THE EFFECT OF EXPANSION OF PRIVITY ON LEGAL MALPRACTICE IN THE UNITED STATES

by

William Robert Keyes

(Under the Direction of Jonathan Williams)

ABSTRACT

In recent decades, legal malpractice has experienced an explosive increase in claims. As malpractice creates a significant cost to society, it is important to understand why legal malpractice exists and what affects it. This study focuses on changes in legal malpractice law, and the resulting changes in reported malpractice data. Specifically, a six criteria balancing test for determining duty of care, which has expanded privity and increased the liability that an attorney faces is studied. Significant legal cases related to this balancing test are discussed, and their effect on malpractice claims is analyzed. This study will allow future policymakers to make better informed decisions to reduce the cost of legal malpractice to society.

INDEX WORDS: Legal Malpractice, Privity, Duty of Care, Contract Law, Insurance, Balancing Test

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DEDICATION

To my family, it has not been easy, and I could not have gotten here without your help.

TABLE OF CONTENTS

Page

LIST OF FIGURES

Page

LIST OF TABLES

Page

CHAPTER 1

INTRODUCTION

Much literature, information, and data are available regarding medical malpractice. The medical field understands the importance and costs of malpractice, and the study of medical malpractice has grown along with the medical field. The legal profession seems to be lagging behind when considering information available concerning legal malpractice. The occurrence of legal malpractice claims and cost of legal malpractice has risen exponentially in recent decades. Thus, it is important to better understand this growing field, so as to minimize the cost of legal malpractice to society.

An important part to understanding legal malpractice lies in understanding why legal malpractice has grown so rapidly in recent decades. Several explanations are available which will be discussed in more detail later in this paper. For example, changes in client attitudes and behavior concerning legal malpractice, and also changes in attorney's opinions in prosecuting cases against other attorneys have affected the boom in reported legal malpractice (Fortney & Johnson, 3). While several explanations may help to account for the rise in malpractice, this study aims to focus on the effect that a policy change regarding the determination of privity in legal malpractice cases has on the profession.

The first chapter of this paper helps to explain key terms, and illustrates the recent growth in reported legal malpractice. Chapter 2 highlights the importance of privity in legal malpractice cases, and focuses on how privity has expanded the liability that a lawyer must face when dealing with malpractice cases. The six criteria balancing test is introduced and its effect on the expansion of privity is described. The third chapter discusses the importance of some significant

state court decisions involving the six criteria balancing test. Chapter 3 is broken into five decades, 1960's, 1970's, 1980's, 1990's and 2000's, in order to illustrate the national influence that this policy changes has experienced regarding privity. Chapter 4 presents the legal malpractice data, and Chapter 5 builds connections between the significant court decisions in Chapter 3, and the data available in Chapter 4. Finally, Chapter 6 discusses shortcomings of this study, specifically concerning the lack of data available. Several suggestions are made for those interested in studying legal malpractice in the future.

Defining Legal Malpractice

As time has passed, the definition of legal malpractice has expanded. Initially, Professor Charles W. Wolfram, in his treatise on modern legal ethics, defined legal malpractice to be the "right of a client to recover damages from a lawyer whose negligent performance has caused financial loss to the client (Wolfram, 206)." This simple definition only covers part of what legal malpractice is defined as today.

The 2010 Edition of Legal Malpractice breaks the practical definition of legal malpractice into four categories based on situations when malpractice suits generally arise: adversary-nonclient, fee disputes, negligence in the professional relationships, and negligence concerning errors.

The adversary-nonclient category of malpractice concerns third parties, who are not clients of the attorney, who incur some damages based on the representation of the attorney. "This category includes tort claims that may be filed against, claims arising from various statutes, most notably in the area of securities regulation, and motions for sanctions, such as

under Federal Rule of Civil Procedure 11 (Mallen & Smith, Vol. 1, 7)." Another major category of legal malpractice concern fee disputes. These generally arise when there is disagreement concerning the amount of money charged for legal services, and the actual service that was provided. A third category of legal malpractice claims arise from negligence in the professional relationship. This type of legal malpractice arises from poor communication between the lawyer and the client. For example, if an attorney has not communicated realistic outcomes to a client, and the clients' expectations on the outcome of a case are too high, the client may feel inclined to sue their attorney for malpractice (Mallen & Smith, Vol. 1, 10). Finally, errors, the most obvious category of legal malpractice arise when an understood "standard of care" is not met by the attorney. The client must also experience costs that would not have existed had the error not been committed.

It is obvious that the definition of legal malpractice has become far more complex when compared to the definition in earlier literature. The purpose of this paper is not to define or categorize legal malpractice, but to observe and explain trends in national data. For simplicity, we will consider legal malpractice in the same light as Susan Fortney and Vincent Johnson in their book Legal Malpractice Law, and conclude that legal malpractice is "an umbrella term covering a range of professional liability claims against lawyers."

National Trends

The frequency of legal malpractice decisions has remained relatively low and constant until the last half century. The rules and expectations concerning legal malpractice cases were

not changing much during the 1800's and early 1900's. Data available on legal malpractice shows an increase in reported malpractice beginning around the 1960's. This increase in reported legal malpractice is apparent when considering both absolute terms (total number of legal malpractice decisions) or relative terms (legal malpractice decisions/population) (Mallen & Smith, Vol.1, 25). This exponential growth is described in the 2010 Edition of Legal Malpractice as follows:

> *There were four times as many published appellate decisions concerning legal malpractice in the 1970s as during the 1960s. During the 1970s alone, there were almost as many reported legal malpractice decisions as there were in the previous history of American jurisprudence. In the 1980s the number of reported decisions tripled over the prior decade. The trend of decisions in the 1990s continued, showing approximately a 155% increase over the prior decade.*

While some of this increase in reported legal malpractice decisions is due to population increases and thus more attorneys practicing in the United States, not all can be explained by the number of practicing lawyers alone.

In the last several decades there has been a change in attitudes toward attorneys and the practice of law. The general population has a greater awareness of legal work, which has had both positive and negative consequences. Greater exposure in the media has created a population which may doubt an attorney's legal work more than generations in the past. These new attitudes towards lawyers have been described by Professor Geoffrey C. Hazard as a "much greater public consciousness of lawyers' work (Hazard, Future of Legal Ethics)." As clients feel they understand the legal profession more, they may be more likely to accuse their attorney of

legal malpractice. The book, Legal Malpractice Law, has cited technological advances as another important development affecting the attorney client relationship. As lawyers meet clients less in person and communicate more through email and over the telephone, clients may feel less of a personal attachment to their lawyer. If the client does not feel a personal attachment to their lawyer, they may be more inclined to accuse their attorney of legal malpractice in some situations. A more educated and informed public may also have higher expectations of their attorneys, leading to more instances of legal malpractice. These societal changes may play an important part in describing the recent growth in legal malpractice claims.

As discussed earlier, also helping to increase the reported legal malpractice decisions is the expanding definition of legal malpractice. Attorneys now face more liability than they once did, leaving them more vulnerable to malpractice suits. Much of this is due to the suits against attorneys that followed the savings and loan crisis of the 1980's (Fortney & Johnson, 9). The next chapter discusses how the expansion of privity in legal malpractice has impacted the frequency of claims.

CHAPTER 2

PRIVITY

One of the most important factors in cases dealing with legal malpractice is determining if privity existed in the relationship with the attorney. Black's Law Dictionary defines privity as "the connection or relationship between two parties, each having a legally recognized interest in the same subject matter (such as a transaction, proceeding, or piece of property); mutuality of interest." Initially, privity of contract was necessary for determining instances of legal malpractice. As the law has evolved, in some instances privity is not necessary and third parties may have standing to sue. This chapter introduces the concept of privity of contract, then cites several early decisions that have had a large effect on how privity has been considered in following years, and concludes by discussing the expansion of privity and its effect on legal malpractice in the United States.

The two most influential cases helping to shape the origins of the concept of privity of contract in the United States are in Winterbottom v. Wright and Robertson v. Fleming (Mallen & Smith, 917). The case of Winterbottom v. Wright dealt with a coach manufacturer being sued for injuries due to a defect in one of the coaches. This case highlighted the importance of privity of contract. Without privity of contract even bystanders may have the right to sue, which could allow unnecessary and frivolous lawsuits. In this case Byron Alderson stresses the importance of privity of contract:

> *If we were to hold that the plaintiff could sue in such a case, there is no point at which such actions would stop. The only safe rule is to confine the right to recover to those who enter into the contract: if we go one step beyond that, there is no reason that we should*

> *not go fifty. The only real argument in [favor] of the action is that this is a case of hardship; but that might have been obviated, if the plaintiff had made himself a party to the contract. (10 Mees. & W. at 115-116, 152 Eng.Rep. at 405)*

Clearly, this case settled in 1842, works in favor of attorneys by limiting duty to only those in contract. Robertson v. Fleming, decided in 1861 in the House of Lords, came to a similar decision. In this case a solicitor erred when drafting a security agreement for a benefit of his sureties. Here, the third party had no standing to sue because of a lack of privity. These cases set the precedent as to how following cases would handle third parties and privity of contract. Not until later in the twentieth century were the constraints determining privity relaxed. This expansion of privity is discussed in the following section.

