RESEARCH *Malpractice*

By Ken Whiteway

INTRODUCTION

The liability of lawyers for failure to research the law adequately is not, at first glance, a problem that arises often. While lawyers are sued by disgruntled clients at an ever-increasing rate for a variety of reasons, the inability to use a law library is seldom the stated cause.

Poor research skills on the part of the lawyer are often hidden among the other issues in a negligence action and are rarely referred to explicitly in the pleadings or the reasons for judgment. For example, failure to commence a suit within a given limitation period is one of the most common causes of negligence actions against lawyers.[1] In a 1920 case in which damages were awarded against a law firm for failure to file in time, Scrutton LJ stated that:

> ...it is not the duty of a solicitor to know the contents of every statute of the realm. But there are some statutes which it is his duty to know...The period of limitations was one of those matters which the respondents as the appellants' legal advisors ought to have borne in mind. It was negligence not to bear it in mind... .[2]

Although it was not mentioned, perhaps the problem, in this and many similar situations, is not that the solicitors failed to bear a particular piece of legislation in mind, but that they were simply unaware of its existence. The negligence arises, not from forgetfulness or unreasonable delay, but from poor basic research skills. Of course, the lawyers involved in cases such as this are unlikely to state the real reason for their failure to act: they, like most of us, would rather be considered absentminded than incompetent.

BASIS OF LIABILITY

A. Historical Development

Although standard sources continue to maintain that the only basis of a lawyer's liability to a client lies in breach of contract[3], this is no longer true. (Lawyers are also liable to their clients for a breach of trust or fiduciary duty and, in tort, to third parties where a special relationship exists[4]; however, here we are examining whether the primary duty to the client lies in contrast, or tort, or both).

That some sort of duty was owed to the client became apparent quite early in England. The principle was clearly formulated in an 1838 case which held that:

> every person who enters into a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill. He does not undertake, if he is an attorney, that at all events you shall gain your case ... but he undertakes to bring a fair, reasonable, and competent degree of skill... .[5]

This general standard of care was also accepted in the United States but with a slightly more tortious tone:

> When a person adopts the legal profession, and assumes to exercise its duties in behalf of another for hire, he must be understood as promising to employ a reasonable degree of care and skill in the performance of such duties; and if injury results to the client from a want of such a degree of reasonable care and skill, the attorney may be held to respond in damages to the extent of the injury sustained.[6]

(Over the next eighty years, privity began to break down as a protection for errant lawyers, resulting in the 1961 decision of *Lucas* v. *Hamm*[7] which held that a lack of privity between a third party plaintiff and a defendant lawyer no longer barred an action for negligence).

In Canada, predictably, the early formulations of the duty owed were amalgams of the British and American positions. An 1881 Ontario court, for example, held that:

> [t]he position of an attorney is one that imposes on him duties of a delicate and often of a difficult character. The client has a right to the exercise on his part of care and diligence in the execution of the business intrusted to him, and to a fair average amount of professional skill and knowledge, ...and if he does not exercise them, the law makes him responsible for the loss to his clients from these deficiencies.[8]

The Canadian precendent most often cited in support of the proposition that a lawyer's liability is founded in contract alone is *Schwebel* v. *Telekes*[9]; however, that case went unchallenged for a very short time. Within nine years, the decision in *Schwebel* was being questioned by the same court that handed it down.

In *Dominion Chain Co. Ltd.* v. *Eastern Construction Co. Ltd.*[10], Wilson J.A., as she then was, dissenting in part, restated the line of authority that had culminated in *Schwebel*:

> [P]rofessionals whose capability was to cause pecuniary rather than physical damage such as accountants, bankers and solicitors, were traditionally viewed as owing a contractual rather than a tortious duty of care to their customers or clients. The source of their duty of care was not tort which historically only compensated physical damage but contract which was subject to no such limitation.[11]

However, Jessup J.A., for the majority, took a different tack:

> In *Schwebel* v. *Telekes*... this Court had to consider whether a claim of negligence against a notary in the performance of his contract of employment sounded in tort or contract. Laskin, J.A. ... pointed out there

were two lines of authorities, the older of which held that a plaintiff may recover either in contract or in tort where there has been a breach of duty under a contract of employment. He did not have to choose between the two lines because on the facts of *Schwebel* the result was the same whether the liability was in contract or in tort. I am unfettered by any Canadian authority in following the older path.[12]

The Court went on to hold that the exemption of solicitors from concurrent tort liability to their clients was anachronistic[13] and that, in any event, the modern English authorities relied upon in *Schwebel* had been overruled by *Esso Petroleum* v. *Mardon*.[14] And, in spite of the fact that *Dominion Chain* dealt specifically with an action against engineers, who could be responsible for physical as well as purely pecuniary damage, the Court seemed to broaden the scope of potential liability to include people such as solicitors by stating that it could be "implied from their relation to their clients as members of professions professing skills."[15]

