

# Liability of the Lawyer for Bad Advice

THOUGH the apocryphal maxim to the effect that "everyone is presumed to know the law" is popular, no one is quite hardy enough to apply it to the lawyer. He can at times be heard to exculpate himself from liability for bad legal advice on the ground that he did his best and that his mistake was due to his ignorance of law. When, where, and to what extent is this excuse available?

For a rounded and rationalized account of the law on the subject of a lawyer's liability for bad legal advice we shall do well to begin with the contractual form of statement. It is of course not historically correct—for there are still vestiges in English law of the barrister's inability to sue his client in contract.<sup>1</sup> Nor is it analytically sound to think of the relation of attorney and client as essentially contractual. The lawyer has a status as an officer of the court, and his relation with his client is fiduciary in the highest degree with consequences that are diametrically opposed to the arm's length conception of a simple contract. Nevertheless, under the general influence of the nineteenth century prejudice in favor of making the contracts principle all-embracing, American courts and text writers have sought and found a way of describing the liability of an attorney-at-law for undertaking a task for which his skill and training are inadequate in terms of implied agreement.<sup>2</sup> The lawyer is thus in precisely the same situation as a workman who by putting up a shingle represents himself as having the necessary skill to do his work.<sup>3</sup> As in the case of the workman, there are details, degrees, and gradations in the skill thus represented.<sup>4</sup> The differences are differences of fact. Whether holding one's self out as a carpenter is or is not the same as

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<sup>1</sup> The whole matter is beautifully handled in COSTIGAN CASES ON LEGAL ETHICS (1933) pp. 474 ff. To his list of cases may be added *Christin v. Lacoste* (1893) 2 Quebec Q. B. 142, where the whole history of fees is discussed.

<sup>2</sup> The English barrister who acts honestly in the discharge of his duty "is not liable" to an action by his client for negligence or want of skill, discretion or diligence in respect of any act done in the conduct of a case or in settling drafts or in advising. 2 HALSBURY'S LAWS OF ENGLAND 394, quoted in COSTIGAN, *op. cit. supra* note 1, at 36.

<sup>3</sup> Cf. 3 BLACKSTONE'S COMMENTARIES 164: "There is also in law always an implied contract . . . with a common tailor or other workman that he performs his business in a workmanlike manner." The advocate or attorney who neglects his client's case is mentioned in the same paragraph.

<sup>4</sup> A contract to construct a building in a "good, workmanlike manner" meant that it was to be constructed with fair average skill, considered in relation to the character of the work, and not with the highest skill known to the carpenter trade; "Workmanlike" meaning worthy of a skillful workman, well-executed, skillful, and "skillful" being defined as having ability in a specified direction, experienced, practiced. *Holland v. Rhoades* (1910) 56 Ore. 206, 106 Pac. 779.

holding one's self out as a cabinet maker, is such a question of fact. Likewise whether the country family physician is culpable for not having the skill of the city specialist depends on the meaning in fact of the representation made by each.<sup>5</sup> To make an accurate estimate of the precise meaning of a lawyer's holding-out would, by analogy, require a good deal of information as to the organization and state of education of the bar of the country. The question what is due skill under any circumstances is in this respect like the question of due care, with which of course it is almost invariably coupled. The fact that a lawyer has misstated a law points equally to the two possible causes: ignorance or carelessness. In fact, negligence is a source of ignorance and ignorance a source of negligence; and the very same results achieved by one lawyer through his knowledge are reached more slowly and laboriously by another through care.<sup>6</sup>

