COMMENT

PROFESSIONAL NEGLIGENCE

INTRODUCTION ............................................. 628
I. PROFESSIONS: PRELIMINARY OBSERVATIONS .......... 629
II. THE PROFESSIONAL STANDARD ...................... 633
   A. The Standard ....................................... 633
   B. Analysis of the Standard .......................... 636
      1. Elements of the Standard ....................... 636
      2. Non-expertise .................................... 637
      3. Care .............................................. 637
      4. Knowledge and Mechanical Functions ............ 637
      5. Judgment ......................................... 640
   C. Setting the Standards .............................. 645
      1. Standards Set by the Profession ................. 645
      2. Standards Set by the Government ................ 646
      3. Standards Set by the Professional ............... 649
III. THE SCOPE OF PROFESSIONAL LIABILITY .......... 652
   A. Introduction ....................................... 652
   B. Possible Limits and Bases of Professional Liability .... 654
   C. Emerging Limits of Professional Liability for Negligence—Beyond Privity .................. 660
      1. Accountants ...................................... 660
      2. Architects ....................................... 661
      3. Attorneys ....................................... 664
      4. Surveyors ....................................... 666
      5. Summary ......................................... 667
   D. Statutes and the Scope of Professional Liability .... 669
      1. Federal Securities Acts ............................ 670
      2. Federal Immunity Statutes ........................ 674
   E. Conclusion—Toward a Clearer Limit of Liability ..... 676
IV. REMEDIES ............................................... 678
   A. Civil Damage Suits ................................. 679
   B. Criminal Sanctions .................................. 681
   C. Professional Review ................................ 683
   D. Summary ............................................ 688
V. CONCLUSION ............................................ 689
PROFESSIONAL NEGLIGENCE

INTRODUCTION

Item: A thirty year-old woman who lost a third of her brain, one eye, her hearing, and the baby she was carrying has been awarded over one million dollars in damages against an engineering firm which designed a highway left hand curve which banked to the right. Hers was the fourteenth accident at the curve in as many months.¹

Item: An eighteen year-old high school graduate has filed suit against the school system, contending that "he can neither read nor write well enough to qualify for employment other than 'the most demeaning, unskilled, low paid manual labor.'"²

Item: A chiropractor who told the parents of a young girl that he could cure her eye cancer without surgery, and induced them to forgo a planned operation was convicted of second-degree murder.³

Item: Standard & Poor's has been named a defendant in a class action suit by bondholders who "share the unenviable distinction of being left holding the bag the first time an issue of triple-A-rated bonds ever defaulted on an interest payment."⁴ It is alleged that the rating—"'like God himself stamped his approval on it'"⁵—was misleading and based on an erroneous assumption that the bonds were backed by the state.

Item: A 10.27 million-dollar suit has been filed against an accounting firm which prepared allegedly misleading and fraudulent financial statements about a now-bankrupt cattle business.⁶ It is contended that the firm was depicted as "'a growing, successful, solvent business enterprise'"⁷ in the accounting statements which are instead alleged to have concealed a fraudulent course of conduct.

This Comment will explore the law of professional errors, and will reexamine aspects of the fundamental tort questions of standard of conduct, duty, and remedy, as they have developed in the professional field. Several questions must be asked. What is the standard of care required of a professional? Is a physician culpable when he loses his patient?⁸ Must teachers succeed in their efforts to teach? To whom is a

¹ N.Y. Times, Oct. 4, 1972, at 53, col. 2 (city ed.).
² Trial, Jan./Feb. 1973, at 3.
⁵ Id.
⁷ Id.
⁸ This Comment does not purport adequately to address the broad subject matter of medical malpractice. Two factors explain this omission. First, except in a relatively small number of circumstances (as in the case of an airplane crash proximately caused by improper medical diagnosis and treatment) only a single plaintiff, or his estate, will be affected by a physician's error, obviating most of the problems created by suits by
duty owed? Do accountants owe a duty to persons other than the clients for whom statements are prepared? May users or only builders of poorly designed highways sue the designer for damages? Are the goals of the legal process served by incarcerating a negligent doctor, or are they better served by revoking his license to practice, or by merely subjecting him to damage actions?

Several years ago, while expressing doubt "that conditions [would] remain the same," one commentator stated, "The law of professional liability is almost totally common law. Its basic principles have changed very little over the years." Special emphasis is focused in this Comment, therefore, on the effect that statutes have had in the development of professional liability for negligence, and how developments external to the common law can influence its further development.

I. PROFESSIONS: PRELIMINARY OBSERVATIONS

The concept of a professional for tort purposes is an elusive one. For nontort purposes, as well as for tort purposes, the term appears to be defined to meet the particular needs, circumstances, and objectives of each situation in which such a distinction is considered to be necessary.

A variety of nontort statutes endeavor to classify "professionals." Although a number of statutes endeavor to define the word in functional terms,11 stressing such criteria as advanced and specialized


10 Id.


The term "Professional employee" means—

(a) any employee engaged in work (i) predominantly intellectual and varied in character as opposed to routine mental, manual, mechanical, or physical work; (ii) involving the consistent exercise of discretion and judgment in its performance; (iii) of such a character that the output produced or the result accomplished cannot be standardized in relation to a given period of time; (iv) requiring knowledge of an advanced type in a field of science or learning customarily acquired by a prolonged course of specialized intellectual instruction
training, and the continued use of intellect, discretion, and judgment, the majority of the statutes merely present an open-ended listing of job categories—typically including those of accountants, attorneys, architects, engineers, and a variety of medical specialties, and less frequently such categories as teachers and funeral directors—or rely exclusively upon the common understanding of the term. Common to all attempted classifications, however, is that the term is subject to continued growth and development.

However valuable such listings may be in the areas of corporation, immigration, or labor law, the demands of tort law require a rather different approach. Skill and knowledge in the practice of a profession or trade are enunciated by the Restatement as the criteria and study in an institution of higher learning or a hospital, as distinguished from a general academic education or from an apprenticeship or from training in the performance of routine mental, manual, or physical processes.

Public Employees Relations Act, PA. STAT. ANN. tit. 43, § 1101.301(7) (Supp. 1972):

"Professional employee" means any employee whose work: (i) is predominantly intellectual and varied in character; (ii) requires consistent exercise of discretion and judgment; (iii) requires knowledge of an advanced nature in the field of science or learning customarily acquired by specialized study in an institution of higher learning or its equivalent; and (iv) is of such character that the output or result accomplished cannot be standardized in relation to a given period of time.

12 See, e.g., D.C. CODE ANN. § 29-1102(b) (Supp V 1972). (District of Columbia Professional Corporation Act):

The term "professional service" means any type of personal service to the public which may be lawfully rendered only pursuant to a license and which by law, custom, standards of professional conduct or practice could not be rendered by a corporation, including without limitation the services performed by certified public accountants, attorneys, architects, practitioners of the healing arts, dentists, optometrists, podiatrists, and professional engineers.


The term "profession" shall include but not be limited to architects, engineers, lawyers, physicians, surgeons, and teachers in elementary or secondary schools, colleges, academies, or seminaries.

Professional Corporation Law, PA. STAT. ANN. tit. 15, § 2902(4) (Supp. 1972):

"Profession" includes the performance of any type of personal service to the public which requires as a condition precedent to the performance of such service the obtaining of a license or admission to practice or other legal authorization. By way of example, and without limiting the generality of the foregoing, such term includes personal services rendered as an architect, chiropractor, dentist, funeral director, osteopath, podiatrist, physician, professional engineer, veterinarian, certified public accountant or surgeon and an attorney at law.

Professional Association Act, PA. STAT. ANN. tit. 15, § 12,602(2) (1967):

"Profession" shall include all occupations, legally or traditionally designated as professions, and which members thereof by law, tradition, or ethics, are forbidden to incorporate for the purpose of rendering professional services, including, but not limited to, architects, attorneys at law, certified public accountants, chiropractors, dentists, osteopaths, physicians and surgeons.

13 Of the "four traditional learned professions" (doctors, lawyers, ministers, teachers), see Wade, Foreword to PROFESSIONAL NEGLIGENCE at vi (T. Ready & W. Andersen ed. 1960), the ministry is consistently omitted, however.


15 A lawyer managing a business is not, however, acting in a professional capacity merely by virtue of his legal professionalism. See, e.g., Oklahoma Tax Comm'n v. Benham, 198 Okla. 384, 179 P.2d 123 (1947).

which constitute "that special form of competence which is not part of the ordinary equipment of the reasonable man, but which is the result of acquired learning, and aptitude developed by special training and experience," and which distinguish the professional and the skilled tradesman from the ordinary reasonable man. Conduct and liability consistent with superior knowledge and skill is therefore a requirement of both the professional (who is skilled by definition) and the skilled tradesman.

Although the distinction between professions and trades is not clear, two factors serve to delineate the occupations and practitioners called "professional." The first is the exercise of intellectual judgment as one's special skill; the second is that of historic social status. As subsequent analysis shall show, those two influences have shaped much of the present law of professional liability, and are the influences which will affect its future directions.

A professional is one who continually must exercise intellectual judgment, predicated upon high educational achievement, in the performance of his duties, and whose clients rely upon that judgment. He is one "whose profession gives authority to a statement made by him." Although the relation between judgment and the professional standard of conduct will be explored at greater depth later in this Comment, suffice it to say at this time that the exercise of judgment of necessity allows errors in judgment. Such errors are unavoidable—they are neither intended, foreseen, or preventable by the exercise of reasonable precautions. Yet unavoidable errors coupled with unprecedented increasing litigation against professionals have, for example, led to the increasing use of "professional liability," "malpractice," and "errors and omissions" insurance to protect against not only legally negligent but also unavoidable actions which cause injury. Although

17 Id. comment a at 73.
18 E.g., physician or surgeon, dentist, pharmacist, oculist, attorney, accountant, or engineer. Id. comment b. Professor Prosser's basic list also includes psychiatrists, architects, and title abstracters. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 32, at 161-62 (4th ed. 1971). See also note 13 supra.
19 Id. comment a.
20 See W. Prosser, supra note 18, § 32, at 161.
21 See A. Whitehead, ADVENTURES OF IDEAS 73 (1933).
23 See notes 86-110 infra & accompanying text.
24 See W. Prosser, supra note 18, § 29.
26 See id. 396-97.

Malpractice insurance is a form of "specialty insurance"; its risks are excluded from general liability policies. Exclusions generally follow from (1) uninsurable hazards (wear and tear), (2) theoretically insurable events for which no market exists (wars, floods, catastrophes too great for any single firm to handle), and (3) hazards for which another
a professional is not an insurer of his work, there is a special quality of the professional which encourages him to protect against even unavoidable errors in his performance, and which further serves to define the professional. Concomitant with reliance upon his judgment is reliance upon his reputation.

Perhaps the greatest distinction between the professional and the nonprofessional is the extent to which the former relies upon his status and reputation as a major determinant in his earning capacity. Protection both of that status and the economic consequences of its damage—perhaps in recognition of the need for professional skills in modern society—accounts for both special limits upon liability and demands for intra-professional review, and is a continual demand of the professional.

The special needs of professions in the negligence area are as old as the common law, and the special status of those who bear the title is even older. Consideration of the history of professional negligence reveals one point of particular relevance in understanding the development of that law in recent years and which may determine the course of future developments. That is that "professions" include an ever-expanding list of occupations and an ever-increasing roster of individual

policy is available (workmen's compensation, specialty policies). Professionals were an unexplored market for many years, with little insurance being written (no expectation of suit or collection until relatively recently). Most professional hazards were eliminated by the terms of general policies, which covered bodily injury. Doctors, however, could incur suit under such a policy, and so their professional activities have always been excluded. The rationale suggested for such exclusion is a qualitative judgment that their activities were somehow special, perhaps in the sense that the individual was intentionally placing himself in a position with a great potential for causing harm to others, much like a contractor using explosives.

No general ratio exists to compare dollar costs of the general versus special coverage, since very different bases are used to figure costs. The injury-on-premises coverage is based on floor footage of a commercial shop, or on the payroll if not a commercial establishment. Malpractice is a flat rate based on factors such as type of profession or specialty within it, location and territory, number of employees (professionals, technicians), and number of stores.

Based on an interview with a source in the insurance industry who wishes to remain anonymous, Sept. 1972.


29 Cf. S. HUBNER, supra note 26, at 396; Wade, supra note 13, at vii. See also notes 294, 367 infra & accompanying text.


31 See notes 224-35 infra & accompanying text.

32 See notes 335-66 infra & accompanying text.

33 See note 294 infra.

34 See Wade, supra note 13, at v & n.1.


Indeed it may still be asserted that

To have one's occupational status accepted as professional or to have one's occupational conduct judged as professional is highly regarded in all post-industrial societies and in at least the modernizing sectors of others.

Id. 3.
members. "Skilled trades" may become "professions." For example, surgeons in England were long denied professional status, as their skill was merely manual and not diagnostic; today they are considered professional.\textsuperscript{36} Similarly, such groups as accountants, architects, and engineers, though not "traditional" professions,\textsuperscript{37} are now accorded that status, and are dealt with as such in this Comment. It has been asserted that "[m]odern life ever to a greater extent is grouping itself into professions,"\textsuperscript{38} and that "[p]rofessions are more numerous than ever before."\textsuperscript{39} Others may therefore follow, and the law must prepare to adapt to greater numbers of occupational groups demanding the special tort position accorded that status.

The judicial system also must prepare to deal not only with more groups, but also with more members. Professionals are becoming an increasing percentage of the work force,\textsuperscript{40} and as the educational level of the American population rises,\textsuperscript{41} more of its members seek professional status.\textsuperscript{42}

As professionals and professionalism increases, as its definition expands, as professionalism becomes the norm, not the exception, and as attacks upon professionals' work increase, tort law must respond to the challenges of a developing society and of the professionals. At the same time, the professional groups must themselves respond to those same challenges.\textsuperscript{43} It is from this perspective that the balance of this Comment should be read.

\section*{II. The Professional Standard}

\subsection*{A. The Standard}

A rule that "has guided the courts in their decisions from the earliest cases to the present day"\textsuperscript{44} is that, in the absence of an express understanding to the contrary, the professional undertakes only to exercise reasonable care and the measure of skill and knowledge ordinarily possessed by members in good standing of his profession.\textsuperscript{45}

\begin{itemize}
  \item \textsuperscript{36} Id. 10.
  \item \textsuperscript{37} See note 13 supra.
  \item \textsuperscript{38} A. Whitehead, supra note 22, at 73.
  \item \textsuperscript{39} Hughes, \textit{Professions in the Professions in America} 1 (K. Lynn ed. 1965).
  \item \textsuperscript{40} Id.
  \item \textsuperscript{43} See also \textit{W. Moore, supra} note 35, at 233-43.
  \item \textsuperscript{44} Patterson & Wallace v. Frazer, 79 S.W. 1077, 1080 (Tex. Civ. App. 1904). The quotation is as accurate today as it was in 1904. See \textit{Restatement (Second) of Torts} § 299A (1965).
  \item \textsuperscript{45} See id.; Wade, supra note 13, at vii.
\end{itemize}
Virtually identical phrasing has been used to express the professional responsibilities of the attorney,\textsuperscript{46} accountant,\textsuperscript{47} architect or engineer,\textsuperscript{48} doctor,\textsuperscript{49} or title abstracter.\textsuperscript{50} The very antiquity of this legal formula, however, seems to have shielded it from close critical analysis.\textsuperscript{51}

The "professional standard," as perceived by some, has been criticized as less demanding than the standards by which tradesmen and other laymen are evaluated. William Curran, for example, asserts that while professional conduct is evaluated in reference to the professional community, the familiar "reasonably prudent man" test contains elements of "oughtness" which exact better-than-average conduct of the man on the street.\textsuperscript{52} Others have found the test of lay conduct "unrealistically high,"\textsuperscript{53} and excessively demanding of those born incompetent through no fault of their own. For, as Leon Green notes, the care and prudence which the law deems "ordinary" is such as prudent, and not \textit{average}, men exercise.\textsuperscript{54} No similar complaints of impossibility seem to have been directed at the "professional standard."

Before analyzing what the standard is, and whether it varies significantly from the standard for nonprofessionals, the question arises whether professionals should receive special treatment under negligence law. Professor Clarence Morris bases a relatively unenthusiastic defense of custom as the proper standard of professional care on the assertion that no other test would be feasible in light of jury inexperience in evaluating professional (medical) conduct.\textsuperscript{55} More vociferous proponents have expressed the fear that a more exacting standard would deter prospective professionals from ever undertaking professional training.\textsuperscript{56} One author has approvingly suggested that the standard arose from a judicial reluctance to permit juries to find the conduct of those at the highest levels of social responsibility tortious.\textsuperscript{57}

\begin{footnotesize}
\begin{enumerate}
\item See, e.g., Gambert v. Hart, 44 Cal. 542, 552 (1872).
\item See, e.g., Gammel v. Ernst & Ernst, 245 Minn. 249, 255, 72 N.W.2d 364, 368 (1955).
\item See Bell, \textit{Professional Negligence of Architects and Engineers}, 12 \textit{VAND. L. REV.} 711, 716 (1959).
\item Note, \textit{Attorney Malpractice}, 63 \textit{COLUM. L. REV.} 1292, 1294 (1963): "Judicial attempts to articulate the standard of care . . . have yielded talismanic formulae that too often obscure analysis."
\item Green, \textit{The Negligence Issue}, 37 \textit{YALE L.J.} 1029, 1035 n.19 (1928).
\item Morris, \textit{Custom and Negligence}, 42 \textit{COLUM. L. REV.} 1147, 1164 (1942).
\item See Goodman & Mitchell v. Walker, 30 Ala. 482, 495 (1857) (if held accountable for the consequences of each erroneous act, "no one . . . would be found rash enough to incur such fearful risks"); Evans v. Watrous, 2 Porter (Ala.) 205, 210 (1835).
\end{enumerate}
\end{footnotesize}
And some special sanctity has been found in the fact that professionals, unlike merchants, do not advertise their wares, and vend services rather than products. A strict standard for professional conduct might result in professionals becoming easy targets for malpractice suits. The potential increase in litigation—inevitable where solvent professionals are involved—is not a development to be welcomed enthusiastically. The client-professional relation could be seriously impaired by placing professionals on the defensive for uncertainties over which they have no control, or by causing professionals to avoid undertaking novel problems. Moreover, the very label attached to such suits—“malpractice”—indicates the vulnerability of the professional reputation to the effects of a negligence suit. While these factors may not outweigh a legitimate concern for client welfare, they counsel against hasty extensions of liability against professionals.