This kind of thinking was supported very quickly by academic opinion. Shortly after *Dominion Chain* was handed down, one commentator stated categorically that limitations on contract or tort recovery should no longer be tolerated:

> [I]t is desirable to impose liability on a defendant: (1) when the defendant ought reasonably to appreciate that a person such as the plaintiff might reasonably rely to his detriment upon the defendant's words, acts or other communications; or
>
> (2) when the defendant ought to realize that a person such as the plaintiff might reasonably entertain particular expectations and it is appropriate ... to hold the defendant responsible for satisfying those expectations.[16]

Curiously, Laskin, after his appointment to the Supreme Court of Canada, had an opportunity to decide once and for all whether a solicitor's liability to his client lay in tort as well as in contract but, notwithstanding the strongly held views he expressed in *Schwebel*, he declined to do so.[17] As a result, there was a checkerboard of decisions across the country which held that the liability lay in contract only[18], in contract and tort[19], or that the distinction between the two forms of action was largely irrelevant.[20]

Despite a lack of leadership from the Supreme Court, it appeared that the academic[21] and judicial trends were toward concurrent liability for negligent lawyers. Holland J. of the Ontario High Court while discussing *Schwebel* stated, without citing authority, but perhaps with *Dominion Chain* in mind, that "it is well recognized now in this province that one may assert such a claim both in contract and in tort".[22] And Barry J. of the New Brunswick Queen's Bench Division stated that:

> ...it will only be a matter of time until the reasoning of Jessup, J. in the *Dominion Chain* case and of Lord Denning in the *East [sic] Petroleum* case will be adopted, either by case law or statute. It appears most inequitable to me that a person who suffers damage by reason of the negligence of a professional person, whether such breach of duty be in tort or contract, should find that he has no recourse against such professional person, even when he did not become aware of the damage or defect until after the passage of time set forth in the *Limitation of Actions Act*.[23]

B. Current Law

These predictions proved to be true. In the 1986 case of *Central Trust Co.* v. *Rafuse*[24], the defendant solicitors arranged a mortgage, the proceeds of which were to be paid in partial satisfaction of the purchase price of shares in the capital stock of a motel. The solicitors were unaware of s. 96(5) of the *Companies Act*, R.S.N.S. 1967, c. 42, which provided that "it shall not be lawful for a company to give ... any financial assistance for the purpose of or in connection with a purchase made or to be made ... of any shares in the company". The mortgage was eventually held to be void and unenforceable and the plaintiffs brought action against the solicitors, both in contract and tort, for failing to exercise due care and skill. The parties agreed that time had run out on the contract, but the defendants were found liable in tort.

Speaking for a unanimous Supreme Court, Le Dain J. held that the duty of care created by a relationship of sufficient proximity is not confined to relationships that arise from contract:

> Where the common law duty of care is coextensive with that which arises as an implied term of the contract it obviously does not depend on the terms of the contract, and there is nothing flowing from the contractual intention which should preclude reliance on a concurrent or alternative liability in tort.[25]

Subject to the qualification that concurrent liability is not appropriate where it would allow a plaintiff to circumvent a contractual exclusion or limitation of liability, "the plaintiff has the right to assert the cause of action that appears to be most advantageous to him in respect of any particular legal consequence".[26]

It is now, therefore, finally clear that lawyers are in no better position than the members of other professions and are susceptible to being caught on the prongs of alternative liability.[27]

THE DUTY TO RESEARCH

Interestingly, an early case which has been called "the very origin of the concept of professional negligence"[28] dealt with faulty research. In *Pitt* v. *Yalden*[29], a solicitor acting for a creditor succeeded in obtaining the arrest and imprisonment of a debtor. Unfortunately, the solicitor interpreted the relevant statute incorrectly and, in addition, failed to discover two earlier decisions which held that the judicial term during which the arrest was made counted as one of the two terms encompassed by the limitation period. As a result, time ran out, the debt was discharged, and the disappointed creditor sued the solicitor.

Lord Mansfield, in the House of Lords, preferred not to attach blame to the lawyer. He declared that lawyers ought not to be liable in cases of reasonable doubt and that, since the relevant statute was unclear, the solicitor should not be held responsible for an error in judgment on a debatable proposition.

The difficulty with the decision in *Pitt* is that there was no "error in judgment" involved. Even if the statute were unclear, and that does not appear to be the case[30], two (at the time) recent cases had already ruled on the very point in question.[31] The real reason for the decision seems to be that, as Lord Mansfield observed, the defendant was a "country" lawyer and was therefore probably unaware of the two earlier decisions.