Expansion of Privity

Several cases began to relax the contractual privity requirement in professional malpractice cases in the early 1900's. Legal Malpractice cites the cases MacPherson v. Buick Motor Company and Glanzer v. Shepard as examples of courts relaxing the necessity of privity in 1916 and 1922, respectively (Mallen & Smith, 916-917). However, it was not until the late 1950's when major reform began to take place.

California initiated widespread policy change concerning legal malpractice in the case Biakanja v. Irving in 1958. This case dealt with the issue of whether a notary public who prepared a will was liable for malpractice because of negligence, although the notary was not bound by contract. The notary acted negligently in preparing the will, as they were not qualified to complete this highly specialized task. The court ruled that privity was not necessary and

would approach such situations case-by-case. This six criteria test was created to determine if privity existed:

1. The extent to which the transaction was intended to affect the plaintiff;
2. The foreseeability of harm to the plaintiff;
3. The degree of certainty that the plaintiff suffered injury;
4. The closeness of the connection between the defendant's conduct and the injury suffered;
5. The moral blame attached to the defendant's conduct; and
6. The policy of preventing future harm.

This balancing test was then slightly altered in Lucas v. Hamm. In Lucas v. Hamm the defendant prepared a will where the plaintiffs were the beneficiaries. The plaintiffs received smaller shares of the estate, because the attorney erred by providing invalid phraseology. Although the attorney was not under contract, privity was not necessary as the plaintiff could still recover as third party beneficiaries. Most importantly, this case altered the six criteria balancing test stated above. In Lucas v. Hamm the moral blame attached to the defendant's conduct was not considered, while the court added the condition of whether recognition of liability under the circumstances would impose an undue burden on the profession. The altered six criteria balancing test which determines when duty of care exists to third parties is restated:

1. The extent to which the transaction was intended to affect the plaintiff;
2. The foreseeability of harm to the plaintiff;
3. The degree of certainty that the plaintiff suffered injury;
4. The closeness of the connection between the defendant's conduct and the injury suffered;

5. The policy of preventing future harm.
6. Whether recognition of liability under the circumstances would impose an undue burden on the profession.

This balancing test stands as the most significant policy change regarding expanding privity in legal malpractice decisions. Many state courts have adopted this six criteria test, revolutionizing how malpractice cases are handled since this decision passed.

In the University of Chicago Law Review Article in 1992, Limits *on Privity and Assignment of Legal Malpractice Claims*, Tom Bell goes as far to describe California's balancing test as an "assault on privity." He states "California's multi-factor balancing test, developed in the seminal cases of *Biakanja v. Irving* and *Lucas v. Hamm*, has met with widespread favor. " He goes on to say "California launched its first major assault on the privity bar to legal malpractice claims in *Biakanja v Irving*, where the court allowed the beneficiary of a will to sue the party who negligently prepared it." Similar comments were made when discussing the effect that the six criteria balancing test has had in expanding privity in Douglas A. Cifu's paper in the Columbia Journal of Law and Social problems. Cifu notes that California has led the nation in court decisions that have expanded legal malpractice to third parties, although he does not describe the six criteria having the widespread national implications, as it has been described in Tom Bell's paper and in Ronald Mallen, and Jeffrey Smith's book, Legal Malpractice.

Introducing this balancing test has several important economic implications. Before the introduction of this test, third parties did not have the standing to sue for malpractice. Attorneys were only held responsible for clients in contract, who they owed a duty of care. Sometimes, third parties were wronged and had no ability to correct for this mistake in the legal system. Thus, a significant cost existed which can be viewed as a market

failure. The introduction of the six criteria balancing test represents an attempt to internalize the negative externality that third parties were facing, so as to account for the cost to society which was not previously being realized. Recognizing these costs and accounting for them has hopefully created more responsible attorneys, and a more efficient and just legal system.

Unfortunately, the introduction of the balancing test and the expansion of privity also introduce costs which did not previously exist. Incentives to sue for malpractice increase as lawyers are held more liable for their actions. By loosening the requirements to sue, frivolous lawsuits arise slowing the legal system and creating a cost to society as a whole. While these costs associated with the introduction of the balancing test may be significant, it is important to compare these costs with the benefits, in order to understand if the introduction of the test represents a net "good" or "bad" to the American legal system.

This paper will focus on the six criteria balancing test as used in Lucas v. Hamm. Chapter 3 presents various significant cases to illustrate the extent to which this policy has spread. Cases citing this policy are discussed and compared to data in Chapter 4, to show the extent to which this policy change has had on reported cases of legal malpractice.

CHAPTER 3

SIGNIFICANT CASES

The six criteria balancing test formulated in *Biakanja v. Irving* and then altered in *Lucas v. Hamm* has revolutionized the way in which privity is determined in legal malpractice cases. The test which was altered in 1961, has been cited in the District of Columbia courts along with 35 state courts across America. The test, developed in California, has even been cited in courts outside of the United States, such as Guam and England. Mallen and Smith state that the balancing test "has been cited with approval and accepted, sometimes with modification, by most jurisdictions that have examined the issue." They also discuss the future application of the test to the legal field. This chapter will go through each decade following the creation of the balancing test, describing significant cases in various states where the test has been adopted. These cases represent the spread of the balancing test, and the simultaneous relaxation of the requirements for determining privity. The timing of these decisions can later be compared to legal malpractice data, to show the effect that the expansion of privity has had on legal malpractice in America.

Each case in this section will begin with the legal citation, then state the procedural posture, overview, and outcome of the decision, as stated in LexisNexis Academic. Finally, the case will be analyzed in terms of how it has used the balancing test.

1960's

ROBERT M. HALDANE et al., Minors, etc., Plaintiffs and Appellants, v. HORACE N. FREEDMAN, Defendant and Respondent
Civ. No. 26068
Court of Appeal of California, Second Appellate District, Division One
204 Cal. App. 2d 475; 22 Cal. Rptr. 445; 1962 Cal. App. LEXIS 2267
June 8, 1962

PROCEDURAL POSTURE: Plaintiff guardian appealed from a decision of the Superior Court of Los Angeles County (California), which dismissed the guardian's action against defendant attorneys for damages for malpractice and for willful and malicious injury to plaintiffs' property interests.

OVERVIEW: The mother obtained a divorce from the father. The attorney was substituted as counsel for the mother. The children's complaint, asserted by the guardian, contended that the attorney conspired with other attorneys to obtain an invalid order for the father's imprisonment. Because of that imprisonment, it was alleged that the attorney's fraudulent and negligent conduct caused the mother's estate to waste and deprived the children of their father's support and society. The court sustained the dismissal of the guardian's action. The children were not in privity with the attorney and therefore had no right to sue the attorney. The attorney was hired by the mother, not the children. The children did not have a vested right in their mother's estate in any event. The children held only a mere expectancy, which was not actionable.

OUTCOME: The court affirmed the dismissal of the guardian's action against the attorneys for damages for malpractice and for willful and malicious injury to plaintiffs' property interests.

ANALYSIS: Although the children were found to have no standing to sue, this case remains significant to this study because the six criteria balancing test was used. Because the test was called upon, this case represents an expansion of privity and increases the liability that future lawyers face.

Samuel Licata, Administrator (Estate of Lilly Licata), et al. v. John A. Spector
File No. 2934
Superior Court of Connecticut, Judicial District of Windham County
26 Conn. Supp. 378; 1966 Conn. Super. LEXIS 140; **225 A.2d 28**
November 9, 1966, Memorandum Filed

PROCEDURAL POSTURE: Plaintiff estate administrator filed a complaint based on defendant attorney's negligence in drafting a will that failed to provide for the required number of witnesses after the probate court (Connecticut) declared the will invalid, and defendant demurred.
OVERVIEW: Plaintiff estate administrator alleged that, because of defendant attorney's negligence in failing to provide for the required number of witnesses in decedent's will, the probate court invalidated the will, assets of the estate had been diverted, and the decedent's estate

had suffered damages. Defendant demurred and the court overruled, holding, on one count, that an attack relating to the elements of damage should be made by motion and not by demurrer. The court also overruled defendant's demurrer to the count based on lack of duty and privity. The court held that liability for a negligent performance of a contract should be imposed where the injury to plaintiff was foreseeable and where the contract was an incident to an enterprise of defendant and there were adequate reasons from policy for imposing a duty of care. Therefore, plaintiff had an equitable right of action.
OUTCOME: Demurrer overruled, where plaintiff was entitled to an equitable right of action because, although privity was lacking, it was made by the decedent for the benefit of the estate beneficiaries.
ANALYSIS: The Plaintiff had an equitable right of action as the "foreseeability" criteria of the balancing test is called upon. Also, this case deals with laws regarding estates, which is one of the areas of law which has a greater increase in malpractice claims in the data section.

1970's

BARBARA **BUCQUET** et al., Plaintiffs and Appellants, v. DAVID **LIVINGSTON,** Defendant and Respondent
Civ. No. 36445
Court of Appeal of California, First Appellate District, Division Two
57 Cal. App. 3d 914; 129 Cal. Rptr. 514; 1976 Cal. App. LEXIS 1505
May 3, 1976

PROCEDURAL POSTURE: Appellant beneficiary sought review of a judgment by the Superior Court of the City and County of San Francisco (California), which granted judgment on the pleadings to respondent attorney in appellant's suit for legal malpractice. Appellant's suit was brought after respondent drafted a trust instrument for settlors, appellant's parents, for purposes of minimizing all taxes payable upon the death of both, that did not accomplish its purpose.

OVERVIEW: Appellant beneficiary brought a legal malpractice action against respondent attorney, who drafted an inter vivos trust for settlors, appellant's parents, for the purpose of minimizing all taxes payable on the death of both. However, upon the death of appellant's father, her mother was taxed for the full value of the trust rather than merely a life estate and also incurred additional federal and state gift taxes, as well as attorney's fees. The trial court granted judgment on the pleadings for respondent. The court reversed and stated that appellant's allegations did state a claim for malpractice insofar as respondent should have known about the provisions of I.R.C. § 2041, and advised the settlors of the potential tax consequences of the inclusion of a general power of appointment in the trust. Further, respondent's failure to advise the settlors of the adverse tax consequences of the retention of the power of appointment during appellant's father's life damaged appellant and other beneficiaries. The court stated that the

potential consequences of the retention of a general power of appointment was a matter within the reasonable competence of an attorney.

OUTCOME: The court reversed the grant of a judgment on the pleadings to respondent attorney in appellant beneficiary's suit for legal malpractice. The court held that the potential tax problems of the trust set up by respondent were within the ambit of a reasonably competent attorney and that the damage to appellant was foreseeable.

ANALYSIS: The Court of Appeal reversed, holding that the beneficiaries had stated a cause of action. The court held that an attorney's duty to use ordinary judgment, care, skill and diligence in the performance of the tasks he undertakes extends not only to the client but also to the client's intended beneficiaries, and that lack of privity does not preclude a beneficiary from maintaining an action against the attorney on either a contractual theory of third-party beneficiary or a tort theory of negligence. It was pointed out, however, that whether an attorney will be held liable to his client's intended beneficiaries in a specific case involves the balancing of policy factors, including the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, and the policy of preventing future harm. (Opinion by Taylor, P. J., with Kane and Rouse, JJ., concurring.)

LESTER S. STEWART, JR. AND ERNEST W. BOWKER, PLAINTIFFS-APPELLANTS, v. VINCENT E. SBARRO, CANIO SBARRO, VINCENT SBARRO, JR., AND THERESA SBARRO, DEFENDANTS, AND PETER J. BONANNI, ESQ. AND ROBERT B. DIETZ, ESQ., DEFENDANTS-RESPONDENTS

[NO NUMBER IN ORIGINAL]

Superior Court of New Jersey, Appellate Division

142 N.J. Super. 581; **362 A.2d 581**; 1976 N.J. Super. LEXIS 830

February 17, 1976, Argued

June 22, 1976, Decided

PROCEDURAL POSTURE: Appellant clients challenged an order from a New Jersey trial court, which held that respondent attorneys did not breach the duty of care that they owed to appellants in connection with a transaction to sell shares of stock.

OVERVIEW: Respondent attorneys were hired to prepare and complete a stock sale for appellant clients. Appellants commenced an action against respondents for failing to properly complete the sale. The trial court held that respondents did not breach the duty of care owed to appellants. The court reversed the trial court's order, finding that respondents breached the duty of care that was owed to appellants because respondent failed to ensure that appellants' stock sale was consummated in accordance with the terms of the agreement. The facts indicated that respondents released the shares of stock before the required signatures were obtained on the note and bond received in payment thereof. The court also found a failure to advise appellants that efforts to consummate the deal had been unsuccessful and to return the documents.

OUTCOME: The court reversed the order finding that respondent attorneys did not breach the duty of care that was owed to appellant clients. The court held that respondents were negligent for failing to ensure that appellants' stock sale was completed in accordance with the terms of the agreement.

ANALYSIS: The balancing test is used to determine duty of care concerning sales of stock. This case, regarding stock sale for clients, falls into the business transaction category of law. The significance of this case to the data is noted in Chapter 4.

1980's

Mrs. Frances E. **GUY** v. Harry J. **LIEDERBACH,** William E. Eimer, Edward D. Foy, Jr., and **Liederbach,** Eimer & Foy, Attorneys-at-Law. Appeal of Farrel J. THOMAS, Executor of the Estate of Frances E. **Guy,** Deceased
Superior Court of Pennsylvania
279 Pa. Super. 543; 421 A.2d 333; 1980 Pa. Super. LEXIS 2898
March 19, 1980, Argued
August 1, 1980, Filed

PROCEDURAL POSTURE: Appellant devisee sought review of a decision of the Court of Common Pleas of Bucks County (Pennsylvania), which sustained appellee attorney's preliminary objections and dismissed appellant's complaint, in appellant's action against appellee for negligence in causing the demise of deceased's devise.

OVERVIEW: Appellant devisee filed an action alleging that the demise of the devise was caused by the negligence of appellee attorney. Appellee filed preliminary objections and the trial court sustained the objections and dismissed the complaint, concluding that the suit was precluded due to a lack of an attorney-client relationship. On appeal, the court reversed and remanded. The court held that the trial court applied an erroneous standard in dismissing appellant's complaint in assumpsit because privity was not an essential element of an assumpsit action based on a third party beneficiary theory. Under certain circumstances, an attorney was liable for damage caused by his negligence to a person intended to be benefitted by his performance irrespective of any lack of privity. In making the determination whether, in a particular case, the privity requirement was to be dispensed with, the factfinder was to employ a balancing test considering the extent to which the transaction was intended to affect appellant, foreseeability of harm to appellant, the degree of certainty that appellant suffered injury, and the policy of preventing future harm.

OUTCOME: The court reversed and remanded the decision of the trial court, which had sustained appellee attorney's preliminary objections and dismissed appellant devisee's negligence complaint for lack of privity. The court found that privity was not an essential element of an assumpsit action based on a third party beneficiary theory.

ANALYSIS: Privity is determined to be unnecessary as the six criteria balancing test is used.

UNITED LEASING CORPORATION v. RANDALL C. MILLER and POWE, PORTER, ALPHIN & WHICHARD, P.A.
No. 7914SC458
COURT OF APPEALS OF NORTH CAROLINA
45 N.C. App. 400; 263 S.E.2d 313; 1980 N.C. App. LEXIS 2651
December 7, 1979, Heard in the Court of Appeals
March 4, 1980, Filed

PROCEDURAL POSTURE: Plaintiff vendor sought review of the decision from the Superior Court, Durham County (North Carolina), which dismissed the vendor's malpractice action against defendant attorneys for failure to state a claim upon which relief could be granted under N.C. Gen. Stat. § 1A-1, N.C. R. Civ. P. 12(b)(6), on the basis that there was no attorney-client relationship between the parties.

OVERVIEW: The vendor entered into a lease agreement with a hotel subject to the condition that title opinions be furnished regarding the properties that were to secure the leasing agreement. The hotel's attorneys furnished a title opinion that was erroneous and neglected to show a prior lien on the property evidenced as a deed of trust in favor of a bank. The bank's lien impaired the security position of the vendor, and it brought an action against the attorneys for malpractice. The trial court dismissed the complaint, and the vendor challenged the decision. On appeal, the court reversed and held that the attorneys owed a duty to the vendor to use reasonable care and that an allegation of the violation of that duty properly stated a cause of action in tort. The court used six factors in determining whether the attorneys owed a duty to the vendor: (1) the extent to which the transaction was intended to affect the vendor, (2) the foreseeability of harm, (3) the degree of certainty that the vendor suffered injury, (4) the closeness of the connection between the attorneys' conduct and the injury, (5) the moral blame attached to such conduct, and (6) the policy of preventing future harm.

OUTCOME: The court reversed and remanded the dismissal of the vendor's malpractice action against the attorneys. The court affirmed the trial court's failure to rule on the attorneys' motion for summary judgment.

ANALYSIS: Malpractice suit is applicable as the six criteria of the balancing test is used as the exception to privity. This case serves as a good example of expansion of privity as a higher court is appealed, and then the balancing test is used. Adding the balancing test to law significantly alters future decisions in North Carolina concerning privity in malpractice suits.