Notwithstanding that the “professional standard” has been criticized as being too lax, and that various reasons exist to support a special standard for the professions, there is doubt as to how “special” the standard is, and whether the differences from lay standards exist more in theory than in fact. A typical statement of the professional standard was given in Patterson & Wallace v. Frazer, in a jury charge referring to attorneys:

Attorneys . . . are held to undertake to use a reasonable degree of care and skill, and to possess, to a reasonable extent, the knowledge requisite to a proper performance of the duties of their profession . . . . There is, however, no implied . . . guaranty [of] the success of [the] proceedings in a suit, or . . . of his opinions . . . . [E]rrors as to questions of law which an attorney with reasonable capacity, with ordinary investigation, might know, is a ground for liability, where injury results therefrom. By ‘reasonable care and skill’ and ‘reasonable knowledge’ is meant such a degree of care, diligence, and skill as a practicing lawyer of ordinary skill and prudence and knowledge of the law would exercise in case of like character under like circumstances . . . .

Examination of the demands of this standard reveals no major deviation from lay norms, except the possibility of shelter from liability where a lawyer of ordinary skill, prudence, and knowledge would make the same simple error. Whether this kind of shelter from liability was intended is suspect. The framers of the standard apparently felt it to be a logical extension of the reasonably prudent man test. There was

---

69 Professor Morris suggests that ambulance chasers would likely thrive in the new legal climate that stricter professional liability standards would create. Morris, supra note 55, at 1165.
61 Id. at 1079.
an apparent understanding that a professional made no claim to be and was not generically different from other men, but only claimed to possess special expertise. Thus, the relative standards for the professions were to be no more and no less exacting than those of any other trade, except insofar as the profession itself was more exacting, and demanded a series of delicate judgments under which error would be occasionally unavoidable. Thus the professional standard may in absolute terms be more demanding than the ordinary test of care for the layman; most scholars have expended little effort arguing that proposition.

B. Analysis of the Standard

1. Elements of the Standard

In assessing the theoretical and practical operation of the professional standard, it may be helpful to examine separately the discrete elements of a professional's work. In addition to lay functions which do not entail professional expertise, professional efforts may be separated into at least three discernible components: care, mechanical matters, and judgmental matters. Care involves attentiveness, sensitivity, and caution. Mechanical functions are at their essence clerical, and include the acquisition of knowledge through research techniques and the mastery of routine procedures. Matters of judgment, on the other hand, lie at the core of professionalism; judgment occurs in making decisions and exercising discretion without the aid of routine and dispositional methods. Throughout the following analysis, the legal profession is used as a primary example, on the belief that the wisdom of the legal system's decisions regarding its own professionals should be more apparent than in its decisions involving the separate expertise of other professions. Perhaps the legal malpractice cases are atypical for the very reason that judges are abnormally well equipped to spot negligence without relying on expert testimony, thus creating in fact an interprofessional distinction not contemplated by legal theory.

---

62 James, The Qualities of the Reasonable Man in Negligence Cases, 16 Mo. L. Rev. 1, 15 & n.87 (1951). Bowman v. Tallman, 27 How. Pr. 212 (N.Y. Super. Ct. 1864), noted: "The practice of the law . . . is subjected to the same rules as any other employment, even where the implements are of a more material kind, and not to any of either greater or less stringency." Id. at 274. See also Moore, Liability of Artisans and Tradesmen for Negligence, in PROFESSIONAL NEGLIGENCE 309 (T. Roady & W. Andersen ed. 1960): "[O]ften times it would appear that a peculiar set of rules applies to professional men as a class. But this is not true unless there is included within the definition of 'profession' practically any occupation or trade requiring particular skills or abilities." Cf. Pepsi Cola Bottling Co. v. Superior Burner Serv. Co., 427 P.2d 833, 839 (Alas. 1967), in which a court found no error in the instruction that a serviceman was required to exercise "that degree of care and skill in handling the job . . . which a reasonably prudent, skilled and qualified boiler repair man would exercise under the circumstances."


64 See note 8 supra.
theless, the strictness with which the law has policed itself should at least suggest the level of stringency at which the law has aimed for all professions.

2. Non-expertise

In areas of non-expertise, professionals have been held only to lay standards. Accordingly, an attorney was not deemed expert in human psychology, and was excused the failure to detect the mental incompetence of his client, when prior conversations had seemed to indicate her normalcy. Similarly, in Reumping v. Wharton, an attorney was forgiven for an error in property appraisal. For like reasons attorneys have not been required to divine the honesty of their clients, and have been allowed to rely upon the client's having fairly stated the facts which constitute his defense.

3. Care

It is firmly established that the professional is not required to exercise extraordinary care. The care demanded of him exceeds the "ordinary" only when his expertise makes him aware of a need for caution that a layman would not perceive, just as a layman is judged in light of special knowledge he may have acquired. It seems wise that a separate "professional" care standard has not been demanded. To urge that extraordinary care replace ordinary care raises delicate democratic and philosophic problems. Since it seems a fair presumption that ordinary care combined with average professional attainments will result in salutary results for the client, there is no compelling legal need to demand better-than-standard care.

4. Knowledge and Mechanical Functions

Apart from a recognition in such old cases as Von Wallhoffen v. Newcombe and Goodman & Mitchell v. Walker that a profession may be divided into mechanical and judgmental segments, there is no consistent recognition in expressions of the professional standard that the area of mechanical functions involves a different standard than in the area of judgment. Historically the two have been fused uncritically, and it is implied that the professional's obligation is to conform to professional community norms in each, suggesting that professionals may be insulated from liability by a relaxed community norm. What the early framers of the professional standard intended in judging a

---

66 56 Neb. 536, 76 N.W. 1076 (1898).
68 W. Prosser, supra note 18, § 32, at 161. See also Beach v. Chollett, 31 Ohio App. 8, 11-12, 166 N.E. 145, 146 (1928).
69 10 Hun 236 (N.Y. Sup. Ct. 1877).
70 30 Ala. 482 (1857).
professional by community standards is speculative; however, courts of the past two centuries in fact have applied, with only minor exception, differing standards to the areas of mechanics and judgment.

The professional's duty to know his field and to master routine procedures is exemplified by judicial opinions in legal negligence cases. While the courts have declared broadly that lawyers are not required to know all the law, they repeatedly have required them to have searched diligently for it. A plethora of examples suggests that the community standard for these mechanical functions demands perfection of basic research technique and mastery of clearly defined procedures. Thus the courts have rejected the plausible argument that could follow from a "community standard"—that each professional inevitably will err at some time, and should be forgiven and protected.

Thus, in Siegel v. Kranis, while noting that attorneys were not liable for all errors of judgment, the court observed that an attorney might be liable for ignorance of rules of practice, failure to comply with requirements of notice precedent to suit, or for neglect to prosecute or defend an action. In making that observation, the court did not feel it necessary to look to community standards in these matters. Reviewing comparable carelessness in Armstrong v. Adams, the court found no "controvertible interpretation of law" or "uncertainty or ambiguity of fact" involved, noted that the defendant's error in drafting a complaint involved the most important part of his client's case, and reversed a lower court's ruling on the attorney's demurrer. Likewise, mechanical research omissions have produced liability. In Werle v. Rumsey the court found it clear and established law that an estoppel certificate from mortgagor to mortgagee did not bar a usury defense to a debt, and found that failure of an attorney to so advise created a prima facie case of negligence. Liability also has been found for failure to follow the lawful instructions of a client.

—


72 See Samuels v. Willis, 133 Ky. 459, 466, 118 S.W. 339, 342 (1909) ("Because all men at some time are careless does not relieve any man from the legal consequences of his careless act . . . .").


75 Id. at 684-85, 283 P. at 874.

76 E.g., Moser v. Western Harness Racing Ass'n, 89 Cal. App. 2d 150, 200 P.2d 7, 11 (Dist. Ct. App. 1948) ("with but slight research a wealth of authority on the subject was readily available").

77 278 N.Y. 186, 15 N.E.2d 572 (1938).

Professionals who err in mechanical functions will not find protection from liability merely because the professional community is lax and has a "custom" of poor performance; medical malpractice cases attest to this. While indicating that custom is the usual test of professional care, Professor Morris writes that "[w]hen laymen are competent to determine whether the doctor has been negligent, the plaintiff need not prove that the defendant departed from standard practices. If, for example, the evidence shows that a surgeon bandaged an arm too tightly ... the courts do not require the plaintiff to show that the methods used are eschewed by other reputable doctors ... " And Francis Bohlen indicated that although in general "the standard of the profession ... determines the skill and competence which the [professional] must exercise," a "certain minimum of general professional competence is always required no matter how isolated or poor the neighborhood." The remarks of the two tort scholars point to a single conclusion: regardless of acceptance in the whole profession or narrow locality, a palpably unreasonable custom, if it can be perceived as such, will be found negligent. The crucial difficulty is in the perception.

One example of the law's unwillingness to accept unreasonable custom as determinative of liability is the recent 1136 Tenants' Corp. v. Max Rothenberg & Co. There the court found that defendant accountant, who had failed to report to his employer suspicious financial circumstances disclosed by the employer's records, had been hired to perform a full audit and was thus liable for failing to conform to normal auditing standards. But, the court noted in dictum, had he only been hired to perform non-analytic "write-up" services, he still would have been legally obligated to report blatantly suspicious circumstances, irrespective of accounting custom.

There would be obvious danger if the Rothenberg dictum were taken by other courts as license to prescribe their own untutored notions of prudent accountancy. However, if read more narrowly, the case merely exemplified traditional judicial refusal to condone flagrantly negligent professional custom. This judicial review, it goes without saying, is of paramount importance: properly guided, such review can dispel the fears of professional oligopoly which some commentators have foreseen as the end result of stricter professional standards and an expanded scope of liability.

Perhaps the greatest departure for lawyers from the exacting scrutiny of mechanical error has occurred in the area of foreign law. Though Von Wallhoffen v. Newcombe indicated that an attorney "must be presumed to be familiar with the law and rules regulating the
practice in actions which he undertakes to bring," an ancient New Jersey case has allowed mechanical error in using the laws of another state to be exempt from liability. An A New York court, however, has recognized that foreign law of a mechanical sort yields to basic research, and has refused to exonerate attorneys who had drawn defective and invalid chattel mortgages. This latter approach is better-reasoned and completely preferable to the former. It is in fuller accord with the expectations of a client, and in closer harmony with the demands made on attorneys performing other mechanical functions. Moreover, the New Jersey rationale is inconsistent with the rule that a professional expert in one speciality who undertakes a task in an area outside his special expertise must employ basic research techniques to learn the new subject area.

5. Judgment

It is in the area of judgment that the greatest possibility of professional protectionism exists, and at which the greatest amount of criticism has been directed. A layman is required to exercise reasonably prudent judgment. The professional, it is said, only need conform to the customary level of judgment within his profession; custom, and not prudent judgment, has become the standard. Yet were there no such test, and were juries free to pass on the propriety of professional customs, professionals could easily be found liable for any bad result. There would be no real guidance for jurors, and trial results would depend on their imaginations and visceral reactions. And, under a fault-oriented tort system, there seems to be justice in shielding an otherwise competent attorney from juror judgment on the propriety of his reliance on a well-established precedent. Likewise, a fault system justifies shielding from liability a doctor confronted by a rare disease and forced to make a blind attempt at diagnosis.

Shielding from liability, where it exists, exists because of the inexactitude, not the mere complexity, of professional judgments. As suggested above, one distinguishing characteristic of a profession is that it emphasizes intellectual activity. Medical science, for example, frequently deals with frontiers of knowledge. Legal science contains few clearly determinate answers, and "sound" judgments may be upset by the unpredictable judgments of others. There may be no level at which legal judgments are harmonized, as frequently even the highest courts

84 Fenaille & Despeaux v. Coudert, 44 N.J.L. 286 (Sup. Ct. 1882).
85 Degen v. Steinbrink, 202 App. Div. 477, 195 N.Y.S. 810 (1922); accord, In re Roel, 3 N.Y.2d 224, 144 N.E.2d 24, 165 N.Y.S.2d 31 (1957) (attorney retained in matter involving foreign law may not claim he is not required to know that law).
89 See text accompanying notes 22-25 supra.
in different states differ diametrically upon the conclusions which follow from identical facts.\textsuperscript{90}

The alternatives to a custom-oriented standard would benefit neither the public nor the professions. Importing a "reasonably prudent man" test into the professions would scarcely portend improvement of professional performance. Such a test—whether applied to the mechanical or the judgmental—would allow a nonprofessional to be judged in the light of his own skill and knowledge, and the unusual nature of a true professional's attainments might escape jurors. Thus, quacks might be able to escape liability for error by qualifying as "reasonably prudent magnetic healers."\textsuperscript{91} In short, some reference to professional standards is necessary for protection of the relying public.

A "best efforts" standard seems equally inadvisable. As with any such subjective standard, based as it is upon the specific abilities and inabilities of the individual, evidentiary problems would become enormous. The standard would become infinitely variable, difficult of proof, and unrelated to client reliance. And unless conduct were evaluated by a minimum professional standard, public protection would suffer if a professional's best efforts were incompetent due to age, illness, or transitory incapacity. At present, whether or not a professional makes personal assertions regarding his competence, his certification advertises to the world that minimum professional standards may be demanded of him.

To determine when the standard for judgment applies, it is necessary to discern the meaning of the term in the professional context, and to distinguish judgmental functions from mechanical ones. In attempting to define the elusive term "judgment," it is perhaps best to begin by subtracting from the field of professional expertise all that can be called "knowable," and then to denominate the remainder as the area of "judgment." Clear examples of judgment are medical problems for which no treatment has been proven a cure, and legal questions for which relevant precedents are utterly scrambled. Yet judgment may likewise be involved in interpreting a statute which might appear clear on its face.

Mechanical and judgmental matters are not easily separable. \textit{Parker-Smith v. Prince Mfg. Co.}\textsuperscript{92} suggests the obvious difficulty in distinguishing between mechanical and judgmental areas within the legal profession. In that case the attorney advised delaying his client's suit while he attempted to negotiate a settlement; while he negotiated, the statute of limitations expired. Although the court found these facts sufficient to submit the question of negligence to the jury, it made clear that such an error did not necessarily evidence lack of due care

\textsuperscript{90} Hill v. Mynatt, 59 S.W. 163, 167 (Tenn. Ch. App. 1900).

\textsuperscript{91} See McCoid, supra note 63, at 606-07.

\textsuperscript{92} 158 N.Y.S. 346 (Sup. Ct. 1916).
and skill. Clearly, errors of judgment may intrude into the most mechanistic areas of law; conversely, a series of mechanistic decisions is frequently involved in proceeding to the most complex and speculative of judgments. Mechanical matters must be carefully extracted and scrupulously examined by the courts. This enormous task of distilling the known from the unknown and unknowable should engage the efforts of talented scholars in each profession who have the wisdom to know what they do not know, and the courage to admit what they do know.

When a function is judgmental, the standard that is applied requires that such judgment be rendered only after a professional is fully qualified and has ascertained all relevant facts. Uninformed judgment is equivalent to a failure to unearth mechanical principles, and must subject an erring professional to liability. As the court in Ramp v. St. Paul Fire & Marine Insurance Co. indicated, a judgment "must be the considered conclusion of the attorney." While acknowledging the need for freedom in exercising judgment, the court recognized that a judgment arrived at by deviations from all norms of research is not a "judgment" at all.

In this vein, it should be noted that a professional cannot disclaim liability by talismanically invoking the word "opinion." Among laymen, the mention of "opinion" is expected to trigger an attitude of distrust, and produce a discounting of the "opinion" offered. In the professional situation, however, given the unequal informational footing and the special relation of the professional and his client, an opinion has been deemed to carry with it an implied knowledge of facts justifying the opinion.

A few examples will serve to illustrate the operation of the judgmental standard. Litigation is an area which demonstrates the overlap between the mechanical and the judgmental, and suggests the difficulty of passing upon attorneys' "errors." In Pearson v. Darrington, an attorney who gave full evidence of recognizing that the trial judge had erred chose not to except. He was subsequently exonerated, with the court indicating that in yielding to the opinion of a presiding judge

---


95 Id. at 82.
96 Cf. Cook, Flanagan & Berst v. Clausing, 73 Wash. 2d 393, 438 P.2d 865 (1968) (though an attorney would not be liable for good faith errors of judgment, he must avoid negligent errors in arriving at that judgment).
98 32 Ala. 227 (1858).
an attorney could not be charged with a want of professional skill. A decision not to object to a courtroom error is tantalizingly difficult to review. In some cases where the law is clearly to his client’s advantage, an attorney may well hesitate to register all possible objections to avoid undue friction with the court. Moreover, an indisputably erroneous ruling of law may not be erroneous at all if the judge’s analysis of crucial facts differs essentially from the attorney’s. Nonetheless, in the cases in which an error may be shown clearly negligent and the proximate cause of loss, liability must attach as elsewhere in the law. The mere possibility of judgment factors entering into a litigation mistake cannot override the need for client redress where a meritorious case has been jeopardized.

