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Note, The Standard of Proof of Causation in Legal Malpractice Cases

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THE STANDARD OF PROOF OF CAUSATION IN LEGAL MALPRACTICE CASES

INTRODUCTION

In *Link v. Wabash Railroad Co.*,[1] the United States Supreme Court, while holding an innocent and unsuspecting plaintiff responsible for the sins of his attorney, gave hope to similarly aggrieved clients: "[I]f an attorney's conduct falls substantially below what is reasonable under the circumstances, the client's remedy is against the attorney in a suit for malpractice."[2] Nevertheless, if nearly insuperable barriers prevent most aggrieved clients from prevailing in meritorious legal malpractice suits, the Court's reassurance is hollow indeed. The traditional standard of proof of causation in legal malpractice cases, the "but for" test,[3] stands as one imposing barrier to recovery. To the extent that judges invoke misplaced confidence in the malpractice remedy to justify punishing clients for attorney misconduct, they distort the legal process.[4]

This Note examines the standard of proof of causation applied

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[1] 370 U.S. 626 (1962). The Court upheld a dismissal with prejudice entered after the plaintiff's attorney failed to appear at a pretrial conference. The suit was already six years old when it was dismissed. The Court inferred from the record that the plaintiff's attorney had caused much of the delay. *Id.* at 634-35 n.11. A vehement dissent questioned the majority's censure of the attorney. *Id.* at 637-43 (dissenting opinion, Black, J.).

[2] *Id.* at 634 n.10. Writing for the Court, Justice Harlan characterized the attorney as the agent of the client:

> Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent . . . .

Id. at 633-34. The majority and the dissent disagreed strongly over the egregiousness of the attorney's behavior. *See* note 1 *supra*. Absolutely clear, however, was the short-term consequence to the client—dismissal with prejudice due to events unknown to the client and only theoretically under his control. *See* D. ROSENTHAL, LAWYER AND CLIENT: WHO'S IN CHARGE? 121-23 (1974).

[3] *See* notes 11-38 and accompanying text *infra*.

[4] Federal courts of appeals have relied on *Link* in upholding harsh invocations of procedural rules. *See, e.g.*, Universal Film Exchs. v. Lust, 479 F.2d 573, 577 (5th Cir. 1973) (summary judgment following attorney's failure to enter appearance); Schwarz v. United States, 384 F.2d 833, 835-36 (2d Cir. 1967) (dismissal for failure to prosecute following gross neglect by plaintiff's counsel). For an example of stringent application of procedural rules in order to *promote* legal malpractice suits, see Brown v. E.W. Bliss Co., 72 F.R.D. 198 (D. Md. 1976), *discussed in* notes 34-37 and accompanying text *infra*.

in legal malpractice cases that arise from the negligence of litigators.[5] The Note sets forth the traditional "but for" test of causation, its harshness in the context of legal malpractice actions,[6] and recent attempts to mitigate that harshness. Some courts have eased the aggrieved client's task by shifting burdens of proof under the "but for" test.[7] One court has forged a far-reaching new test which permits an inference of causation from a client's "lost opportunity" of success in the underlying action.[8] Another court has separated the issue of attorney's negligence from that of client's loss by requiring bifurcation of the malpractice trial.[9] This Note proposes a new standard, drawn from medical misdiagnosis cases, requiring the plaintiff to demonstrate a "lost substantial possibility of recovery."[10]

I

TRADITIONAL TORT THEORY AND THE "BUT FOR" TEST

Courts have not consistently treated legal malpractice as sounding in tort rather than contract.[11] Even where courts speak in terms of contract, however, the elements of the cause of action are indistinguishable from those of the traditional tort claim.[12] Typically, the plaintiff must prove that (1) the defendant had a duty to meet a certain *standard of care* in his conduct toward the plaintiff; (2) the defendant *breached* that duty; (3) the breach *caused* an injury

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[5] The standard of care required of attorneys, although not totally separable from the issue of causation, is not this Note's primary concern. It has, however, developed its own substantial literature. *See, e.g.*, Leavitt, *The Attorney as Defendant*, 13 HASTINGS L.J. 1 (1961); Schnidman & Selzer, *The Legal Malpractice Dilemma: Will New Standards of Care Place Professional Liability Insurance Beyond the Reach of the Specialist?*, 45 U. CIN. L. REV. 541 (1976); Comment, *New Developments in Legal Malpractice*, 26 AM. U.L. REV. 408, 408-21 (1977).

[6] *See* notes 11-38 and accompanying text *infra*.

[7] *See* notes 39-57 and accompanying text *infra*.

[8] *See* notes 58-64 and accompanying text *infra*.

[9] *See* notes 65-69 and accompanying text *infra*.

[10] *See* notes 70-81 and accompanying text *infra*.

[11] Wade, *The Attorney's Liability for Negligence*, 12 VAND. L. REV. 755, 756-57 (1959); Note, *Attorney Malpractice*, 63 COLUM. L. REV. 1292, 1292-93 (1963).

[12] Wade, *supra* note 11, at 756; Note, *supra* note 11, at 1293. *See, e.g.*, Coon v. Ginsberg, 32 Colo. App. 206, 509 P.2d 1293 (1973); Boecher v. Borth, 51 App. Div. 2d 598, 599-600, 377 N.Y.S.2d 781, 784-85 (3d Dep't 1976) (dissenting opinion, Larkin, J.); Young v. Bridwell, 20 Utah 2d 332, 437 P.2d 686 (1968).

Tort and contract actions may, however, have different statutes of limitations. Remedies also may vary, since noneconomic losses are more easily recoverable in a negligence action.

to the plaintiff; and (4) the *injury* was real.[13] The traditional test for the third element, causation, is the "but for" test. This test merely restates the requirement of causation in fact— that harm would not have occurred "but for" the defendant's negligence.[14] The burden of proof is usually on the plaintiff to prove causation in fact by a preponderance of the evidence.[15]

In legal malpractice cases, however, courts often combine the "but for" requirement with a high standard of proof. As a result, in many jurisdictions the simple "but for" test has come to stand for an impossibly demanding burden of proof, which has a devastating effect on the prosecution of meritorious malpractice actions. For instance, in *Coon v. Ginsberg*,[16] a Colorado appellate court required a "showing with certainty"[17] that the plaintiff had sustained actual

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[13] *See* Harding v. Bell, 265 Or. 202, 205, 508 P.2d 216, 217 (1973); W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 30 (4th ed. 1971).

Judges often fail to distinguish among the elements of the claim. For example, judges often collapse the standard of care and the causation elements into a single indeterminate category. *See, e.g.*, Smith v. Lewis, 13 Cal. 3d 349, 530 P.2d 589, 118 Cal. Rptr. 621 (1975), *discussed in* notes 58-64 and accompanying text *infra*. *See also* Note, *Erosion of the Traditional Suit Within a Suit Requirement*, 7 U. TOL. L. REV. 328 (1975).

Judges, however, do usually isolate the element of injury. Unless the plaintiff alleges and proves injury, the court has no reason to inquire into other elements. *See, e.g.*, Brosie v. Stockton, 105 Ariz. 574, 468 P.2d 933 (1970); St. John v. Tepper, 54 App. Div. 2d 712, 387 N.Y.S.2d 457 (2d Dep't 1976) (mem.); