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Richard G. Coggin
Williamette University

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ATTORNEY NEGLIGENCE . . . A SUIT WITHIN A SUIT

RICHARD G. COGGIN*

THE law today, it would seem, has become, like most professions and sciences a creature of specialization. Not many years ago most practitioners of the law in this country would have considered the general field of negligence a somewhat limited subject. But today, even this small segment of the vast science of law must be divided and subdivided, each individual subdivision being guided by its own special set of rules. Because of this transition from the general to the special, any paper of this sort must be strictly limited in scope. Even the seemingly narrow subject of "attorney negligence" would be entirely too broad to be covered in anything short of book-length proportions, and, hence, this dissertation will be limited to only a single class of attorney negligence cases. Simply stated, it is here the intention to deal only with the problems arising in a suit against an attorney by his own client, where that attorney, through his own negligence or inaction, has allowed his client's cause of action to become barred by the statute of limitations.

Basically, two broad areas of inquiry will be discussed. First, there is the problem of whether such an action sounds in tort or is based upon the express or implied contract between the attorney and his client. As will be seen, the rules which have been applied to this problem are vague and ill-defined by the courts, and universal propositions of law are almost impossible to make because of the conflicts which exist.

Secondly, the pivotal question of damages will be discussed. How much should be assessed in damages? What should be the

* J.D., Willamette University, 1957; member of the Oregon Bar.

method of determining these damages? The answer to these questions must eventually involve a suit within a suit. That is, the client's original cause of action which has been lost must be, in effect, tried in the suit against the attorney.

I. Basis of Liability to the Client

Before any legal liability can attach, there must, of course, be a duty which the law will recognize. Whether this duty arises out of a contract between the parties, ex contractu, or whether such duty is imposed by the dictates of social policy, ex delicto, will be later discussed in detail. For the moment it will suffice to recognize that such a duty has long been recognized between the attorney and his client. *Imperitia culpae annumeratur*—want of skill is recognized as a fault. This Latin maxim states simply the principle long recognized by both the Roman civil law and the English common law.[1] As applied to the liability of attorneys, a leading English case[2] has aptly laid down the principle as follows: "Every person who enters a learned profession undertakes to bring to the exercise of it a reasonable degree of care and skill. He does not, if he is an attorney, undertake that at all events you shall gain your case . . . nor does he undertake to use the highest degree of skill. There may be persons who have higher education and greater advantages than he has; but he undertakes to bring a fair, reasonable and competent degree of skill."[3]

Generally, it may be stated that an attorney will be held liable to his client in either of two distinct situations:

(1) Where the defendant attorney did not possess the requisite amount of skill; or

(2) Where, although he did possess the requisite skill, he failed to exercise it in the particular case.

In this paper, it is primarily the latter of these two situations with which we will be dealing.

At the outset it should be noted that, from the doctrine laid down in *Lanphier v. Phipos*,[4] it may be concluded that the attorney defendant will be held only to an "ordinary degree of skill and

[1] Eddy, Professional Negligence 28-30 (1955).
[2] Lanphier v. Phipos, 8 Car. & P. 475 (1838).
[3] *Id.* at 479.
[4] 8 Car. & P. 475 (1838).

care." While language may be found indicating that the attorney will only be held liable for "gross negligence,"[5] such language is generally restricted to cases of early origin. The clear weight of authority today is that he will be liable for lack of "ordinary" care, skill and diligence.[6] This limitation has often been reiterated by the courts, using such language as "fair average of professional skill and knowledge,"[7] and "reasonable degree of care and skill—not answerable for every error or mistake,"[8] until it may now be concluded that the general rule will require of him only that degree of care and skill which is commonly possessed and exercised by attorneys in practice in the particular jurisdiction.[9]

Applying the above rules to the case in which the attorney has negligently allowed his client's action to be barred by the statute of limitations, however, it is clear that an attorney must be presumed to know and be familiar with the law and rules regulating the practice of actions which he undertakes to bring[10] and with well settled principles of law and rules of practice which are of frequent application in the ordinary practice of the profession.[11] Unquestionably, such a requirement of skill, knowledge and familiarity would extend to a thorough understanding of the local statute of limitiations and its application.