The recognition of specialties is not so far advanced in law as in medicine. Hence, we cannot expect so clear a demarcation among lawyers, but within limits we have both the fact of the specialization and the recognition of it.<sup>7</sup> There is a distinction on the basis of locality. Thus in *Fenaille v. Coudert*<sup>8</sup> the court said: "In assuming the employment of plaintiffs, the skill and knowledge they professed, must be considered with reference to the locality of their practice. In the absence of any express declaration on the subject, they will be presumed to have held themselves out as possessing such skill and knowledge as attorneys practicing (in the state of New York) might reasonably be supposed to possess, and no more. As attorneys of New York, they are not to be presumed to know the laws of a foreign state. Nor did they impliedly undertake that they had such knowledge, by accepting an employment which . . . was, in terms, limited to drawing a contract in all respects binding between the parties." In this case the difficulty was one of fact rather than law. The attorneys had been employed to draw a building contract binding in all respects between the parties, and failed to advise their client of the necessity of its registration as required by the laws

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<sup>5</sup> Rosenbaum, *The Degree of Skill and Care Legally Required of a Medical or Surgical Specialist* (1932) 49 MEDICO-LEGAL JOURNAL 85.

<sup>6</sup> *Parker-Smith v. Prince Mfg. Co.* (1916) 172 App. Div. 302, 158 N. Y. Supp. 346: Erroneous advice as to the application of the statute of limitations is not necessarily negligence, for there may be a question whether the error indicates lack of due professional care and skill.

<sup>7</sup> Thus, in *Trimboli v. Kinkel* (1919) 226 N. Y. 147, 123 N. E. 205, Cardozo, J. says: "It is negligence to fail to apply the settled rules of law that should be known to all conveyancers." City lawyers are devoting themselves so increasingly to such specialties as conveyancing, criminal law, corporate reorganizations, bankruptcy, patent law, and the like, that there is in fact no representation on their part that they are experts in any branch but their own.

<sup>8</sup> (1882) 44 N. J. L. 286, 291.

of the adjoining state for use in which it was drawn. Had they or had they not held themselves out as learned in that phase of the law of the adjoining state or the Conflict of Laws of their own state? In general, what kind and degree of skill and learning does any lawyer in any given case hold himself out as possessing? If we say, borrowing the language of the court, "the ordinary legal knowledge and skill common to members of the legal profession," we are raising a new question, vaguer and more general than the first. In reality, the second question does not answer the first. Assuming that some expert in legal education can tell us what the average lawyer knows about tax law, or criminal law, or bankruptcy law, this information is a poor criterion for judging not merely what the lawyer before us should have known but what he held himself out to his client as knowing when he accepted a case. Average facts do not conclude specific cases; yet the use of averages or types affords a familiar escape for the law by substituting an ascertaining approximate answer for an unascertainable exact one.

In this way we are constantly forced back to a standardized conception of the lawyer's skill, from which the nineteenth century, the Era of Contract, tried to escape. The struggle is illustrated in that leading case which Costigan wisely used as the basis for teaching the whole matter, *Citizens' Loan, Fund & Savings Ass'n v. Friedley et al.*<sup>9</sup> That case goes on the contractual theory. "Attorneys are very properly held to the same rule of liability for want of professional skill and diligence in practice, and for erroneous or negligent advice to those who employ them, as are physicians and surgeons, and other persons who hold themselves out to the world as possessing skill and qualification in their respective trades or professions. . . . An attorney who undertakes the management of business committed to his charge thereby impliedly represents that he possesses the skill, and that he will exhibit the diligence, ordinarily possessed and employed by well-informed members of his profession in the conduct of business such as he has undertaken." But when a standard is sought, the court promptly forgets all about the question of actual representation and discourses learnedly about what a lawyer ought to know. This includes not only "those rules and principles of law that are well established and clearly defined in the elementary books," but also "the ordinary settled rules of pleading and practice and the statutes and published decisions in his own state." This is a modest requirement, particularly when accompanied by the negative explanations which absolve him from culpability "if he is mistaken in a point of law on which reasonable doubt may be entertained by well-informed lawyers." But whether the standard be considered high or low, it is an external standard that substitutes averages for actualities.

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<sup>9</sup> (1890) 123 Ind. 143, 23 N. E. 1075, COSTIGAN, *op. cit. supra* note 1, at p. 33.