The defence of being a "country" lawyer is not likely to prove very successful today. With the advent of computer-assisted legal research and the abundance (perhaps over-abundance) of case reporting services, it would be difficult for any lawyer, even one far removed from a large population center, to claim the inability to discover relevant authorities. As early as the turn of the century, it was suggested that one of the duties of a lawyer was to keep up with the general literature of the profession.[32] And while a lawyer would not necessarily be negligent if research conducted with ordinary skill and knowledge failed to disclose *all* relevant authorities on a subject[33], it may be, because of modern research techniques and technology, that lawyers are now under a duty to be aware of information which can readily be found.[34]

The courts always seem to have been willing to excuse the lawyer who has done research but still fails to grasp the point. That was one of the stated reasons for lack of liability in *Pitt* and it was echoed in 1830 by Tindall C.J. who declared that a solicitor:

> ... is liable for ... want of care in the preparation of the cause for trial ... . Whilst on the other hand, he is not answerable for error in judgment upon points of new occurrence, or of nice or doubtful construction... .[35]

Some cases seem to exclude liability, *not* for not finding the law, but simply for not being able to understand it. Perhaps the best example of this kind of judicial reasoning is *Lucas* v. *Hamm*.[36]

Lucas is the case, dear to the hearts for all first-year law students, in which an attorney failed to comprehend the implications of the rule against perpetuities and was sued by irate beneficiaries. Although the point is overshadowed by the main issue of the case[37], the seven-member California Supreme Court unanimously agreed that the rule poses such complex and difficult problems that even careful and competent attorneys will occasionally fall afoul of it. The decision, quite naturally, met with widespread disfavour in academe[38], but it was justified as merely a restatement of the old principle that an attorney "is not liable for being in error as to a question of law on which reasonable doubt may be entertained by well-informed lawyers".[39] It has been suggested that Lucas may well be a judicial aberration and "will prove to be a slur on the profession which, like the mule, will display neither pride of ancestry nor hope of posterity".[40]

As mentioned earlier, negligent research is often only an implied allegation. The many cases that deal with liability because of missed limitation periods or failure to advise the client of the applicable law[41], for example, are probably often the result of inadequate research techniques; but, it is quite rare to find liability grounded in the complete failure of the lawyer to carry out adequate research. Again, the leading case in this area came out of California.

In *Smith* v. *Lewis*[42], a woman brought an action for legal malpractice against an attorney based on his negligent failure, in an earlier divorce petition, to assert the woman's claim to an interest in her former husband's retirement benefits. The lawyer did not research the question but, nonetheless, informed his client that such benefits were not community property and he did not ask for them to be included as part of the settlement. Under California law, however, such benefits were indeed considered to be community property and the women was awarded $100,000 in damages.

In finding the lawyer liable, the Court held that:

> ...an attorney does not ordinarily guarantee the soundness of his opinions and, accordingly, is not liable for every mistake he may make in his practice. He is expected, however, to possess knowledge of those plain and elementary principles of law which are commonly known by well informed attorneys, and to discover those additional rules of law which, although not commonly known, may readily be found by standard research techniques..... If the law on a particular subject is doubtful or debatable, an attorney will not be held responsible for failing to anticipate the manner in which the uncertainty will be resolved.... But even with respect to an unsettled area of law, we believe an attorney assumes an obligation to his client to undertake reasonable research in an effort to ascertain relevant legal principles and to make an informed decision as to a course of conduct based upon an intelligent assessment of the problem.[43]

Liability was found in *Smith* v. *Lewis* because the defendant attorney failed to perform sufficient research to enable him to make an informed judgment on behalf of his client. Had he conducted even minimal research into the standard legal sources, he would have discovered that the retirement benefits in question were likely to be treated as community property.[44] There is disagreement as to whether *Smith* v. *Lewis* sets a standard for the level of research which must be reached in order to avoid malpractice liability[45]; however, at least in California, "[i]t appears attorneys will now be required to research all possible ramifications related to an unsettled area of law before proceeding with the case".[46]

A line of authority that required lawyers to engage in an acceptable level of research developed much

earlier, and more forcefully, in other American jurisdictions, but those cases did not receive such wide notoriety. By 1926, for example, the Washington Supreme Court had held:

> Not always can an attorney be expected to know the law upon a given subject, but when he is employed to ascertain it, the greater his ignorance, the greater his duty to inform himself. And when, as here, the exact question involved has been more than once decided by the court of last resort of his own state and the rule is well-settled throughout the United States, it is gross negligence to permit a client to hazard, perhaps, his little all without any search whatever of the authorities.[47]

Failure to perform the research that an ordinarily prudent lawyer would engage in before rendering legal advice can be very costly. In *Togstad* v. *Veselty, Otto, Miller & Keefe*[48], an attorney advised his clients that they had no cause of action in a medical negligence claim and failed to inform them of a two-year limitation period. The Supreme Court of Minnesota agreed with the jury that the initial suit would have succeeded and awarded a total of $649,500 in damages against the negligent firm.