Ex Contractu or Ex Delicto

> "The fundamental difference between tort and contract lies in the nature of the interest to be protected. Tort actions are created to protect the interest in freedom from various kinds of harm. The duties of conduct which give rise to them are imposed by law, and are based primarily on social policy

[5] Pearson v. Darrington, 32 Ala. 227 (1858); Babbitt v. Bumpas, 73 Mich. 331, 41 N.W. 417 (1889); W. L. Douglas Shoe Co. v. Rollwage, 187 Ark. 1084, 63 S.W.2d 841 (1933); Mardis' Adm'rs v. Shackleford, 4 Ala. 493 (1842).

[6] Sjobeck v. Leach, 213 Minn. 360, 6 N.W.2d 819 (1942); Malone v. Gerth, 100 Wis. 166, 75 N.W. 792 (1898); Gabbert v. Evans, 184 Mo. App. 283, 166 S.W. 635 (1914); Brock v. Fouchy, 76 Cal. App. 2d 363, 172 P.2d 945 (1946).

[7] Kendall v. Rogers, 181 Md. 606, 31 A.2d 312 (1943).

[8] Sjobeck v. Leach, 213 Minn. 360, 6 N.W.2d 819 (1942).

[9] Davis v. Associated Indemnity Corp., 56 F. Supp. 541 (D.C. Pa. 1944); Kissam v. Bremerman, 44 App. Div. 588, 61 N.Y. Supp. 75 (1899); Rapuzzi v. Stetson, 160 App. Div. 150, 145 N.Y. Supp. 455 (1914); Roehl v. Ralph, 84 S.W.2d 405 (Mo. App. 1945); Armstrong v. Adams, 102 Cal. App. 677, 283 Pac. 871 (1929). See discussion of this rule in Glenn v. Haynes, 191 Va. 574, 66 S.E.2d 509 (1951), quoting Va. Code § 54-46 (Michie 1950). See comparable provisions in W. Va. Code c. 30, art. 2, §§ 11, 12, 13 (Michie 1955).

[10] Von Wallhoffen v. Newcombe, 10 Hun. 236 (N.Y. 1877).

[11] Davis v. Associated Indemnity Corp., 56 F. Supp. 541 (D.C. Pa. 1944).

> and not necessarily upon the will or intention of the parties. Contract actions are created to protect the interest in having promises performed. Contract obligations are imposed because of conduct of the parties manifesting consent, and are owed only to the specific individuals named in the contract."[12]

Such a basic difference in the interests to be protected may, at first, lead one to the hasty conclusion that tort and contract actions are always easily distinguishable. While this may be quite true in the majority of cases, as applied to the problem here under discussion, such a conclusion would be clearly erroneous. The dilemma with which the courts have been faced in dealing with problems of this nature may be best illustrated by the language in *Rich v. New York Central & H. R. Co.*, in which the court said:

> "We have been unable to find any accurate and perfect definition of a tort. Between actions plainly ex contractu and those clearly ex delicto there exists what has been termed a borderland, where the lines of distinction are shadowy and obscure, and the tort and the contract so approach each other and become so nearly coincident as to make their practical distinction somewhat difficult. A tort is described in general as a wrong independent of a contract. And yet, it is conceded that a tort may grow out of, or make a part of, or be coincident with, a contract, and that precisely the same set of facts, between the same parties, may admit of an action either ex contractu or ex delicto."[13]

Unfortunately or not, as the case may be, in the field of attorney negligence we are left somewhere in the midst of this borderland in an area of considerable confusion and conflict.

