CIVIL LIABILITY OF LAWYERS FOR DEFICIENCY IN SERVICES: A CRITICAL ANALYSIS

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Abstract

Lawyers like other professionals invite liability for deficiency in service. Such liability may arise under contract law, tort law or the Consumer Protection Act, 1986. They owe a primary duty to assist the courts in the administration of justice, which prevails over their duty of care towards the clients. Liability of lawyers under contract law arises for breach of contractual obligations either express or implied. Under tort law, the liability arises for failure to exercise reasonable care and skill in rendition of their professional services. The standard of care that is expected of a lawyer is that of a reasonably competent lawyer. An option is given to the client either to invoke the jurisdiction of civil courts under contract law, tort law or the consumer forae under the Consumer Protection Act, 1986. Liability of lawyers for any deficiency in service is not absolute. Law has recognized certain exceptions to this rule. Thus, the interest of clients and lawyers are properly balanced.

I Introduction

LAWYERS PRACTICE a learned profession.[1] As a part of their profession, they render service to the clients with respect to both litigitious and non-litigitious matters. They must render professional services in compliance with some legal requirements. Accordingly, they should obtain

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1. Apart from lawyers, doctors, architects, engineers, surveyors and chartered accountants also practice learned professions which must possess the following characteristic features:

(i) Acquisition of knowledge, theoretical as well as practical, in any discipline or science.
(ii) Application of the knowledge so acquired for the welfare of the society.
(iii) Supervision of professional conduct by a peers body.

consent and, informed consent, of a client and exercise an amount of care that a reasonably competent lawyer would have exercised under similar circumstances. In addition, they owe a primary duty to assist the courts in the administration of justice, which supersedes their professional duties towards their clients. In effect, while determining their liability for deficiency in service, courts take note of this well established proposition of law.

II Liability of lawyers under contract law

Like other professionals engaged in a learned profession, the relationship between a lawyer and client is contractual in nature.[2] The extent of a lawyer's obligation towards his client for breach of contract depends on the terms of the contract, express or implied.[3] Generally, a lawyer renders his service with respect to legal matters. He is not bound to give any advice regarding any business matter.[4] But, if he does so in accordance with the unequivocal instructions by the client, it will be at his peril, if the latter suffers any loss acting on such advice. It follows that a lawyer may render his advice in any business matter.

Sometimes, time may be an essence of the contract which needs to be performed within the time expressly stipulated or inferred from the circumstances. If a lawyer fails to perform his obligation within the strict time limits imposed by the circumstances, he invites liability for the same. In *Stirling* v. *Poulgrain,*[5] a client instructed the lawyers to transfer two forms to a trust with an intention of reducing the estate duty. The revenue authority confirmed that if the same could be effected within a particular date, estate duty could be reduced. But the lawyers failed to do so. In effect, there was an increase in the estate duty to be paid. The lawyers were held liable for breach of contract.

Sometimes, a client may seek advice of a lawyer with respect to a future transaction. On tendering the advice sought, the duty of the lawyer

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2. It is the execution of a retainer by a client, either express or implied, that creates a contract for service between him and a lawyer. See Lord Hailsham of St. Marylebone (ed.), XLIV Halsbury's *Laws of England* 61-63 (Butterworths, London, 4th ed., 1983).

3. *Midland Bank Trust Ltd.* v. *Hett, Stubbs & Kemp* [1978] 3 All ER 571 (ChD).

4. *Yager* v. *Fishman & Co.* [1944] 1 All ER 552 (CA). In this case, the contention of the clients that lawyers failed to advise them to determine the lease instead of keeping it in existence to find a suitable tenant did not cut ice with the Court of Appeal.

5. [1980] 2 NZLR 402.

ceases. He is not under an obligation either to remind the client or to repeat the advice unless he has undertaken that duty. There is always an implied obligation on the part of a lawyer to exercise reasonable care and skill,[6] which is assessed through negligence standard.

In *Pilbrow* v. *Pearless De Rougement & Co.*,[7] one P contacted a firm of solicitors over telephone. Thereafter, he went to the firm where the receptionist guided him to a person who was not a solicitor. Even then, the required legal advice was tendered by him. Later, the client came to know that the person who tendered the legal advice was not a solicitor. A question arose whether the firm could be allowed to recover the cost. The firm was not allowed to recover the cost. The court observed that the situation was not one which could be characterized as defective performance of a contract for legal services but as non-performance of a contract for legal advice by a solicitor. Accordingly, it was held that P was entitled to treat the contract as discharged by breach.

An advocate is bound to do what he has agreed to do, otherwise he invites liability. In *S.A. Ahmed* v. *Poonam A. Shah*,[8] the client engaged an advocate for filing a suit for specific performance. But the advocate filed a suit for injunction. The client paid him Rs. 62,125/- towards the court fee even though the advocate had remitted only Rs. 25/- to the court. In addition, she had paid professional fee, litigation expenses and a further sum of Rs. 90,000/-. It was held that there was deficiency in service. The advocate was directed to refund the entire amount that he had received from the client. In addition to that, he was directed to pay the cost of the complaint and damages for mental agony to the client.

In *Akhilesh Vijayvergiya* v. *Sterling Computers Ltd.*,[9] it was held that *vakalatnama* executed by the client should not be used as a shield to cover up unauthorized acts.

Duty to enter into a contract: Persons undertaking a public avocation like common carriers and inn-keepers are under an obligation to enter into a contract with a person willing to do so.[10] This obligation has been extended to an advocate who cannot refuse a brief in the absence of

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6. *Nocton* v. *Ashburton* [1914] AC 932 at 956 (HL).
7. [1999] 3 All ER 355 (CA).
8. II 2009 CPJ 367.
9. III 2008 CPJ 235 (NC).
10. At common law, a common carrier is under an obligation to carry the goods offered to him for a reasonable reward provided he has room. See Raoul Colinvaux (ed.), *Carvers Carriage by Sea* 4 (Stevens and Sons, London, 13th ed., 1982).

justifying circumstances. In this regard, the High Court of Allahabad in *Gokul Prasad* v. *Emperor*,[11] observed:[12]

> It is very important that men at Bar should understand that they are members of a public profession, they engage and undertake to act for anybody who fulfills certain conditions. Therefore if a client comes to them with proper instructions and prepared to pay a fair and proper fee and invites them to undertake a case of a kind which they are accustomed to do and if they refuse … should be punished as such.

Refusal to accept a brief can be justified only under limited circumstances.[13] In *Muralidharan Nair* v. *N.J. Antony*,[14] the High Court of Kerala observed:[15]

> It may be possible for him to reject a brief in the following cases -
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> (i) When he is physically disabled from appearing for the client.
> (ii) When he may not be available to present the case in court.
> (iii) Where his training in the special branch limits his usefulness in other branches.
> (iv) Where the client is not prepared to pay him his reasonable fees.
> (v) Where he confines his practice in some courts and in some places only.
> (vi) Where he is likely to be made as a witness in the same case.
> (vii) When he has been consulted by the other side.

Termination of the contract: A lawyer can terminate a retainer for justifiable causes after giving reasonable notice to his client.[16] An unjustifiable termination invites liability.[17] A client may at his will terminate

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11. AIR 1930 All. 262.

12. *Id.* at 263.

13. A common carrier can refuse goods, if they are not of the class he carries or they are dangerous or of exceptional size or expose the carrier to undue risk or of value disproportionate to their safety measures or they are tendered at unreasonable time or are inadequately packed. See John Morris (ed.), 2 *Chitty on Contracts* (Sweet and Maxwell, London, 13th ed., (2008).

14. 1985 KLT 1.

15. *Id.* at 6.

16. Termination of retainer for causes like refusal of client to bear the costs incurred or failure to pay the costs within a reasonable time are justifiable causes. See the Solicitors Act, 1974 (English), s. 65(2).

17. The Contract Act 1872, s. 73.

a retainer, if the lawyer has failed to discharge his obligation.[18] In such a situation, the latter has to blame himself for the termination of the contractual relationship and, accordingly, he will invite liability for the same.

Exclusion of liability: It is obvious that a contractual relationship exists between a lawyer and client. A question arises as to whether a lawyer can exclude his liability or limit his liability by inserting an exclusion clause in the contract. Divergent opinions are found in different jurisdictions.[19] In some jurisdictions, they are declared as void.[20] A limit on the liability is permitted in some jurisdictions, but not total exemption.[21] Exclusion to the extent of insurance cover is permitted in some jurisdictions though such an agreement is inconsistent with the professional duties of a lawyer.[22] Exclusion of liability is permitted for minor negligence in some jurisdictions. But exclusion is not permitted for gross negligence or deliberate default.[23]

English law recognizes such exclusion clauses, provided the following conditions are fulfilled:[24]

(i) An express contractual term is incorporated into the retainer.

Or

(ii) On reliance of the notice to the same effect, the attention of the client is drawn to it before execution of the retainer.

(iii) The words used are unambiguous.

However, if any dispute arises as to the reasonableness of such clauses, they are subject to legal scrutiny.[25]

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18. In *Re Wingfield and Blew* [1904] 2 ChD 665 at 684.

19. Michael Gill, "Professional Liability and Protection of Lawyers", 61 *ALJ* 552 at 560 (1987).

20. This rule exists in South Africa, Japan, the United States and Canada, *ibid.*

21. *Ibid.*

22. *Ibid.* Austria is an example.

23. *Ibid.* For example, South American countries.

24. Rupert M. Jackson & John L. Powell, *Professional Negligence* 27 (Sweet & Maxwell, London, 2nd ed., 1987); see also the Unfair Contract Terms Act (English), 1977, ss. 2(3) and 11. In India also, the same position exists, see *Skypak Agency* v. *K.K. Pillai*, I 1995 CPJ 10 (Ker. SCDRC).

25. *Ibid.*

III Liability under tort law

The tortious liability of a lawyer for deficiency in service arises independent of a contract.[26] He is bound to exercise reasonable care and skill, which is expected from a reasonably competent lawyer.[27] It is neither the highest nor the lowest degree of the care. It cannot be denied that he should have knowledge of law. As law is an ocean, it is humanly impossible for any lawyer irrespective of his experience to know all the laws. In this regard, in *Mantriou* v. *Jefferies*,[28] the court observed:

> No attorney is bound to know all the law. God forbid that it should be imagined that an attorney or a counsel or even a judge is bound to know all the laws.

But he is bound to know the substantive laws, statutes and procedural laws pertaining to his sphere of practice, which a reasonably competent lawyer ought to have known failing which he invites liability for negligence. In *Fletcher & Son* v. *Jubb & Helliwel*,[29] a lawyer failed to initiate an action for personal injury against the local authority, within the period of limitation as contemplated under the Public Authorities Act, 1893. In effect, the action was dismissed as barred by limitation. The lawyer was held guilty of negligence and the client was allowed to recover.

It should be noted that when a client entrusts a case to a lawyer, the former does so reposing confidence in latter's knowledge of law regarding the same. It is unreasonable on the part of a lawyer to plead ignorance. If he is ignorant of a particular point of law involved in a case which he has accepted, he must take steps to ascertain it. He is bound to know how and where to ascertain the legal provisions pertaining to his sphere of practice, which he ought to have known. If the circumstances are such that a reasonably competent lawyer would have put himself into research to ascertain the same, a lawyer will invite liability for failing to do so. In *Bannerman Brydone Folster & Co.* v. *Murray,*[30] in reality an option was a clog on redemption but the lawyer had failed to take note of it. This

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26. R.A. Percy (ed.), *Charlsworth on Negligences*, para 1006 (Sweet & Maxwell, London, 1977).

27. *Ibid.*

28. (1895) 2 C & P 113, as quoted in J.P. Eddy, *Professional Negligence* 28 (Stevens and Sons Ltd., London, 1955).

29. [1920] KB 275.

30. [1972] NZLR 411.

topic is dealt in every book on real property. But the court, taking into consideration the facts of the case, held that no reasonably competent lawyer would have been alerted to make necessary research on this point.

There is an exception to the above rule that when a lawyer professes to have a specialized knowledge in a particular branch of law, a client can expect a higher standard of care than that of a reasonably competent lawyer.[31]

The negligence of a lawyer must be ascertained with reference to the general practice of the profession which is considered as the standard of care and skill. In *Simmons* v. *Pennington,*[32] certain premises were subjected to a restrictive covenant that they should be used only for residential houses. But in breach of the covenant, they were regularly used for business purposes. According to the sale particulars, the property was described as one free from restrictive covenants and could be used for business purpose. The lawyers were acting for the sellers. On enquiry by the purchasers, they revealed the existence of restrictive covenant. In effect, they refused to purchase the property. It was held that the lawyers had acted in accordance with the then existing professional practice. It is obvious from the decision that to determine the negligence of a lawyer regard must be had to the prevailing professional practice at the time of commission of the alleged act of negligence.

The general professional practice as providing the necessary evidence of the standard of care will not be considered as a yardstick to determine the question of negligence in some unusual circumstances. In *Edward Wong Finance Co. Ltd.*, v. *Johnson Stokes & Masters*,[33] the plaintiffs agreed to lend a sum of $ 13,55,000 to the purchasers of a part of a factory to be secured by a mortgage. Their lawyers handed over the money to the sellers' lawyers. It was agreed that the sellers lawyers would discharge an existing mortgage on the property and effect a transfer of property to the purchaser within 10 days. But sellers' lawyers left for Hong Kong with the money that the existing mortgage on the property remained undischarged and the plaintiff's intended charge over the property did not materialize. The general practice in Hong Kong with respect to conveyancing transactions was the handing over of money by the purchasers or mortgagee's lawyers to the sellers lawyers to ensure

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31. *Benson* v. *Thomas Eggar & Son*, Dec.2, 1977, unreported, quoted in Rupert M. Jackson and John L. Powell, *supra* note 24 at 212.

32. [1955] 1 All ER 240 (CA).

33. [1984] AC 296 (CA).

conveyance of property within the prescribed period of time. The law society had drawn the attention of the lawyers towards the obvious risk of misappropriation. It should be noted that the transaction involved a very huge amount of money, where the probability of embezzlement was too high. Under these special circumstances, it was held that the standard of care of sellers lawyers fell short of a reasonably competent lawyer, inspite of the fact that they acted in accordance with the existing professional practice.

Breach of duty amounting to negligence: Breach of duty on the part of a lawyer may arise from violation of contractual or tortious obligation. In most of the circumstances, it is ascertained on the yardstick of a reasonably competent lawyer. In the past, under the following circumstances, courts have held the lawyers guilty of breach of duty.

Failing to give advice: Generally a client approaches a lawyer for advice on legal matters. It implies a proper and complete advice. Incomplete advice is as good as absence of advice. In *Mathew* v. *Maughold Life Assurance Co. Ltd.*,[34] a client approached the lawyers to seek their advice on a scheme of reduction of estate duty. However, they failed to inform her that she could exercise a certain option provided her husband survived for a period of seven years. In effect, she could not exercise that option. Accordingly, she was deprived of the benefit of reduction in estate duty liability. The lawyers were held guilty of negligence.

Sometimes, the liability of a lawyer to tender advice arises even though the client had not asked for it. In *Stronghold Investments Ltd.* v. *Renkema,*[35] the lawyers were acting on behalf of the purchasers of a property. They failed to advise the purchasers of a property about the formalities to be complied with for the transfer of fire insurance policy. As a result, the purchaser remained unsecured. Subsequently, fire occurred and the purchaser sustained loss which could not be recovered from the insurer. It was held that the lawyers were bound to tender the required advice, even though the purchasers had not specifically asked for that and they were held guilty of negligence.

Giving wrong advice: A lawyer is under an obligation to give correct advice when law on that point is unambiguous. In *Otter* v. *Church*

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34. [1985] 1 PN 142, as quoted in Rupert M. Jackson and John L. Powell, *supra* note 24 at 204.

35. [1984] 7 DLR 427.

Adam's Tatham & Co.,[36] the plaintiff, guardian of a minor aged 18 years, consulted the defendant lawyer to ascertain the nature and extent of interest of the latter with respect to a property fallen on him. The lawyer advised that on attaining majority, the boy would get an absolute interest in the property. But in fact it was an equitable interest in the tail and the remainder was to devolve upon his uncle. The boy, who was then in military service in India, died. The correct position of law was that only execution of disentailing assurance would have perfected his title. The lawyer had advised that the transfer of the property could be postponed until his return to England. The minor lost his interest in the property as a result of the wrong advice. The lawyer was held guilty of negligence on the ground that the law on that point was clear. It follows that if law on a point is not clear, a lawyer cannot be held liable and he can take the benefit of error of judgment.

Failure to inform important matters coming to his knowledge: A lawyer in the course of representing a client may collect a bulk of information. All these matters may not be relevant for the purpose of the retainer. He must ascertain the relevant matter and bring it to the notice of his client. In *Lake* v. *Bushby,*[37] the lawyer was acting on behalf of a vendor and purchaser of a property. It came to his knowledge that there was no planning permission for the bungalow, which was constructed on that property. There was the risk of the planning authority pulling down that building at any time. It was held that omission on the part of the lawyer to divulge the information to the purchaser amounted to negligence.

The effect of construction of a building without planning permission is that the purchaser may find it difficult to sell it at a later stage or even if he succeeds in selling it, he will be compelled to sell it for a reduced price. A reasonably competent lawyer ought to know this consequence. In a situation contemplated above, the proper course of action is to inform the risk to the purchaser so that he can decide whether to purchase the property or not. That is, if the lawyer obtains the informed consent of the client, he will be relieved from liability and the client has to blame himself for the loss.

Failure to make necessary enquiries: A lawyer must act upon the express or implied instruction of a client. If such instructions warrant, he

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36. [1953] 1 ChD 280.
37. [1949] 2 All ER 964 (KB).

is bound to make necessary enquiries requested for. Law may also impose such an obligation. In *Goody* v. *Baring,*[38] the lawyer was acting on behalf of a purchaser of a residential building. The first and third floors were let to the tenants. The rent charged for them was higher than the standard rent that could be charged under the Rent Restrictions Act. The tenants were allowed to recover the extra rent that they had paid from the purchaser. It was held that the lawyer was negligent for not making necessary enquiries to find out the standard rent.

If there are express or implied instructions on the part of the client as to the enquiries to be made, they must be made. But in the absence of such instructions, it is left to the judgment of the lawyer to make such enquiries that a reasonably competent lawyer would have made under similar circumstances.

Failure to inform the progress of the transactions: A lawyer is bound to inform the client about the progress of the transactions. In addition, wherever necessary, he is required to seek further instruction from the client. In *Groom* v. *Crocker*,[39] the court observed:[40]

> It is an incident of duty that the solicitors shall consult with his client in all questions of doubt which do not fall within the express or implied discretion left to him and shall keep the client informed to such an extent as may be reasonably necessary according to the same criteria.

In *Stinchombe & Cooper Ltd.* v. *Addison, Cooper, Jessen & Co.*,[41] the purchasers of a piece of land from a local authority engaged the services of a lawyer with respect to the same. It was provided in the contract that the local authority had the right to set aside the contract if within 12 months no building work was commenced. The lawyer failed to draw the attention of the purchasers in this regard. The local authority set aside the contract as no building work was undertaken as agreed. The purchasers sustained loss. The lawyers were held guilty of negligence.

In *Riaz Ahmad Sharif Khan* v. *Babu Mustafa Khan*,[42] an advocate was acting on behalf of the complainant. He informed the result of the case

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38. [1956] 2 All ER 11 (ChD): See also *Hunt* v. *Luck* [1902] 1 ChD 428.

39. [1939] 1 KB 194.

40. *Id.* at 222.

41. [1971] 115 SJ 368, as quoted in Rupert M. Jackson and John L. Powell, *supra* note 24 at 229.

42. III 1998 CPJ 559 (Mah. SCDRC).

after one year. In effect, the complainant was deprived of his remedy as the same was barred by limitation. It was held that the lapse on the part of the advocate in not informing the result of the case amounted to deficiency in service. It was observed:[43]

> [I]f the client loses, the advocate is further duty bound to intimate the result of the proceedings to the client and the client should be left with adequate time to avail further remedy. The client may engage an advocate or may not engage. But the duty of an advocate would only end after the intimation of the result of the proceedings handled by him to the client…..

The failure to inform the progress of any transaction may invite criminal liability. In *Ashton* v. *Wainright*,[44] the officers of a club engaged the services of a lawyer. They wanted the club to be shifted to new premises. Lawyer moved the application to seek permission from the concerned authorities. Permission was refused. The refusal of permission was not informed to the officers. In the meantime, the club was shifted to the new premises. As a consequence of the refusal, the club remained unregistered. The officers invited criminal liability for serving drinks in an unregistered club. Lapse on the part of the lawyer to communicate the refusal was held to be a negligent act.

Failure to warn against certain risks: A lawyer is under an obligation to inform the risk known to him to the client which the latter, being a layman, cannot appreciate. In *Boyce* v. *Rendells*[45] the court observed:[46]

> [I]f a…solicitor learns of facts which reveal to him as a professional man the existence of obvious risks then he should do more than merely advise within the strict limits of his retainer. He should call the attention to and advise upon the risks.

The duty of disclosure is not confined only to obvious risks but also extends to facts, legal rights and obligations of the client.[47] In *Ramp* v. *St.*

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43. *Id.* at 563.

44. [1936] 1 All ER 805 (KB).

45. [1983] EG 268 at 272, quoted in Rupert M. Jackson & John L. Powell, *supra* note 24 at 233.

46. *Ibid.*

47. Susan R. Martyn, "Informed Consent in the Practice of Law", 48 *Geo. W.L.R.* 307 (1980).

Paul Fire and Marine Insurance,[48] a lawyer was held liable for failing to closely scrutinize or fully inform the clients the consequences of signing contract compromising their suit. Similarly, for failing to inform the numerous risks involved in conveyancing transactions, failing to inform the client of the danger involved in exchange of contracts before purchase of a property and failing to warn the risks to a purchaser of a property in moving and carrying out works of repair before the exchange of contracts, a lawyer invites liability for deficiency in service.[49]

Failure to explain legal documents properly: Sometimes a client may approach a lawyer to seek an explanation regarding the contents of a document. Generally, a client signs a legal document or sends it on the basis of advice of the lawyer. A client being a layman cannot understand the contents of a legal document. Hence, there is a legal obligation on the lawyer to interpret the document properly. In *Sykes* v. *Midland Bank Executor & Trustee & Co. Ltd.*,[50] the plaintiffs took certain premises on lease. The lease deed contained an unusual clause which did not permit the sub-lessor to withhold his consent unreasonably for change of user. But the head lessor could do so. The lawyers failed to bring it to the notice of their clients. The above said unusual clause was not explained to them. The lawyers were held guilty of breach of duty in not drawing the attention of the clients to that unusual clause which they could foresee as affecting the interests of latter.

It is evident from the decision that a lawyer is not bound to explain each and every word.[51] It is impracticable also. Microscopic examination of the document is not called for. It signifies that there must be a reasonable limit on the duty of a lawyer as to what ought to be explained. But matters which a lawyer can foresee as otherwise detrimental to the interest of a client must be explained, like an unusual clause in an agreement as contemplated in the case discussed above.

Failure to advise on matters of business under some unusual circumstances: Generally, the clients seek the advice of a lawyer on legal matters. He is not bound to give any advice on business matters. As an exception to this general rule under some circumstances, if he fails to give

48. 269 So. 2d 239, 244 (La.1972), quoted *id.* at 331.
49. Rupert M. Jackson & John L. Powell, *supra* note 24 at 233.
50. [1971] 1 QB 113.
51. *Walker* v. *Boyle* [1982] 1 All ER 634 at 645 (ChD).

advice on business matters he will be held guilty of negligence. In *Neushul* v. *Mellish & Harkavy,*[52] the plaintiff, a widow, proposed to lend a huge amount of money to F, a trickster. F, in order to induce her to lend money, told her that he intended to marry her. But there was no firm commitment on his part regarding the marriage. The plaintiff sought the advice of the defendants, lawyers, regarding raising of funds for the proposed lending. The lawyers were aware of the weak financial position of F who failed to repay money. It was held that the lawyers were negligent in failing to warn against making the loan which they knew to be unwise adventure.

It follows that silence regarding a state of affair known to the lawyer but not to the client attracts liability, when there is a possibility of the latter being exposed to loss.

Failing to protect the interest of a lender of money: Sometimes, a lawyer may act on behalf of a money lender in his professional capacity. In such a situation, he is bound to take reasonable steps to protect the interest of such money lender. In *Wilson* v. *Tucker*,[53] the plaintiff proposed to lend money on the security of legacy under a will. But the legacy was void. The lawyer, however, failed to detect the same. In effect, the security proved to be abortive. The court found the lawyer negligent for failing to ascertain that the legacy was void. A reasonably competent lawyer foreseeing the consequence of exposing the lender to hardship in the absence of security would have ascertained whether the legacy was void or not.

Failure to discharge the duties in connection with conveyancing transactions: Sometimes, clients are exposed to future risks. It is the duty of the lawyers to protect their clients from such risks, which are common in conveyancing transactions. Any lapse on the part of a lawyer to make customary enquiries and search in this regard invites liability for negligence. In *G+K Ladenbau (U.K.) Ltd.* v. *Crawley and De Reya*,[54] the plaintiff instructed the defendant of a vacant land which they intended to develop. They had applied for planning permission for the same. By mistake, common rights were registered with respect to that land which

52. [1967] 111 SJ, as quoted in Rupert M. Jackson & John L. Powell, *supra* note 24 at 238.

53. [1822] 3 Stark 154, *id.* at 248.

54. [1978] 1 WLR 266 (QB).

had to be removed from the register. Both the conveyancing lawyers did not check the common register to ensure an unencumbered title. The sale was completed. The plaintiffs intended to resell it. But resale was delayed due to existence of the common rights. They brought an action against the lawyers for negligence on the ground of loss that occasioned as a result of such delay in resale. There was evidence on record against the practice of making such common search. Inspite of it, the lawyers were held guilty of negligence on the ground that they were aware of the fact that the land was vacant and the plaintiffs intended to develop it for resale. Accordingly, they ought to have reasonably foreseen that failure to ensure unencumbered title would expose the plaintiffs to loss.