In Canada, the concept that a lawyer is not liable for an error of judgment on an unsettled area of law also seems to have been adopted quite early.[49] In 1901, the Supreme court held that a solicitor advising his client according to established jurisprudence is not guilty of actionable negligence even though the decision upon which he relied in giving the advice may be subsequently overruled.[50] There was also authority for the proposition that a solicitor would not be answerable in damages provided there was not fault to be found either with his integrity or diligence.[51] The general rule appeared to be that "a solicitor does not undertake with his client not to make mistakes, but only not to make negligent mistakes".[52]

Since *Rafuse*, the Canadian and American positions concerning negligent research appear to be very similar. Echoes of *Smith* v. *Lewis* can be heard in Le Dain J.'s formulation of the current Canadian law:

> A solicitor is not required to know all the law applicable to the performance of a particular legal service, in the sense that he must carry it around with him as part of his "working knowledge", without the need of further research, but he must have a sufficient knowledge of the fundamental issues or principles of law applicable to the particular work he has undertaken to enable him to perceive the need to ascertain the law on relevant points.[53]

The principles laid out in *Rafuse* are already being applied. In the recent case of *Elcano Acceptance Ltd.* v. *Richmond, Richmond, Stambler & Mills*[54], the plaintiff claimed that he suffered a loss as a result of his lawyer's ignorance of s. 4 of the *Interest Act*, R.S.C. 1970, c. I-18, which provides that where interest is payable "by the terms of any written or printed contract" for a period less than a year, no interest is recoverable exceeding 5% per annum unless the contract contains an express statement of the annual rate. The defendant lawyer had drafted promissory notes which called for interest at 2% monthly. The plaintiff was unable to recover the full interest provided and brought an action for negligence against the solicitor.

After citing *Rafuse*, O'Leary J., in finding the lawyer liable, held that:

> ... the provisions of s. 4 are so basic and fundamental and a knowledge of them so necessary to the drafting of contracts that provide for the payment of interest that any reasonably competent solicitor practising in the field of commercial law anywhere in Canada must be aware of them....
>
> Even if it could be said that a reasonably competent solicitor practising in commercial law might not have concluded on reading s. 4 that the word "contract" included promissory notes (a proposition I cannot accept), at the very least such a solicitor could not have excluded without researching the point, the possibility that it did include promissory notes. If he had researched the point he would have found no authority to the effect that s. 4 did not apply to promissory notes and he would have found considerable authority that it did.[55]

CONCLUSION

It has long been settled that a lawyer may charge his client for time spent in researching the law[56]; but, there is also a presumption that "he knows what to look for and where to find it".[57] Canadian law schools have often been remiss in their efforts to effectively instruct students in the methodology of legal research[58], and there is no indication that this situation is remedied during the articling process or in the early years of a lawyer's professional life.

While courts are quite willing to find fault with a lawyer who fails to discover primary materials which may affect a client's rights or obligations, there has been no attempt to formulate a standard of acceptable research which would allow liability to be avoided. Thus far, liability is always based on a finding that, in hindsight, the lawyer failed to do sufficient research to enable him to make an informed decision on the course of action most beneficial to the client.

It seems clear that the lawyer who bases his advice on a hazy recollection of what was learned in law school, or who depends on the authorities unearthed by an articling student after a couple of hours of poking around the library, may be in jeopardy. At the very least, a lawyer is expected to be familiar with the material of which an ordinarily skillful practitioner in the field in question would be aware. This includes all relevant statutes, regulations, leading cases, and recent developments.

Given that no reasonable lawyer would accept a retainer without a basic grasp of the subject involved, updating knowledge is no onerous task. Over the last decade, there has been a great increase in the number of Canadian legal textbooks published and recent monographs are

now available on all major subjects. Topical reports, and in some cases looseleaf services, have appeared in many areas of practice. National current awareness services, as well as local services produced in many jurisdictions, report recent developments in a form easily accessible to even the busiest practitioner. Decisions from all Canadian superior courts are available through QL Systems or CAN/LAW usually within a few days of being handed down. Additionally, there is the simple expedient of a telephone consultation with an acknowledged expert in the field. Courts are not willing to make lawyers insurers of every opinion they offer; therefore, a reasonable examination of current authorities and legislative activity, which in most cases can be accomplished in a relatively short time, should do much to deflect liability.

The Task Force on Lawyer Competency of the American Bar Association lists the ability to perform legal research as one of the most important of the fundamental skills required of a lawyer[59], and the Canadian Bar Association also admonishes its members to "keep abreast of developments in all branches of law wherein the lawyer's practice lies".[60] Given recent judicial trends and the increasing litigiousness of the consumers of legal services, this is very sound advice.