While it may be admitted that there is a certain degree of flexibility within this borderland—always of some advantage—there also exists a counterbalance of confusion and uncertainty with which this type of problem has so long been associated.

Gravamen and election of remedies.

Since there appears to be authority which would allow cases of this nature to be brought either in tort or contract, it becomes important at the outset of any such action to determine what theory the plaintiff has adopted in order to choose among the conflicting rules of law the proper one for application.

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[12] PROSSER, TORTS § 81 (2d ed. 1955).
[13] 87 N.Y. 382, 390 (1882).

The first step in making such a determination would, of course, be a study of the complaint to discover the gravamen disclosed therein. As a general rule it may be stated that the substance of the complaint will control the action brought, and the language used in the complaint will generally be determinative of this question.[14] In some cases, however, even a thorough study of the "substance" of the complaint will not be completely indicative of the plaintiff's theory. In cases of such ambiguity, it has been held that the prayer for relief may be looked to for clarification.[15]

A more difficult problem than mere determination of the gravamen of the complaint is posed in cases where inconsistent rules of tort and contract are available, such as in cases *involving* the statute of limitations. This problem raises the question of whether or not the plaintiff will be allowed an election of remedies as to these inconsistent rules, or whether he is to be strictly bound by the language of his pleadings. Although few cases have dealt directly with this question, it would appear that election will be allowed where only matters of adjective law are involved.[16] Similarly, freedom of election has been allowed even as to substantive rules where only pecuniary or property rights and interests are at issue. Such was the holding in *Stimpson v. Sprague* in which the court said:

> "If a man undertake an office, employment, trust or duty, he thereby, in contemplation of law, impliedly contracts with those who employ him to perform that with which he is entrusted with integrity, diligence and skill; and if he fails so to do, it is a breach of contract, for which the party may have his remedy by an action on the case, or, in most cases, by an action of assumpsit."[17]

In this case, survival of an action was allowed against the estate of a deceased attorney who had failed to file an action in time, thus allowing the case to be barred.

The importance of determining whether the action against the attorney is ex contractu or ex delicto is, of course, primarily concerned with the application of inconsistent rules of law. While this problem could conceivably present itself in a variety of situations, *e.g.*, determination of proper jurisdiction, or which conflict of laws

[14] Sherger v. Union Nat. Bank, 138 Kan. 239, 25 P.2d 588 (1933).
[15] Sandgren v. West, 9 Wn. 2d 494, 115 P.2d 724 (1941).
[16] Micheletti v. Moidel, 94 Colo. 87, 32 P.2d 266 (1934).
[17] 6 Me. 470, 471 (1830).

rule should apply, or the survival[18] or assignability of the action, the greatest amount of dispute has arisen in cases involving (1) the applicable statute of limitations, and (2) the proper measure of damages. Consequently, these two areas will be discussed in some detail.

Statute of limitations.

One of the most important, and surely one of the most litigated problems arising in cases lying within the borderland between tort and contract, is the problem of which statute of limitations is applicable to the action against the attorney. The courts have adopted a variety of theories. The importance of making the distinction becomes obvious when it is remembered that, typically, the statute of limitations in tort actions is much shorter than that limiting contract actions.[19] Hence, it is of the utmost importance whether the plaintiff will be allowed to elect the contract theory and thereby save his action which may have been barred by the shorter limitation on tort actions.

From the cases reviewed, it would appear that some jurisdictions will freely allow the plaintiff to make such an election. Illustrative of this view is a Washington case[20] in which the court refused to bar the action brought against the attorney by use of the shorter tort statute of limitations. In this case the defendant attorney had "negligently" allowed his client, the plaintiff, to witness a will in which the plaintiff was a named beneficiary, thereby causing him to lose his legacy. The court stated that it had long been the rule that such actions against attorneys were "based" on breach of contract, and that therefore the contract statute of limitations was applicable. It should be noted, however, that even in jurisdictions recognizing this liberal rule, if the pleadings disclose only an action in tort, with no reference whatsoever to the contract between the parties, the courts are apt to deny such election.[21]

In many states the statute of limitations provides specifically for cases of "malpractice" and in these states another problem has become apparent. Since these malpractice statutes generally apply

[18] *Ibid.*

[19] *E.g.,* ORE. REV. STAT. § 12.080 (six year limitation on contract actions), and § 12.110 (two year limitation on tort actions) (1955).