Hill v. Mynatt demonstrates the difficulties of the professional in rendering a correct judgment. The attorneys in Hill had elected to bring their client’s wrongful death action in state court because of procedural hurdles in federal court, only to find that by the time their case was heard the defendant’s assets were exhausted. Hindsight indicated the claim could have been collected if they had proceeded in federal court. The court ruled against liability in colorful language:

[A]lthough an attorney has no right to be a clam, and shut himself up in the seclusion of his own self-conceived knowledge of the law . . . the law does not require and never has required . . . that he should be a true Sir Oracle of what the courts have decided or will decide as the law applicable to every given state of facts.

The level of judgment required of attorneys has not demanded that they be prophetic, particularly when relying upon established practice. Nor is an attorney answerable for his errors in judgment upon “points of new occurrence, or of nice or doubtful construction.”

A summary of the risks and judgmental decisions involved in determining whether to object may be found in A.L. Levin & H. Cramer, Problems and Materials on Trial Advocacy 104-12 (1968).

Decisions whether to appeal a loss raise litigation-like problems, although they allow for study. In Martin v. Burns, 102 Ariz. 341, 429 P.2d 660 (1967), it was deemed proper for an attorney not to appeal from an adverse determination when the sole result of appeal would have been the reconsideration of the identical issue. In Childs v. Comstock, 31 Misc. 250, 74 N.Y.S. 643 (Sup. Ct. 1902), however, the failure of attorneys to appeal from an adverse decision of a board of appraisers was found negligent, when clear precedent suggested that commodities taxed by the board were non-dutiable. The split of authority is more apparent than real. Where, as in Childs, the law is clearly in the client’s favor, failure to appeal resembles mechanical error. Where the law is nebulous, practical considerations would in some cases justify a refusal to appeal. Where appeal is unlikely to succeed, the court system would be ill-served by forcing practitioners to appeal at peril of negligence.

59 S.W. 163 (Tenn. Ch. App. 1900).

Id. at 167.


Goodman & Mitchell v. Walker, 30 Ala. 482, 496 (1857); accord, Citizens Loan
A final example of a well-known decision on attorney liability which applied a spurious professional standard indicates the need for a reenunciation of the professional standard to make clear the dichotomy between mechanical or routine matters and matters of judgment. In *Lucas v. Hamm*, an attorney who drafted a will failed to take into account the Rule Against Perpetuities, with the result that the will violated the Rule and was invalidated. The court, however, found no negligence. Without analyzing the nature of the error, it simply reasoned that the *complexity* of the Rule Against Perpetuities made it a trap for ordinary attorneys, many of whom easily might have committed identical error.

The error of the *Lucas* court has been pointed out in muted but widespread criticism. One comment on the case, noting that the court adopted a “surprisingly restrictive view of the standard of care,” indicated that two cases had been directly on point to settle the exact problem the will drafter faced. Another writer noted that the court failed to consider that a doctor in the same jurisdiction would have been held liable for failing to refer matters beyond his ken to a specialist. As still another scholar phrased it,

> Although there may be some connection between the complexity and uncertainty of the law on a given question and a high incidence of error by attorneys dealing with that question, it cannot be assumed that the latter is established merely by proving the former. . . .

He pointed out that “[n]either complexity nor uncertainty clouded the meaning of the rule against suspension, in effect in substantially the same form from 1872.”

The *Lucas* case seems an exception; in general courts quietly

---

*Fund & Sav. Ass'n v. Friedley*, 123 Ind. 143, 147, 23 N.E. 1075, 1075 (1890); *Gimbel v. Waldman*, 193 Misc. 758, 84 N.Y.S.2d 888 (Sup. Ct. 1948). *See also* *Smith v. St. Paul Fire & Marine Ins. Co.*, 344 F. Supp. 555 (M.D. La. 1972) (incorrectness of attorney on the legal effect of a judgment of possession did not constitute malpractice when there was a lack of prior judicial determinations of the issue and differences of opinion existed among Louisiana attorneys); *Martin v. Burns*, 102 Ariz. 341, 429 P.2d 660 (1967) (when law that an order of the court was appealable was not well settled, failure to appeal was not malpractice); *Meagher v. Kavil*, 256 Minn. 54, 97 N.W.2d 370 (1959).

---

106 *Note, 75 HAw. L. Rxv. 620, 621-22 (1962).*  
107 *See Note, An Attorney's Liability for Professional Negligence in Georgia, 3 Ga. St. B.J. 210, 211 (1966).*  
108 *Note, Attorney's Violation of Future Interests Statutes Held Not Actionable, 14 Stan. L. Rev. 580, 582 (1962) (footnote omitted).*  
109 *Id. n.9.*  
110 *See Ramp v. St. Paul Fire & Marine Ins. Co.*, 254 So. 2d 79 (La. Ct. App. 1971), *aff'd*, 269 So. 2d 239 (La. 1972), in which the court concluded that defendant attorneys either missed a forced heirship issue in their interpretation of a will, or improperly advised their clients to sign an instrument compromising these rights. The court did not dwell on possible complexities surrounding forced heirship, but asserted instead that forced heirship was one of the most basic concepts of the state's legal system, and that an attorney should possess such reasonable knowledge of the concept as would enable him to perform
have perceived the differences between mechanical and judgmental areas, and have applied sensible standards to each. Yet the *Lucas* case has not been recognized as erroneous by the California courts. Thus, until the mechanical/judgmental dichotomy is clearly enunciated, the risk remains that this case, which has been noted for its progressivity in extending the concept of privity, may be read as a correct application of the professional standard.

C. Setting the Standards

1. Standards Set by the Profession

   It is the professional community, in both organized and unorganized forms, which is most important in setting the technical standards by which the professional will be judged. This reflects the fact that the layman, in entrusting himself to the services of a professional, relies upon the standards of the profession.

   The client, knowing that the person from whom he seeks advice or serious help has met the profession's standards for certification, rightfully assumes that the service he receives will conform to those standards, although he probably is not familiar with the contents of the standards.111

   Following a public protection rationale, in those aspects of a profession that are subject to mechanical standards, the individual practitioner deviates from those standards only at his peril. In the medical profession, for example, the doctor is not free to experiment upon his patients.112 Deviation from established procedures should create a prima facie case of negligence; allowance, of course, should be made for the possibility of compelling justification based on other competing professional guidelines.

   Standards for performance in a professional community can be established in a formal way, such as a promulgation of rules by an official organization,113 or they can develop through the custom of the community. In the latter case, the new lawyer or doctor is guided in his professional activities by adhering to the procedures learned in his apprentice experience; an injured client and a jury seeking to judge
an errant practitioner must look to experts to discern the proper standards.

The leaders of a profession may set forth in a formal manner a portion of the governing, operational standards. Thus the accounting profession provides a set of precise and detailed technical auditing procedures, referred to as "generally accepted auditing standards,"\(^{114}\) by which the conduct of any of its members may be judged. These provide the basis that has generally been used by the courts in establishing what conduct fails to meet the professional standard.\(^ {115}\) Indeed it is one of the earmarks of a professional group that courts recognize its professional standards as legally binding. However, such procedures are not uniform across the profession, and an accountant in a normal audit has several methods of compilation and calculation from which to choose, all of which are acceptable. This lack of uniformity may lead to varied results and has caused many problems for the courts in determining in a given case whether an adequate job has been performed.

Systematic issuance by the professions of definitive standards has the beneficial effect of enabling a client to obtain before the fact a clearer idea of what he might reasonably expect of his professional counselor. If a client believes that he has suffered from negligent performance, such standards can alleviate the need for expert testimony in a suit for malpractice. Obviously, though, standards issuance is no panacea; it cannot assure a clarification of client expectations. Moreover, a too-detailed set of standards might add new problems for courts and professionals alike. No generalized standards can totally eliminate the need to exercise judgment in unusual cases. If minutely-detailed standards were to suggest to a court that a discretionary area had been totally eliminated, a court lacking expertise in a particular profession might find unwarranted liability in some cases. Because of this possibility that a judgmental case might fall between standards which would seem clearly applicable to a layman, the presumption of negligence that accompanies apparent deviation from such standards should be rebuttable. But violation of a standard should suffice to prevent a dispositive motion and allow the case to reach the jury.

2. Standards Set by the Government

As has been noted, the general formula for professional negligence is a common law development; the more particularized operational standards derive from the profession itself. There are areas, however, where government has molded professional standards by statute and by supervision by administrative agencies.\(^ {116}\)

---

\(^{114}\) See American Institute of Certified Public Accountants, APB Accounting Principles (1971).

\(^{115}\) See, e.g., Shatterproof Glass Corp. v. James, 466 S.W.2d 873 (Tex. Civ. App. 1971).

\(^{116}\) This is in accord with Restatement (Second) of Torts § 285 (1965), which
In the securities field, Congress' special interest in protecting the investing public has resulted in a regulatory scheme affecting professional performance. Two statutorily defined standards affect professionals involved in securities work: section 18(a) of the Securities Exchange Act of 1934 and sections 11(b)(3) and 11(c) of the Securities Act of 1933.

Section 18(a) requires the least stringent of all possible standards, good faith, and accordingly represents no advance over common law requirements. This has the benefit of not exposing accountants to liability to potentially huge classes of investors for activity in which the degree of culpability is low, but it renders the section virtually valueless as a deterrent to sloppy work and as a vehicle for damaged investors. While it is true that the presumption is one of culpability, and that the accountant must prove his good faith, the standard is so loose as to be meaningless in the normal course of securities work. Rare is the instance, one would expect, when an accountant is actually trying to defraud an investor.

Section 11 contains a somewhat more useful standard, but it is not on its face totally satisfactory either. While proscribing untrue statements, it provides a due diligence defense which seems to impose a simple good faith standard, with the myriad difficulties of having to prove a state of mind. Negligence is almost assuredly isolated from liability. However, the statutory definition of reasonableness raises provocative questions. For the statute declares that in determining what constitutes reasonable investigation and reasonable ground for belief, "the standard of reasonableness shall be that required of a prudent man in the management of his own property." In the absence of determinative litigation, the extent to which this standard was meant to depart from the common law is largely speculative.

The first case applying section 11 to accountants, Shonts v. notes that a standard of conduct may be, *inter alia*, established by a legislative enactment or administrative regulation which so provides, or adopted by the court from a legislative enactment or an administrative regulation which does not so provide. When a statute mandating a standard of conduct is constitutional, the court must apply it. *Id.* comment b at 21.

118 Id. §§ 77k(b)(3), 77k(c).
119 Id. § 77k(b)(3)(B)(i).
120 Id. § 77k(c).
121 In Martin v. Hull, 92 F.2d 208 (D.C. Cir. 1937), the court rejected the argument that a lower court had erred in refusing to charge that defendants were obligated to exercise a high degree of care. The court noted that the statutory standard had emerged in Congress as a choice between a standard tantamount to insurance and one of reasonable care. If it were clear that the court was speaking to the issue of "care," the court's decision would seem faultless in view of traditional reluctance to require greater than ordinary care; however, it does not seem that the court was making this nice kind of distinction. The court's perception of how the reasonable man standard was to relate to a professional is not recorded; defendants were not accountants and had themselves relied on experts in creating the misleading documents at issue.
Hirliman,\textsuperscript{122} accepted extremely low-grade accounting practices; recovery was denied because the court found no post-certification, preregistration duty to disclose newly discovered information. In \textit{Escott v. BarChris Construction Corp.},\textsuperscript{123} Judge McLean refused to accept this lax standard, and held accountants to a standard allegedly no higher than that recognized in their profession but also no lower. In discussing the liability of an accountant who failed to detect false entries, he noted, after pointing out that the accountant had not spent an adequate amount of time on an important task and had been too easily satisfied with glib answers to his inquiries, that “there were enough danger signals in the materials which he did examine to require some further investigation on his part. Generally accepted accounting standards required such further investigation under these circumstances.”\textsuperscript{124} Although the result in \textit{BarChris} seems salutary, the rigors of McLean's standard arguably fall short of the statutory language, which may well have been intended to require the care and skill of a prudent accountant without reference to ordinary practice. In \textit{BarChris} the difference between “prudent” and “normal” professional practice was immaterial; in a proper case, the difference could be critical.

Two other sections of the securities acts, sections 17(a)\textsuperscript{125} and 10(b),\textsuperscript{126} flatly proscribing the use of deceptive devices, might at first appearance create a very new standard of liability without fault for professional securities people. However, it seems apparent that such is not now the case. While noting that scienter was not to be deemed a prerequisite to an action for fraud and indicating that securities laws had expanded the common law, Judge Waterman left room in \textit{SEC v. Texas Gulf Sulphur Co.}\textsuperscript{127} for a defense of diligence and good faith which seems coextensive with normative professional standards. There may, however, be less reluctance under these sections to declare dubious professional customs to be negligent. The lack of litigation makes the outer boundaries here almost entirely speculative.

Legislatures and agencies also play a role in setting standards through their interaction with professional organizations. In the legal profession, states may enact the Disciplinary Rules promulgated by the American Bar Association.\textsuperscript{128} Similarly, the American Institute of Cer-

\textsuperscript{122} 28 F. Supp. 478 (S.D. Cal. 1939).
\textsuperscript{123} 293 F. Supp. 643 (S.D.N.Y. 1968).
\textsuperscript{124} \textit{Id.} at 703.
\textsuperscript{125} 15 U.S.C. \textsection 77q(a) (1970).
\textsuperscript{126} \textit{Id.} \textsection 78j(b).
\textsuperscript{127} 401 F.2d 833 (2d Cir. 1968), cert. denied, 394 U.S. 976 (1969).
\textsuperscript{128} See, \textit{e.g.}, Indiana’s \textit{Code of Professional Responsibility for Attorneys at...
PROFESSIONAL NEGLIGENCE

tified Public Accountants often publishes new *Statements on Auditing Procedure*, which may be adopted by the SEC as a proper method for work filed with it. The practical effect of this may be to so discredit any alternative procedures as to eliminate them quite rapidly.

3. Standards Set by the Professional

In the course of his dealings with a client, the individual practitioner can alter the expectations of the client, and thus the standard by which the practitioner's success or failure will be judged. Reasonable disclaimers of success in areas of uncertainty can reduce friction and disappointment; but questions about the effectiveness of disclaimers, and of knowing client consent undoubtedly will arise. Certainly, detailed disclaimers, however sensible, will hardly add to the public confidence which a professional must enjoy.

By his dealings with clients, a practitioner can also elevate his standard of performance. Where a professional has chosen to engage in "hard sell" activity, and has generated expectations of infallibility...
by lavish promises, a warranty of success may be implied. This accords with the Restatement approach, allowing the professional standard to be altered by representations of superior skill or knowledge.

The professional may choose to confine his practice to a limited area of expertise. Once the professional makes a decision to specialize, client reliance is necessarily altered. The dimensions of additional legitimate reliance are most clearly ascertainable in medicine, where in order to specialize a practitioner must meet special, well-defined, and identified standards. This does not seem to be the case in most other professions. The outer edges of various legal specialties, for example, are vague, and the ABA Code of Professional Responsibility explicitly cautions against the advertising of specialties.

A general practitioner will not ordinarily be held to the same absolute standards as a specialist. Even so, when a lay person consults a general practitioner and that practitioner, recognizing the complexities of the case, still undertakes the case, it is justifiable for the lay person to expect to be treated with due care and skill or alternatively be referred to one who does possess such skill (except, of course, in case of emergency). Thus, despite a grave reluctance to inhibit or discourage the much needed general practitioner, the practitioner has been and will be held to a high standard of skill once he voluntarily undertakes a case.

4. Setting a Standard of Perfection: The Professional as Insurer?

Although warranties have been, historically, primarily identified with tangible property, and statements have been made to the effect that the warranty principle is "uniquely applicable to goods," the application of a warranty principle to the professional holds some promise, and deserves further study particularly in its economic implications. Logically the first place to consider applying an insurance principle is in those functions which are least professional in nature.

The most inviting application for strict liability in tort, is in the use or dispensing of defective products that cause injury. Although ob-

---

133 W. Prosser, supra note 18, § 109, at 726-27.
134 See Restatement (Second) of Torts, § 299A (1965).
135 ABA Code, supra note 111, DR 2-105. For a good discussion of related reliance problems, see Note, supra note 51, at 1302-04.
136 See McCoid, supra note 63, at 566.
137 See id. 597, explaining that the profession itself decides when referral is called for, in the form of expert testimony to the factfinder. See also Note, supra note 107, at 216.
138 See McCoid, supra note 63, at 597.
jections have been raised against this extension of strict liability, the clear analogy to conventional products liability suggests equivalent liability regardless of the status of the person dispensing a product. Beyond products liability, the next logical extension would be to the most mechanistic activities, such as the lawyer’s function of drafting a standard will, a “simple mandate of law that requires no room for . . . interpretation.”

It is fairly apparent that each of the professions grows vastly more complex with each passing year. The rapid proliferation of technical sources and available expertise creates problems for the perplexed professional who must, like Alice, run frantically just to keep abreast of new developments. A perfection standard may seem menacing to such a professional; yet the growing complexity of the professions creates growing dependence upon the professional, and demands that mere complexity be no legal justification for non-liability.

In implementing a standard of professional perfection, the problem of legal causation may in some cases assume huge dimensions. If the law rigidly requires a plaintiff to prove beyond all doubt that a mechanical error by the professional defendant caused his injury, then the scheme of “strict” liability would be effectively emasculated. If, on the other hand, a relaxed standard of proximate causation encourages all disgruntled clients with “bad results” to bring suit for minor errors only incidental to their injury, then the consequent increase in litigation could be a dismal prospect. Such a development might seriously impair professional-client relations, and have the result of increasing the expense and diminishing the quantity of professional work amid professional overcaution; few professionals would be willing to venture into new areas or new problems.