1. *See* J. Sopinka, "Professional Responsibility of Lawyers at Common Law", in Merrideth Memorial Lectures, 1983-84. (Toronto: De Boo, 1985) at 252.
2. *Fletcher & Son* v. *Jubb, Booth & Helliwell,* [1920] 1 K.B. 275 at 281-282 (C.A.).
3. *See, e.g.,* 4. C.E.D. (West. 3rd), Title 16, para. 150:
   > Although in earlier cases there was some suggestion that an action might lie against a solicitor in tort, it is now clearly established that the basis of liability of a solicitor to his client is for breach of contract. [This statement of the law has been corrected in the most recent release dated July 1989. *See* 4 C.E.D. (West. 3rd), Title 16, para. 369]. See also, *Code of Professional Conduct.* (Ottawa: Canadian Bar Association, 1988) at 7, note 2:
   >
   > As a matter of law, the English and Canadian courts have consistently held that actions by clients against their lawyers for breach of duty stem from the contract of employment made or implied from the retainer, or from the fiduciary relationship that exists between lawyer and client and not on any general tort basis.
4. Sopinka, *supra,* note 1, at 247.
5. *Lanphier* v. *Phipos* (1838), 8 Car. & P. 475 at 479, 173 E.R. 581 at 583 (K.B.).
6. *Savings Bank* v. *Ward,* 100 U.S. 195 at 198, *sub nom. National Savings Bank* v. *Ward,* 25 L.Ed. 621 at 622 (1879).
7. *Lucas* v. *Hamm,* 56 Cal. 2d 583, 15 Cal. Rptr. 821, 364 P. 2d 685 (1961), *cert. denied,* 368 U.S. 987, 7 L.Ed. 2d 525, 82 S.Ct. 603 (1962).
8. *Re Kerr, Akers & Bull* (1881), 29 Gr. 188 at 195 (C.A.).
9. *Schwebel* v. *Telekes,* [1967] 1 O.R. 541, 61 D.L.R. (2d) 470 (C.A.).
10. *Dominion Chain Co. Ltd.* v. *Eastern Construction Co. Ltd.* (1976), 12 O.R. (2d) 201, 68 D.L.R. (3d) 385, 1 C.P.C. 13 (C.A.), aff'd on other grounds *sub nom. Giffels Associates Ltd.* v. *Eastern Construction Co. Ltd.,* [1978] 2 S.C.R. 1346, 84 D.L.R. (3d) 344, 19 N.R. 298, 4 C.C.L.T. 143, 5 C.P.C. 223.
11. *ibid.,* 12 O.R. (2d) 201 at 226, 68 D.L.R. (3d) 385 at 410, 1 C.P.C. 13 at 43.
12. *ibid.,* 12 O.R. (2d) 201 at 207, 68 D.L.R. (3d) 385 at 391, 1 C.P.C. 13 at 22. It was not until 1938 in *Groom* v. *Crocker,* [1939] 1 K.B. 194, [1938] 2 All E.R. 394 (C.A.), that it was held that a solicitor's duty to his client lay only in contract. Prior to that, the law was stated in cases such as *Boorman* v. *Brown* (1844), 11 Cl. & F. 1 at 44, 8 E.R. 1003 at 1018-1019 (H.L.):
    > [W]henever there is a contract and something to be done in the course of the employment which is the subject of that contract, if there is a breach of duty in the course of that employment, the plaintiff may recover in tort or in contract.
13. *ibid.,* 12 O.R. (2d) 201 at 209, 68 D.L.R. (3d) 385 at 393, 1 C.P.C. 13 at 24.
14. *Esso Petroleum* v. *Mardon,* [1976] Q.B. 801, [1976] 2 All E.R. 5, [1976] 2 W.L.R. 583, [1976] 2 Lloyd's Rep. 305, 120 Sol. J. 131 (C.A.). Lord Denning stated at 819 (Q.B.) that:
    > in the case of a professional man, the duty to use reasonable care arises not only in contract, but is also imposed by the law apart from contract, and is therefore actionable in tort.
    >
    > For a more detailed analysis of the historical development of tortious liability between parties in a contractual relationship, *see* N. Rafferty, "The Tortious Liability of Professionals to Their Contractual Clients", in F.M. Steel & S. Rodgers-Magnet, eds. *Issues in Tort Law.* (Toronto: Carswell, 1983) at 243-263.
15. *op. cit.,* 12 O.R. (2d) 201 at 210, 68 D.L.R. (3d) 385 at 394, 1 C.P.C. 13 at 25. Shortly before *Dominion Chain,* the Supreme Court of Canada had decided that recovery in tort for purely economic loss was permissible. *See Rivtow Marine Ltd. v. Washington Iron Works,* [1974] S.C.R. 1189, 40 D.L.R. (3d) 530, [1973] 6 W.W.R. 692.
16. B.J. Reiter , "Contracts, Torts, Relations and Reliance",, in B.J.Reiter & J. Swan, eds. *Studies in Contract Law.* (Toronto: Butterworths, 1980) at 242.
17. *See Smith* v. *McInnes,* [1978] 2 S.C.R. 1357, 91 D.L.R. (3d) 190, 4 C.C.L.T. 154, *sub nom., Webb Real Estate* v. *McInnes,* 25 N.S.R. (2d) 272, 36 A.P.R. 272, 19 N.R. 608 (S.C.C.).
18. *Melanson* v. *Leger* (1978), 24 N.B.R. (2d) 632, 48 A.P.R. 632 (Q.B.); *Andrei* v. *McKillop* (1982), 38 O.R. (2d) 21 (Co.Ct.); *Hutzkal* v. *B.,* [1974] 6. W.W.R. 607 (Alta.