[20] Schirmer v. Nethercott, 157 Wash. 172, 288 Pac. 265 (1930).

[21] Bland v. Smith, 197 Tenn. 683, 277 S.W.2d 377 (1955); 53 C.J.S., *Limitations of Actions* 1036 (1948).

the shorter tort period of limitation, the problem is whether attorney negligence cases may properly be characterized as malpractice, thus denying the plaintiff any possibility of election.

Typical of the states which do characterize such cases as malpractice is Ohio. In *Galloway v. Hood*,[22] a client sued his attorney for failure to prosecute a workmen's compensation claim until it was barred by the Ohio statute. The defendant demurred to the complaint on the ground that it charged malpractice and was thus barred by the short limitation period. The trial court sustained the demurrer, and the appeal court upheld this decision, relying on long established Ohio precedent as to such a characterization.[23]

Completely opposed to the Ohio view, the courts of the State of New York, which also has a malpractice statute of limitations, have expressly refused to characterize actions against attorneys as malpractice actions. In the leading New York case on this subject, *O'Neill v. Gray*,[24] the defendant attorney demurred to a complaint charging him with failure to make an amendment of his client's complaint, resulting in a dismissal. Basis of this demurrer was substantially the same as in *Galloway v. Hood;* that the complaint charged malpractice and was therefore within the purview of that statute of limitations. In overruling this demurrer, the court held that such a statute (malpractice) applied only to wrongs to the person, and did not comprehend injuries to property caused by an attorney's negligent conduct of litigation for his client, the court, per Augustus Noble Hand, J., stating: "The present action is either for breach of the contract of retainer or for injury to property. In either case . . . the period of limitation is six years."[25]

Some mention should be made of still another type of jurisdiction in which this problem is of no importance, at least so far as the statute of limitations is concerned. An example is California, in which the statute limits to two years "an action upon a contract, obligation or liability not founded upon an instrument of writing."[26] A number of California decisions have held that the word "liability"

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[22] 69 Ohio App. 278, 43 N.E.2d 631 (1941).

[23] Long v. Bowersox, 8 Ohio N.P. (n.s.) 249 (1909); McWilliams v. Hackett, 19 Ohio App. 416 (1923).

[24] 30 F.2d 776 (2d Cir. 1929).

[25] *Id.* at 779.

[26] CAL. CODE CIV. PROC. § 339 (1955).

as used in this statute refers to tort liability,[27] thus allowing the same period of limitation for both tort cases and those arising out of implied contract.

Measure of damages . . . . election.

While the mode of proving damages and problems relating thereto will be discussed fully in the second part of this paper, it is well to consider for a moment whether the measure of damages allowed will be subject to the plaintiff's election in borderline cases. Since the damages allowable in tort cases are generally much more favorable than those allowed in contract actions, this question may, in some cases, be of the utmost importance.

In tort actions, the general rule is that the measure of damages will be that which will afford complete compensation to the injured party,[28] limited only by the vague and unsatisfactory rule of proximate cause.[29]

In contract actions, however, the limitations on recovery are generally much more stringent. Since such actions rest upon an agreement between the parties, it has long been held that, in contract cases, the damages will be limited to those which were within the contemplation of the parties at the time of the making of the contract.[30] Later cases have extended this doctrine even more, limiting damages, even though within the contemplation of the parties, to those as to which there was at least tacit assent on the part of the defendant to be bound.[31]

Actually, whether such an election will be allowed in attorney negligence cases must remain a matter of speculation, since no cases have been found exactly in point. However, there appears no valid reason why the broad rules previously cited[32] allowing freedom of election in cases involving only pecuniary or property losses should not here apply. Further, the courts have shown a marked tendency to be lenient in this regard as to other cases in the border-

[27] Italiani v. Metro-Goldwyn-Mayer Corp., 45 Cal. App. 2d 464, 114 P.2d 370 (1941); Rubino v. Utah Canning Co., 123 Cal. App. 2d 18, 266 P.2d 163 (1954).