C. W. WISDOM and ELIZABETH LOCHEN, Plaintiffs, v. J. W. NEAL and NEAL AND NEAL, Defendants
Civ No. 81-483 HB
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

568 F. Supp. 4; 1982 U.S. Dist. LEXIS 10162
September 15, 1982

PROCEDURAL POSTURE: Defendant attorneys determined that an estate should be distributed per stirpes to the decedent's heirs. The New Mexico Probate Code provided that distribution of the estate should have been made on a per capita basis. N.M. Stat. Ann. §§ 45-2-103, 45-2-106 (1978). Plaintiffs, brother and sister, brought a legal malpractice action seeking to recover damages for their loss from the attorneys. Both parties filed cross motions for summary judgment.

OVERVIEW: The attorneys raised two defenses: res judicata/collateral estoppel and the absence of an attorney-client relationship. The court found that res judicata was clearly inapplicable because the causes of action in this suit and the testacy proceedings were not the same. The court found that the doctrine of collateral estoppel did not require dismissal of the brother's and sister's claim. The attorneys' second line of defense consisted of the argument that because there was no attorney-client relationship between the parties, the attorneys owed the brother and sister no duty and could not be held liable for their mistake. The brother and sister conceded that there was no attorney-client relationship but contended that no such relationship was required in New Mexico to recover for legal malpractice. The court found that the attorneys owed a duty of due care to the brother and sister. There was no dispute that the attorneys' failure to observe the statutory scheme of distribution was a breach of the standard of care required of an attorney, and the court granted summary judgment for the brother and sister as to the principal element of damages.

OUTCOME: The court granted summary judgment for the brother and sister as to the principal element of damages. To insure their just compensation, the court awarded the brother and sister interest at the statutory rate from the time of the erroneous distribution.

ANALYSIS: The brother and sister are awarded compensation although there is a lack of privity of contract. A duty of care is owed to the nonclients representing an expansion of privity in New Mexico.

FIRST FINANCIAL SAVINGS & LOAN ASSOCIATION, Plaintiff, v. TITLE INSURANCE COMPANY OF MINNESOTA, et al., Defendants
Civil Action No. C81-416A
UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA, ATLANTA DIVISION
557 F. Supp. 654; 1982 U.S. Dist. LEXIS 17122
September 28, 1982

PROCEDURAL POSTURE: Defendants, title company and attorneys, brought motions for summary judgment and plaintiff bank cross-motioned for summary judgment in an action arising from the assignment by a mortgage company of two worthless loan packages to the bank. The mortgage company defaulted on its drafts in its initial purchase of the loans, in which it was represented by the attorneys with title binders issued by the title company, and filed for bankruptcy.

OVERVIEW: The attorneys represented a mortgage company in the closing of loan packages conditioned on the funding of its drafts. The loan packages were assigned to the bank. The mortgage company defaulted on its drafts and filed for bankruptcy. The deed instruments were not recorded. Holding worthless loan packages, the bank brought an action against the attorneys for negligence and intentional misrepresentation. In deciding summary judgment motions, the court held that the attorneys had a duty to the bank to exercise reasonable care in the execution and delivery of the certifications, despite lack of privity, because they knew the mortgage company would assign the loans to the bank and it was clearly foreseeable that the bank would rely on the accuracy of the closing attorney's certifications. The bank had to prove that the attorneys breached their duty by negligently performing the professional services and they knew or should have known the mortgage company would assign the loans before its drafts had been paid. The title company had no obligation to the bank to issue final title policies. Issues of material fact remained regarding liability of the title company under agency principles.
OUTCOME: The court denied the attorneys' motions for summary judgment on the claims of negligence and intentional misrepresentation and denied the bank's motion for summary judgment. The court granted the title company's motion for summary judgment on the claims of liability under the title binders and denied its motion on the claims alleging liability based on agency principles. The court entered a default judgment against defendant insurance agency.
ANALYSIS: Although there is a lack of privity, a duty is still owed to the bank. Again, the "foreseeability" element of privity is called upon, representing an expansion of duty.

DONNELLY CONSTRUCTION COMPANY, an Arizona corporation, Plaintiff-Appellant, v. OBERG/HUNT/GILLELAND, Architects, Defendants-Appellees
No. 17056-PR
Supreme Court of Arizona
139 Ariz. 184; **677 P.2d 1292**; 1984 Ariz. LEXIS 184
February 8, 1984

PROCEDURAL POSTURE: Defendant architects appealed the decision of the Court of Appeals, Division One (Arizona), which reversed the trial court's decision to grant the architect's motion to dismiss plaintiff construction company's claims for failure to state a claim. The construction company alleged negligence, negligent misrepresentation, and breach of the implied warranty that the architects' plans and specifications were accurate, and sought its increased costs.

OVERVIEW: The architects prepared plans and specifications for a board of supervisors in charge of soliciting construction bids. The construction company relied upon said plans and specifications when submitting a bid, which was accepted. The court reversed the trial court's dismissal of the construction company's complaint and remanded. The court found, inter alia, that (1) even though an architect, who was empowered to resolve disputes between an owner and a contractor, acted in a quasi-judicial capacity, such that immunity attached to those duties, in this instance the claims against the architects all stemmed from alleged negligence in preparing plans and specifications and not said duties; (2) the negligent misrepresentations cause of action did not require privity to be maintained, such that persons, for whose benefit or guidance the representations were made, could bring a claim against the maker of the representations; and (3)

neither an action in tort, nor a claim for breach of the implied warranty that the plans and specifications were accurate, required the existence of privity to maintain the action.

OUTCOME: The court vacated the opinion of the appellate, on the law, even though it agreed that the trial court erred, reversed the trial court's grant of dismissal, and remanded the case for further proceedings not inconsistent with the opinion.

ANALYSIS: Privity was not necessary in a case involving negligence of a construction company. Although an architect is not technically a lawyer, they can still be held to duty of care requirements, when performing legal duties.

OLIVE LORRAINE, a beneficiary under the Last Will and Testament of CECIL JOHNSON, Appellant, v. GROVER, CIMENT, WEINSTEIN & STAUBER, P.A., MARVIN WEINSTEIN, individually, and INA UNDERWRITERS INSURANCE COMPANY OF LOS ANGELES, CALIFORNIA (INAPRO), a foreign corporation, Appellees

No. 84-975

Court of Appeal of Florida, Third District

467 So. 2d 315; 1985 Fla. App. LEXIS 12241; 10 Fla. L. Weekly 327

February 5, 1985

PROCEDURAL POSTURE: Appellant beneficiary under a will challenged the summary final judgment of the Circuit Court for Dade County (Florida), entered in favor of appellee law firm and appellee insurer on appellant's claim of legal malpractice. The issue was whether a lawyer should have prevented the property devised to appellant from passing under the homestead provisions of Fla. Const. art. X, § 4 and Fla. Stat. ch. 732.401-.4015 (1981).

OVERVIEW: Appellee law firm drew a will based on the expressed wishes of a decedent, and the will was executed. It contained a provision that left appellant beneficiary a life estate in a residence with the remainder going to his sons. In probate, it was determined that the residence was decedent's homestead, and it passed directly to the sons under Fla. Const. art. X, § 4 and Fla. Stat. ch. 732.401-.4015 (1981). Appellant sued appellee law firm, claiming that an alternative should have been prepared. The court held that, even if decedent had desired to transfer the property at issue inter vivos, there was no liability to appellant as a third party. Appellant could not pursue a negligence action because she was not in privity with appellee. Nor was she within the exception to the privity requirement because she could not show that, due to the attorney's professional negligence, the testamentary intent, as expressed in the will, was frustrated, and appellant's devise was lost as a direct result of the negligence. The court held that the testamentary intent was frustrated by the Florida constitution and statutes, not the attorney's negligence and affirmed.

OUTCOME: The court affirmed the summary judgment in favor of appellee law firm. The court held that an intent to devise a comparable interest in other property upon the failure of the primary devise could not reasonably be extrapolated from any of the provisions in the decedent's will, and, therefore, appellant beneficiary was not within the exception to the privity requirement for an action in negligence against appellee.

ANALYSIS: Although appellant could not pursue a negligence action because they were not in privity, the exception to privity is called upon which represents an important decision concerning

the expansion of privity in the state of Florida. This case deals with estate law and is considered partially responsible for the relatively large increase in malpractice claims regarding estates.

Robert E. FLAHERTY et ux. v. Manuel WEINBERG et al.
No. 118, September Term, 1983
Court of Appeals of Maryland
303 Md. 116; 492 A.2d 618; 1985 Md. LEXIS 588; 61 A.L.R.4th 443
May 28, 1985

PROCEDURAL POSTURE: Plaintiff home buyers appealed dismissal of their complaint alleging negligence, breach of warranty, and negligent misrepresentation by defendant attorney by the Circuit Court for Frederick County (Maryland).