S.C.).

19. *Baldwin* v. *Chalker* (1984), 48 Nfld. & P.E.I.R. 86, 142 A.P.R. 86, 34 R.P.R. 167 (Nfld. C.A.), varying (1982) 39 Nfld. & P.E.I.R. 532, 111 A.P.R. 532 (Nfld. S.C.T.D.): "... where a solicitor is in breach of a duty to a client by failing to exercise that degree of care and skill expected of a reasonably prudent solicitor an action lies in both contract and tort."; *Tabata* v. *McWilliams* (1981), 33 O.R. (2d) 32, 123 D.L.R. (3d) 141; 19 R.P.R. 137 (H.C.), aff'd (1982) 40 O.R. (2d) 158, 140 D.L.R. (3d) 322 (C.A.); *St. Onge* v. *Pelletier* (1986), 67 N.B.R. (2d) 399, 172 A.P.R. 399 (Q.B.); *John Maryon International Ltd.* v. *New Brunswick Telephone Co. Ltd.* (1982), 141 D.L.R. (3d) 193, 24 C.C.L.T. 146, *sub nom. New Brunswick Telephone Co. Ltd.* v. *John Maryon International Ltd.*, 43 N.B.R. (2d) 370, 175 A.P.R. 370 (C.A.), leave to appeal to S.C.C. refused (1982) 43 N.B.R. (2d) 468, 113 A.P.R. 468, 46 N.R. 262; *Melanson* v. *Cochrane, Sargeant, Nicholson & Patterson* (1985), 63 N.B.R. (2d) 91, 164 A.P.R. 91, aff'd (1986), 68 N.B.R. (2d) 370, 175 A.P.R. 370 (C.A.). *Cf. Power* v. *Halley* (1980), 30 Nfld. & P.E.I.R. 484, 84 A.P.R. 484, 110 D.L.R. (3d) 741, 16 R.P.R. 100 (Nfld. S.C.T.D.), aff'd (1981), 30 Nfld. & P.E.I.R. 476, 84 A.P.R. 476, 124 D.L.R. (3d) 350, 20 R.P.R. 82 (Nfld. C.A.)

20. *Clarke* v. *Milford* (1984), 64 N.S.R. (2d) 361, 143 A.P.R. 361, 43 C.P.C. 113, 32 R.P.R. 280 (S.C.T.D.); In *Loubardeaus* v. *W.* (1984), 33 Sask. R. 26 (Q.B.), Noble J. said, at 32:

> While there has been an ongoing debate on whether an action brought by a client alleging breach of the standard of care by a lawyer is founded in contract or tort, everyone seems to agree that the standard of care is the same. Thus it makes little practical difference whether the lawyer was negligent in serving his client thus occasioning a breach of contract or that he was negligent in the tortious sense — the result will be the same.

21. *See* Reiter, *supra*, note 16, at 247. His basic thesis is that:

> contract and tort are merely different conceptual labels for grouping concerns about the appropriate scope of legal intervention and that the concerns that arise on examination of any relationship are similar whether the case is being looked upon as on of contract or of tort... .

See also C.J.F. Kidd, "The Negligent Professional Advisor: Can the Client Sue in Tort" (1975), 9 U. Queensland L.J. 252 at 257:

> [T]he modern cases on negligence ... provide good authority for the existence of a general (i.e. tortious) duty of care which not only embraces the old status relationships, providing an alternative or additional cause of action to that provided by the contract in those cases, but which should also encompass the relationship between professional advisor and client and confer similar causes of action there also. On this view the contract between the parties is no longer the sole source of the advisor's duty to act with reasonable care.