If the focus is shifted from the mechanical operations, to an emphasis on insuring results, there are strong counterconsiderations against over-weighing concern for clients’ welfare. Professional bad results—that is, “errors” where no professional standards are violated and the practitioner’s judgment conformed to accepted professional community levels—do not seem reasonably susceptible to a system of strict liability. Because the elements of control that exist when dealing with only mechanical operations are lacking in such cases, such “errors” will be by definition unavoidable, regardless of the amounts of care and skill exerted. Talking about this lack of control, the court in


Broyles v. Brown Engineering Co. pointed out the essential inapplicability of the warranty principle to the bad result. Speaking of the medical profession the court declared:

The practice of medicine ... depends on factors beyond the control of the practitioner. The medicines prescribed are usually the products of experiments by scientists or are compounded by other agencies. The same medicine may have beneficial and favorable results on one patient and unfavorable reaction on another. An example is penicillin. One patient reacts favorably and another unfavorably. The chemistry of human bodies varies. Some patients respond to surgery while other patients within the same age bracket respond unfavorably. The response is not yet within human control.

Similarly, the court considered the legal profession and noted:

Lawyers ... are dependent on the legal pronouncements of judicial agencies .... Interpretation of law is and cannot be an exact and accurate science. There is generally no formula to follow. Even when Code forms are used in the drafting of a complaint, questions often arise as to whether or not the correct form for the client's case has been used. The courts from state to state, and among the judges on a particular court, often disagree in their interpretation as to the effect of judicial pronouncements or legislative enactments. Trial lawyers are dependent on the reactions of jurors to factual presentations and the application of law thereto .... [A]s a whole, lawyers are dealing with factors that are beyond their control ....

Given this inability to control the causes of "bad results" and given the staggering possibilities of economic loss, requiring professionals to become insurers of good results would portend unhappy economic consequences for the consumer, adding perhaps astronomically to already high professional costs, and perhaps discouraging recourse to professional services. It does not appear that public reliance upon the professional outweighs these considerations.

III. THE SCOPE OF PROFESSIONAL LIABILITY

A. Introduction

The foregoing discussion has assumed that the professional is liable to some unspecified class of persons for his negligent acts. This

143 275 Ala. 35, 151 So. 2d 767 (1963).
144 Id. at 38-39, 151 So. 2d at 771.
145 Id. at 39, 151 So. 2d at 771. See Dorf v. Relles, 355 F.2d 488 (7th Cir. 1966), and Denzer v. Rouse, 48 Wis. 2d 528, 180 N.W.2d 521 (1970), for recent affirmations of the time-honored rubric that an attorney is not a guarantor of good results.
Comment will now consider the size and character of that class and explore the possible limits upon it. The traditional limit on professional liability has been the privity relationship between the professional and his client. Thus, when a negligence action was brought against a professional, the threshold question was whether the plaintiff had been the professional’s client. A negative answer usually resulted in dismissal, unless the plaintiff was able to allege more than mere negligence.

Although the privity limit on liability serves the goal of certainty in the law, it may not serve other goals such as justice or deterrence of negligent conduct. Consider the following hypothetical situation. Homeowner H hires A, an architect, to design and supervise the construction of his house. To finance the project H borrows $50,000 from B, a bank, with the house and land as collateral. H takes possession of the house, later goes bankrupt, and B forecloses the mortgage. When


When one considers the limitation or extension of liability costs, this can be done in several ways. First, the class of persons who may sue can be limited so that only those in a particular relationship with the group in question may sue a member of that group. The privity limitation is an example of this method. Second, the degree of causation required to bring suit can be defined so as to limit or extend liability. Courts use this technique when they speak in terms of proximate cause or legal cause. Third, the definition of what is actionable conduct can be modified so as to change the scope of liability. Certain conduct can thus be held nonactionable. Fourth, conduct can be held actionable by all injured parties, but recoverable damages can be controlled by limiting damage recovery to only certain damages. Of these methods of controlling liability costs, the first (the privity limitation) has been used most successfully in limiting professional liability for negligence. The others have been used no more in the area of professional negligence than in other areas of negligence. For this reason, only the privity limitation will be discussed at length in this section, but the reader must keep in mind that the other three methods of limiting liability are also active.

147 An alternative to the privity doctrine was, however, suggested in the very case that established its dominance in the field of professional liability. In Ultramares Corp. v. Touche, 255 N.Y. 170, 174 N.E. 441 (1931), Chief Judge Cardozo held that privity was no bar to liability for fraud and ordered a new trial on the question of fraud with the insight "that negligence or blindness, even when not equivalent to fraud, is none the less evidence to sustain an inference of fraud. At least this is so if the negligence is gross." Id. at 190-91, 174 N.E. at 449.

This suggestion that fraud need not be active or deliberate to be actionable, but that gross negligence or recklessness would suffice to supply the needed inference of fraudulent intent was later made a basis for liability in State St. Trust Co. v. Ernst, 278 N.Y. 104, 15 N.E.2d 416 (1938), in which the defendant accountant firm knew that the certified balance sheet it was preparing would be used to obtain credit, and prepared 10 copies. One month later it prepared a covering letter or supplemental statement expressing severe doubts about some of its statements in the balance sheet, but made up only a single copy, which it sent to its employer. Although Ultramares might suggest that the accountant has a duty only to his employer for negligent mistakes, a duty manifestly satisfied by the covering letter, the court found reckless disregard of consequence in not sending copies to all to whom the initial certified balance sheet had been exhibited. In its opinion this was negligence so gross as to constitute an inference of fraud, for "heedlessness and reckless disregard of consequence may take the place of deliberate intention." Id. at 112, 15 N.E.2d at 419.

Gross negligence or recklessness became a substitute for the element of intent in fraud actions; intent, always extremely difficult of proof, could be circumvented.


148 See W. Prosser, supra note 18, §§ 3, 4.
B attempts to resell the house it discovers that the house has grossly defective wiring and plumbing clearly due to A's negligence. As a result, B cannot resell the house to recover the deficiency and brings a negligence action against A to recover the balance. In answer to the suit, A claims that B has no cause of action against himself because it is not in privity of contract. Under the privity doctrine the suit would be dismissed. But is that fair to B? A was negligent, and B had no way of protecting itself from such an occurrence short of the unreasonable precaution of hiring its own architect. Also, the injury to B resulting from A's negligence is quite foreseeable. The major interest served by the denial of liability is the protection of A from the heavy burden of liability in such circumstances.

But, the privity doctrine is no longer the controlling factor that it once was. Many jurisdictions have modified it or repudiated it in various circumstances. What is the effect of these new developments on situations such as that above? What new facts or circumstances are relevant in courts' eyes to the decision to impose liability? What should be the limits of a professional's liability for negligence? Answering questions such as these is the goal of the following discussion.

B. Possible Limits and Bases of Professional Liability

As a general rule a tortfeasor is liable for the foreseeable consequences of his negligence. This limitation on the extent of liability for negligence has been characterized as "[t]he risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension." Foreseeability may be viewed as an alternative basis and limit of professional liability that could be applied in the absence of the contractual implications of the relationship between professional and client. The policy that a tortfeasor should be responsible for the foreseeable consequences of his acts, so familiar in other areas of our tort law, could easily form a basis of liability in this field as well. Concurrently, this same proposition delineates a convenient, though imprecise, limit of liability—that of foreseeable harm.

That the foreseeability limitation is different from, and extends farther than, the privity limitation can be seen by examining cases

149 See notes 224-35 infra & accompanying text.
150 California is the only jurisdiction to have eliminated the privity test altogether in a significantly large area. See Biakanja v. Irving, 49 Cal. 2d 647, 320 P.2d 16 (1958).
151 The reader may find it helpful to compare the analysis and conclusions of this Comment with the predictions made on the future of professional liability for negligence in Curran, Professional Negligence—Some General Comments, 12 Vand. L. Rev. 535, 545-47 (1959). A more comprehensive analysis of some of the cases treated in this Comment may be found in Prosser, Misrepresentation and Third Person, 19 Vand. L. Rev. 231 (1966).
152 RESTATEMENT (SECOND) OF TORTS § 435 (1965).
where the privity limitation has been applied. The most famous of these is *Ultramares Corp. v. Touche* in which the defendant accountant was held not liable to a plaintiff who, in lending money to the firm that employed the accountant, had relied on a certified original copy of defendant's audit. The limitation on liability was based on the lack of privity between the plaintiff and the defendant. But, if a foreseeability standard were applied, liability would certainly have been found, as prospective reliance on the accountant's statement by lenders to the accountant's employer was both foreseeable and known by the accountant. In another case the defendant accountant sent his report to the plaintiff who then relied on it in business dealings with the accountant's employer. The accountant was held not liable to the plaintiff for negligence in preparing the audit because of lack of privity. Under a foreseeability standard it is clear that liability would have been found, as the defendant knew both the plaintiff's identity and of his prospective reliance. Further examples of the wider scope of the foreseeability limit on liability as compared to the privity standard can be seen in cases treating the liability of attorneys for negligently drawn wills, of engineering companies for negligently prepared engineering reports used by their employers in securing bids for construction projects, and of abstractors for negligent title searches. A second possible test for measuring the extent of liability for negligence is that of reasonable reliance. This means that a professional would be liable to those who reasonably rely on his negligent ac-

1973]

PROFESSIONAL NEGLIGENCE 655

---


155 The defendants knew also that in the usual course of business the balance sheet when certified would be exhibited by the Stern company [the accountant's employer] to banks, creditors, stockholders, purchasers or sellers, according to the needs of the occasion, as the basis of financial dealings. Accordingly, when the balance sheet was made up, the defendants supplied the Stern company with thirty-two copies certified with serial numbers as counterpart originals. 255 N.Y. at 173-74, 174 N.E. at 442.


157 See, e.g., Lucas v. Hamm, 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961) (privity limitation would have prevented liability to a named beneficiary although the likelihood of harm to such a person due to the attorney's negligence was certainly foreseeable).

158 See, e.g., *Texas Tunneling Co. v. City of Chattanooga*, 329 F.2d 402 (6th Cir. 1964), rev'g 204 F. Supp. 821 (E.D. Tenn. 1962) (absence of privity between the contractor and the engineering company prevented liability; foreseeability of harm was obvious because of the customary trade practice of contractors' relying upon the engineering company's reports of underground geological formations to be encountered in the construction project).

159 See, e.g., Anderson v. Boone County Abstract Co., 418 S.W.2d 123 (Mo. 1967) (abstractor held liable only to the party who purchased his services; foreseeability of harm to plaintiff, a subsequent purchaser less than 2 years later, may not have been beyond question, but the size of the group of foreseeable plaintiffs certainly was larger than that of the group in privity with the abstractor).

160 For a very early use of this concept in defining the extent of liability for negligence, see Smith, *Liability for Negligent Language*, 14 HARV. L. REV. 184, 195-97 (1900).
tions to their detriment, regardless of their actual relationship with him. Reliance as a justification for imposing liability espouses a policy decision that those who innocently and reasonably rely on a professional's work should not be required to bear a loss admittedly caused by another's negligence. And it limits liability so that a professional is liable only to those who reasonably rely on his work. This reasonable reliance limit may simply be another characterization of the foreseeability limit in many cases, as reasonable reliance is foreseeable, and the only foreseeable harm in many circumstances is only that which is caused by reasonable reliance on a professional's negligent acts. But the two policies are analytically separate, and the result may differ.

The limit on liability imposed by the application of the reasonable reliance test is again wider than and different from, the privity limitation. An example is found in Craig v. Everett M. Brooks Co. The defendant civil engineering and surveying company was hired by a project owner to survey the project and set stakes. The defendant performed the work negligently and the plaintiff, the contractor on the project, was damaged because of his reliance on the defendant's erroneously placed stakes. There was no privity of contract between the parties, but the court applied the reasonable reliance standard and concluded that as the defendant knew that the plaintiff would rely on the negligently set stakes the defendant should be liable for the resulting losses to the plaintiff.

The fear of economic harm due to excessive liability has often lead the courts to limit narrowly liability for professional negligence. This pragmatic policy tends to operate contrary to the expansive scope of liability of foreseeability and reasonable reliance, and has in the past controlled the extent of liability. Fear of a crushing burden of liability was best expressed in Ultramares by Chief Judge Cardozo who stated:


163 Do beneficiaries under a will, a class whose potential injury is foreseeable, rely in any sense upon the skills of the attorney who prepares the document? See Lucas v. Hamm, 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961).


165 Plaintiff was compelled to relocate and rebuild 2 catchbasins and a road originally misplaced in reliance upon defendant's negligent placing of "offset stakes" on the construction site. The cost of relocation was sought as damages. Id.

If liability for negligence exists [without privity], a thoughtless slip or blunder, the failure to detect a theft or forgery beneath the cover of deceptive entries, may expose accountants to a liability in an indeterminate amount for an indeterminate time to an indeterminate class. The hazards of a business conducted on these terms are so extreme as to enkindle doubt whether a flaw may not exist in the implication of a duty that exposes to these consequences.\(^{167}\)

The fear expressed in these cases is that once the privity limitation on liability is broken, no other limit on liability would be possible, and negligence in carrying out a contract would result in liability to all who are remotely affected by the negligent act without regard to their relationship with the defendant. Thus, a liability is envisioned that is out of all proportion to the magnitude or importance of the duty undertaken in the contract and to the degree of fault of the professional in negligently performing his duties.

In the particular case of professionals, such crushing liability could have disastrous effects; it could drive the more responsible practitioners out of the profession, leaving only those who are irresponsible and unaffected by their potentially great liability.\(^{168}\) The resultant lowering of professional standards would certainly be a high price to pay for the benefits to the public of more extensive liability. There is also the remote possibility that some activities or professions would not be engaged in at all if the weight of potential liability became too great.\(^{169}\) Whether one considers this result desirable or not must depend upon whether an activity that creates such great potential liability is better not engaged in precisely because of the great potential for harm in its practice.\(^{170}\)

This fear of unlimited liability for breach of a contractual duty remains a major consideration for some courts in cases where an extension of such liability has been sought.\(^{171}\) Others have made no mention of the problem when extending liability to third parties not in privity.\(^{172}\)

\(^{167}\) Ultramares Corp. v. Touche, 255 N.Y. 170, 179-80, 174 N.E. 441, 444 (1931).

\(^{168}\) See C. Morris, Torts, 207-08 (1953).

\(^{169}\) See id.


\(^{171}\) See Anthony v. Vaughan, 356 Mass. 673, 255 N.E.2d 602 (1970) (extension of liability denied due to problem of liability to an indeterminate group of people); Westerhold v. Caroll, 419 S.W.2d 73 (Mo. 1967) (explaining why unlimited liability did not result from the decision); Rozny v. Marnul, 43 Ill. 2d 54, 250 N.E.2d 656 (1969) (noting that unlimited liability would not result from its decision).

\(^{172}\) E.g., Biakanja v. Irving, 49 Cal. 2d 647, 320 P.2d 16 (1958) (although standards were given for expanded liability, no mention of unlimited liability was made); Hanberry v. Hearst Corp., 276 Cal. App. 2d 680, 81 Cal. Rptr. 519 (Dist. Ct. App. 1969) (no mention of standards or problem of unlimited liability).
When courts have confronted this reason for limiting liability it has been persuasive in some cases in confining liability to limits near privy, while in others it has been held inapplicable in the particular circumstances of the case.

One possible solution to the problem of unduly burdensome liability is liability insurance for professionals which would essentially pass on the burden of liability to all who use the professional's services. Although there has been some discussion of the relationship between the availability of such insurance and professional liability to third parties for negligence in legal literature, the courts seem to have generally ignored the subject. Thus, any statement concerning the effect of such insurance on the decisions of courts would be purely speculative.

Although the courts have generally ignored the existence of professional liability insurance in their discussions of the propriety of extending liability for professional negligence, an examination of an area where such insurance was not ignored in the extension of liability demonstrates its possible effects on judges' thinking. Such an area is that of charitable immunity to negligence actions. Charitable immunity had several different bases, but the one relevant here is the argument that the imposition of liability for negligence would allow damage recoveries which would so deplete the funds of the charities as to deprive the public of their benefit. This argument raises fears remarkably similar to those expressed concerning the effects on the professions of liability for negligence to parties not in privy.

In the jurisdictions which have rejected charitable immunity in the past thirty years the existence of liability insurance which protects the charity's assets from sudden depletion has been significant in reaching that decision. One of the earliest and most comprehensive cases to

---

174 See cases cited note 171 supra.
177 The only case explicitly mentioning liability insurance as a means of relieving the burden of professional liability for negligence is Rusch Factors, Inc. v. Levin, 284 F. Supp. 85 (D.R.I. 1968). In De Bardeleben Marine Corp. v. United States, 451 F.2d 140 (5th Cir. 1971), the court noted that the problem of burdensome liability was not present as the United States was the defendant. The United States of course is a self-insurer.
178 See Bing v. Thunig, 2 N.Y.2d 656, 143 N.E.2d 3, 163 N.Y.S.2d 3 (1957). The court mentioned 4 arguments that had been used to support charitable immunity: 1) the funds given to the charity create a charitable trust that cannot be diverted to pay tort claims; 2) the recipient of charity waives his right to damages for injuries suffered through the negligence of the charity's servants; 3) the rule of respondeat superior does not apply to doctors and nurses employed in charity hospitals as they are to be regarded as independent contractors because of their special skill; 4) the possibility that a substantial damage award would do irreparable harm to the charity and discourage the generosity of donors.
deal with the problem is *President and Directors of Georgetown College v. Hughes.* The court, in answer to fears of dissipation of the defendant hospital’s charitable trust funds and deterrence of new donations to the charity, stated:

Further, if there is danger of dissipation, insurance is now available to guard against it and prudent management will provide the protection. It is highly doubtful that any substantial charity would be destroyed or donation deterred by the cost required to pay the premiums. While insurance should not, perhaps, be made a criterion of responsibility, its prevalence and low cost are important considerations in evaluating the fears, or supposed ones, of dissipation or deterrence.