Can we safely accept this standard of legal learning or any elaboration of it as a picture of the implied representations of skill, learning and ability made by lawyers in the absence of unusual circumstances or stipulations to the contrary? Are we helped or hindered by the practice—not prevalent in Indiana when the *Friedley* case was decided—of examining applicants for admission to the bar? Can we take cognizance of the changing business of the lawyer, of the new fields of law that achieve prominence from time to time, of specialization in large cities, of the influence of law schools, of trends in legal literature, of the growth of kindred professions such as accountancy, trusteeship, investment service, and of recent tendencies in the training of business men?

Other reasons besides this difficulty may be put forward for hesitating about accepting the contractual basis for liability or exemption therefrom for bad legal advice. The question of liability is not based on the presence or absence of a money consideration,<sup>10</sup> though, of course, there is no difficulty in spinning some other kind of consideration if a contractual basis is sought in such cases. The form of action, where that matters at all, is generally Tort for negligence in the discharge of professional duties.<sup>11</sup> Furthermore, the nature of an advocate's work involves the existence of doubt as to the legal outcome. He is not the judge. His advice, being reasonably interpreted frequently means not "You have a clear right to such a tax deduction or to such a claim," but, rather, "You have a sufficiently debatable point to warrant your trying it out in court." If such advice is to be read as a warranty of the correctness of a view, the very function of the advocate and defender is destroyed by making him advise his client to concede all doubtful points to save his own skin. Another way of saying the same thing, perhaps, is to call attention to the lawyer's status as an officer of the court, and ask for reasonable exemption from the hazards of performing an official function when it is performed to the best of his ability. A more practical reason for not assuming that a lawyer warrants his conclusion of law to be true is found in the very nature of legal questions. Whatever nonsense has been uttered about whether the law is a science, it is universally conceded that it is not an exact science. Whatever degree of probability can be reached with due diligence, it is indeed rarely true that in a given concrete case about which a question is actually raised, certainty can be attained. Finally, it is simply not true that the lawyer makes any pretense about "knowing" the statutes and decisions of his state. At most he represents that he knows where and how to look for them and that he will do everything necessary to find the pertinent parts. If he makes any representa-

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<sup>10</sup> *Grudberg v Midvale Realty Co.* (1922) 119 Misc. Rep. 558, 196 N. Y. Supp 760.

<sup>11</sup> Cases gathered in 6 C. J. (1916) 708, Sec. 253.

tion of skill and training, it is that he has acquired that power—quite different from knowledge—which comes from legal training and from contact with legal traditions, and which we may call lawyer-like thinking. But the folly of undertaking to prove the presence or absence of anything so vague and elusive, makes the question of representations as to it in a contract of rather remote or only occasional significance.

There is one set of circumstances when, paradoxically, the fact that a man is a lawyer does color his contract: it is when he undertakes to act in a non-legal, business capacity. If a layman undertakes to act as an executor, or agent, or trustee, his training or the lack thereof must be read into any reasonable interpretation of what he undertakes to do before we can proceed to accuse him of any culpable omission. The difference between an ordinary layman in this respect and a trust company that possesses and advertises its possession of special equipment has been sharply commented on in recent years.<sup>12</sup> But the principle is old. If a lawyer undertakes to act in any of these capacities it is quite easy to argue that he is expected to act in a lawyer-like way; and acts and omissions which might not be considered culpable in a layman might well be so considered in his case. The apparent paradox, however, does not go to the heart of one question, for it does not touch detailed mistakes of law. It concerns rather those vaguer effects of legal training which we have already discussed. They are only brought out in sharper detail here because we are contrasting the ways of a lawyer with those of a layman, not those of a good lawyer with those of an inferior one.