See, or rather hear, *also* R.M. Nelson, *Professional Liability: Tort or Contract* [sound recording]. (Toronto: Law Society of Upper Canada, Dept. of Continuing Education, 1975): if the duty lies only in contract, lawyers could, in their written retainers, specifically exclude or limit tort liability.

22. *Robert Simpson Co. Ltd.* v. *Foundation Co. of Canada Ltd.* (1981), 34 O.R. (2d) 1 at 14, 126 D.L.R. (3d) 469 at 483, 19 C.C.L.T. 117 at 140 (H.C.), rev'd on other grounds (1982), 36 O.R. (2d) 97, 134 D.L.R. (3d) 458, 20 C.C.L.T. 179, 26 C.P.C. 51 (C.A.).

23. *Melanson* v. *Leger* (1978), 24 N.B.R. (2d) 632 at 627, 48 A.P.R. 632 at 637 (Q.B.).

24. *Central Trust Co.* v. *Rafuse*, [1986] 2 S.C.R. 147, 75 N.S.R. (2d) 109, 186, A.P.R. 109, 31 D.L.R. (4th) 481, 34 B.L.R. 187, 37 C.C.L.T. 117, 42 R.P.R. 161.

25. *ibid.*, [1986] 2 S.C.R. 147 at 205, 75 N.S.R. (2d) 109 at 139-140, 186 A.P.R. 109 at 139-140, 31 D.L.R. (4th) 481 at 522, 34 B.L.R. 187 at 235, 37 C.C.L.T. 117 at 165, 42 R.P.R. 161 at 209,.

26. *ibid.*, [1986] 2 S.C.R. 147 at 206, 75 N.S.R. (2d) 109 at 140, 186 A.P.R. 109 at 140, 31 D.L.R. (4th) 481 at 522, 34 B.L.R. 187 at 235, 37 C.C.L.T. 117 at 166, 42 R.P.R. 161 at 209.

27. For discussions of the implications of *Rafuse, see*: J. Blom, "Concurrent Liability in Tort and Contract - Start of Limitation Period: Central Trust Co. v. Rafuse" (1987), 21 U.B.C.L.Rev. 429; G.M. Caplan & A.I. Schein, "Caught in the Cross-Fire: the Erring Employee in the Borderland of Contract and Tort" (1987), 8 Advocates' Q. 243; W.H. Charles, "Torts and Contract - Merging Areas?" (1987), 8 Advocates' Q. 222; D. Gibson, "Developments in Tort Law: the 1986-87 Term" (1988), 10 Supreme Court L.R. 345; J. Irvine, "Annotation" (1986), 37 C.C.L.T. 119.

28. R.E. Mallen & J.M. Smith, *Legal Malpractice,* vol. 1. 3d ed. (St. Paul, Minn.: West, 1989) at 814.

29. *Pitt* v. *Yalden* (1767), 4 Burr. 2060, 98 E.R. 74 (K.B.).

30. The relevant statute and rule were quoted in *Pullen* v. *White* (1763), 3 Burr. 1448 at 1449, 97 E.R. 921 (K.B.):

> The question depends upon these words of the second clause of 4, 5 W. & M., c. 21, ("that if any defendant be taken or charged in custody upon any writ out of the Courts at Westminster, and detained in prison for want of sureties for his appearance thereto, the plaintiff may *before the end of the next term after such writ of process shall be returnable,* declare against such prisoner, & c.") and upon the 6th clause of a rule of this Court, made in Easter term, 5 W. & M. ("that if the declaration be not filed *before*

the end of the next term after the writ or process by which the prisoner was taken or charged in custody is returnable; and affidavit made and filed thereof before the end of twenty days next after such term, the prisoner shall be discharged on common bail signed by a Judge;") together with the undermentioned rule Tr. 2 G. 1. [emphasis added].

31. *ibid.*, and *Russell* v. *Stewart* (1765), 3 Burr. 1787, 97 E.R. 1099 (K.B.).
32. *Hill* v. *Mynatt*, 59 S.W. 163 (Tenn. Ch. App. 1900).
33. *Mecartney* v. *Wallace*, 214 Ill. App. 618 (1919).
34. *See* Mallen, *supra*, note 28, at 820.
35. *Godefroy* v. *Dalton* (1830), 6 Bing. 460 at 468, 130 E.R. 1357 at 1361 (C.P.).
36. *See* note 7, *supra.*
37. *i.e.*, the absence of privity is not a bar to recovery, in tort or in contract, by beneficiaries against a lawyer for the negligent preparation of a will. For a Canadian case which reaches a similar conclusion, *see Whittingham* v. *Crease & Co.* (1978), 88 D.L.R. (3d) 353, [1978] 5 W.W.R. 45, 6 C.C.L.T. 1, 3 E.T.R. 97 (B.C.S.C.).
38. If no one is expected to understand the rule against perpetuities, whither many hours of lectures in Property, Wills, and Trusts? *See, inter alia,* "Attorney's Violation of Future Interests Held Not Actionable" (1961-62), 14 Stan. L. Rev. 580; and R.E. Megarry, "Note" (1965), 81 L.Q. Rev. 478 at 481:

    > The standard of competence in California thus seems to be that it is not negligent for lawyers to draft wills knowing little or nothing of the rule against perpetuities, and without consulting anyone skilled in the rule (a point mentioned by the Court of Appeal but ignored in the judgment of the Supreme Court). If the rule against perpetuities is in this category, what other fundamentals of the law are there of which the California attorney may be ignorant without culpability? How does California translate and apply *spondet peritiam artis?*

39. *See* note 7, *supra*, 56 Cal.2d 583 at 587, 15 Cal.Rptr. 821 at 825, 364 P. 2d 685 at 689.
40. Megarry, supra, note 38, at 481.
41. *See, e.g.*, M.A. DiSabatino, "Admissibility and Necessity of Expert Evidence as to Standards of Practice and Negligence in Malpractice Action Against Attorney" (1982), 14 A.L.R. 4th 170.
42. *Smith* v. *Lewis*, 13 Cal. 3d. 349, 118 Cal. Rptr. 621, 530 P.2d 589, 78 A.L.R. 3d 231 (1975).
43. *ibid.*, 13 Cal. 3d 349 at 358-359 118 Cal. Rptr. 621 at 627, 530 P. 2d 589 at 595, 78 A.L.R. 3d 231 at 239-240.
44. *ibid.*, 13 Cal. 3d 349 at 360, 118 Cal. Rptr. 621 at 628, 530 P.2d 589 at 595, 78 A.L.R. 3d 231 at 241. For another example of a case in which the research done by the defendant lawyer was virtually non-existent, *see Aloy* v. *Mash*, 38 Cal.3d 413, 212 Cal. Rptr. 162, 696 P 2d 656 (1985).
45. *See "Smith* v. *Lewis*: Panel Discussion" (1976), 1 Legal Res. J. 7.
46. J.M. Husband, "Legal Malpractice - Erosion of the Traditional Suit Within a Suit Requirement" (1975), 7 Toledo L. Rev. 328 at 329-330.
47. *In re Boland*, 140 Wash. 148, 248 P. 399 at 402 (1926). *See also Ramp* v. *St Paul Fire & Marine Ins. Co.*, 254 So. 2d 79 (La. App. 1971), modified on other grounds, 269 So.2d 239 (1972), where attorneys were held liable for recommending a settlement for a small fraction of the client's claim when a basic knowledge of estate law would have revealed that the claim was entirely valid.
48. *Togstad* v. *Vesely, Otto, Miller & Keefe*, 291 N.W. 2d 686 (Minn. S.C. 1980).
49. *Alexander* v. *Small* (1846), 2 U.C. Q.B. 298.
50. *Taylor* v. *Robertson* (1901), 31 S.C.R. 615.
51. *Farquharson* v. *Weeks* (1910), 7 E.L.R. 547 (P.E.I.S.C.).
52. *Meakins* v. *Meakins* (1910), 2 O.W.N. 150 at 151 (H.C.).
53. *Central Trust Co.* v. *Rafuse*, [1986] 2 S.C.R. 147 at 208, 75 N.S.R. (2d) 109 at 141, 186 A.P.R. 109 at 141, 31 D.L.R. (4th) 481 at 524, 34 B.L.R. 187 at 237, 37 C.C.L.T. 117 at 167, 42 R.P.R. 161 at 211.
54. *Elcano Acceptance Ltd.* v. *Richmond, Richmond, Stambler & Mills* (1989), 68 O.R. (2d) 165 (H.C.).
55 *ibid.*, at 178.
56. *Re Solicitors* (1930), 66 O.L.R. 443, [1931] 1 D.L.R. 819 (S.C. App. Div.).
57. *Re Solicitor*, [1973] 1 O.R. 870 at 872 (S.C. Tax. Off.).
58. *See*, e.g., S. Campbell, "Toward an Improved Legal Education" (1978-79), 43 Sask. L. Rev. 81 at 110; J. Gulej, "Strategies for Successful Legal Writing and Researching", *Lawyers Weekly* (25 August 1989) 11. *Cf.* T.A. Woxland, "Why Can't Johnny Research?" (1989), 81 Law Lib. J. 451.
59. Amercian Bar Association. Task Force on Lawyer Competency. *Report and Recommendations.* (Chicago: A.B.A., 1979) at 9.
60. *See* note 3, *supra*, at 5-6.

Ken Whiteway, LL.B. (Queen's), M.L.S. (Western), is Reader Services Librarian, College of Law, University of Saskatchewan.