But the rule enjoining a duty of search is not absolute. A lawyer is not bound to make search under each and every circumstance. Every time, it is a question of fact. There is scope for discretion when the land is densely built.[55]

Defective drafting: It amounts to deficiency in service. In *T.C. Govinda Samy* v. *B. Kasthuri*,[56] an advocate drafted sale deeds for the complainants which were defective. There was discrepancy in the description of the property mentioned in the sale deed and the parent documents. They were returned for rectification. But the advocate refused to rectify them. The complainants got it rectified by a document writer. In the meantime, there was an increase in the market value of the property. The complainants were asked to pay the additional amount. They brought an action against the advocate for deficiency in service. It was held that defective drafting of sale deed amounted to deficiency in service. The complainants were allowed to recover the charges incurred for registration of rectification deed, compensation and cost.

Unjustifiable withdrawal of vakalatnama: An advocate can withdraw a *vakalatnama* only for a justifiable cause, otherwise he invites liability. In *Sou Prathibha Waman Bhava* v. *Yashwant Laxman Datar*,[57] the allegation of the complainant was that the advocate had withdrawn her *vakalatnama* without sufficient cause. But the advocate had sent the notices to her of his intention to terminate the *vakalatnama* as there was no instruction from her. Further, she had not even paid the professional fee.

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55. *Id.* at 289.
56. III 2003 CPJ 619 (TN SCDRC).
57. I 2007 CPJ 11 (NC).

Under these circumstances, he withdrew the *vakalatnama*. The national commission [national consumer disputes redressal commission established under the Consumer Protection Act, 1986 (CP Act)] held that there was sufficient cause to withdraw the *vakalatnama* and there was no deficiency in service. It follows that if there is no sufficient cause to withdraw the *vakalatnama*, it amounts to deficiency in service.

Non-return of documents: It amounts to deficiency in services. In *Shakunthala Bajpai* v. *R.K. Saini*,[58] the complainant engaged the advocate for filing a case against the Delhi Development Authority. Her contention was that the advocate did not file the case. But records indicated that a writ petition was filed. The complainant demanded the return of her documents. The advocate claimed that he had a lien on the documents and he could return them only if the complainant tendered apology and withdrew the allegations made against him. She filed a complaint against the advocate in the district forum (district consumer disputes redressal forum set up under the CP Act), which held in favour of the complainant. On appeal to the state commission (state consumer disputes redressal commission established under the CP Act), decision of the district forum was set aside. On further appeal to the national commission, it was held that non-return of the documents amounted to deficiency in service, which had nothing to do with the withdrawal of allegations and tendency of apology by the complainant.

Breach of duty and misconduct of litigation: The peculiar feature of adversarial system of administration of justice is that the parties disputing a cause are placed in rival camps attacking each other's weakness to win the claim for which they hire the services of lawyers. It imposes a duty on a lawyer to conduct the litigation with reasonable care and skill. Their conduct amounts to breach of duty under the following circumstances:

Filing a suit in a wrong court: A case cannot be filed in any and every court whatsoever. The jurisdiction of courts is clearly demarked. Cases must be filed in the respective courts having jurisdiction to try them. For example, the jurisdiction of consumer redressal forae are clearly demarcated, depending upon the value of the claim.[59] If the value of the claim is less than Rs. twenty lakh, a complaint is to be filed before the district forum, above 20 lakhs and below Rs. one crore, before the state

58. III 2007 CPJ 301 (NC).
59. See the CP Act, ss. 11, 17 and 21.

commission and above Rs. one crore, before the national commission. If a claim which ought to have been filed before the state commission is filed before the district forum, the complaint will be dismissed at the threshold for want of jurisdiction. Such an unfortunate happening involves unnecessary delay, loss of expenditure already incurred and the expenses to be incurred for the institution of the suit in the proper court. Accordingly, filing a suit in a wrong court results in negligence.[60]

Issuing proceedings in the wrong name: A legal duty is imposed on a lawyer to identify the parties to a proceeding or case which he has accepted to argue. Any lapse on his part in this regard will result in issue of legal processes or summons in wrong names compelling them to appear before the courts unnecessarily. It results in negligence on the part of a lawyer. In *Losner* v. *Michael Cohen & Co*.,[61] the lawyers issued proceedings under the Dog Act (English) 1971, without properly identifying the owners of the dogs. It resulted in issue of proceedings to wrong persons. It was held that their conduct amounted to negligence.

Failure to exercise reasonable care in matters of evidence: A lawyer is bound to exercise reasonable care in chief examination, cross-examination and re-examination of witnesses. The effectiveness with which it is done, cannot be a matter of judicial scrutiny as it is a matter of intelligence which varies from lawyer to lawyer. It is felt that a lawyer could be held negligent for any lapse on his part to trace the prospective witnesses. Some cases may call for expert evidence. A lawyer needs to take reasonable steps to see that a competent expert whose experience and educational qualifications is suited for the purpose in hand is selected. In *Mercer* v. *King*,[62] a lawyer selected a surveyor, who was addicted to drinks, as an expert witness. In effect, the claim of his client failed. He was held guilty of negligence.

Failure to initiate action within the period of limitation: A lawyer is under an obligation to see that a suit is filed within the period of limitation.[63] He should not allow a suit to be barred by limitation. In such an eventuality, the only way is to file a petition for condonation of delay. The court will

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60. *Gill* v. *Lougher* (1830) 1 Car. & J. 170, quoted in Rupert M. Jackson and John L. Powell, *supra* note 24 at 240.

61. [1975] 119 SJ 340, *ibid.*

62. [1859] 1 F & F 490, *id.* at 241.

63. The Limitation Act, 1963.

consider it only if there is a justifiable cause for the delay. Unreasonable delay in filing condonation petition also will affect the interest of a client who may be deprived of his right to seek justice from the court. Accordingly, the conduct of a lawyer in allowing a claim to be barred by limitation would amount to negligence.

Failure to pursue the proceedings: After the institution of a suit, a lawyer is under an obligation of follow it up. Any lapse on his part to do so might result in an *ex parte* judgment in favour of the opposite party. This will amount to negligence. In *Riaz Ahmad Sharifkhan* v. *Babu Mustafa Khan*,[64] the Maharastra state commission observed:[65]

> Once the advocate is engaged by the client and he receives fees in part or full, he is duty bound to attend the interest of his client. He must file the proceedings as asked for by the client forthwith. He must incorporate all the pleadings subject to law and rules and he might be deligent in filing the proceedings before the court or tribunal. He cannot relax on this point… it is his duty to maximize the benefit and to minimize the loss to his client… The client may win or loose

It is evident from the observation that a lawyer is bound to discharge the legal duties towards his client. He may win or loose the case but that is immaterial. In case of an *ex parte* judgment in favour of the opposite party as a result of omission on the part of lawyer to pursue the proceedings, his plea that even if he were to pursue it, it would not have altered the position, cannot be accepted. The expectation of law is to see whether a lawyer has done what a reasonably competent lawyer would have done under similar circumstance.

In *V.S. Shukla* v. *Brijesh Kumar Dwivedi*,[66] a lawyer failed to plead the case on behalf of his client. The Madhya Pradesh state commission held that if a lawyer had failed to plead the case, the client was free to engage the services of another lawyer.

The view taken in *V.S. Shukla* is contrary to the view taken in *Riaz Ahmad Sharifkhan*, which imposes a duty on a lawyer to do the needful to protect the interests of his client.

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64. See *supra* note 42.
65. *Ibid.*
66. III 1997 CPJ 334 (MP SCDRC).

Failure to take reasonable care in settling the claims on behalf of the client: Sometimes, a lawyer may have power conferred on him on behalf of his client. If so, he should exercise reasonable care in doing so, failing which he invites liability for negligence. In *Mc Namara* v. *Martin Mcars & Co. Ltd.*,[67] it was held that if a lawyer with full knowledge of the weak financial position of his client, settled a claim against the latter at an unreasonable huge amount or without proper enquiries advised to accept a claim at a low amount, his conduct amounted to negligence.

*Failure to put up a defence***:** In *Cook* v. *S.*,[68] the lawyers were held liable for failing to put up a defence even though all necessary documentary evidence was furnished by the client.

Other instances: There may be instances where the conduct of a lawyer may fall short of the conduct of a reasonably competent lawyer. Such instances amount to negligence. In *Heywood* v. *Hellers*,[69] the plaintiff engaged a firm of lawyers to obtain an injunction against a man who was harassing her. The lawyers obtained an injunction. But they failed to bring him before the court. In effect, he continued his misconduct and the harassment remained unabated. Lawyers were held guilty of negligence on the ground that a reasonable lawyer could have foreseen that continued molestation would cause further mental distress. In this regard, the court observed:[70]

> Not in every case of breach of contract on the part of a solicitor towards his client damage will be recoverable under this head. It is only when the services contracted for are such that both solicitor and client contemplate that a failure by the solicitor to perform the contract will foreceeably occasion vexation, frustration or distress.

Liability of lawyer to third parties: As a general rule, a lawyer owes duties only to his clients as there exists a contractual relationship only between him and the latter. To this rule, an exception is found where the lawyer is acting as an officer of the court. In *Batten* v. *Wedghood Coal & Iron Co.*,[71] in pursuance of an order of the court, a property was

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67. [1983] 126 SJ 69 as quoted in Rupert M. Jackson & John L. Powell, *supra* note 24 at 244.