The lawyer of today is increasingly concerned with commitments to perform services within the general range of his professional work but not limited to the answering of legal questions or to litigation in its narrower sense. A delicate question arises in such cases: whether he carries with him the high standard of accountability peculiar to his profession in such work, or whether he can draw a line between his lawyerly functions and those in which he competes with brokers or trust companies, accountants or business agents. The question had not yet come to a head when Costigan made his great collection of materials. From what has just been said of reading the lawyer's characteristics into his appointment for these services, it follows that such a separation cannot practically be made. From an ethical standpoint it is dangerous to attempt it. A recent Michigan case clarifies the situation. "The services" in that case, according to the Court, "were within the common range of professional work, some of them were purely legal, and most of them involved legal ability and action. When an attorney receives such a commitment, he takes it in his professional capacity, and must account

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<sup>12</sup> *In re Clark's Will* (1930) 136 Misc. Rep. 881, 242 N. Y. Supp. 210, *rev'd* on other grounds in (1931) 257 N. Y. 132, 177 N. E. 397.

upon the same basis. We know of no rule which permits matters so commingled to be separated technically into lay and professional services in connection with an attorney's duty to account to his client for the latter's money in his hands."<sup>13</sup> What is said here of the lawyer's duty of good faith, it is submitted, applies equally to his training. It is inseparable from his status. It colors his duties even in his non-legal work and in such non-contractual or not purely contractual positions as director of a corporation, guardian or trusted adviser in business affairs. He cannot without stultifying himself contract his way out of it.

There is, however, another phase of the lawyer's liability that is curiously colored by the contract theory because of the period in which it became fixed, and that now seems to be calling for modification. To whom is the lawyer liable? The answer is clearly put on the basis of privity of contract. The liability of an attorney for negligence or ignorance is solely to his client.<sup>14</sup> The so-called exception that for fraud or a malicious or otherwise tortious act his liability may extend to the person hurt is not really an exception but an application of the ordinary principles of tort law where they are clearly applicable.<sup>15</sup> The business importance and expediency of this rule in such situations as the passing on title to real estate or the validity of bonds or other documents may readily be conceded. The legal reasoning behind it, however, is drawn largely from the assumption that the lawyer's relation with his client is purely contractual. He is thus not classified with such public officers as the public weighman,<sup>16</sup> whose certificate speaks to all persons who may wish to rely on it, but with the private employee who according to the familiar rule is liable only to his employer for a failure to perform his duty and not to strangers who may be misled by the assumption that he has done his duty well. The case of the lawyer is exactly analogous to that of the certified public accountant as it came before the New York Court of Appeals in 1931.<sup>17</sup> Let us assume that the accountants through negligence or ignorance but without fraud or malice made up an incorrect report on the basis of which credit was extended with unfortunate results. The court is now called upon to determine what an accountant is and to whom he speaks. If he is found to be a private employee of the business man, there is no difficulty about denying his liability to strangers. Public licensing in itself does not change his liability to his employer, his employer's liability for his acts, nor his relation to strangers. Paradoxically

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<sup>13</sup> *Reeck v. Polk* (1934) 269 Mich. 252, 257 N. W. 698.

<sup>14</sup> *National Savings Bank of the District of Columbia v. Ward* (1880) 100 U. S. 195, 200.

<sup>15</sup> *Buckley v. Gray* (1895) 110 Cal. 339, 342, 42 Pac. 900.

<sup>16</sup> *Glanzer v. Shepard* (1922) 233 N. Y. 236, 135 N. E. 275.

<sup>17</sup> *Ultramares Corporation v. Touche* (1931) 255 N. Y. 170, 174 N. E. 441.

it may be said that a system of licensing affects chiefly, if not exclusively, the status of the unlicensed. On the other hand, if we conclude that a certified public accountant is a public officer who speaks from his public position to all who may read his certificate, there is no difficulty in reaching the opposite conclusion of law. The decision, supported by a brief submitted by lawyers of the American Institute of Accountants as *amici curiae*, took the view that the public accountant did his actual work as a private employee. Chief Judge Cardozo was quite aware of the analogy of the case before him and the problem of a lawyer's liability to strangers. In fact, we may assume that the analogy greatly influenced his thinking in favor of limiting the liability. "Liability for negligence," said he, "if adjudged in this case will extend to many callings other than an auditor's. Lawyers who certify their opinion as to the validity of municipal or corporate bonds, with knowledge that the opinion will be brought to the notice of the public, will become liable to the investors, if they have overlooked a statute or a decision, to the same extent as if the controversy were one between client and adviser. Title companies insuring titles to a tract of land, with knowledge that at an approaching auction the fact that they have insured will be stated to the bidders, will become liable to purchasers who may wish the benefit of a policy without payment of a premium."<sup>18</sup> We come back once more to the "citadel of privity" of contract, in spite of Cardozo's recognition of the assault upon it and his own famous participation in this assault in the case of *McPherson v. Buick Motor Company*.<sup>19</sup>

