilton v. McNeil* (1895) 3 Terr. L.R. 298 (N.W.T.S.C.) is to the same effect.

106. *Hamilton v. McNeil*, *supra* n. 105.

would bring home the dangers of carelessness to the lawyer. However, manipulating costs does not fully compensate the aggrieved client and is no substitute for an action for damages.

Another "remedy" is appeal. There is some authority that a lawyer's negligence in the conduct of litigation may be an available ground for appeal of the resulting trial decision.[107] The question has arisen more often in criminal cases,[108] but should be equally available in attacking civil suits.[109] This is a subject in itself and will not be discussed here.

Conclusion

Canadian courts are free to permit the aggrieved client a cause of action for his lawyer's negligence in the conduct of all phases of litigation. However, the Canadian courts must make a policy decision. There are no compelling reasons to adopt the rule in *Rondel v. Worsley* and restrict the client's remedy. The client should be permitted to sue his lawyer in respect of all aspects of litigation, including his conduct of the trial. Even then the client is confronted with proving negligence, causation and damage — a most formidable task.

107. *R. v. Brooks* (1906), 11 O.L.R. 525 (C.A.); *R. v. Rosik*, [1971] 2 O.R. 47 (C.A.); but see *R. v. Draskovic*, [1972] 1 O.R. 396 (C.A.).

108. See Grunis, "Incompetence of Defence Counsel in Criminal Cases" (1973), 16 Crim. L.Q. 288, for a full discussion of the availability of appeal in criminal cases; see also Lewis, "Incompetency of Counsel" (1973), 25 Baylor L. Rev. 299.

109. *Elliott v. Ladds* (1866), 6 N.S.R. 170 (C.A.).