The court recognized that the real burden of imposing liability on the charity was the cost of liability insurance premiums and not the risk of depleting the charity’s assets in satisfying damage awards, as would also be the case with professionals. As such premiums are essentially a cost of doing business, the court found little danger of ruining the charity in imposing liability for negligence. This result and its supportive reasoning have been followed in many other jurisdictions so that charitable immunity has largely disappeared.

This reasoning would seem to apply to professionals’ third party liability with equal force, and one can only speculate why the courts have not recognized the similarities between the situations in professional liability and charitable immunity. It is perhaps because liability insurance for institutions has been generally available for some time and its cost is reasonable and well established, making it rather easy to require charitable institutions to carry it. But liability insurance for professionals is not as well established, and its cost, when liability to third parties is added, will be wholly speculative and possibly prohibitive. Perhaps as professional liability insurance becomes more common and the rates stabilize, the example of how liability insurance

---

180 130 F.2d 810 (D.C. Cir. 1942). The existence of such immunity in the District of Columbia had never been decided, and the court was able to examine the question without the constraint of precedent.

181 Id. at 823-24.


affected the rejection of charitable immunity will become increasingly persuasive.

C. Emerging Limits of Professional Liability for Negligence—Beyond Privity

“The assault upon the citadel of privity is proceeding in these days apace. How far the inroads shall extend is now a favorite subject of juridical discussion.”

Although this statement was made in 1931 it could just as well be made about the most recent developments concerning professional liability for negligence. This “assault” will be analyzed in several professions to illuminate exactly where the scope of liability has advanced and where it might be proceeding.

1. Accountants

Under the privity doctrine, accountants are liable for negligence only to the person or firm that hires them. This boundary of liability has remained remarkably stable until the last few years. As recently as 1968 a court was able to assert that, “[n]o appellate court, English or American has even [sic] held an accountant liable in negligence to reliant parties not in privity.” Yet in that very case the dam began to break, and an accountant was held liable to a third party who relied to his detriment on an audit done by the accountant, who had been apprised that the audit was being prepared specifically to facilitate the borrowing of money from the plaintiff.

It is worth noting that one simple way for a reliant party to protect himself in the face of the privity limitation is by placing himself in privity with the accountant by splitting the cost of the accountant's services with the party being audited, as was done in Gammel v. Ernst & Ernst, 245 Minn. 249, 72 N.W.2d 364 (1955). This procedure would only be available, of course, to those very close to the party being audited.

The court claimed that this result was in harmony with Rhode Island law, which followed Ultramares, because the plaintiff and his intended reliance were specifically known to the accountant while the plaintiff in Ultramares was simply a member of an undefined class of prospective lenders. The court felt that principles embodied in Rs-
This general line of expansion of liability has been adopted in several other cases, \(^{191}\) but no courts appear to have gone past it in further extending an accountant's liability to third persons. *Shatterproof Glass Corp. v. James* \(^{192}\) held the defendant accountant liable to a damaged third party where the accountant was specifically told by his employer to supply information to the plaintiff, thus making the plaintiff's reliance upon the accountant's work both foreseen and certain. In reaching that result the court embraced the scope of liability embodied in section 552 of the *Restatement (Second) of Torts*. \(^{193}\)

The common circumstance upon which liability is based in these cases is that the plaintiff's reliance on the accountant's work is specifically known to the accountant. Not merely foreseen reliance, but known reliance has become the outer, common law limit for accountants, yet this expansion of liability is not a universal trend. Recent cases still adhere to the classic privity standard of *Ultramares*, \(^{194}\) but at least an initial break from the old common law limit has been signaled. \(^{195}\)

2. Architects

The variety of services provided by architects in modern society and the effect of their work upon a large number of people means that negligence by an architect can result in a variety of injuries and economic losses to several different classes of persons. Under either a strict privity standard or under the broader standard found in the field of

---


\(^{193}\) (Tent. Draft No. 12, 1966).

*Information Negligently Supplied for the Guidance of Others.*

1. One who, in the course of his business, profession or employment, or in a transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

2. Except as stated in subsection (3), the liability stated in subsection (1) is limited to loss suffered

(a) by the person or one of the persons for whose benefit and guidance he intends to supply the information, or knows that the recipient intends to supply it; and

(b) through reliance upon it in a transaction which he intends the information to influence, or knows that the recipient so intends, or in a substantially similar transaction.

3. The liability of one who is under a public duty to give the information extends to loss suffered by any of the class of persons for whose benefit the duty is created, in any of the transactions in which it is intended to protect them.


accountancy, the hypothetical situation posed at the beginning of this section would be one of non-liability. The lender's reliance on the architect's work was not prospectively known to the architect, and the lender was not a member of that small class of possible plaintiffs peculiarly dependent upon his work. But in this area, the strict privity limit is now almost nonexistent, and new limits are emerging.

One of the many services that an architect provides is the supervision of construction projects. This is usually done after the architect has designed the project and is normally a matter of assuring that the contractors on the job conform to blueprints and specifications. Both the designing and the supervision are contractual undertakings and the scope of the duty to the employer is defined by the contract.

From these contractual undertakings courts have derived a duty of due care to third parties the breach of which will give rise to a liability on the part of the architect. The leading case of Miller v. DeWitt imposed liability on an architect for injuries to workmen on the job based solely on his contractual duty to supervise the work. The court reasoned that:

> Privity of contract is not a prerequisite to liability. They [the architects] were under a duty to exercise ordinary, reasonable care, technical skill, and ability and diligence, as are ordinarily required of architects, in the course of their plans, inspections, and supervision during construction for the protection of any person who foreseeably and with reasonable certainty might be injured by their failure to do so . . . .

Another basis of architects' liability to third persons could be strict liability for unreasonably dangerous products, as prescribed by Restatement (Second) of Torts § 402A (1965). This theory of liability (phrased in terms of an implied warranty) was held applicable to a builder in Schipper v. Levitt & Sons, Inc., 44 N.J. 70, 207 A.2d 314 (1965), in which the court held that a builder would be liable for injuries caused by a defectively designed hot water system, upon proof that the design was unreasonably dangerous and proximately caused the injury in question. There seems little reason for a different result, especially in view of the foregoing discussion of the professional standard of care above, if instead of designing the system itself, the defendant had employed an architect or engineer for that purpose.


198 Miller v. DeWitt, 59 Ill. App. 2d 38, 208 N.E.2d 630 (1967). The employee, Miller, was injured when temporary shoring for the roof of a building being remodeled collapsed under the weight of the roof. The defendant architect had done the design work and had general supervision and control of the project, including the right to halt the work in order to insure compliance with the plans and specifications, but had neither designed the shoring that collapsed nor approved its use. Extent of liability was not an issue before the supreme court but it was discussed at some length by the lower appellate court.

The same result has been reached in a suit by the user of a finished building for injuries caused by an architect's negligent design defect in remodeling the building and where death resulted from the failure to indicate the location of a buried power line on project plans.

The common holding of these cases is that an architect is under a duty to use due care and skill in providing his various services and that his duty is owed to all who may be foreseeably injured by his negligence. This duty would generally extend to anyone legitimately on the construction site or anyone legally using the finished building or project. Though the scope of the architect's employment is limited by the contract with his employer, the scope of his duty to use due care in carrying out his duties under the contract is defined by law.

An architect's liability for economic harm to third parties generally arises out of his supervisory activities. The typical situation is that of State ex rel. National Surety Corp. v. Malvaney in which the architect's duties included the certification of progress payments to the contractor. The contractor defaulted on the job and the plaintiff surety was required to finish it. The surety brought an action against the architect for negligently certifying the progress payments. The architect was bound by contract to the owner and the surety was obligated to the owner for any defaults by the contractor.

Given these arrangements, any negligence on the part of the architect in certifying the progress payments was certain to result in damage to the surety upon the contractor's default, a circumstance of which the architect had constructive notice. The certification procedure was as much for the benefit of the surety as for the benefit of the owner. The court held that even though the parties were not in contractual privity the entire scheme created a duty on the architect's part to the surety to use due care in certifying payments.

---

204 In our opinion these cases [Miller, Montijo, etc.] have disregarded fundamental contractual principles in attempting to parlay general inspection or supervision clauses which give the owner or architect a right to stop observed unsafe construction processes into a duty which is neither consistent with generally accepted usage nor contemplated by the contract or the parties. Id. at 135-36, 474 P.2d at 854-55.
The liability of an architect for economic injury due to negligent supervision thus is predicated on the certainty of harm to the plaintiff resulting from the architect's negligence. The standard certainly is more limited than foreseeability but less limited than privity and can perhaps be characterized as one of reasonable certainty. Applying this standard to the hypothetical situation given at the beginning of this section, one basic question presents itself. Is the certainty of harm to the lender resulting from the architect's negligence the same or greater than the degree of certainty in *Malvaney*? The answer appears to be that it is not, as the harm to the lender is dependent upon the owner's failure to repay, which is itself unforeseeable and unrelated to the architect's work. Thus liability would exist only when the economic harm to the plaintiff is almost certain to result from the architect's negligence because of the plaintiff's known (or constructively known) reliance on the architect's work.

3. Attorneys

Liability of attorneys for negligence has been traditionally limited to clients and parties for whose direct benefit a transaction was carried out (under third party beneficiary theory). These limits were shattered several years ago, however, in *Biakanja v. Irving*. A notary had acted as an attorney in preparing a will, and due to his negligence the will was not properly witnessed and was therefore denied probate. The intended beneficiary under the invalid will sued the notary for her lost legacy. The court, finding the notary negligent, enumerated the following six criteria compelling plaintiff's recovery:

The determination whether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are the extent to which the transaction was in-

---

208 See, e.g., *Lawrence v. Fox*, 20 N.Y. 268 (1859). Third party beneficiary theory could perhaps provide a remedy in contract in some of the attorney cases mentioned in this section. See notes 209-14 infra. Also, recovery in *Malvaney* might have been possible under this theory, although the holding was not based on it. But the remedy is usually dependent upon the existence of a contract and upon the explicit or implicit intent of the parties to benefit the third person. Hence, its application is far more limited than the tort doctrines discussed and used here. See *Restatement of Contracts §§ 133-47* (1932).
210 The notary failed to have the testator subscribe to the will in the presence of the two witnesses required to sign the will in the testator's presence. See *Cal. Prob. Code § 50* (West 1956).
tended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant’s conduct and the injury suffered, the moral blame attached to the defendant’s conduct, and the policy of preventing future harm.\(^{211}\)

The court found that the goal of the transaction had been to transfer the estate to the plaintiff and that this circumstance satisfied the first four criteria. That the harm had been caused by the notary’s unauthorized practice of law satisfied the last two. Using this standard of extent of liability, actual attorneys have subsequently been found potentially liable to beneficiaries under wills for alleged errors in their preparation.\(^{212}\) Influential in the decision was the fact that a contrary conclusion would have caused the innocent plaintiff to bear the loss.

Liability has also been found possible where the attorney, regularly employed by a collection agency to collect debts, instituted a suit that was dismissed for lack of diligent prosecution. The attorney’s negligence resulted in the loss to the plaintiff creditor of recovery on a valid and collectible claim.\(^{213}\) The *Biakanja* criteria were met as the transaction in which the attorney’s negligence occurred was intended primarily for the benefit of the plaintiff, the harm to the plaintiff due to negligence in prosecuting the action was certainly foreseeable, there was a direct connection between the defendant’s negligence and the plaintiff’s injury, lack of diligence in prosecuting actions carries some moral blame, and the policy of encouraging diligence in prosecuting actions would be furthered by the imposition of liability in such a situation.\(^{214}\)

Thus, under the influence of *Biakanja* the extent of attorneys’ liability for negligence has expanded to include those whose injury due to the attorney’s negligence is foreseeable. Foreseeability is essentially

\(^{211}\) 49 Cal. 2d at 650, 320 P.2d at 19.


\(^{214}\) *Id.* at 772, 97 Cal. Rptr. at 192. Alternatively the court based its holding on RESTATEMENT (SECOND) OF TORTS § 324A (1965) which provides:

Liability to Third Person for Negligent Performance of Undertaking

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if

(a) his failure to exercise reasonable care increases the risk of such harm, or

(b) he has undertaken to perform a duty owed by the other to the third person, or

(c) the harm is suffered because of reliance of the other or third person upon the undertaking.
knowing the names or existence of the people who would be injured by any negligence,\textsuperscript{215} and an attorney cannot draw a will without knowing who the intended beneficiaries will be or institute a suit for the collection of a debt without knowing of the creditor.

4. Surveyors

As with the professions discussed above, the scope of liability of surveyors for negligence has expanded from the privity limitation in the past few years.\textsuperscript{216} The farthest courts have gone in this area has been to hold a surveyor liable to subsequent purchasers of property nine years after the original erroneous survey.\textsuperscript{217} In reaching this result the court considered the following factors important:

1. An express, unrestricted, and wholly voluntary guarantee of accuracy appearing on the face of the inaccurate plat;

2. Defendant's knowledge that the plat would be used and relied on by others than the person ordering it, including plaintiffs;

3. The fact that potential liability was restricted to a comparatively small group, and that, ordinarily, only one member of that group would suffer loss;

4. The absence of proof that copies of a corrected plat prepared by defendant when he discovered the inaccuracy one week after the original survey were ever distributed;\textsuperscript{218}

\textsuperscript{215} Liability has been extended considerably further under Biakanja in other areas. See Barrera v. State Farm Mut. Auto. Ins. Co., 71 Cal. 2d 659, 456 P.2d 674, 79 Cal. Rptr. 105 (1969) (insurer held to owe a duty to potential accident victims to investigate automobile insurance applications within a reasonable amount of time); Connor v. Great W. Sav. & Loan Ass'n, 69 Cal. 2d 650, 447 P.2d 609, 73 Cal. Rptr. 369 (1968) (lender held liable to purchasers of homes in a development it financed for failure to prevent defective design and construction); State Farm Mut. Auto. Ins. Co. v. Wood, 25 Utah 2d 427, 483 P.2d 892 (1971) (following Barrera).

The foreseeability standard applied in these cases was considerably wider in scope than that used in the attorney cases as the lender and insurer were said to owe a duty to a general group rather than specific, known persons. Whether this difference is due to inherent differences between professions and corporations or to the more limited resources of an individual professional to meet a damage judgment is uncertain. But, in discussing the imposition of new liability in these cases the courts seemed to disregard the burdensome liability problem mentioned in the text. See text accompanying notes 166-74 supra.

\textsuperscript{216} See generally Comment, 1 Loyola U.L.J. 176 (1970); Comment, Pecuniary Liability to Third Parties for Negligent Misrepresentation, 64 NW. U.L. Rev. 903 (1970); Note, 37 Tenn. L. Rev. 827 (1970).

\textsuperscript{217} Rozny v. Marnul, 43 Ill. 2d 54, 250 N.E.2d 656 (1969). In Rozny, a surveyor, without knowing for whom his work was specifically intended, surveyed a lot, which was subsequently sold by his employer to a builder. Three years after the survey, the builder sold the lot and a house on it to the plaintiffs, who subsequently constructed further improvements on the property, relying on the original survey. Nine years after the original survey, the inaccuracy was discovered.

\textsuperscript{218} The defendant testified at trial that he had no record or recollection of sending a corrected survey to the person who had ordered the original, in accordance with his regular procedure. Id. at 57, 250 N.E.2d at 658.

The surveyor's failure to send out the corrected survey is similar to the problem of post-certification discovery of error and failure to appraise reliant parties of that discovery in the area of accountants' liability. See Fischer v. Kletz, 266 F. Supp. 180 (S.D.N.Y. 1967); State St. Trust Co. v. Ernst, 278 N.Y. 104, 15 N.E.2d 416 (1938). See
The undesirability of requiring an innocent reliant party to bear the burden of a surveyor's professional mistakes;

The impact that recovery here would have in promoting cautionary techniques among surveyors.219

The standard for determining extent of liability expressed by these factors is apparently one of foreseeable reliance. The surveyor who guarantees his work is liable to future purchasers or lenders who rely on it.220 How far this standard can be applied beyond the facts of this case is not clear. The relatively short time between the survey and the plaintiff's purchase,221 the guarantee of accuracy, and the surveyor's failure to send out the corrected survey are unique circumstances that had some effect on the decision. The existence of a guarantee seems critical. As the original negligence was at least as blameworthy as the failure to send out the corrected survey, perhaps the lack of the second negligent act in another case would not be critical. Then the standard would be liability to those who will foreseeably rely on the guaranteed work for some reasonable length of time after it is originally done. Reasonableness here could take into account such factors as changes in surveying techniques and the cost of resurveying for the reliant party. A more recent case222 allowed recovery under the standard advanced by section 552 of the Restatement (Second) of Torts223 with the court noting that the defendant had full knowledge of how his work would be used and the plaintiff's intended reliance upon it. This standard of liability is apparently one of known reliance, somewhat more limited, however, than the one derived above.

5. Summary

The emerging limits of liability beyond strict privity outlined above are generally controlled by the three policies of foreseeability, reasonable reliance, and burdensome liability. The treatment and use also note 147 supra for a discussion of an inference of fraud sometimes found in such cases.


220 Liability for reliance of a different type is also possible. In Craig v. Everett M. Brooks Co., 351 Mass. 497, 222 N.E.2d 752 (1967), a surveyor was held potentially liable to a contractor who relied to his foreseeable detriment upon stakes negligently placed by the surveyor for the owner of the project.

221 But cf. Howell v. Betts, 211 Tenn. 134, 362 S.W.2d 924 (1962) (24 years elapsed between the inaccurate survey and the plaintiff's reliance; the court held that too much time had elapsed for the plaintiff to recover).


223 (Tent. Draft No. 12, 1966); set forth in note 193 supra.

It is clear from comment h and illustrations following the Restatement section that the liability envisioned is to a person or group (no matter how large) whose reliance upon the incorrect information in a particular transaction was known or expected. Use of the information by a person or group is not within the scope of liability if the use is merely foreseeable as opposed to known or expected or if the particular transaction in which the information is used is not the transaction for which it was intended, whether the use of the information in that transaction was foreseeable or not. Thus, the standard is somewhere between privity and reasonable foreseeability.
of these policy considerations, however, have not been uniform among those jurisdictions that so far have extended liability, and seemingly different meanings and limits stem from the same concepts. For this reason, it will be helpful to reexamine briefly the limits of liability just outlined to see if any consistent results have been reached.

In all of the professions discussed above the twin policy concepts of foreseeability and reasonable reliance have been used in extending liability. The emerging limits of liability in three areas are generally consistent. Accountants are liable for foreseeable harm to specific third persons; architects are liable for economic injury when they know, or should know, that their negligence will, with a reasonable certainty, result in injury to third parties; and attorneys are liable for foreseeable harm to known persons. In each of these situations the professional has been held liable to a very limited group which varies with the peculiar characteristics of the factual situation. The basic characteristic of each group is that their reliance on the professional's work is both expected and practically unavoidable. The developing standard is, then, that in these three areas the professional is liable for negligence only to those whose reliance is expected and practically unavoidable. As noted before, use of this standard in the above hypothetical would result in no liability.

The apparition of the burden of excessive liability has accounted for the reluctance of many courts to extend liability even to these modest limits. In the particular instance of accountants it defeated attempts at imposing liability for negligence to unknown third persons and surely accounts for the stress courts place upon the foreseen factor in cases where liability is extended. In cases involving the other professions, the courts have been careful to explain how an extension of liability will not result in unduly excessive liability. A particularly good example is presented by Westerkold v. Carroll in which the court discussed the two bases of the ancient holding in

---

225 See, e.g., Blakanja v. Irving, 49 Cal. 2d 647, 650, 320 P.2d 16, 19 (1952) (of the 6 factors set out as affecting the determination of liability, 4 are related to the foreseeability-reasonable reliance policies). See text accompanying note 211 supra.
226 This limit is practically that discussed in note 223 supra. Thus, at least for the present time, RESTATEMENT (SECOND) OF TORTS § 552 (Tent. Draft No. 12, 1966) could be very useful in persuading courts to accept this modest extension of liability.
Winterbottom v. Wright—economic burden and possible judicial infringement of contract—and then carefully explained why its holding was not inconsistent with that case.

The scope of liability that has been applied to surveyors in at least one case is somewhat wider than that explained above. The group to whom a duty is owed consists generally of those who acquire a financial interest in the property for a reasonable length of time after it is surveyed. This definitely can encompass a larger group than that described above, as members of this group need not necessarily rely on the surveyor’s work and are certainly not expected to do so. But, the applicability of this standard beyond the case where it developed is questionable and a better argument can probably be made for the application of the narrower standard applied to the other three professions above. The only circumstance in which one of the professions examined is held to a true foreseeability standard in most jurisdictions is that of the architect whose work precipitates personal injuries. He is essentially liable to all those who could be foreseeably injured because of his negligence in the design or supervision of a project. This scope of liability is akin to that applied in common personal injury cases and is most likely an outgrowth of the principles imposing liability without regard to privity for injuries resulting from dangerous instrumentalities expressed in MacPherson v. Buick Motor Co. rather than an expansion of the limits set in Ultramares.

D. Statutes and the Scope of Professional Liability

An appreciation of the full scope, and the potential future scope, of professional liability requires an examination of the impact of statutory limits of liability. Legislatures may determine the extent of liability, either by altering or codifying the common law. Liability to third persons has been imposed, for example, under statutes such as one in Kansas which requires the bonding and purchase by abstracters of “error and omissions” insurance “for the payment . . . of any and all actual damages that may be sustained or accrue to any person or persons relying [upon his work] by reason of . . . any error, deficiency or mistake in any abstract or continuation thereof . . . .” Yet the

232 Notes 220-21 supra & accompanying text.
233 See notes 222-23 supra & accompanying text.
234 217 N.Y. 382, 111 N.E. 1050 (1916) (manufacturer of negligently made goods held liable, irrespective of privity of contract, for injuries to the ultimate user caused by the defect when the goods are likely to cause injury if negligently made and when the ultimate user would not be likely to inspect the goods before use).
statutes most affecting professional liability, and which have been the subject of much recent litigation,\textsuperscript{237} are those federal laws regulating the issuance and sale of securities.

1. Federal Securities Acts

Consider the following hypothetical. Buying corporation $B$ wishes to acquire selling corporation $S$. $B$ employs lawyer $L$ to accomplish this task. Lawyer $L$ hires accountant $A$ to audit $S$'s operations, and on the basis of that report the acquisition is completed. Subsequently, $L$, using $A$'s earlier evaluation of $S$ corporation's financial status, prepares the necessary registration statements, and $B$ corporation issues shares of stock to the public. Investor $I$ buys some of the stock. Subsequently, it is learned that $A$ failed to discover substantial operating losses of $S$ corporation which cause $B$'s bankruptcy and $I$'s loss of fortune. $I$ then brings an action against $L$ and $A$ to recover his loss. Under the common law rules discussed above,\textsuperscript{238} the liability of lawyer $L$ and accountant $A$ is quite doubtful. None of the information about $S$ corporation supplied to $B$ corporation by $L$ and $A$ was intended to be relied upon by $I$. But, as will be seen, this whole situation can be changed by statute.\textsuperscript{239}

Professionals have been held liable under four distinct provisions of the federal securities laws: sections 11 and 17(a) of the Securities Act of 1933,\textsuperscript{240} section 18 of the Securities and Exchange Act of 1934\textsuperscript{241} and section 10(b) of the latter act\textsuperscript{242} with SEC regulation 10b-5 promulgated pursuant thereto.\textsuperscript{243} Of these, the last has ultimately proved the most useful. These provisions of the securities legislation sweep aside common law concepts of privity or reasonable foreseeability. Their \textit{raison d'etre} is investor protection,\textsuperscript{244} and it is from this perspective that the issue of professional liability has in general been approached.

Section 11 of the Securities Act of 1933 is a radical departure from the common law in numerous aspects. It provides a statutory basis for civil suit by "any person" acquiring a registered security\textsuperscript{245} against


\textsuperscript{238}See notes 225-26 supra & accompanying text.

\textsuperscript{239}For the purpose of brevity, the following discussion of statutes will be limited to the federal area, although the analysis itself is equally applicable to similarly worded state statutes. See, e.g., \textit{Cal. Corp. Code} §§ 25,000-04 (West Supp. 1972); Pennsylvania Securities Act of 1972 (Pa. Legis. Serv. 924 (1973)).


\textsuperscript{241}Id. § 78r.

\textsuperscript{242}Id. § 78j.

\textsuperscript{243}Id. § 78r.

\textsuperscript{244}See notes 263-65 infra & accompanying text.

"every person who signed the registration statement," and "every accountant, engineer, or appraiser, or any person whose profession gives authority to a statement made by him" who prepared or certified any part of the statement or any report or valuation used in its preparation. Section 11 has no requirement of scienter; nor are privity or reliance necessary for a finding of third party liability. It is enough that the statement be materially misleading. However, the provision's effectiveness as a vehicle for recovery is limited to the purchasers of newly registered securities, and it is of no benefit to an investor who has otherwise made a bad investment in reliance on a negligently prepared audit. He is relegated to the common law. Section 11 is applicable only to registration statements filed with the Commission, and does not pertain generally to all misleading statements in the securities field. Thus not only is a commercial lender excluded from the ambit of its coverage, but also one who purchases a security in reliance on an annual report, press release, or other document not a registration statement (when the registration statement is not materially misleading) may not rely on section 11 as a basis of liability.

Section 18 of the Securities and Exchange Act of 1934 is a less effective instrument for dealing with professional misbehavior than is either section 11 or the varied doctrines of the common law. Section 18(a) expressly provides a civil damage remedy to any reliant party damaged by the purchase or sale of a security whose price is affected by false and misleading statements of a material fact, contained in any document filed with the Commission or any exchange, and made by "any person." Its operation is not exclusively limited, however, to registration statements. Thus section 18(a) is applicable in theory to many more factual situations than section 11, which is limited to one who buys a newly registered security. For example, both a purchaser who bought a security in reliance upon a fraudulent annual report filed with an exchange, and an owner who sold short in reliance on a misleading press release may recover. Unfortunately, its operation is limited to the purchase or sale of securities at an affected price; again no protection is afforded the commercial lender.

Section 18(a) does require scienter, causation, and reliance to maintain a cause of action. Thus, like the common law its effectiveness is limited to fraud. The twin requisites of causation and reliance, and a liberal good faith defense make section 18 of no new significance as a vehicle for recovery against negligent professionals.

---

246 Id. § 77k(a)(1).
247 Id. § 77k(a)(4).
248 Cf. id. § 77p.
249 Id. § 77k(a).
Section 10(b) of the Securities and Exchange Act of 1934,\(^{252}\) providing criminal sanctions, with its operative rule 10b-5\(^{253}\) has been the most far reaching and effective provision of the securities laws in dealing with professionals. \textit{Kardon v. National Gypsum Co.}\(^{254}\) early found an implied civil remedy for violation. Although the Supreme Court has never conclusively ruled on the issue, it has noted that "[i]t is now established that a private right of action is implied under § 10(b)."\(^{255}\) Accountants, therefore, on numerous occasions have been held to fall within the intended ambit of rule 10b-5.\(^ {256}\) The coverage contemplated by the rule 10b-5 is broad and comprehensive, and has been construed as such by the SEC\(^ {257}\) and the courts. Its effectiveness is not limited to statements filed with an exchange, but it proscribes any device, scheme or artifice to defraud in connection with the purchase or sale of securities which has been interpreted to apply to assertions made "in a manner reasonably calculated to influence the investing public."\(^ {258}\)

It seems that the decisive issue is whether the professional foresaw or reasonably should have foreseen that his work would influence the investing public. This approximates quite closely the full limits of foreseeability rule which no court has yet been willing to impose under the common law, and which may in fact be a real breakthrough in professional liability.\(^ {259}\) Although neither the 1933 Act nor the 1934 Act is

\(^{252}\) Id. § 78j(b).

\(^{253}\) 17 C.F.R. § 240.10b-5 (1972).

\(^{254}\) 69 F. Supp. 512 (E.D. Pa. 1946). The court based its finding of civil liability on the classic doctrine of negligence per se. Id. at 513. This doctrine allows a court to adopt a statute or administrative regulation as the standard of conduct of a reasonable man if (1) plaintiff is a member of the class of persons intended to be protected by the statute or administrative regulation and (2) the interest invaded was intended to be protected (3) against the harm that resulted (4) from the particular hazard. \textit{Restatement (Second) of Torts} § 286 (1965). See also id. §§ 287-88C (1965); \textit{W. Prosser}, \textit{supra} note 18, § 36; Lowndes, \textit{Civil Liability Created by Criminal Legislation}, 16 \textit{Minn. L. Rev.} 361 (1932); Morris, \textit{The Relation of Criminal Statutes to Tort Liability}, 46 \textit{Harv. L. Rev.} 453 (1933); Thayer, \textit{Public Wrong and Private Action}, 27 \textit{Harv. L. Rev.} 317 (1914).


\(^{258}\) \textit{SEC v. Texas Gulf Sulphur Co.}, 401 F.2d 833, 862 (2d Cir. 1968), \textit{cert. denied}, 394 U.S. 976 (1969). This broad scope of liability is not accepted by all circuits. In \textit{Wessel v. Buhler}, 437 F.2d 279 (9th Cir. 1971), prospectuses were prepared from accountants' statements which were not themselves ever publicly disseminated, nor had any investor ever seen the statements before the litigation began. The Ninth Circuit held that preparation of the statements did not have a sufficient connection with the purchase or sale of securities

\(^{259}\) Id. § 78j(b).
generally thought to protect commercial lenders, the definition of "securities" in the two Acts is broad enough to include many transactions normally thought of as loans, with the exception of notes which mature in nine months or less, which are specifically not covered by the Acts. Thus, while normal short-term commercial loans are not covered by the Acts, the possibility is raised that notes of longer duration may be within the scope of the statutes.

The inclusion of civil liability in the two acts was intended to achieve two goals. First, because criminal penalties are only partially effective in the enforcement of such laws, civil liability was intended to be a strong deterrent to their violation. Second, it was intended to provide a vehicle whereby injured investors could be repaid their losses, a reason which partially explains why lenders are afforded no protection under the acts. These goals are essentially the same as those generally advanced as justification for common tort law.

In imposing this broad civil liability, Congress was not creating a new theory but was just redefining its scope to advance certain social goals. Such an advance can also be made by courts, as in the case law just discussed, and Congress is governed by the same policy considerations as those affecting advances made by courts. Hence, rather than offering a new application of civil liability to accomplish new goals, these statutes simply constitute an instance where the Congress, instead of the courts, weighs the various considerations and decides whether or not to impose liability to advance common goals. That Congress can move more rapidly in the process because it is unrestrained by judicial precedents is obvious, but the goals and guiding considerations are essentially the same.

to establish a basis for liability. In thus reading rule 10b-5 narrowly, the court said, "[w]e perceive no reason, consonant with the congressional purpose in enacting the Securities and Exchange Act of 1934, thus to expand Rule 10b-5 liability." Id. at 283. In this jurisdiction the accountant A in the hypothetical would thus not be liable under rule 10b-5.

The considerations of both reliance and unduly burdensome liability affected Congress' drafting of these statutes, especially the 1934 Act. See Comment, Civil Liability for Misstatements in Documents Filed Under Securities Act and Securities Exchange Act, 44 YALE L.J. 456, 457 (1935).
2. Federal Immunity Statutes

A particularly interesting interplay between the common law, statutes, and courts affects the scope of liability of professionals employed by the federal government—the statutory expansion of liability to a party otherwise immune from suits at common law. Though the authors of the Restatement disfavor immunities generally, the United States Government itself is immune from tort damage suits unless it has given its consent through a legislative enactment to an action against it. This immunity does not commonly extend to government officials and employees, but it has been used to prevent suits against some higher government officials. Without a legislative enactment, lower government officials and government employees (professionals most often fall into this group) are liable for their own acts in their employment, while their employer, the Government, is not so liable. Thus, without a legislative enactment, the victim of such negligence has only the remedy of suit against the actual tortfeasor (who may be judgment proof) or relief through a private bill.

Due to the unfairness to individuals with otherwise just claims against the Government who could only get relief through private bills, and the concomitant heavy burden on Congress caused by the many private bills, Congress enacted the Federal Tort Claims Act in 1946. The heart of this enactment is section 2674 in which the United States waives its immunity to tort actions so that it is liable "respecting the provisions of this title [title 28] relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances . . ."

Through a combination of statutes and judicial holdings, federal officers and employees are generally no longer subject to tort actions in the areas where the United States has waived its immunity. This is true for the following reasons. First, as the United States is always financially solvent, and as a judgment in a suit or an administrative adjustment of a claim against the United States bars a subsequent action against the individual officer or employee, a plaintiff will almost invariably sue only the United States in a tort claim to which it has waived immunity. Second, in two large classes of cases where a plaintiff might choose to sue the individual officer or employee, that of

---

266 Restatement (Second) of Torts 59 (Tent. Draft No. 18, 1972) (Note to Institute).
267 See W. Prosser, supra note 18, § 131. A similar immunity extends to the states. Id.
272 Id. §§ 2672, 2676.
motor vehicle accidents and medical malpractice of Veterans Administration employees, where the officer or employee is probably insured, the remedy against the United States is exclusive of any action against the individual officer or employee. And third, the Supreme Court has held that the United States does not have a right of indemnity against negligent employees whose negligence caused damage for which the United States is held financially liable.3

Governmental protection of its professionals, and governmental liability for their acts, is not complete though. Judicial construction of the statute has excluded negligent misrepresentation from its scope. Specific exceptions to the general waiver of governmental immunity are found in section 2680(h), this section has been interpreted by the courts, possibly erroneously, to retain immunity from suits for negligent misrepresentation. Thus government professionals are still likely to be sued personally for the type of tort which they are most likely to commit, the tort of negligent misrepresentation.

A further complication has developed with respect to medical malpractice suits against Veterans Administration medical personnel. As noted above, the remedy against the United States in these cases is exclusive of any action against the individual at fault. The problem has arisen as to whether this statute shrinks federal immunity so as to make the United States subject to suit where the malpractice charged is one of negligent misrepresentation. Two federal courts that have

273 Id. § 2679(b); 38 U.S.C. § 4116 (1970). See McCord, supra note 268, at 890-918, with regard to the former section.


275 This section provides that immunity is not waived for “[a]ny claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights.” 28 U.S.C. § 2680(h) (1970).