[28] 25 C.J.S., *Damages* § 80 (1941).

[29] See Andrews' opinion in Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928).

[30] Hadley v. Baxendane, 9 Exch. 341, 156 Eng. Rep. 145 (1854).

[31] Globe Refining Co. v. Landa Oil Co., 190 U.S. 540 (1903); Hooks Smelting Co. v. Planters' Compress Co., 72 Ark. 275, 79 S.W. 1052 (1904).

[32] Stimpson v. Sprague, 6 Me. 470 (1830).

land between tort and contract, such as cases involving breach of warranty[33] and cases based upon the contract of a common carrier[34] in which tort damages are allowed although the action may be apparently in contract.

Contributory negligence of the client.

Although the defense of contributory negligence of the client is seldom an important factor in attorney negligence cases for the simple reason that, as a rule, the entire responsibility for conducting the original litigation is entrusted to the defendant, the fact that the courts have occasionally held that some fault on the part of the plaintiff was sufficient to bar recovery in the present action indicates that these cases should be at least considered.

Examples of contributory negligence on the part of the client which may bar his action include cases in which the client failed to supply his attorney with vital information necessary to the defense of his case,[35] and where the client had misrepresented facts regarding a particular defense available.[36] Also, it has been held that while the acquiescence of the client in the actions of his attorney would not ordinarily bar recovery, where the client was a skilled attorney himself, fully apprised of all of the issues involved, he could not recover for pleading errors resulting in loss of his action.[37]

Regarding the defense of contributory negligence, it should be kept in mind that the nature of the action, ex contractu or ex delicto, becomes an important factor. While evidence of such fault on the part of the plaintiff in a contract case may go in mitigation of damages to some extent, in the majority of jurisdictions contributory negligence of the plaintiff in a tort action will completely bar recovery.

II. Proof of Damages . . . A Suit Within a Suit

The final, and probably most important, question which arises in cases in which an attorney allows his client's action to be lost is the problem of how damages are to be ascertained. While it may

[33] Ryan v. Progressive Grocery Stores, 255 N.Y. 388, 175 N.E. 105 (1931).
[34] Gillespie v. Brooklyn Heights R.R., 178 N.Y. 347, 70 N.E. 857 (1904).
[35] Salisbury v. Gourgas, 51 Mass. 442 (1845).
[36] Rapuzzi v. Stetson, 160 App. Div. 150, 145 N.Y. Supp. 455 (1914).
[37] Carr's Ex'r v. Glover, 70 Mo. App. 242 (1897).

seem a simple matter to merely determine the amount which would have been recovered in the original action, applying this amount to the present case as the actual damages suffered, such a method is not without problems of its own.

Liquidated and unliquidated claims.

As a general rule, it may be stated that in actions where an attorney has allowed his client's cause of action to be lost, the measure of damages in a subsequent action against the attorney for his failure will be the value of the lost claim.[38]

Where such original claim was "liquidated," such as where the attorney failed to bring an action on a note,[39] little trouble will be encountered in determining the amount lost.

However, it is immediately apparent that where the original claim was unliquidated, such as where a personal injury action was barred,[40] much more serious questions of proof arise. In this latter case, many objections have been raised to the "suit within a suit" method of determining damages.