OVERVIEW: Plaintiff home buyers were not represented at the closing of their home, but relied on statements by defendant attorney for their mortgagee, which were based on an inaccurate survey. When the errors were discovered, plaintiffs sued the attorney for negligence, breach of warranty and negligent misrepresentation. The trial court dismissed plaintiff's complaint because there was no privity between plaintiffs and defendant. The court affirmed on the negligence and breach of warranty counts because there was no contract to define a duty or contain warranties. The court reversed on the negligent misrepresentation count, because a third party beneficiary theory was a limited exception to the strict privity rule.

OUTCOME: The judgment was reversed on the negligent misrepresentation count and remanded because a third party beneficiary theory was a limited exception to the strict privity rule.

ANALYSIS: A third party is recognized as an exception to the strict privity rule, as the balancing test is used. The balancing test is adopted in Maryland, expanding privity.

1990's

Landis **Bohn,** et al, Petitioners, v. George **Cody,** et al, Respondents
No. 57579-7
SUPREME COURT OF WASHINGTON
119 Wn.2d 357; 832 P.2d 71; 1992 Wash. LEXIS 46
February 27, 1992, Decided
February 27, 1992, Filed

PROCEDURAL POSTURE: Plaintiff lenders appealed from the judgment of the Court of Appeals (Washington) upholding the summary judgment that was entered for defendant attorney in a action alleging negligence, breach of contract, and violation of conflict-of-interest rules with

respect to the attorney's representation of the lenders' daughter and preparation of documents relating to a loan given by them to their daughter, on which she subsequently defaulted.

OVERVIEW: Foreclosure proceedings were commenced against the lenders' daughter when she defaulted on a real estate contract. After agreeing to their daughter's request for a loan, the mother met with the attorney to discuss their arrangement. The attorney emphasized that he represented only the daughter and not the lenders, but said he would handle the paperwork to achieve the lenders' objective of having proper security for the loan. The attorney did not tell the mother to obtain independent counsel or about tax liens on the property that he did not know about. After the lenders paid the amount needed to prevent foreclosure, the property was seized and sold at a tax sale. The daughter never repaid the lenders, so they sued the attorney, but their claims were rejected on summary judgment. On review, the Supreme Court ruled that an attorney-client relationship was not established with the lenders and the attorney did not violate conflict of interest rules. However, a factual dispute existed as to whether the attorney owed them a duty of care as third parties to his relationship with their daughter given their lack of representation in the transaction.

OUTCOME: The summary judgment for the attorney was reversed in part with respect to the lenders' contract and negligence claims that they were within the class of third parties to whom an attorney would owe a duty of care. The summary judgment was affirmed in part with respect to their claims that an attorney-client relationship was formed between them and that the attorney violated disciplinary rules.

ANALYSIS: Duty of care is owed to the third party, representing an expansion of privity in Washington.

LEONARD E. GREENBERG and ARNOLD C. GREENBERG, Appellants, v. MAHONEY ADAMS & CRISER, P.A., et al., Appellees.
CASE NO.: 91-2699
COURT OF APPEAL OF FLORIDA, FIRST DISTRICT
614 So. 2d 604; 1993 Fla. App. LEXIS 2086; 18 Fla. L. Weekly D 545
February 18, 1993, Filed

PROCEDURAL POSTURE: Appellants sought review of an order of the Circuit Court for Duval County (Florida) that dismissed their professional malpractice suit against appellees.
OVERVIEW: The court reversed the order dismissing appellants' professional malpractice suit against appellees. The lower court's order was based solely on the ground that appellants lacked privity with appellees and could not bring a legal malpractice action because they did not come within the testamentary exception to the privity requirement. The court held that while ordinarily a party must share privity of contract with an attorney before he may bring suit for legal malpractice, the rule of privity is relaxed in Florida and a third party may bring suit despite the absence of privity where it was the apparent intent of the client to benefit the third party. Although the most obvious example of the third party intended beneficiary exception to the privity rule is in the area of will drafting, the court held that the exception is not limited to will drafting. Therefore, where the lower court's basis for its order dismissing appellants' complaint with prejudice was that the complaint did not come within the testamentary exception to the

privity requirement, the order was erroneous. The court remanded for a determination of whether other facts or legal arguments required dismissal.
OUTCOME: The court reversed and remanded the order dismissing appellants' professional malpractice suit against appellees, holding that the testamentary exception to Florida's relaxed rule of privity, which allowed a third party to bring suit despite the absence of privity where it was the apparent intent of the client to benefit the third party, was not the only exception to the third party beneficiary exception to the privity rule.
ANALYSIS: Privity is clearly relaxed, representing the spread of the effect of the balancing test. In this case, the intent of the client to benefit the third party is the reason that privity does not have to exist.

MARK TWAIN KANSAS CITY BANK, Appellant, v. JACKSON, BROUILLETTE, POHL & KIRLEY, P.C., and JOHN R. WEISENFELS, Respondents, CHICAGO TITLE INSURANCE COMPANY, Third Party Defendant.
WD 49899
COURT OF APPEALS OF MISSOURI, WESTERN DISTRICT
912 S.W.2d 536; 1995 Mo. App. LEXIS 1670
October 3, 1995, Filed
PROCEDURAL POSTURE: Plaintiff bank brought an action against defendant law firm for negligent misrepresentation, alleging that the law firm incorrectly represented facts in an opinion letter to its client, that the bank relied upon that opinion letter in making a loan to the law firm's client, and that the bank had suffered economic loss as a result. The Circuit Court of Jackson County, Missouri granted summary judgment for the law firm. The bank appealed.
OVERVIEW: During the loan negotiations, the bank requested an opinion letter and title coverage from the prospective borrower. The law firm drafted the opinion letter for its client and included a disclaimer. The client defaulted on the loan and the bank brought an action against the law firm for negligent misrepresentation. On appeal, the court held that Missouri permitted non-clients to bring an action against attorneys for negligence if six factors were met, including the specific intent by the client that the attorney's services were to benefit the non-client. The court held that under the circumstances, the bank could not maintain a negligence action against the law firm. The court held that the opinion letter was not intended to benefit the bank but to benefit the client. The court held that there was no fact issue regarding the bank's reliance on the letter because the bank was a sophisticated lender and was aware of significant irregularities in the transaction, such as the fact that the signature on the deed and mortgage did not belong to the trustee of the borrower. The court held that the bank did not adequately plead or prove its claim of equitable estoppel.
OUTCOME: The court affirmed the summary judgment for the law firm in the bank's negligent misrepresentation action.
ANALYSIS: In appeal, the state of Missouri uses the six criteria balancing test. A negligence action cannot be held against the law firm as the opinion letter was not meant to benefit the bank.

2000's

PARADIGM INSURANCE COMPANY, a foreign insurance company, Defendant Counter-claimant-Appellant, v. THE LANGERMAN LAW OFFICES, P.A., a professional association, Plaintiff Counter-defendant-Appellee.
Supreme Court No. CV-99-0412-PR
SUPREME COURT OF ARIZONA
200 Ariz. 146; **24 P.3d 593**; 2001 Ariz. LEXIS 87; 349 Ariz. Adv. Rep. 11
June 13, 2001, Filed

PROCEDURAL POSTURE: Plaintiff law firm sued defendant insurer for legal fees, and the insurer counterclaimed for damages. On summary judgment, the Superior Court in Maricopa County (Arizona) held that because there was no express agreement that the firm could represent both the insurer and the insured, no attorney-client relationship existed between the firm and the insurer. The insurer appealed, and the court of appeals reversed in part.

OVERVIEW: The insurer issued a policy to the insured for medical malpractice liability. The insured, the hospital where the insured was medical director, and another doctor were sued for malpractice. The insurer assigned the law firm to defend the case. The firm failed to investigate whether the insured was covered by the hospital's liability insurance. The insurer found out that the firm was representing a claimant against another doctor insured by the insurer, canceled the firm's representation in the instant case, and retained new counsel. The case was settled. The firm sent a bill to the insurer for legal service, but the insurer refused to pay, alleging malpractice. The supreme court held: (1) an express agreement was not a prerequisite to the formation of an attorney-client relationship; (2) when an insurer has assigned an attorney to represent an insured, the lawyer had a duty to the insurer arising from the understanding that the lawyer's services were ordinarily intended to benefit both the insurer and the insured when their interests coincided; and (3) a lawyer had a duty to a non-client and could be liable for negligent breach.

OUTCOME: The judgment of the superior court was reversed in part and remanded, and the decision of the court of appeals was vacated in part, since summary judgment on the lack of duty was improper.
ANALYSIS: A contract was not necessary for privity, and privity is expanded. The lawyer has duty to the nonclient and is liable for malpractice in Arizona.