68. [1967] 1 All ER 299 (CA).

69. [1976] 1 All ER 300 (QB).

70. *Ibid.*

71. [1886] 31 ChD 346.

sold. The plaintiff's lawyer in his capacity as an officer of the court failed to invest the sale proceeds. In effect, there was loss of interest to the defendants. They were allowed to recover from the lawyer the interest which they would have otherwise earned.

With the development of law relating to negligence, the liability of lawyers towards third parties has received judicial recognition.[72] Very frequently, the liability of lawyers towards third parties has arisen with respect to carelessly drafted wills as a result of which intended beneficiaries are deprived of their legacy. In *White* v. *Jones*,[73] a testator who had quarreled with his daughters made a will bequeathing certain properties from his estate. Subsequently, being reconciled, he gave instructions through a letter to the lawyer to draft a new will conferring further bequest of $ 9000 to each daughter. The lawyer did not do anything to give effect to the instructions before the death of the testator. In effect, the plaintiffs were deprived of the additional bequest. It was held that the lawyers were guilty of negligence as the intended beneficiaries were deprived of their additional bequest.

A lawyer undertakes to exercise reasonable care and skill in the rendition of his services. When he has knowledge of the fact that any improper discharge of duties on his part would expose others to loss, he will be held responsible for that. The neighbourhood principle becomes applicable in this situation. A lawyer certainly is in a position to foresee the consequences of negligently drafted will as resulting in deprivation of opportunity of a legatee to claim the intended legacy. The legatee is left with no remedy either against the testator or against the estate of the testator. The remedy of the disappointed beneficiary lies only against the lawyer. A lawyer owes a duty to a testator to draft a will carefully. As the will operates only after the death of testator, the duty of a lawyer towards the testator also extinguishes. Therefore, assumption of responsibility by a lawyer towards his client needs to be extended to the disappointed beneficiary, otherwise injustice would be perpetrated because of a flaw in law.

The liability of a lawyer towards a disappointed beneficiary with respect to a carelessly drafted will is recognized under the Australian law

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72. The decision in *Donoghue* v. *Stevenson* [1932] All ER 1 (HL) & *Hedley Byrne Co. Ltd.* v. *Heller & Parteners Ltd.* [1963] 2 All ER 575 (HL) led to the adoption of the principle of third party liability.

73. [1995] 1 All ER 691 (HL).

also. In *Hill* v. *Van Erp*,[74] it was held that the duty towards the intended beneficiary would arise as a result of coincidence of interest of the client who retained a lawyer to carry out his testamentary intentions and the interest of the intended beneficiary.[75] A lawyer is placed in a controlling position to avoid the undesirable consequences which becomes a significant factor in establishing a duty of care.[76] In *Whettingham* v. *Crease and Co.*,[77] a lawyer drafted the will carelessly that all the bequests made to the plaintiff became void. He was held guilty of negligence. In *Rose* v. *Caunters*,[78] a lawyer who drafted a will failed to warn that a will should not be attested either by the beneficiary or the spouse of the beneficiary. It resulted in improper attestation of the will. In effect the intended legacy failed. Accordingly the lawyer was held liable to the disappointed beneficiary. In *Hawkins* v. *Clayton,*[79] a lawyer drafted the wills. He retained them in his custody. On the death of the testatrix, he failed to locate the executors and inform the same in due time. In effect, the testator testamentary disposition failed. It was held that there was a breach of duty on the part of the lawyer in not locating the executors. It was further observed that continuation of custody of the will with lawyer indefinitely would frustrate the purpose for which it was accepted.

It is evident from the above decision that a lawyer is considered as the custodian of the testamentary intentions. Therefore, it is his duty to see that the intentions of the testator are properly realized. But it is an onerous duty. Accordingly, he has to ascertain the death of the testator and the whereabouts of the executor. Sometimes, it may extend to many years for collection of necessary information. A lawyer taking reasonable step in this regard will suffice. What steps are reasonable depends upon the cost of extensive enquiries and the expected value of the legacy. Accordingly, if the cost of the enquiries outweighs the value of legacy, he is not bound to make such enquiries. This proposition reflects the balancing approach where neither the lawyer nor the intended legatee is exposed to injustice. In *Walker* v. *Geo H. Medicott & Son*,[80] the court of appeal

74. [1997] 71 ALJR 487.

75. *Id.* at 502.

76. *Id.* at 509.

77. [1979] DLR 353.

78. [1979] 62 All ER 240 (ChD).

79. [1979] DLR 353.

80. [1999] 1 All ER 685 (CA). However, in this case the plaintiff failed to prove negligence on the part of solicitor as a result of which the will failed to record the intention of the testator.

observed that a cause of action against an advocate for carelessly drafting a will arises when a disappointed beneficiary adduces convincing evidence to show that the will does not properly record the intention of the testator. In some jurisdictions, to do justice to the disappointed beneficiary, courts have carved out a principle to create a cause of action in favour of the disappointed beneficiary by dispensing with the requirement of privity of contract and recognizing those contracts as having protective effect for third parties.[81] For example, the German law, which is more circumscribed by its code than the English law, has adopted this principle to safeguard the economic interests against negligence in tort.[82]

It is obvious from the above discussion that a lawyer will be held liable to third parties only in some limited circumstances. The judicial approach reflects a narrow circumscription of such situations. Therefore, it follows that a lawyer is not held liable to client's opponent, unless he moves away from his normal duty of acting on behalf of his client.[83] Likewise, he cannot be held liable to the buyer while acting on behalf of the seller of the land.[84]

It is so even in case of a prospective beneficiary under a will regarding collateral dispositions which could jeopardize his interest.[85] Some courts have refused to hold the lawyers liable to the disappointed beneficiary for drafting a will in such terms which renders the legacy void for perpetuity.[86]

IV Exceptions to liability for negligence by lawyers

The rule exposing a lawyer to liability for his professional negligence is not absolute. There are many exceptions to this rule:[87]

Contributory negligence: Sometimes contributory negligence of a client may be the cause of injury for which a lawyer cannot he held

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81. John G. Flemming, "The Solicitor and the Disappointed Beneficiary", 109 *LQR* 334 at 347 (1993).

82. *Ibid.*

83. *Al-Khandary* v. *J.R. Brown & Co.* [1988] 1 All ER 833 (CA).

84. *Gran Gelate Ltd.* v. *Richcliff* [1992] 1 All ER 865 (ChD).

85. *Clarke* v. *Bruce Lance & Co.* [1988] 1 All ER 364 (CA).

86. *Lucas* v. *Hamm*, 11 Cal. Rptr.727 (1961) as quoted in 81 *LQR* 479 (1965).

87. Procedural defences are not discussed here. A lawyer can raise the defences contemplated under the CP Act.

liable.[88] Contributory negligence on the part of a client cannot be put into a straight jacket formula. It is also a question of fact. It depends on the educational qualification of a client. Accordingly, if the client is an educated person and able to understand the contents of a legal document, for any lapse on his part, his lawyers cannot be held liable. On the other hand, where the client is illiterate person, he relies exclusively on the advice tendered by his lawyer and, accordingly, he puts his thumb impression. In effect, the question of client's contributory negligence does not arise. But sometimes, a legal document may have legal technicalities, that even though the client reads it, it is doubtful whether he understood its content. Hence, he relies more on the advice of his lawyer. In such a situation, the test of reasonable client shall be applied to ascertain whether he ought to have understood the contents. Accordingly, the question of client's contributory negligence shall be determined.

Error of judgment: It signifies honest difference of opinion among competent lawyers with respect to matters of law or fact, for which a lawyer cannot be held guilty of negligence.[89] A lawyer may commit a mistake in interpreting ambiguous provisions of law, inspite of reasonable care. In *Lucas* v. *Hamm*,[90] a lawyer drafted a will in such a tenor that the bequest made under it became void as it infringed the rule against perpetuity. In effect, the intended beneficiary was deprived of the bequest. The court of first instance held the lawyer guilty of negligence. The reason was that even though the law against perpetuities was a complicated area, to a general practitioner, he ought to have consulted an expert in that field when faced with problems beyond his capabilities. On appeal, the decision was set aside on the ground that a lawyer of ordinary skill placed under similar circumstances might have failed to anticipate the risk.

It is not disputed that certain legal concepts are confusing and full of complexities. A legal obligation is imposed on a general practitioner to make reasonable efforts to find out the law. If it is beyond his capability, he must look to an expert in that sphere for his advice The question of negligence does not arise provided a lawyer has discharged the above obligations. A lawyer shall be held liable when the error is the result of

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88. See, for a discussion on contributory negligence, R.F.V. Heuston and R.A. Bucklay, *Law of Torts* 499-514 (Sweet and Maxwell, London, 8th ed., 1998).