From a practical business point of view one thing was overlooked in the *Ultramares* case, and it may be that the case thus has a direct historical connection with a clause in the federal securities legislation of 1933 and 1934. Let us examine the relevant words of Section 11: "In case any part of the registration statement, when such part became effective, contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading, any person acquiring such security (unless it is proved that at the time of such acquisition he knew of such untruth or omission) may, either at law or in equity, in any court of competent jurisdiction, sue . . . every accountant, engineer, or appraiser, or any person whose profession gives authority to a statement made by him, who has with his consent been named as having prepared or certified any part of the registration statement, or as having prepared or certified any report or valuation which is used in connection with the registration statement, with respect to the statement in such registration statement,

<sup>18</sup> *Ibid* at 188, 174 N. E. at 448.

<sup>19</sup> (1916) 217 N. Y. 382, 111 N. E. 1050.

report, or valuation, which purports to have been prepared or certified by him." The legal profession is not mentioned, but it is deeply interested in the question whether the lawyer is a "person whose profession gives authority to a statement made by him." If he is, he may be pardoned for pondering over the reason for this sudden breakdown of the "citadel of privity" so far as he is concerned, and this liability which a few years ago was pointed to as a *reductio ad absurdum*.

Whatever reason Congress may have had for not mentioning the lawyer by name as it did the accountant, engineer and appraiser, and whatever conclusions judges trained in the tradition of the lawyer will in the first stages draw from this obscurity or from the argument that the whole section is concerned with statements of facts not conclusion of law, the simple truth is that as matters now stand lawyers do and should have a hand in preparing the registration statements called for, and the contribution goes beyond the mere statements of conclusions of law as abstract legal proportions. Investors have long been in the habit of relying on the names of counsel appended to an issue, not merely for the assurance of complete technical compliance with the law but for the character and standing of the whole transaction, for their checking at least of such facts as a lawyer is competent to check and for the accuracy of the form of the statement and its exact conformity to the facts presented. It seems that the lawyer is, or may well be, in the same category as the accountant. At all events, his immunity against attacks by strangers is threatened.

What is perhaps not so obvious—at least it was not to the American Institute of Accountants when it appeared in the *Ultramares* case—is the positive side of such a threat. The business value of an expert's statement depends on the use that can be made of it with the public, and that in turn depends precisely on the issue raised by contrasting the decision in the *Ultramares* case with the theory of the Securities Act. Which corresponds to the business needs of the community and to general business understanding? Perhaps only tendencies can be pointed out, rather than established facts. Accountants' and lawyers' statements as well as engineers' certificates have in current business practice come to be more and more consciously prepared for the specific purpose of being shown to the public, or to particular members of the public. The failure of the attorney's certificate of title to run with the land has led to the substitution of title company and title registration systems for the older service of the lawyer. And now Congressional legislation recognizes the same trend in the business world and attempts to fill a gap.

And in all, it is doubtful whether the reliance of the last century



on the contractual theory of a professional man's liability, and more particularly a lawyer's, is adequate for the twentieth century. We shall probably return to an emphasis of his professional status as the basis for a theory of his duties and liabilities, as well as for his rights. This shift means no radical change in his legal position. It means, rather, a restatement of his answerability to the court and to society, and a reminder that he is not an ordinary employee of his client. For this emphasis Mr. Costigan laid the foundation in his now classical collection of cases.

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