SIMONA OSORNIO, Plaintiff and Appellant, v. LAWRENCE A. WEINGARTEN, as Personal Representative, etc., Defendant and Respondent.
H027258
COURT OF APPEAL OF CALIFORNIA, SIXTH APPELLATE DISTRICT
124 Cal. App. 4th 304; 21 Cal. Rptr. 3d 246; 2004 Cal. App. LEXIS 1961; 2004 Cal. Daily Op. Service 10342; 2004 Daily Journal DAR 14027
November 22, 2004, Filed

PROCEDURAL POSTURE: Plaintiff nonclient was the named beneficiary under a will but was presumptively disqualified as a donee under Cal. Prob. Code § 21350(a)(6) because she was care custodian to the testator, a dependent adult. She sued defendant, the attorney who drafted the will, for negligence. The Monterey County Superior Court, California, sustained the attorney's demurrer without leave to amend, and the nonclient appealed.
OVERVIEW: The attorney drafted the will without including a certificate of independent review as required by Cal. Prob. Code § 21351. The complaint alleged, therefore, that the attorney failed to exercise reasonable care in performing legal services for the testator. As an initial matter, the court agreed with the trial court that the complaint failed to state a claim because it failed to allege a duty to the nonclient. Any claim of duty was directly refuted by statute, in that a certificate under § 21351 was to be signed by independent counsel and was not part of the drafter's duties to the testator. The court found, however, that the nonclient should have been allowed to amend her complaint to allege that the attorney negligently failed to advise the testator and to refer her to another attorney. The court balanced the five Biakanja/Lucas factors and held that an attorney drafting instruments to transfer property to a presumptively disqualified person owed a duty of care to advise as to the likelihood of presumptive disqualification and to recommend that the client seek independent counsel. Thus, the attorney owed a duty of care to the nonclient under the facts as could be alleged.
OUTCOME: The court reversed the judgment and directed that on remand, the trial court grant the nonclient leave to file an amended complaint.
ANALYSIS: Although only five of the six factors are used, this case still represents an expansion of privity directly due to the balancing test. Again, a duty of care is owed to a nonclient, which was not the norm until the six criteria balancing test was created.

JANET REDIES, Plaintiff and Appellant, v. ATTORNEYS LIABILITY PROTECTION SOCIETY (A Mutual Risk Retention Group), a Montana corporation, ROBERT TAMBLER, and JOHN DOES 1-3, Defendants and Respondents.
No. 05-438
SUPREME COURT OF MONTANA
2007 MT 9; **335 Mont. 233**; 150 P.3d 930; 2007 Mont. LEXIS 13
June 7, 2006, Submitted on Briefs
January 17, 2007, Decided
PROCEDURAL POSTURE: Appellant non-client challenged a decision of the District Court of the Thirteenth Judicial District, in and for the County of Yellowstone (Montana), which granted summary judgment to respondent insurer on claims of violating Mont. Code Ann. § 33-18-201. The trial court found that the insurer had a reasonable basis under Mont. Code Ann. § 33-18-242(5) for contesting the non-client's claim against an attorney, an insured.
OVERVIEW: The non-client had been in an accident. A conservator was appointed and sought legal advice from the attorney. After the non-client fully recovered, she brought this action claiming that the insurer failed to settle the legal malpractice lawsuit she had brought against the attorney. The trial court ruled in the insurer's favor and the court affirmed. While the assessment of reasonableness generally was within the jury's province, reasonableness was a question of law

for the court when it depended entirely on interpreting legal precedents and evaluating the insurer's proffered defense thereunder. The question of whether an attorney retained by a conservator owed a duty to the protected person was unsettled in 2001 and 2002. Given that the court signaled in case law that a multi-factor balancing test might have been effective for ascertaining the existence and scope of the duty owed by an attorney to non-clients in non-adversarial contexts, it was reasonable for the insurer to apply this test to the factual situation before it, and thus the insurer had a reasonable basis in the law under Mont. Code Ann. § 33-18-242(5) for contesting the non-client's claims against the attorney.
OUTCOME: The court affirmed.
ANALYSIS: The balancing test is referenced in determining duty in a case involving legal malpractice in Montana. The insurer applies this test to the situation, which is recognized by the court as an expansion of duty.

CHAPTER 4

LEGAL MALPRACTICE DATA

Figure 1, from the 2010 edition of Legal Malpractice, represents the relative number of legal malpractice decisions divided by the average population. The average population over the decade is used, and by dividing by the population, the data is normalized to show that population increases alone do not account for the increases in legal malpractice. The data covers the last two centuries, in order to display the dramatic increase in the number of decisions in the last couple decades.

Three peaks are apparent when viewing the graph. The first peak starting at about 1820 and ending in 1860 represents new organization in the legal profession (Mallen & Smith, 21). The second peak in 1890 represents two things: the enactment of ethical codes, and laws addressing the abuses by lawyers when collecting funds (Mallen & Smith, 21). The third peak beginning in the 1960's represents the recent changes in the legal profession as discussed earlier in this paper.

Figure 1

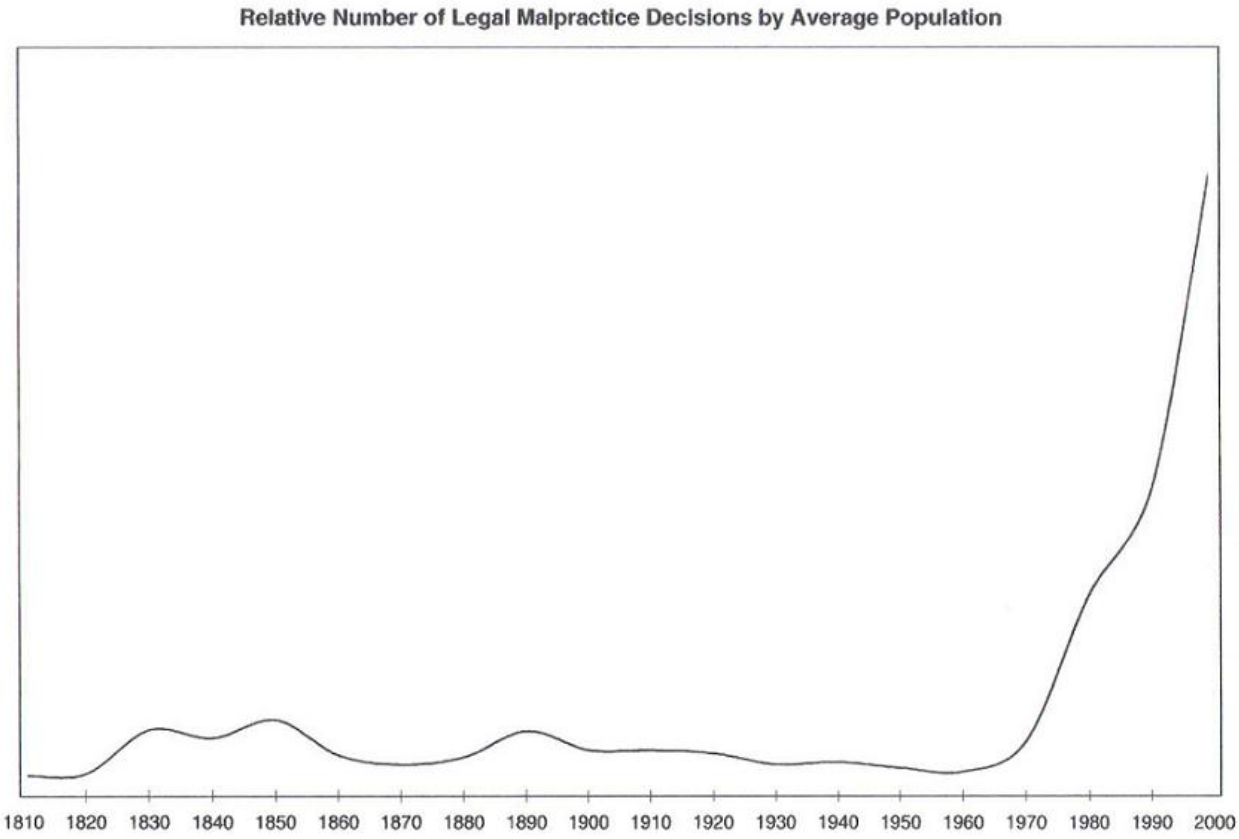
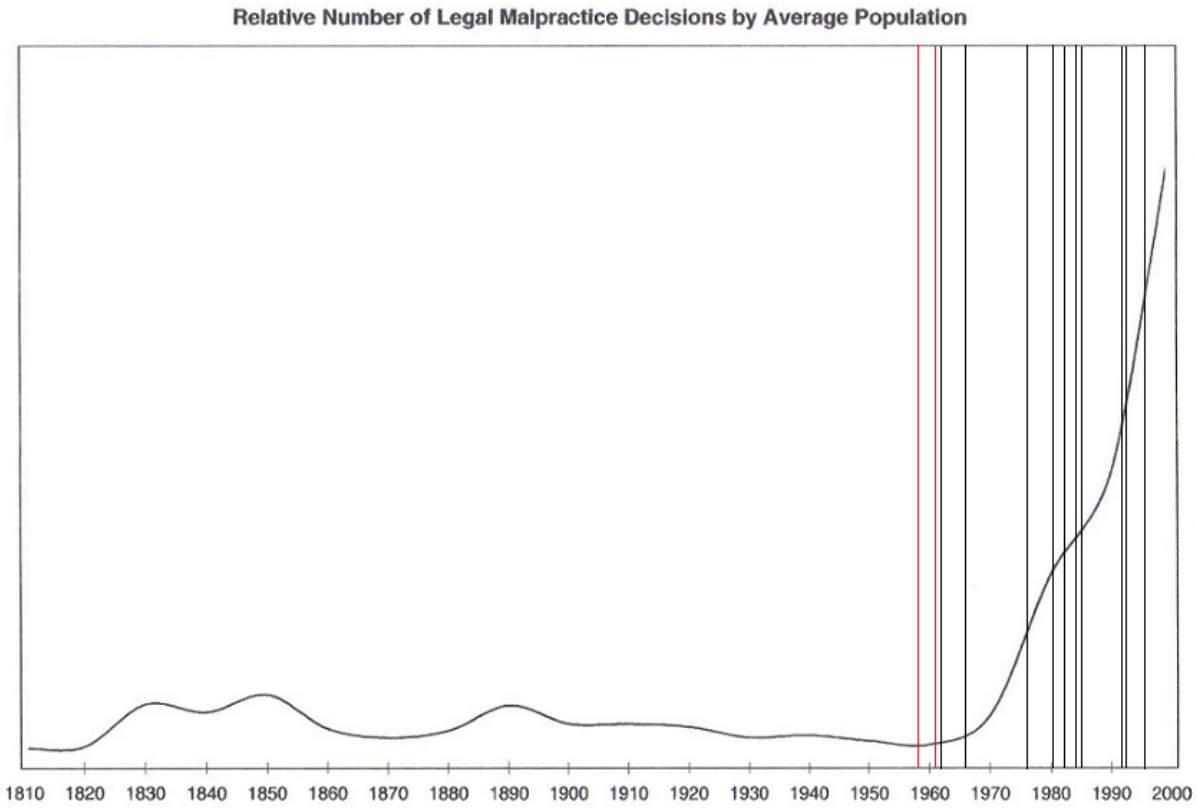