89. See J.P. Eddy, *supra* note 28 at 28.

90. See *supra* note 86.

lapse on his part to make reasonable efforts.[91] The very object of imposing civil liability on lawyers is to improve the quality of legal services and to generate professional competence.[92]

In addition to the obligation of exercising reasonable care, a lawyer is bound to inform the client the doubtful nature of law on a particular point and the complexity involved in it. Complexity is not an objective concept. Accordingly, it is obvious that the test of a reasonably competent lawyer is the only guiding principle for the courts to fall back upon to ascertain the negligence of a lawyer.

Practical advice: Often a client may seek practical advice from his lawyer. The nature of such advice is that legal considerations constitute only a part of it. Non-legal considerations outweigh the legal considerations. Hence, substantially, the advice tendered is not of a legal nature. It is not likely that any mistake in this regard will be considered as amounting to negligence. Only palpably wrong advice given by a lawyer attracts liability. In *Bryant* v. *Goodrich*,[93] a lawyer wrongly advised a married woman whose marriage broke down to leave her matrimonial home. He was held guilty of negligence.

Investigation or advice on unasked matters: Generally, a lawyer is bound to render advice with respect to matters on which a client solicits advice. He is not bound to investigate or advise on an unasked matter. In *Hall* v. *Meyrick,*[94] the plaintiff, then a widow, and one Hall intended to bequeath everything to the other. They approached the defendant lawyer for drafting mutual wills. Soon after that, they married. But they did not reveal the possibility of a marriage between them. The plaintiff's son who was present then made a jocular reference to their marriage. The defendant lawyer failed to advise that unless made in contemplation of marriage, mutual wills would automatically get revoked consequent upon marriage. After marriage, Hall expired. The automatic revocation of the will rendered his death intestate depriving the plaintiff of her bequest made in the will. She brought an action against the lawyer for negligence for a lapse on his part to inform the automatic revocation of mutual wills on marriage of

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91. *Ibid.* See also *White House* v. *Jordan* [1981] 1 All ER 267 (HL).

92. David L. Dranoff, "Attorney Professional Responsibility, Competence Through Malpractice Liability" , 77 *North Western LR* 633 (1982).

93. [1966] 110 SJ 108 as quoted in Rupert M. Jackson & John L. Powell, *supra* note 24 at 228.

94. [1957] 1 All ER 208 (QB).

the testators. It was held that the lawyer was not negligent in not informing the impact of marriage on mutual wills for the reason that the fact of marriage was not brought to his notice either directly or in a less direct way by the client.

The existence of a duty depends upon the circumstances. In *Caaradine Properties Ltd.* v. *D.J. Freeman & Co.*,[95] the court observed:

> An inexperienced client will need and will be entitled to take a much broader view of the scope of his retainer and of his duties than will be the case with an experienced client.

It follows that more experienced the client is, a lawyer is relieved of his obligation of rendering advice on unasked matters. But in case of an inexperienced client, a duty arises on a lawyer to tender his advice even on unasked matters.

Sometimes, the client may waive the advice either expressly or impliedly. In *Griffiths* v. *Evans*,[96] the plaintiff, who sustained a personal injury in the course of employment, had been receiving weekly payments under the Compensation Act, 1906. As he was under an apprehension of reduction in weekly payments, he approached the defendant lawyer. The latter advised his remedy under the above Act. But he failed to advise the common law remedy of damages for the same. It was held that failure to give such advice did not amount to negligence as it was not specifically asked for. The court observed that as the plaintiff was receiving payments under the Act for a long time, it amounted to election of the remedy under the Act and to waive the remedy under common law. Such an election amounts to waiver of advice on alternative remedies.

It is evident from the above decision that if an advice on alternative remedy is specifically asked for, a lawyer is bound to tender it, that a client is enabled to make an informed choice of such remedy which is beneficial to him. But seized of the knowledge of an alternative remedy, whether the client would have opted for it is a question of fact. If so, any failure on the part of a lawyer to inform about the alternative remedy invites liability for negligence, otherwise a client should not be allowed to be wise after the event.

Acting on client's instructions: Generally, a client has to act in accordance with the instructions of his lawyer. But law does not stand on

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95. [1982] 126 SJ 157 (CA) quoted in Rupert M. Jackson and John L. Powell, *supra* note 24 at 232.

96. [1953] 2 All ER 1364 (CA).

his way if he so desires to mismanage his affairs that he may instruct the lawyer to act in accordance with his instruction. In such a situation, a lawyer can avoid liability on the plea of acting on the instructions of his client. However, such instructions should not be the result of lawyer's advice. It is obvious that the defence operates when the lawyer has discharged his duties. He cannot blindly rely on the express instructions of his client. At the same time, he has the option of either to abide by the instructions or to determine the retainer.[97]

Ignorance of remotely referred provision of law: Law is an ocean. There are innumerable number of statutes and legal principles. Therefore, a lawyer cannot remember all of them. He may be ignorant of some of them. He may fail to refer a statutory provision. Such omission resulting in negligence depends upon whether such statutory provision omitted to be referred is one of constant and common occurrence or one of unfamiliar and remote occurrence. If it is of remote occurrence, which a reasonably competent lawyer would not have known, he may be able to avoid liability.[98]

V Remedies for deficiency in legal services

A client aggrieved by deficiency in service may claim legal as well as administrative remedy. He can seek legal remedy in civil courts under contract and tort law or in consumer forae under the CP Act, by way of damages. Administrative remedy lies in invoking the disciplinary jurisdiction of bar councils to check abuse of position by lawyers.

A client can claim damages for injury arising from the negligent conduct of a lawyer. Damages are not awarded where injury is only a remote consequence of negligence. In *Simmons* v. *Pennington & Sons*,[99] a lawyer advised his client not to re-sell the property pending outcome of a litigation. During the pendency of litigation, the property caught fire and the client sustained loss as the fire insurance policy had lapsed. The client claimed damages. His claim failed on the ground that the damages were too remote. It was held that it was not necessary to determine whether lawyer's advice was negligent. Accordingly, it follows that damages must

97. *Sutherland* v. *Public Trustee* [1980] 2 NZLR 536 at 548.

98. M.C. Agrawal (rev.), Sanjeeva Row's *The Advocates and the Legal Practitioners Act* 207 (Law Book Company, Allahabad, 5th ed., 1987).

99. [1955] 1 All ER 240 (CA).

be foreseeable. In *Pilkington* v. *Wood*,[100] as a result of lawyer's negligence, the sale of plaintiff's property was delayed. Due to such delay, the plaintiff had to travel from the place of his employment to the place of property in week ends. In addition, he had to pay interest on overdraft due to delay in selling the property. He claimed traveling expenses and the interest so paid. He was not allowed to recover on the ground that they were not in reasonable contemplation of the parties when the lawyer was retained.

In most of the circumstances, a lawyer is in a position to foresee the damages. Accordingly, proof of foreceability of damages does not pose any hardship. In addition, a client should prove causation to claim damages. He has to prove that the cause of his injury is the breach of duty to take care on the part of his lawyer. In *Sykes* v. *Midland Bank Executor & Trustee Co.*,[101] the lawyers failed to bring to the notice of the plaintiffs the existence of an onerous clause in the lease deed. The plaintiffs failed to depose in evidence whether they would or would not have entered into the lease in case their attention was drawn to the existence of the onerous clause. The court, on a balance of probabilities, held that the plaintiffs would have entered into the lease even if their attention was drawn towards that onerous clause.

VI Measure of damages

The cardinal principle of damages is to restore the client to the position in which he would have been had the lawyer discharged his duties properly. Therefore, the courts are called upon to speculate as to what would have been the position had the lawyer discharged his duties properly.

The measure of damages depends upon the nature of loss. As a result of negligence on the part of a lawyer, if a client is deprived of the opportunity of acquiring or renewing an interest in a property, the resulting loss is quantified by the difference between the value of the property what the client intended to purchase minus the price for which he would have purchased it.[102]

Sometimes, there may be diminution in the value of the property. In such a situation, the normal measure of damages is the difference between the price paid by the client and the actual value of the property on the

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100. [1953] 2 All ER 810 (ChD).
101. [1971] 1 QB 113.
102. *Stincombe & Cooper Ltd.* v. *Addison, Cooper, Jessen & Co.*, *supra* note 41.

date of purchase.[103] In case of failure to institute the suit within the limitation period resulting in loss of opportunity, it is difficult for the courts to decide whether the client would have won the case. In such a situation, the courts allow recovery of loss only. In *Kitchen* v. *Royal Air Force Association*,[104] the lawyers failed to initiate proceedings within the time contemplated under the Fatal Accident Act (English) 1846. The maximum damages that could have been recovered had the proceedings been initiated within the period of limitation was $ 3000. The court awarded $ 2000 as damages.

The courts may dismiss a claim for want of prosecution resulting in loss to the client. In such a situation, the negligent lawyer will be held liable to pay the cost of the action and compensation for loss of chances of recovering damages.[105] In cases relating to loss of opportunity consequent upon the failure to defend the proceedings, a client will be awarded nominal damages, when there is no worthy defence or no defence at all. But if there is worthy defence, the damages should represent the opportunity so lost. In *Cook* v. *Swinfen,*[106] the lawyer was acting for a wife in a divorce proceeding. He failed to defend it. The husband obtained a decree against her. It was held that had the lawyer defended the suit, there was an outright chance of the wife winning the case. Accordingly, the wife was allowed to recover damages for losing a favourable outcome and opportunity of obtaining maintenance.