The sparse legislative history of § 2680(h) suggests that the section was meant to except from the waiver of immunity “a type of [tort] which would be difficult to make a defense against, and which [is] easily exaggerated.” Hearings on S. 2690 Before a Subcomm. of the Senate Comm. on the Judiciary, 76th Cong., 3d Sess. 39 (1940). The section was also once referred to as one which retains immunity for “deliberate torts.” House Comm. on the Judiciary, Tort Claims Against the United States, H.R. Rep. No. 2245, 77th Cong., 2d Sess. 10 (1942). These clues, along with the fact that the section mostly lists intentional torts, leads to the conclusion that it was meant to retain immunity only for intentional misrepresentation and not negligent misrepresentation. See 2 F. Harper & F. James, THE LAW OF TORTS § 29.13, at 1655 (1956); Gelhorn & Schenck, Tort Actions Against the Federal Government, 47 Colu. L. Rev. 722, 730 (1947); Gottlieb, The Federal Tort Claims Act—A Statutory Interpretation, 35 Geo. L.J. 1, 49-50 (1947); Comment, The Federal Tort Claims Act, 42 Ill. L. Rev. 344, 361 (1947).

277 An anomaly of liability has developed in this area of federal tort immunity. The United States is liable for negligent misrepresentation in suits brought under admiralty jurisdiction and is not liable for suits brought under normal civil jurisdiction. Compare De Bardeleben Marine Corp. v. United States, 451 F.2d 140 (5th Cir. 1971), with Vaughan v. United States, 259 F. Supp. 286 (N.D. Miss. 1966). See also Kommanvitselskapet Harvi v. United States, 457 F.2d 456 (3d Cir. 1972), petition for cert. filed, 41 U.S.L.W. 3425 (U.S. Jan. 29, 1973) (finding liability in admiralty for negligent misrepresentation, but holding, on rehearing, that no causation or reliance had been proven).

278 See C. Morris, supra note 168, at 256-83.
handled this problem have reached opposite results, one finding the United States immune from suit and the other finding the United States liable.279 This problem of statutory interpretation is of some importance to the medical profession and should be resolved by the courts as soon as possible.

E. Conclusion—Toward a Clearer Limit of Liability

The one clear point that emerges from the melange of cases discussed above is that the scope of professional liability for negligence is in a state of flux. Some jurisdictions still cling to the old limits of liability announced in Ultramares Corp. v. Touche,280 while others have discarded the old ideas and developed their own criteria for determining the extent of liability.281 As seen before,282 a new limit of foreseen reliance is slowly emerging in the changing jurisdictions. But, this is far short of the full foreseeability standard applied in tort law generally.

The social utility rationale underlying the decision in Ultramares,283 while it may have been necessary and accurate in that day, no longer should stand as an obstacle to the extension of professional liability to the full limits of foreseeability. Many professionals are now organized into large firms of national import and stature.284 Professionals generally are in a better risk bearer capacity than the innocent reliant plaintiff who would otherwise bear the loss285 and usually are in a better position to obtain insurance and spread the cost of lawsuits than are the potential plaintiffs.

To permit professionals to escape liability for negligent misstatement is to ignore professional pretensions and the great reliance placed by the public on them. Limiting their liability under even the modern "foreseen reliance" standard ignores the trust placed in their work by all of society. Even the liability imposed under the federal securities statutes is too limited, as it unfairly protects only investors and not other reliant groups. As stated by one commentator in discussing ac-


281 See, e.g., Biakanja v. Irving, 49 Cal. 2d 647, 320 P.2d 16 (1958), where the court developed its own standards of extent of liability without reference to Ultramares.

282 See notes 224-35 supra & accompanying text.

283 See text accompanying note 167 supra.

284 Recent legislative enactments now allow for professional incorporation. See, e.g., PA. STAT. ANN. tit. 15, §§ 2901-14 (Supp. 1972). One of the advantages of the professional corporation is that the other members of the corporation will not be held jointly and severally liable for the torts of their associates, as is the case in a professional association. Compare id. § 1609 with id. § 12,617 (1967).

countants, "[t]he legal duties of the auditor ought to be co-existensive with his professional pretensions."286

Extending professionals’ liability to the full limits of foreseeability certainly would be no radical departure from generally accepted tort principles. On the contrary, it would correct the present anomaly. Such a development would close the gap between the law of sales or products liability and that now governing negligent service. Manufacturers ever since MacPherson287 have been exposed to an increasing scope of liability with few if any debilitating effects. The fear of burdening defendants with a crushing or indeterminate liability is unfounded. The crushing liability was feared equally at the institution of liability for negligent manufacture but has never materialized in that theater.288 There is no sufficient reason for distinguishing physical loss from intangible economic harm.289 The underlying rationale of protection to the innocent party is equally applicable to either.

The limit of professional liability thus advocated for both the common law and statutes is one based on foreseeability-reasonable reliance. The only problem with such a standard is that it is excessively imprecise. Thus, it is necessary to give some indication of what factors are relevant in applying the terms to real situations. Perhaps the most important factor bearing on the reasonableness of reliance on a professional’s work should be whether a reliant party, not in privity, has another reasonable method of obtaining the information produced or the work done by the professional. Reliance on a map or chart is certainly reasonable as the normal user cannot get the information supplied by the map without incurring enormous expense compared with the cost of the map. On the other hand, the reliance of a purchaser of land on an abstract of the title done for a previous owner may not be reasonable if the cost of having a new abstract done is insignificant compared to the possible loss if the abstract was badly prepared. A second factor should be the relationship between the relative costs of reliance (cost to the professional of carrying liability insurance) and of nonreliance (having the work done again).290 If it is generally cheaper to insure against the possible loss than to always have work done over, reliance would seem reasonable. If, on the other hand, it is

289 According to Professor Morris, a loss in any case should lie where it falls unless some affirmative public good will result from shifting it. C. Morris, supra note 168, at 9. In both situations in the text, the imposition of the loss on the parties usually responsible for the loss and most able to prevent future losses would result in the greatest public good. Those parties are, of course, the manufacturers and the professionals.
290 This of course assumes that the reliant party has a choice of whether or not to rely on the professional’s work. If he does not have such a choice then the reliance would be reasonable if it is also foreseeable.
cheaper to repeat work than to insure against mistakes, reliance would be unreasonable. A third factor should be the way in which a professional presents his work to the public. If he presents it in a way that tends to induce reliance by third parties, he should be held liable for damage due to the reliance so induced. But, if he warns that it should not be relied on, it should tend to show that reliance was unreasonable. A fourth factor should be whether the techniques of the profession involved have changed significantly between the time the work was done and the time of reliance. No professional should be held liable for damage due to obsolete work. Unfortunately the foreseeability standard is essentially impossible of definition when the reliance factor is absent, as in the negligently-drawn-will case. The only thing of practical value that can be said is that the closeness of the relationship between the professional’s negligence and the plaintiff’s harm is the essential element of foreseeability.

The standard of extent of liability created is simply that a professional is liable for harm due to his negligence to those who reasonably rely on his work or those who will be foreseeably injured through reliance on his work. This, of course, is fleshed out by the factors listed above for determining the meaning of these limits. Although these limits are wide, they are not excessive in view of the complexity of modern society and certainly do not impose unlimited liability. Also, they create a scope of liability that is fair to both the professional who can anticipate and insure against his liability and innocent third parties who increasingly must rely on the professional’s work.

IV. Remedies

“The charlatan and rogue may assume to heal the sick. The knave and criminal may pose as a minister of justice. Such things cannot have been intended, and will not be allowed.” Judge Cardozo thus aptly expressed the frustration and indignation of those who relied upon the expertise of a professional and suffered due to his negligence. Although the doctrine of privity may serve to make redress difficult, the wronged individual generally has three avenues of satisfaction open to him: a civil damage suit, a criminal action, and review before the appropriate licensing or certification board. A summary of each of these remedies follows.

As these remedies serve varied purposes, they are generally not exclusive of each other. Only the civil damage suit is compensatory, but all of them to differing degrees involve punitive and deterrent elements. These latter two purposes are served both directly through tort judgments, license suspensions, fines, and jail sentences, as well as in-

---

292 In re Rouss, 221 N.Y. 81, 91, 116 N.E. 782, 786 (1917) (Cardozo, J.).
293 See text accompanying notes 146-47 supra.
directly through damage to the professionals' reputations and a concomitant loss of business.  

A. Civil Damage Suits

A civil damage action may be brought against a negligent professional in either contract or tort, depending upon the circumstances of the injury, the nature of the profession, and the relationship between the professional and the injured party. Recovery in contract is limited to those who are in privity of contract with the professional, or who are third party beneficiaries of that contract. An excellent example of the latter is a beneficiary under a will, who, although not in privity because the contract is between the testator and the attorney, is entitled to recovery as a third party beneficiary of that contract.  

Conformance to the standard of the profession is considered to be an implicit term of the contract between the professional and his client. Thus if a professional does not act in a manner consistent with the requisite standard of care, through his "failure, without justification, to perform all or any part of what is promised," he has breached his contract. Compensatory damages, sufficient to put the plaintiff in as good a position as he would have been had the contract been performed, are recoverable for a breach. Compensation for the failure to act as promised is their purpose, and punitive damages are not recoverable in an action in contract. Any monetary recovery, however, inherently involves a measure of both punishment and deterrence. The attendant publicity of a trial and consequent damage to the reputation of the individual involved provide further deterrence.  

Recovery of damages against a professional in tort may be pre-


We would hope that, in view of the injury to the reputation of [defendant attorneys] caused by the filing of the complaint and the widespread publicity given thereto, the SEC would [exercise restraint] in deciding whether to file a new complaint....

295 For a discussion of the relation between and the relative advantages of the 2 actions, see W. Prosser, supra note 18, § 92, at 619-22. "Generally speaking, the tort remedy is likely to be more advantageous to the injured party in the greater number of cases, if only because it will so often permit the recovery of greater damages." Id. § 92, at 619.


297 Id. § 329. The defendant, however, will not be charged with "harms that he had no sufficient reason to foresee when he made the contract." Id. Explanatory Notes § 329, comment a at 504.

298 See text accompanying notes 64-110 supra.

299 See text accompanying notes 64-110 supra.

300 Id. § 312.

301 Id. § 329. The defendant, however, will not be charged with "harms that he had no sufficient reason to foresee when he made the contract." Id. Explanatory Notes § 329, comment a at 504.

302 Id. § 342.
mised on either a common law negligence theory or negligence in the violation of a statute.\textsuperscript{303} An excellent example of statutes which affect many professional groups may be found in the anti-fraud provisions of the securities laws.\textsuperscript{304} Courts have consistently implied a civil damage remedy for the violation of these statutes.\textsuperscript{305} As Judge Kirkpatrick concluded in the first such case: "[t]he disregard of the command of a statute is a wrongful act and a tort."\textsuperscript{306} Although there was initially some doubt,\textsuperscript{307} more recent decisions have suggested that the right to recompense for negligent as well as fraudulent behavior falls within the ambit of these provisions.\textsuperscript{308} 

Recovery in a common law tort action against a professional is limited either by the doctrine of privity or by some alternative formulation of foreseeability or reasonable reliance.\textsuperscript{309} Compensatory damages are available,\textsuperscript{310} and although punitive "damages are not given for mere inadvertence,"\textsuperscript{311} they may be awarded at the jury's discretion if the defendant's conduct was done "with a reckless indifference to the interests of others."\textsuperscript{312} Such factors as the character of the defendant's act, the nature and extent of the harm to the plaintiff, and the wealth of the defendant are properly considered in the assessment of punitive damages.\textsuperscript{313} They have been awarded in medical malpractice actions, in one case against a doctor who ignored a patient's rectal hemorrhage for over forty-eight hours,\textsuperscript{314} and in another case, against a doctor who reassured a patient that there was no danger of addiction to the morphine he had prescribed.\textsuperscript{315} Although the patent purpose of punitive damages is punishment, they neither preclude a criminal conviction for the same act, nor are they precluded by one.\textsuperscript{316} They most effectively serve compensatory, 

\begin{itemize}
  \item \textsuperscript{303} See C. Morris, \textit{supra} note 168, at 179-85.
  \item \textsuperscript{305} See \textit{note 255 supra} & accompanying text.
  \item \textsuperscript{307} \textit{See} Fischman v. Raytheon Mfg. Co., 188 F.2d 783 (2d Cir. 1951).
  \item \textsuperscript{308} \textit{See}, e.g., SEC v. Texas Gulf Sulphur Co., 401 F.2d 833 (2d Cir. 1968), \textit{cert. denied}, 394 U.S. 976 (1969); Myzel v. Fields, 386 F.2d 718 (8th Cir. 1967); Ellis v. Carter, 291 F.2d 270 (9th Cir. 1961).
  \item \textsuperscript{309} \textit{See} text accompanying notes 153-84 \textit{supra}.
  \item \textsuperscript{310} \textit{Restatement of Torts} §§ 901-03 (1939).
  \item \textsuperscript{311} \textit{Id.} § 908, comment b at 555.
  \item \textsuperscript{312} \textit{Id.} comment c at 557.
  \item \textsuperscript{313} \textit{Id.} § 908(2).
  \item \textsuperscript{314} Rennwanz v. Dean, 114 Ore. 259, 229 P. 372 (1924).
  \item \textsuperscript{315} Los Alamos Medical Center, Inc. v. Coe, 58 N.M. 686, 275 P.2d 175 (1954). But see Gill v. Selling, 125 Ore. 587, 262 P. 812 (1928) (punitive damages denied to a patient who came to a doctor's office to pick up the results of a test, and who was mistaken for another and given a spine puncture test).
  \item \textsuperscript{316} \textit{Restatement of Torts} § 908, comment a at 554 (1939).
\end{itemize}
deterrent, and punitive functions, as the fears of crushing liability in the profession today attests.\textsuperscript{317} Punitive damages compensate the outraged plaintiff for the expense of suit, and other elements of damage not legally compensable.\textsuperscript{318} Plaintiffs are thus encouraged to seek compensation in cases which might not otherwise merit the trouble or expense of a lawsuit.\textsuperscript{319}

B. Criminal Sanctions

In addition to seeking damages from a negligent professional, an injured party in certain circumstances may seek the intervention of the strong arm of the criminal law.\textsuperscript{320} The effect of a criminal prosecution, whether or not a conviction be obtained, becomes especially poignant when the "defendants have been men of blameless lives and respected members of a learned profession."\textsuperscript{321}

Physicians may be found guilty of manslaughter for "gross and reckless negligence,"\textsuperscript{322} or mere performance of their duties without due caution and circumspection.\textsuperscript{323} An extreme but illustrative example is Commonwealth v. Pierce,\textsuperscript{324} in which a doctor had directed that a sick woman's clothes be saturated with kerosene. The woman died as a result of the treatment, and the doctor was convicted despite the absence of any bad faith or evil intent on his part. The case raises some serious questions as to the extent to which a professional may experiment with new techniques, or follow a minority school of thought, without incurring liability for failure.\textsuperscript{325} Generally the presence or absence of a license to practice has been held to be irrelevant in the man-

\textsuperscript{317} See text accompanying notes 1-7 supra.

Even in the absence of punitive damages, the amounts sought in damages may be extremely high. Two examples of recent suits against large accounting firms demonstrate the magnitude of the potential recoveries sought against professionals. Several insurance companies recently filed a $10.27 million suit against a New York firm, see N.Y. Times, Sept. 11, 1971, at 33, col. 7, and in another suit that was eventually settled out of court, the Bank of America and 3 other banks sued Peat, Marwick, Mitchell & Co. for over $6 million, Bank of America v. Peat, Marwick, Mitchell & Co., No. 42,748 (Super. Ct. Marin Co., Cal. 1968) (settled).

\textsuperscript{318} See W. PROSSER, supra note 18, § 2, at 9-11.

\textsuperscript{319} See Moris, Punitive Damages in Tort Cases, 44 HARV. L. REV. 1173 (1931).

\textsuperscript{322} See Ruder, supra note 237. See generally Note, Federal Criminal and Administrative Controls for Auditors: The Need for a Consistent Standard, 1969 WASH. U.L.Q. 187. The reader may find the conclusions drawn therein interesting to compare with those of this Comment, although the focus is different.


\textsuperscript{325} For a discussion of this problem in the context of civil liabilities, see RESTATEMENT (SECOND) OF TORTS § 299A, comment f at 75 (1965).
slaughter cases, although in some instances the absence of a license has been held to be proper evidence of culpable negligence.

Although corporate insiders have been prime targets of criminal prosecution in the past, the criminal provisions of the federal securities laws may have application to attorneys, accountants, appraisers, engineers, and broker-dealers, who may be subjected to a maximum fine of 10,000 dollars, and a maximum prison sentence of five years for their professional misdeeds.

An example of accountants' criminal liability may be found in United States v. Simon, in which fines totaling 17,000 dollars were imposed on three defendants. The case is noteworthy for the interaction of accepted professional standards with the judgment of the community as expressed by a jury. With but one exception the defendants had conformed to generally accepted accounting principles, but the court noted that:

Proof of compliance with generally accepted standards was "evidence which may be very persuasive but not necessarily conclusive that he acted in good faith, and that the facts as certified were not materially false or misleading."

Simon also raises the possibility of the courts, through the application of criminal sanctions, dictating the standards of the profession and affording a very stern measure of deterrence to future negligent be-

---


330 Id. See also Uniform Securities Act § 409, providing maximum penalties of 3 years or $5000 or both. Section 410 of the act also provides civil sanctions. This act has been influential in the drafting of other state "blue sky laws." See State v. Russell, 119 N.J. Super. 344, 291 A.2d 580 (App. Div. 1972).


332 Other cases involving criminal sanctions against accountants are United States v. Benjamin, 328 F.2d 854 (2d Cir.), cert. denied, 377 U.S. 953 (1964) (conviction); United States v. Gitchell, 282 F.2d 681 (5th Cir. 1960) (acquittal on appeal); United States v. White, 124 F.2d 181 (2d Cir. 1941) (conviction); United States v. Olen, 183 F. Supp. 212 (S.D.N.Y. 1960) (motion for a change of venue granted; disposition unknown, although one of the defendants subsequently submitted his resignation from further practice before the S.E.C. See Homer F. Kerlin, S.E.C. Acct. Series Rel. No. 105, 4 CCH FED. SEC. L. REP. ¶ 72,127 (1966).