Figure 2 now uses the same data as Figure 1, normalized by population, but now lines are superimposed to represent the court cases analyzed in Chapter 3. The first two red lines in 1958 and 1961 represent the cases *Biakanja v. Irving* and *Lucas v. Hamm*, respectively. These cases highlighted in red represent the creation of the six criteria balancing test for determining privity. The following black lines represent the significant cases which are analyzed in this paper, which signify the spread of this policy change throughout the states.

While it is impossible to extract all other influences on the increase in malpractice decisions other than the effect that the balancing test has created, Figure 2 still provides a powerful visual support of the significance of this policy change. Only years after the initial

decisions an increase is apparent. A steep incline continues as more cases around the United States adopt the balancing test. It is important to also remember that there may be a several year lag after a decision regarding the balancing test to appear in the data. This lag exists because it may take a state several years for a decision to have a direct influence on other cases within the state.

Figure 2



The following two graphs, Figure 3 and Figure 4, also from Mallen and Smith's Legal Malpractice, display similar findings as Figure 2. Figure 3 compares legal malpractice decisions by general population and by lawyer population. Decisions have increased with respect to both percentage increases in population and lawyers. "The rate of increase in number of lawyers has flattened, while the frequency of legal malpractice decisions continues to increase" (Mallen &

Smith, 23). By eliminating explanations for the increase in malpractice such as increases in population and number of lawyers, we can conclude that the increase must be due to other factors. These other factors may include some of the social changes as discussed earlier, although after superimposing the cases over the graph, the importance of the expansion of privity through the spread of the balancing test is clear.

Figure 3

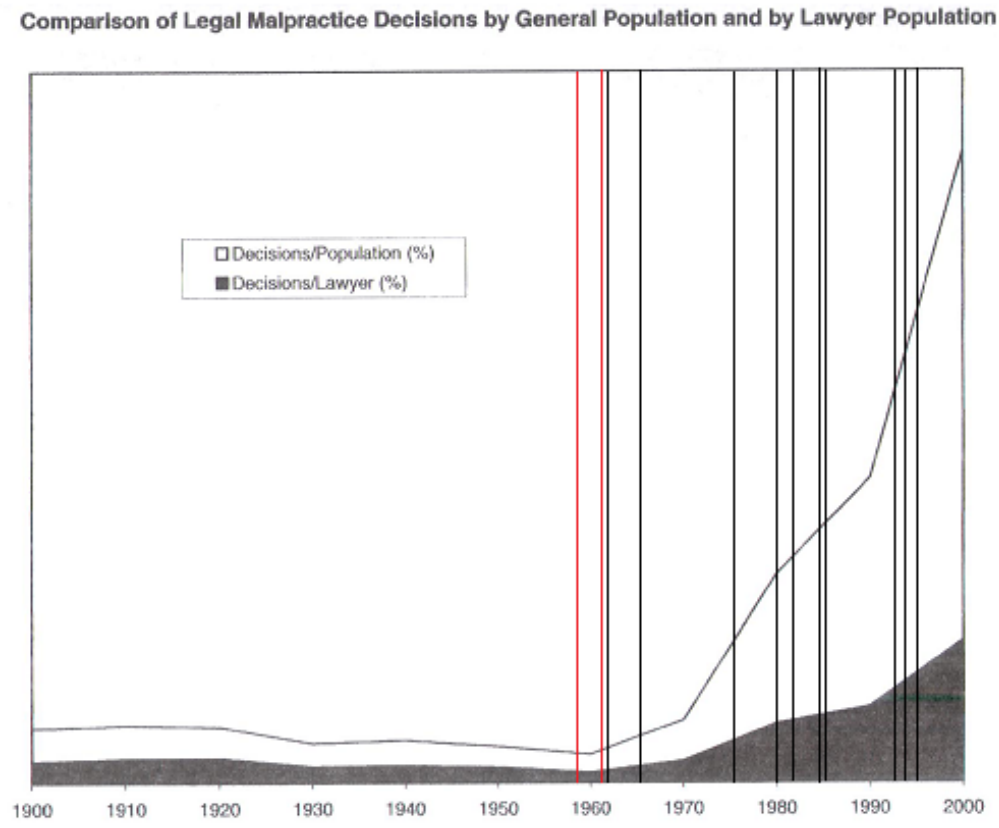
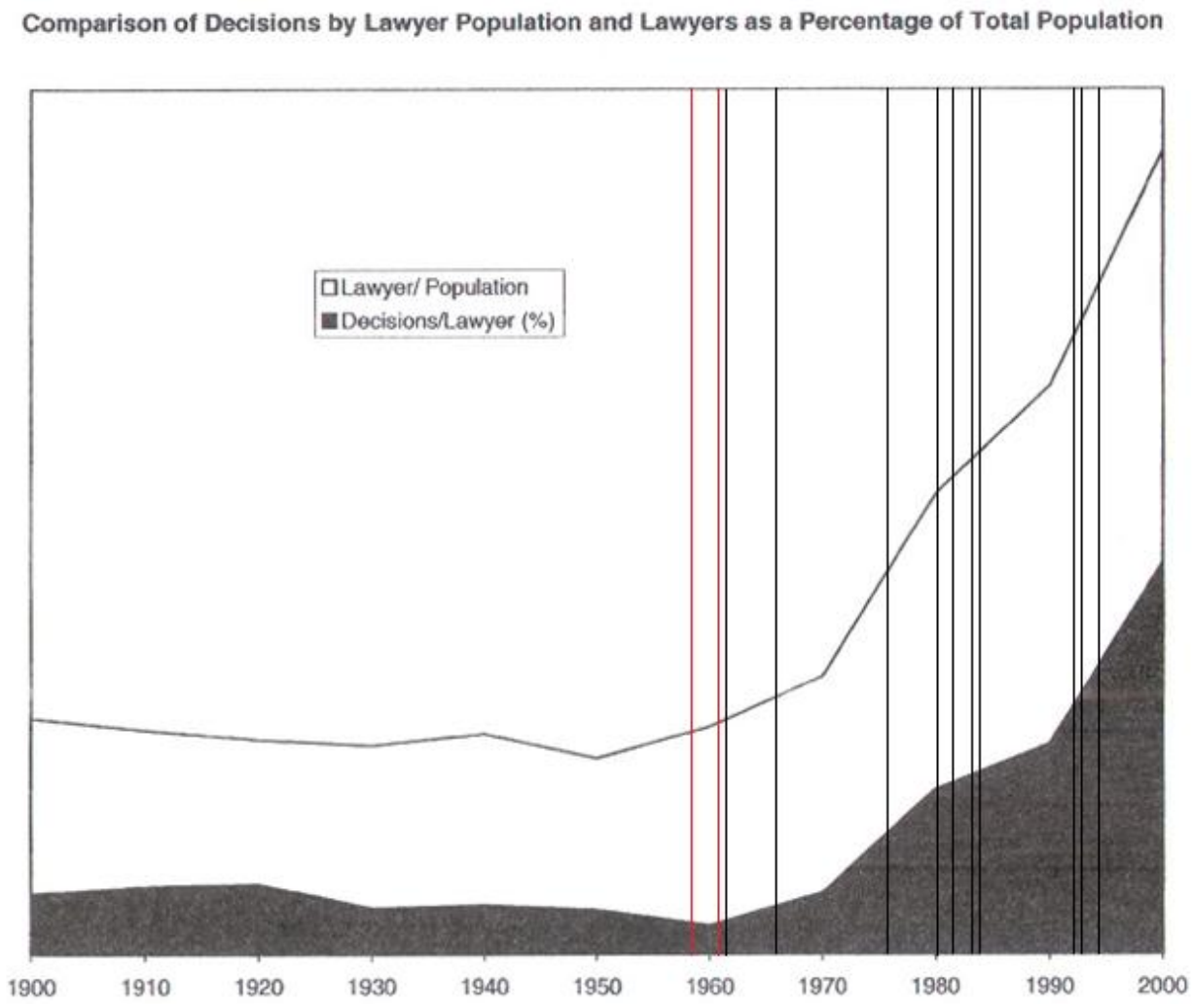