If due to negligence of a lawyer, a client is unable to recoup a loan, he is allowed to recoup from the former.[107] Sometimes, a client may be forced to sell his property for a lesser price due to the negligence of his lawyer. In such a situation, the measure of damages is the difference between what he would have received under the normal circumstances and what he has actually received.[108]

Generally, a lawyer does not invite liability for loss of earning. He may invite liability in an unusual case. In *Malyon* v. *Lawrence Messer & Co.*,[109] the plaintiff met with a road accident. Due to the negligence of his

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103. *Lake* v. *Bushby* [1942] 2 All ER 964 (KB).

104. [1958] 2 All ER 241 (CA).

105. *Allen* v. *Sir Alfred McAlpine & Sons Ltd.* [1968] 1 All ER 543 (CA).

106. [1967] 1 All ER 299 (CA).

107. *Pretty* v. *Fowke* (1887) 3 LTR quoted in Ruper M. Jackson & John L. Powell, *supra* note 24 at 264.

108. *Ibid.*

109. [1968] 2 Lloyd & Rep. quoted*, ibid.*

lawyer, the suit was barred by limitation. In the meantime, the plaintiff contracted neurosis which was not expected to subside till the conclusion of the litigation. He was allowed to recover damages for the value of the original claim and compensation for loss of earnings caused thereby.

Where rectification of lawyer's mistake is possible, a client is allowed to recover the cost of such rectification. In *G+K Laden Bau Ltd.* v. *Crawley & De Reya*,[110] the plaintiffs were allowed to recover the expenses they incurred to remove the right of common which had been registered over their land.

At times, due to the negligence of a lawyer, the intended transaction of his client may fail to materialize. As such, he is entitled to recover the whole expenditure incurred or anticipated gains from the transaction. He is not allowed to recover both. He has to make a choice between the two to avoid double compensation.[111]

A client can recover damages for the physical inconvenience, discomfort and distress caused by the negligence of his lawyer. In *Bailey* v. *Bullock*,[112] a client instructed his lawyer to recover the possession of his house from the tenants. The lawyer kept silent for two years, consequent upon which the client and his family were forced to live with his wife's parent in a very inconvenient accommodation. He was allowed to recover damages for discomfort and inconvenience. But recovery was not allowed for annoyance and mental distress. Recovery is allowed if mental distress is the direct consequence of the negligence. In *Heywood* v. *Wellers*,[113] a rogue continuously molested a woman. She instructed the lawyers to institute an action to prevent him from doing so. The action became ineffective due to several mistakes committed by the clerk to whom the task was entrusted by the lawyers. Her molestation continued unabated. She sued the lawyers. The court awarded damages for anxiety, vexation and mental distress after deducting lawyer's cost which she would have paid had they performed their duty to prevent the molestation. The court distinguished the mental distress which was the direct consequence of lawyer's negligence and incidental to it, to allow recovery in case of the former.

A question arises whether a client can be allowed to recover loss, which he could have avoided. As plea proceeds from a negligent lawyer,

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110. See *supra* note 54.
111. *Anglia Television* v. *Reed* [1972] 1 QB 60.
112. [1950] 2 All ER 1167 (KB).
113. See *supra* note 69.

the judicial attitude has been to disallow it.[114]

VII Remedies under the Consumer Protection Act

There exists a contractual relationship between a lawyer and client. In most of the circumstances, it is an implied contract. It is a contract for service.[115] The definition of service as contemplated in section 2(o) of CP Act is very wide to include a contract for service also. Contract of personal services and services rendered free of charge are excluded from the purview of the definition. For this reason, legal profession has been brought under the fold of the CP Act. There is an opposition from the lawyers for their inclusion. But there is no reason why they should be excluded from the purview of the Act. In *D.K. Gandhi* v. *M. Mathias*,[116] the national commission made it clear that all professionals including lawyers should come within the purview of the Act. The stance taken by the national commission is compatible with the Supreme Court decision in *Jacob Mathew* v. *State of Punjab*.[117] In this case, it was observed that in law of negligence, professionals such as lawyers, doctors, architects and others are included in the category of persons professing some special skill or skilled persons generally. A professional is held liable for negligence on any one of these two grounds: either he did not possess the requisite skill, which he professed to possess or he did not exercise, with reasonable competence in the given case, the skill which he did possess.

The question of inclusion of lawyers under the CP Act has once again come before the Supreme Court.[118] The opposition of lawyers is based on the immunity from liability conferred on the barristers.

In *Rondel* v. *Worsely*,[119] the House of Lords held that a barrister cannot be held liable in negligence for any acts or omissions in the course of trial of any criminal proceedings.

The reason for immunity from liability lies in the fact that a barrister does not have any legal right to remuneration. The services he renders are purely honorary one. A lawyer and client suffer from incapacity to sue

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114. *Pilkington* v. *Wood*, *supra* note 100.

115. *Jacob Mathew* v. *State of Punjab* (2005) 6 SCC 1.

116. III 2007 CPJ (NC).

117. *Supra* note 115.

118. The Supreme Court on appeal stayed the order passed by the National Commission in *D.K. Gandhi*.

119. [1969] 1 AC 191.

each other. Though a barrister undertakes a duty by accepting the brief, he does not enter into a contract. In *D.K. Gandhi* v. *Mathias*,[120] on the above reasoning, the state commission held that lawyers could not be held liable to the client for any acts or omissions. On appeal, the national commission reversed the decision.

In *Saif Ali* v. *Sydney Mitchell & Co.*,[121] the proposition laid down in *Rondell* was approved. But the immunity based on the contention of competing duties of a barrister towards the courts did not cut ice with the House of Lords. A distinction was made between an error which blatantly amounted to negligence and an error of judgment. Error of judgment is a good defence. It was further held that if someone possessed of a special skill undertakes, quite irrespective of contract, to apply that skill for the assistance of another person who relies upon such skill, a duty of care will arise.[122] It is this proposition which provided the required premise to infliction of liability under tort law to the rejection of the theory that lawyers are liable under contract only.

To invoke the jurisdiction of consumer forae, the relationship of consumer and service provider must be established. [123] Lawyers receive remuneration for their service. Any client who hires the services of a lawyer for consideration is a consumer.[124] But a litigant in a civil court is not a consumer of judicial service and the state does not provide any service when it discharges its sovereign function of administration of justice.[125] It, therefore, follows that anything done by the state in discharge of its sovereign function does not fit into the definition of service contemplated in the Act.

A lawyer attracts liability under the CP Act for any deficiency in service rendered by him. Substantive law relating to negligence has not been changed. Therefore, all instances of breach of duty discussed above invite liability under the Act and the jurisdiction of the consumer forae can be invoked for the same. In a claim for deficiency in service, the principles governing damages under tort law, discussed above, would

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120. *Supra* note 116.

121. [1978] 3 All ER 1033 (HL).

122. *Ibid.*

123. *Ramesh Chandra Verma* v. *Chairman, District Forum Dholpur*, II 2004 CPJ 14 (Raj. SCDRC).

124. The CP Act, s. 2(d); *Akhil Bharathiya Grahak Panchayath* v. *State of Gujarat*, I 1994 CPJ 114 (NC).

125. *Ibid.*

also apply. The consumer forae are empowered to give other appropriate relief' also.[126] Accordingly, a client can recover the fee paid to the lawyer for any deficiency in service. If it is yet to be paid, the lawyer forfeits his right to recover the fee. In *C.S. Sarma* v. *P. Venkatswamy*,[127] the complainant had paid the fee for filing a suit but the lawyer did not file the suit. The lawyer was directed to pay the fee with interest. Likewise, in *Veerabrahmachari* v. *B. Venkateswara Rao*[128] a lawyer was directed to repay for failing to file a suit. In addition, he was directed to pay compensation of Rs. 250/-. In *G. Jambunathan* v. *S. Velumuthu*,[129] a lawyer was working under the banner of legal aid cell. He was misleading others by describing himself as 'Official Legal Aid Organisation'. The complainant believing him paid Rs.7,500/- towards the court fee. But the court fee paid was only Rs. 30/-. The petition filed by him was also useless. He was held liable to refund the amount paid towards the court fee. He was further directed to pay compensation of Rs. 25,000/-. In this regard, the national commission observed:[130]

> [W]e have to condemn in the strongest terms the unscrupulous attempts to misuse and exploit the genuine legal aid organisation for operating upon the gullible members of the public.