The major objection which has been raised to such a mode of proof is that it will require the present jury to "speculate" as to the amount of damages which the first jury, had it heard the case, would have assessed,[41] thus bringing the question within the familiar "rule of certainty":

> "The damages recoverable in any case must be susceptible of ascertainment with a reasonable degree of certainty, or, as the rule is sometimes stated, must be certain both in their nature and in respect of the cause from which they proceed. Damages which are uncertain, contingent or speculative cannot be recovered in actions ex contractu or actions ex delicto."[42]

It is submitted that this is not a valid objection to such a method of proving damages for the simple reason that it is entirely unnecessary for the present jury to speculate as to what the former

[38] Lally v. Kuster, 177 Cal. 783, 171 Pac. 961 (1918); Livingston v. Cox, 6 Pa. 360 (1847); Lamprecht v. Bien, 125 App. Div. 811, 110 N.Y. Supp. 128 (1908).

[39] Mardis Adm'rs v. Shackleford, 4 Ala. 493 (1842).

[40] Hammons v. Schrunk, 63 Ore. Adv. Sh. 499, 305 P.2d 405 (1956), *rev'd on other grounds* (sheriff negligently failed to serve process).

[41] *Ibid.;* Kruegel v. Porter, 106 Tex. 29, 155 S.W. 174 (1911); Patterson & Wallace v. Frazer, 79 S.W. 1077 (Tex. Civ. App. 1904).

[42] 15 Am. Jur., *Damages* § 20 (1938).

jury would have done. As will be later seen, the burden of proof in such cases rests on the plaintiff, and there appears no reason why all of the issues relevant cannot be presented directly to the present jury for their exclusive determination. No substantial right of the defendant would be violated by such a course of action.

Further, considerations of policy would appear to support this view. In addition to the long standing boast of Anglo-American law that "no wrong shall be without a remedy," the risk here involved is of a sort which may be easily spread through the use of so-called "malpractice" insurance. Such insurance is presently available at a relatively low unit cost, and this would certainly seem to be a more equitable allocation of the cost of attorney negligence than the alternative suggested by the opposition—preventing recovery entirely because of remoteness.

A more valid objection to the use of the suit within a suit method of ascertaining damages is the fact that the attorney defendant will probably not have at his disposal the evidence which would have been offered by the opposing party in the original action. Again, however, it is submitted that it is more equitable to spread the risk through the use of low-cost insurance rather than deny recovery to the innocent party.

Pleadings and burden of proof.

Cases involving pleading requirements and placement of the burden of proof leave little doubt that the courts generally approve of the theory of a suit within a suit in actions against negligent attorneys.

In *Johnson v. Haskins,*[43] an action was brought against an attorney who had failed to file a death action in behalf of his client. In upholding the lower court's sustaining of the defendant's demurrer to the complaint, the court said: "In actions such as this, it appears well settled that the plaintiff's petition must state facts sufficient to show among other things, plaintiff had a good cause of action against whom plaintiff originally asserted a claim."[44]

In *Piper v. Green,*[45] a directed verdict for the defendant was affirmed on the basis that the plaintiff had failed to prove that the

[43] 119 S.W.2d 235 (Mo. 1938).
[44] *Id.* at 236.
[45] 216 Ill. App. 590 (1920).

railroad, the original defendant, had been negligent and that the plaintiff had himself exercised due care.

> "It was incumbent upon appellants to allege and prove facts showing that they placed in appellee's hands a valid, subsisting claim against a solvent party, and that such claim was lost by the negligence or misconduct of the appellee. *These were material elements, necessary to be alleged and proved.*"[46]

The only reasonable conclusion which can be drawn from these and other cases reviewed[47] is that the burden is on the plaintiff to prove that he had a good cause of action in the original suit, and that failure to so allege and prove will prove fatal to the present action. Such proof can be made in only one way, namely by, in effect, trying the issues of the original action in the present trial—by a suit within a suit.

Admissible evidence.