333 425 F.2d at 805-06.
professional behavior.\textsuperscript{333} Dicta in a civil case\textsuperscript{334} points to much the same possibility of external control of the standards of the accounting profession.

C. Professional Review

Almost all states have certification boards,\textsuperscript{335} responsible for the initial licensing of the professions and continuing review of complaints of unethical conduct and unacceptably poor quality work. Although much time is spent reviewing complaints about the moral and ethical character of individuals,\textsuperscript{336} the boards also determine if challenged work meets professional standards. The New York statute, applicable to a broad spectrum of professions, is illustrative of the remedial powers and sanctions possessed by such boards:

The penalties which may be imposed by the board of regents on a present or former licensee found guilty of professional misconduct . . . are: (1) censure and reprimand, (2) suspension of license, (3) revocation of license, (4) annulment of license or registration, and (5) limitation on registration or issuance of any further license. The board of regents may stay such penalties and place the licensee on probation and may restore a license which has been revoked.\textsuperscript{337}

The board has no power to order compensation to an injured party; in effect its power is limited to revocation of the license or lesser variants thereof. The possible loss of one's means of livelihood, however, should serve a significant deterrent function. This deterrence is probably quite ineffectual in cases of conduct in a nonprofessional capacity; criminal sanctions have consistently failed to deter similar conduct.

\textsuperscript{333} See also Recent Cases, 23 Vand. L. Rev. 809, 812 (1970).


\textsuperscript{336} See, e.g., Fellner v. Bar Ass'n, 213 Md. 243, 131 A.2d 729 (1957) (attorney disbarred for habitual use of slugs in parking meters); In re Welansky, 319 Mass. 319, 40 S.E.2d 202 (1946) (attorney disbarred for manslaughter); In re Welser, 1 N.J. 575, 64 N.J. 363 (1949) (carnal abuse); Palmer v. Spaulding, 299 N.Y. 363, 87 N.E.2d 301 (1949) (doctor's license suspended due to his addiction to narcotics); Weinreb v. Beier, 294 N.Y. 628, 64 N.E.2d 175 (1945) (dentist's license revoked for first degree assault); In re Durbinsky, 256 App. Div. 102, 7 N.Y.S.2d 387 (1938) (attorney disbarred for passing bad checks). For a more complete discussion of disbarment for unprofessional conduct in a non-professional capacity, see Note, 43 Cornell L.Q. 499 (1958), noting that private vices are generally not sufficient grounds for disbarment, but when public become sufficient, because of the public notoriety and resultant adverse reflection on the profession as a whole.

\textsuperscript{337} N.Y. Educ. Law § 6511 (McKinney 1972).
In such cases protection of the reputation of the entire profession should be the guiding rationale. But the sanctions possessed by the regents are admirably designed to protect the public from negligence, through deterrence and removal of the offender from a position in which he can cause harm.

The New York statute also provides an elaborate prehearing procedure by the professional committee on conduct for the particular profession, and a review of the regents' decision by the appellate division of the supreme court. The burden of proof in these proceedings, despite their quasi-criminal nature, is not the criminal burden of "beyond a reasonable doubt," but rather one of "substantial legal evidence." Thus, an acquittal in a criminal prosecution has been held to be not determinative of the result in a license revocation proceeding. The determination of the board of regents will generally be left untouched on appeal to the courts, unless it is not supported by substantial evidence. Likewise the punishment meted out will remain undisturbed unless so disproportionate to the conduct involved as to be shocking to one's sense of fairness. The board of regents is thus afforded a fair measure of independence in setting standards and determining policy.

Delicensing eliminates the offender from a position in which he can cause harm, and additionally serves by public example to warn other members of the profession. If it is fully utilized by the public, it ought to be a means of weeding out the misfits. In addressing the question of disbarment, the Arizona Supreme Court has opined, however, that the proper policy should be "[t]he protection of the public, not the punishment of the attorney guilty of unprofessional conduct . . . ." Thus traditionally neither punishment nor compensation of the injured party, but only prospective protection, has been viewed as a proper part of the delicensing function served by review boards. This is quite consistent with the lesser burden of proof necessary in delicensing proceedings.

---

338 The regents are directed to appoint a board for each profession within their jurisdiction, as well as a committee or committees on professional conduct within each board. Id. § 6508(1).
339 Id. § 6510.
340 See In re Ruffalo, 390 U.S. 544, 551 (1968) (denomining disbarment as "adversary proceedings of a quasi-criminal nature," and holding any attorney charged with disbarment or misconduct entitled to due process, including notice).
345 In re Tanner, 107 Ariz. 534, 535, 490 P.2d 6, 7 (1971) (quoting In re Russel, 57 Ariz. 395, 406, 114 P.2d 241, 245 (1941)) (attorney was consistently negligent in handling his clients' affairs, while running his practice from the phone and premises of a cocktail lounge and a used car dealership).
346 See text accompanying note 341 supra.
Another delicensing remedy is disqualification from practice before a federal agency, which may in turn result in the revocation of the practitioner's license. The SEC, for example, may suspend or permanently withdraw the privilege of appearing or practicing before it from such professionals as attorneys, accountants, or engineers.  

Disciplinary hearings to disqualify professionals from practice are usually held in private, and only those of great public interest, involving gross violations, are reported. The threat of this sanction can exert considerable leverage on the improvement of standards within the profession and influence individuals to practice a greater degree of care. Imposition of this sanction can have more drastic impact; in Pennsylvania, for example, disqualification from practice before the SEC is grounds for the revocation of an accountant's state license. Conversely, no disbarred attorney and no accountant, engineer, or "other expert" whose license has been suspended or revoked elsewhere, may practice before the SEC.

The internal apparatus for review of the bar is distinct from that of other professions, as the courts have inherent common law jurisdiction over attorneys as officers of the court. In many states and jurisdictions, either by statute or rule, the bar association or a committee of censors has quasi-official powers, sometimes as a supplement to the courts' police powers. A North Carolina statute, for example, which expressly directs the nature of the discipline and disbarment proceedings, also provides that "[n]othing contained in this article shall be construed as disabling or abridging the inherent powers of the court to deal with its attorneys." The fact that judges are attorneys means that the legal profession is effectively isolated from outside review.

The isolation of lawyers from effective external control has had disastrous effects on disciplinary enforcement, and has contributed to widespread public dissatisfaction with the entire profession. The ABA Special Committee on Evaluation of Disciplinary Enforcement has termed lawyers' self-discipline a "scandalous situation that requires the immediate attention of the profession." Most attorneys

---

347 17 C.F.R. § 201.2(e) (1972).
348 Id. § (e)(7).
351 17 C.F.R. § 201.2(e)(2) (1972).
352 See, e.g., In re Tracy, 197 Minn. 35, 266 N.W. 88 (1936).
355 American Bar Association Special Committee on Evaluation of Disciplin-
are unwilling to report unethical or negligent conduct of those with whom they are professionally and socially well acquainted.\textsuperscript{356} The situation is analogous to the "conspiracy of silence" of doctors in their malpractice cases.\textsuperscript{357} As the ABA Special Committee found,

the public dissatisfaction with the bar and the courts is much more intense than is generally believed within the profession. The supreme court of one state recently withdrew disciplinary jurisdiction from the bar and placed it in a statewide disciplinary board of seven members, two of whom are laymen.\textsuperscript{358}

The addition of nonprofessionals into the disciplinary process can help to give more weight to the public's interest in this review process. Hopefully this move portends a trend not only within the legal profession but among all the professions which suffer from public distrust of the self-disciplinary process.

Signs of dissatisfaction with traditional procedures in medical malpractice cases have also been mounting. Several local medical associations have organized medical review committees to hear charges of malpractice.\textsuperscript{359} These are doctor-staffed panels that report only to the defendant, recommending an equitable settlement. They do not call witnesses. These panels, while possibly helpful in maintaining the good reputation of the unjustly accused, are unresponsive to the central problem. Understandably, these attempts have met with little appreciation from the public. They are simply another form of professional self-discipline.

Alternative attempts to improve the quality and speed of the liability determination process seem more promising. The Pima County (Arizona) screening plan\textsuperscript{360} employs a panel of nine doctors and nine attorneys who hold an informal hearing with witnesses, full evidence, and disclosure. Referral to the panel is voluntary by the plaintiff's attorney. A negative recommendation from the panel implies that the attorney should drop the suit; and an affirmative finding is accompanied by a promise to provide expert testimony at trial. The California Plan Advisory Panel,\textsuperscript{361} which is in use in several major California cities, provides a list of qualified physicians willing to serve on a panel. The claimant's attorney selects one, who becomes his medical

\textsuperscript{356} Id. 1, 2.
\textsuperscript{357} See, e.g., Comment, Medical Malpractice—Expert Testimony, 60 Nw. U.L. Rev. 834, 834-37 (1966).
\textsuperscript{358} AMERICAN BAR ASSOCIATION SPECIAL COMMITTEE ON EVALUATION OF DISCIPLINARY ENFORCEMENT, supra note 355, at 2.
\textsuperscript{359} See J. WALTZ & F. INBAU, MEDICAL JURISPRUDENCE 83 (1971).
\textsuperscript{360} See id. 83-84.
\textsuperscript{361} See id. 84-85.
advisor. This doctor submits a written report to the attorney after examining the patient or his medical records. If the attorney is dissatisfied, he may obtain another doctor from the panel, but his doing so waives the confidentiality of the first doctor's report, which may then be used to discredit the second, more favorable report at trial. If only a single doctor is selected, he must testify at trial on behalf of the plaintiff, if called to do so. The system has been fairly well received and is reported to be a success in making "physicians less reluctant to testify on behalf of plaintiffs in malpractice actions."

Both of these plans should improve the speed and size of recovery, through the strengthening of meritorious cases and the pressure of contradictory testimony to drop unfounded claims. Although the pressure of peer group censure of gross offenders is present in both plans, they are primarily aimed at improving the monetary recovery of a legitimate claim. Neither plan is a very radical departure from the traditional approach; both are premised upon the use of the judicial process. However, they should serve to improve the quality of that process as well as the public image of the medical profession. The Pima plan has the additional advantage of including nonmembers of the profession on the panel, whose objectivity will help to instill public confidence in the plan. At the same time it is responsive to the oft-heard cry that only members of a profession are qualified to pass judgment on each other.

Yet given this cry, it is interesting to note that the AMA's clinical convention vehemently opposed the Professional Standards Review Organization set up by the 1972 amendments to the Social Security Act. The organizations consist of committees of doctors responsible for settling medicare disputes. Such irresponsibility and inconsistency on the part of a profession in claiming that it alone is competent to discipline its members and to set its own standards, while rejecting such responsibility when it is offered, can well lead to the imposition of external control either by the courts or by civilian review boards. The lesson of police abuse of power and the development of civilian review boards is apposite.

An attack on accountants has been progressing also. The Wall Street Journal recently reported that "the New York Stock Exchange plans to tighten its examination of accounting practices and financial reporting . . . ." The Exchange expressed concern to the profes-

362 Id. 85.
363 Comment, supra note 357, at 843-44.
sional rulemaking body of accounting, the American Institute of Certified Public Accountants, that its scrutiny had not been sufficient. The Exchange, a large consumer of accounting services, therefore planned to add two watchdog CPA's to its department of stock list. Consumer monitoring of a profession through a hired staff of members of the profession has potential for other professions as well. Blue Cross, for example, a medical-services consumer of great size and potential leverage, could monitor physicians with a board of well-known and highly respected physicians. The functions of consumer watchdog groups could be not unlike those of the certification boards, but they would have the added advantage of being able to scrutinize closely the professionals, without waiting for negligence complaints to be filed. Perhaps it is in the direction of preventive supervision that efforts at reform, at least in some quarters, might most profitably be made.

D. Summary

Although many remedies are presently available to one injured by a professional’s negligence, all are unresponsive in some way to the needs of the injured party or to the distinctive position of the professional in society. The traditional approach, a civil damage suit, compensates the injured individual, but the availability of malpractice insurance has significantly reduced its punitive and deterrent value. No future protection is offered; the offender may remain in practice, subjecting the public to the possibility of recurrent negligence. Criminal prosecution is peculiarly unsuited for dealing with negligent professionals; it often has too destructive an effect on the reputation of the defendant. A good reputation, while valuable to anyone, is vital to the professional, who generally is prohibited from advertising,

and must rely solely on his good name and public trust for his livelihood. Additionally, the attendant notoriety of a prosecution may unfairly malign the image of the entire profession. Despite these harsh burdens, the plaintiff remains uncompensated.

A revised form of certification or professional review would be the most viable alternative. But that also, at this time, leaves the plaintiff uncompensated. Certification boards also presently spend most of their time and resources investigating complaints of moral and ethical character. Yet it is precisely because the public notoriety attendant to ethically nonprofessional—and not merely negligently nonprofessional—conduct may stigmatize the entire profession, that the professions are most inclined to police morals instead of quality. If certification boards were given the power of compensation, they could become the ideal vehicle for dealing with professional negligence.  

367 See, e.g., ABA Code, supra note 111, DR 2-101, -102; AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS, CODE OF PROFESSIONAL ETHICS art. 3 (1967).

368 Such a power, however, may be conferred constitutionally on an administrative
They could compensate the plaintiff more quickly, efficiently, and economically than the courts with their crowded dockets now do. Professionals and nonprofessionals should be utilized in the review procedure, safeguarding all interests. Delicensing would protect the public from future occurrences by removal of the offender, and by serving as a warning to others.

V. CONCLUSION

A brief overview of professional negligence law reveals that we are dealing with a class—the professions—whose membership is defined more by history than by logic. Those who practice in a profession are measured by a standard of care that differs from the layman's standard only when matters of judgment are involved; the professional's judgment is measured by the professional community norm. When the professional's conduct falls short of this standard, he is liable for the resulting damage to his client, and in an increasing number of jurisdictions, to an increasingly larger class of third parties whose reliance on the professional and whose resulting injury were foreseeable. The aggrieved client or third party has to seek his remedy primarily in civil litigation, facing often insurmountable problems of proof in complex areas of professional expertise. The profession too has an interest in remedying the errors of its members and also in preventing future harm to the profession's reputation; its recourse is to professional review of its errant members, and promulgation of standards to prevent future mistakes.

This survey of the present status of the professional negligence field shows the foundation upon which future developments will be premised. First, because the very concept of professional is an historical one, the class of professions is subject to continuing expansion, as more occupations seek the prestige associated with professional status. Doubtless this expansion will alter the meaning of the concept, and focus greater attention on the legal consequences of achieving pro-

agency only if the authorized fines may be characterized as "civil" rather than "criminal." An administrative agency can never be given the power "to determine guilt or innocence in criminal cases," because under the federal Constitution, "the criminal defendant is entitled to special procedural protection of the kind that is given neither in civil proceedings in court nor in administrative proceedings." 1 K. Davis, ADMINISTRATIVE LAW TREATISE § 2.13, at 133 (1958). A fine is civil if it is "compensatory" rather than "punitive." See Helvering v. Mitchell, 303 U.S. 391 (1938). If the fines are ultimately paid to an injured complainant, they are deemed civil. Cf. Southern Ry. v. Melton, 133 Ga. 277, 65 S.E. 665 (1909).


A recent study of state court delay in personal injury tort cases tried to a jury reveals, for example, in the Philadelphia Court of Common Pleas during 1972 (1st 4 months), an average delay of 49.6 months from ready date to trial; in San Francisco, 38.6 months answer to trial, 31.2 months ready date to trial; in Chicago 58.0 months between the date of filing to trial. Institute of Judicial Administration, State Trial Courts of General Jurisdiction: Personal Injury Jury Cases: Calendar Status Study—1972 (Aug. 1, 1972).
professional status. At the same time, the increasing complexity of the subject matter a professional deals with will exacerbate already existing proof problems in malpractice litigation.

The privity limitation on the scope of professional negligence is increasingly being eroded—a recognition that the limits of privity do not correspond to the actual limits of society's reliance upon the professional and the need to remedy the harm that professional negligence can cause. In its place should be the same limit of liability that governs other areas of negligence law; no sound reason exists for discriminating against the victims of professional negligence.

With the expansion of the scope of professional liability will come increased litigation—litigation that places increasingly burdensome costs on the individual practitioner, puts injured parties through a formidable obstacle course, and taxes a court system whose dockets are already overloaded. Malpractice insurance will of necessity be utilized to spread the practitioner's risks throughout the profession. But as insurance costs escalate, it begins to appear that the existing insurance-civil litigation system is inadequate.

Efforts to reform the present scheme of professional accountability should focus, then, on reducing the social and economic costs of professional negligence. Closer, ongoing scrutiny of professional competence, weeding out those whose shoddy work casts a shadow on the entire profession, should be of greater concern to the organized profession. Certification or professional review procedures, including review boards with the power to compensate complainants, should provide a viable alternative to lawsuits. Where the judicial route is the only available path, plans that simplify the presentation of expert testimony and discourage insubstantial claims can reduce the overall costs of litigation.

Those courts that have resisted the expansion of professional liability have correctly recognized the potential economic dislocation that accompanies tort litigation. But the answer to this concern should not be in effect to allow a subsidy of individual negligent practitioners at the expense of injured clients or third parties. Placing the burden on the professional, and consequently through insurance rates to the entire profession, may be the most effective catalyst for replacing the presently ineffective tort liability system with a scheme that is more responsive to the interests of the professional and those who rely on his services.