The above discussion reveals that the consumer forae have jurisdiction to entertain the claims of clients against the lawyers for breach of duty or for refund of money.[131] In *S.A. Ahmed* v. *Poonam A. Shah*,[132] an advocate committed fraud on a client by obtaining Rs. 62,125/- towards court fee even though he had paid only Rs. 25/-. It was held that it amounted to professional misconduct. The advocate was directed to refund the amount. But the consumer forae cannot exercise jurisdiction in disciplinary matters. In *Daivathan* v. *M. Balachandran*,[133] the allegation of the complainant was that he had engaged a lawyer for filing a caveat and his *vakalatnama* was misused for filing a suit. The Kerala state commission held that a client cannot invoke the jurisdiction of the consumer forae against a lawyer with respect to allegations of fraud and impersonation.

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126. The CP Act, s. 14.
127. I 1997 CPJ 425 (AP SCDRC).
128. I 1997 CPJ 147 (AP SCDRC).
129. II 1995 CPJ 64 (NC).
130. *Ibid.*
131. *Ibid.*
132. *Supra* note 8.
133. III 1997 CPJ 307 (Ker. SCDRC).

It cannot be denied that fraud and impersonation on the part of a lawyer amount to infraction of the code of conduct for lawyers resulting in professional misconduct for which a client can invoke the disciplinary jurisdiction of the bar council. A lawyer can also be indicted under the Indian Penal Code, 1860.

The view expressed by the Kerala state commission requires reconsideration if one looks at the definition of service which is wider in its gamut. If service is not provided in the manner in which the service provider ought to have provided, it would amount to deficient service. In the case discussed above, *vakalatnama* was misused for filing a suit instead of getting a caveat issued. It is submitted that it amounts to misfeasance resulting in deficient service.

VIII Remedy through professional bodies

The state bar councils are empowered to punish the lawyers for professional misconduct. They can remove the name of an erring lawyer from the rolls to debar him from practice or suspend his name from the rolls.[134] Cheating the clients or allowing the clerks to cheat, misleading them regarding the progress of a case, misappropriation of fund without filing a suit and allowing the cause to be barred by limitation invite disciplinary jurisdiction of the bar councils.[135] The efficacy of this remedy is questionable as there are serious allegations against the functioning of bar councils' disciplinary committees showing a callous attitude in not taking proper action even in serious cases.[136]

The functioning of bar council committees in the USA in this regard appear to be better than other jurisdictions. There also mere negligence will not suffice to warrant disbarment.[137] However, in many instances of gross negligence, disciplinary action has been taken against the erring lawyers.[138]

IX Conclusion

Ignorance of law is not excused. A layman is not in a position to understand the complexities of law. These factors make it inevitable to

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134. The Advocates Act, 1961, ss. 35-36.

135. See *supra* note 28 at 206.

136. V.R. Krishna Iyer, "Accountability of Professions", 14 *IBR* 650 (1987).

137. *ILL People* v. *Chrone*, 129 NE 291, 298 App. Div. 490, quoted *supra* note 28 at 208.

138. See *supra* note 28 at 208.

approach the lawyers for legal services who render them to the needy. A lawyer like any other professional invites liability for deficiency in professional services under contract law or tort law or the CP Act. Contractual liability of a lawyer depends upon the terms of the contract which may be implied or express. There is always an implied obligation that he should exercise reasonable care and skill while rendering such legal services which is assessed on the basis of standard of care contemplated under law of torts to ascertain the negligent conduct. Accordingly, a lawyer invites liability for breach of an implied obligation or anything which is specifically agreed under the retainer. Law does not compel a lawyer to ensure success in a litigation. If he does so, that will be at his peril and he cannot plead the defence of reasonable care and skill. In effect, he attracts liability for breach of contract.

The liability of a lawyer for deficient services arises under tort law also independent of contract for failure to exercise reasonable care and skill. The standard of care that is expected is that of a reasonably competent lawyer. Unlike medical profession, legal profession is not stratified one. Therefore, it does not warrant a different standard of care depending upon the experience of lawyers and their specialized area of practice. It does not make any difference whether a lawyer is a beginner or experienced one. A beginner cannot be compared to an experienced lawyer. Hence, the conduct of a beginner needs to be examined in the light of a relative beginner placed under similar circumstance. It goes without saying that the conduct of an experienced lawyer needs to be assessed with reference to similarly experienced lawyer placed in similar situation as to what he would or would not have done. Therefore, it is submitted that in case of an experienced lawyer, who holds himself out as a specialist, taking into consideration the criteria of a comparative experienced one, a higher standard may be prescribed.

The above discussion reveals that a client for any deficient legal services may invoke the jurisdiction of civil courts under contract law or tort law. An option is given to a client to knock the doors of the consumer forae under the CP Act which provides an alternative mechanism of a speedy, easy and inexpensive nature. But to avail the remedy, he must have hired the services, *i.e.* it must be non-gratuitous service. But under tort law, no dichotomy is created between gratuitous and non-gratuitous service. Under contract law, though consideration is contemplated, it need not be monetary consideration. It can be any benefit to one party or detriment suffered by the other party. Examined in the backdrop of these provisions, consideration contemplated under

the CP Act becomes meaningless. Moreover, the substantive law relating to negligence is applied under the Act to determine the deficiency in service on the part of a lawyer. It should be noted that the on going debate which generated a consensus in favour of dispensation of the consideration requirement failed to cut ice with the legislature to reconcile the position with the avowed object of the Act. Therefore, it is submitted that a re-thinking on the insistence of the statutory requirement of consideration for service is necessary. The definition of deficiency in service is wide enough to cover deficiency arising out of breach of contractual obligations or a tortuous act or lack of consent and informed consent.

Given the number of laws, statutes and judicial decisions, whatever may be the intellectual capacity and experience of a lawyer, he cannot afford to know all the existing laws. Law also does not impose a duty on a lawyer to know all the laws. He is expected to know the legal provisions concerning his sphere of practice, whether substantive or procedural which are frequently referred.

A lawyer should obtain the consent of a client to represent him, which is usually inferred from the retainer. In case of minors and mentally incompetent persons, consent of their guardians must be obtained. It is an absolute requirement, otherwise it attracts liability for fraud or misrepresentation or deficiency in service under the CP Act.

The requirement of informed consent is recognized in the practice of law also. It is highly demanding, wide and strict. It is applied without any exceptions whatsoever. It does not require any relaxation. In case of doctors, it is applied subject to the exceptions of emergency, therapeutic privilege and waiver on the part of the patient. A lawyer is not exposed to the constraints, complexities, uncertainties and tension to which a doctor is exposed. Hence, a lawyer cannot claim the exceptions contemplated in the case of doctors. The information disclosed by him will not expose the client to any physical or psychological harm which may happen in the case of a patient. For example, if risk of death or material risk involved in a medical procedure if disclosed to a patient, it may cause physical or psychological harm to him. Therefore, it follows that a lawyer should divulge all the relevant information what a prudent client would expect from him.

It is a well established proposition that a lawyer is held liable to his clients. But sometimes there may be persons other than the clients who are directly affected by his acts or omissions. They can bring an action against the lawyer on application of the neighbourhood principle which

gives rise to third party liability. Such actions usually arise in the context of carelessly drafted wills causing harm to an intended beneficiary depriving him of the intended legacy. As such, in many jurisdictions, a lawyer's liability for a disappointed beneficiary is recognized.

Law does not permit a lawyer to contract out his liability for negligence. Such prohibition protects the clients from the clutches of unscrupulous lawyers. But a total prohibition is not needed to protect the interest of clients. Accordingly, in some jurisdictions, the parties are allowed to limit the liability at a reasonable level. But such limited liability clauses are subjected to judicial scrutiny. In effect, the interests of the clients get sufficiently safeguarded.

The legal position regarding the professional liability of lawyers, though well established, the debate has come to the fore with the antagonists arguing for immunity based on the decision in *Rondell* and *Saif Ali***.** As per the *ratio* of *Rondell*, a barrister cannot be held liable for his acts or omissions in the course of criminal proceedings. In a criminal proceeding, there is always an obligation on the prosecution to prove the guilt of an accused beyond reasonable doubt, otherwise, the benefit of doubt should go to the accused. Moreover, a barrister does not receive any remuneration. Though in *Saif Ali*, the decision in *Rondell* received approval, it recognized the liability of a solicitor for negligence subject to the exception of error of judgment not resulting from negligence itself. In effect, in many jurisdictions, the tortious liability of a lawyer for professional negligence is well recognized. The medical profession with all its constraints caused by the inexactitude of medical profession is subjected to the regime of legal control. Such constraints are not found in legal profession. Keeping apart this very pronounced distinction, legal profession as a learned profession, shares the salient features of medical profession. Like medical councils, bar councils cannot determine the questions touching the rights of the parties. But these peer review bodies have failed to check the professional mis-conduct of the concerned professionals. Therefore, there is no reason why the legal profession should be kept outside the purview of legal control. The legal profession has not made out a case as to how it is eligible for immunity from liability.

The liability of a lawyer must be examined in the light of his primary duty towards the court in assisting it in the administration of justice in an impartial way. Accordingly, if a lawyer does any act in pursuance of the above duty, he cannot be exposed to liability. Therefore, if there is a conflict between his duty towards the court and his client, the former shall prevail.