Further proof that the courts have unanimously accepted the suit within a suit method of proving damages is afforded in cases dealing with the admissibility of evidence of the former cause. In *McLellan v. Fuller*,[48] the attorney defendant had failed to give certain notice required by statute, resulting in dismissal of his client's personal injury action. Evidence was admitted on the question of whether the plaintiff could have maintained his action in the prior litigation, and the jury was charged that ". . . the measure of damages is that which the plaintiff might have recovered in the former action against the company."[49] On appeal the judgment for the plaintiff was affirmed, the court refusing to rule that the instruction was an erroneous statement of the law.

An even less oblique treatment of the problem was given in the case of *Lamprecht v. Bien*,[50] in which the trial court excluded plaintiff's evidence that he had a good cause of action in the prior case. The principal reason given was that it was improper to try

[46] *Id.* at 593 (emphasis supplied).
[47] Goldzier v. Poole, 82 Ill. App. 469 (1899); Roehl v. Ralph, 84 S.W.2d 405 (Mo. App. 1945); Vooth v. McEachen, 181 N.Y. 28, 73 N.E. 488 (1905); Lamprecht v. Bien, 125 App. Div. 811, 110 N.Y. Supp. 128 (1908).
[48] 226 Mass. 374, 115 N.E. 481 (1917).
[49] *Id.* at 379, 115 N.E. at 482.
[50] 125 App. Div. 811, 110 N.Y. Supp. 128 (1908).

in this action the issues of the earlier litigation. In reversing the trial court, the appellate division remarked: "The plaintiff, . . . being required to show the actual damage suffered, was deprived of the opportunity to do so by the exclusion of the only evidence available for that purpose. Such exclusion was error."[51]

With respect to evidence of damages in the former action, it is interesting to note that proof of exemplary as well as compensatory damages will generally be admitted for the jury's consideration. Such was the holding in *Patterson & Wallace v. Frazer,*[52] in which the former action involved slander to the client. In *Kruegel v. Porter,*[53] another slander case, a similar result was reached.

Ability of the original defendant to respond in damages.

Universally it has been held that the mere fact that the plaintiff would have recovered a judgment in the first action is not sufficient, in and of itself, to hold the attorney liable. In addition to proof that a judgment would have been rendered against the former defendant, it is necessary to allege and prove that he would have been able to respond in damages.[54] Thus it was held in *Piper v. Green*[55] that the plaintiff must prove that the original defendant was *solvent,* and that failure to so prove would bar recovery. The actual amount of the loss in the former action is within the province of the jury,[56] and it has been held error to instruct, as a matter of law, that mere proof of negligence on the part of the attorney would entitle the plaintiff to recover the whole amount of the debt for which the former suit was brought.[57]

The proper method of proving such ability to pay has, itself, raised some interesting questions. For example, it has been held that evidence that the former defendant was covered by liability

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[51] 110 N.Y. Supp. at 129.
[52] 79 S.W. 1077 (Tex. Civ. App. 1904).
[53] 106 Tex. 29, 155 S.W. 174 (1911).
[54] King v. Fourcht, 47 La. Ann. 354, 16 So. 814 (1895); Fitch v. Scott, 4 Miss. 314, 34 Am. Dec. 86 (1834).
[55] 216 Ill. App. 590 (1920).
[56] W. L. Douglas Shoe Co. v. Rollwage, 187 Ark. 1084, 63 S.W.2d 841 (1933).
[57] Eccles v. Stephenson, 6 Ky. 517 (1814).

insurance is admissible, despite the fact that any mention of such insurance in the original action would have been grounds for a mistrial.[58]

In conclusion, it must be said that no authority has been found which holds that damages in attorney negligence cases such as these should be denied as being too remote or speculative. On the contrary, the decided cases have held that as a matter of both precedent and equity, full recovery should be allowed of any loss actually sustained by the innocent client.

[58] Hammons v. Schrunk, 63 Ore. Adv. Sh. 499, 305 P.2d 405 (1956).