Figure 4 takes the data in Figure 3 one step further by comparing decisions by lawyer population and lawyers as a percentage of total population. Thus, as lawyers per citizen has increased, decisions per lawyers have increased also. By eliminating other factors such as population changes, the effect of the spread of the loosening requirements for privity become more apparent.

Figure 4



The American Bar Association has released data regarding legal malpractice claims. The data has been collected since 1983 in five separate studies. The data has been combined in the latest edition of the study in the "Profile of Legal Malpractice Claims: 2004-2007." Table 1 shows the data broken down by the different major categories of law, over the years that the studies have existed. The row representing the totals (across the bottom) contains the top nine categories of legal malpractice claims, along with all other categories not shown in this table. The totals in the right column are percent changes per year for each category, over the entire

study. In this paper, only the top nine categories creating legal malpractice claims have been displayed, and the percent change per year has been calculated, in order to normalize the data on a year to year basis.

Table 1

AREA OF LAW	1986-1995	1996-1999	2000-2003	2004-2007	TOTAL
Personal Injury – Plaintiff	-4.343%	29.648%	-8.685%	11.891%	5.414%
Real Estate	-5.961%	31.845%	-5.493%	16.602%	5.421%
Family Law	-2.401%	28.343%	-5.992%	11.818%	8.252%
Estate. Trust and Probate	-2.866%	29.952%	-4.991%	13.301%	8.741%
Collection and Bankruptcy	-5.055%	23.615%	-5.088%	6.356%	-4.366%
Criminal	-2.510%	27.326%	-4.706%	16.365%	9.571%
Corporate/Business Organization	0.940%	21.426%	10.049%	1.496%	5.853%
Business Transaction Commercial Law	12.970%	-8.692%	-7.320%	25.451%	9.712%
Personal Injury – Defense	-3.355%	35.383%	23.826%	-14.959%	5.723%
TOTAL	-3.445%	23.079%	-4.890%	9.152%	

Several things are apparent when reading this table. First, the data does not seem to completely agree with the figures. This table suggests that there have been some slight decreases in the number of claims over certain time periods. There is a percentage decrease in malpractice over the years 1986 to 1995 and then again from 2000 to 2003. While this is concerning, the overall trend in the data shows a similar dramatic increase in malpractice claims similar to that in the graphs.

The decreases in claims are most likely due to differences in collecting the data across the five studies. The "Profile of Legal Malpractice Claims" states, "For the 1985 Study, participating insurers submitted data on a standard reporting form for each claim, using common terminology and categories. This claim-by-claim reporting system proved to be cumbersome and was abandoned after that study." The Report goes on to say, "While the recent studies used

the same general data categories as the 1985 Study, our categories did not always correspond to those used by the participating insurers."

It is interesting to note that some of the largest gains in percent change in legal malpractice claims appear in the categories estate trust and probate, family law, and business transaction commercial law. These categories also appear frequently throughout the significant cases in Chapter 3. Cases closely relating to estates include Licata v. Spector (1966), Bucquet v. Livingston (1976), and Lorraine v. Grover, Ciment, Weinstein, and Stauber (1985). An example of family law can be seen in Haldane v. Freedman (1960). Significant cases relating to business transactions or commercial law include Stewart v. Sbarro (1976), First Financial Savings and Loan Association v. Title Insurance Company of Minnesota (1982), and Mark Twain Kansas City Bank v. Jackson Brouillette, Pohl and Kirley (1995). Possibly the expansion of privity has shown up in these areas of the law which commonly deal with third parties.

CHAPTER 5

CONCLUSION

A significant relationship exists between the creation and spread of the six criteria balancing test and the legal malpractice data. While it is not possible to prove a direct cause-and-effect relationship between the expansion of privity and the increase in reported claims, the descriptive statistics presented in this paper allow one to reasonable conclude that the creation of the six criteria balancing test and thus the expansion of privity have played a very significant role in the increase in legal malpractice claims in the United States. Other factors such as the changing attorney-client relationship may still play a role in the increase in reported legal malpractice, but the effect of the expansion of privity cannot be ignored.

Table 1 in Chapter 4 highlights several interesting connections which can be made between the expansion of privity and the data available. Three of the top four areas of law which experienced the greatest percent growth throughout the entire ABA study, family, estate, and transactional law, all regularly involve disputes with third parties. The nature of these areas of law makes them especially sensitive to changes in the law regarding third parties. The six criteria balancing test, which has allowed third parties outside of contract to sue, appears to have had the most significant impact on these areas of law. Criminal law, which also experienced one of the top four largest gains in percent increase in claims, has most likely increased due to changes in criminal law which have allowed criminals a greater ability to challenge decisions in court. This increase reported in criminal law is due to these mentioned changes, and most likely not due to the expansion of privity.

As many states have adopted this test in determining privity, lawyers have had to face more responsibility to clients to whom they may have not previously been liable. The more liability that an attorney faces allows the attorney to be more susceptible to claims of legal malpractice. The increase in liability is directly due to the spread of the balancing test. The purpose of this paper is not to decide whether this increase in reported malpractice is a good or bad thing, but simply to stress the importance of the policy changes effect, on claims. Hopefully, future policymakers can use this study to better understand the effect that certain changes in the law can have on legal malpractice claims.

CHAPTER 6

LACK OF CURRENT DATA / SUGGESTIONS

Most current literature has noted the lack of current data regarding legal malpractice. Insurance companies could possibly provide the best data regarding legal malpractice. Many insurance providers do not allow their data to be published due to it being highly confidential. Other insurance companies do not keep data.

Of the data available, the "Profile of Legal Malpractice Claims: 2004-2007", which was used in this study, seems to be the best. Even the Profile of Legal Malpractice Claims which has been released by the American Bar Association has been subject to harsh criticism. A Vanderbilt Law Review article written by Manuel R. Ramos calls the study "questionable." He claims the study supports the contention that legal malpractice is simply a "minor issue." An article in the Florida Law Review states that the 1985 ABA Study missed anywhere between 78.17% to 99.63% of available legal malpractice claims. The 2007 version of the study even suggests that it does not adequately cover the entire lawyer population and may mislead. This lack of data is concerning, although these samples may correctly predict the data, only with greater variance due to smaller sample sizes. While some states like Oregon and Missouri publish some data, no highly respected data is available regarding national legal malpractice data.

An article in the Yale Law Review entitled "Improving Information on Legal Malpractice" describes the lack of available data and how the only information that does exist tends to be incomplete. This article was published in 1973, and unfortunately many of the issues discussed in the article still exist today.

Future studies could attempt to collect more reliable information regarding legal malpractice claims. Possibly, insurance companies could be held more accountable for producing standardized data across the industry which could benefit the companies collecting the data, the legal profession, and students attempting to study legal malpractice. With more reliable information, it may be easier to produce a study that shows the direct effect that policy changes regarding legal malpractice law have, and policymakers could enact laws that decrease the cost of legal malpractice to society.

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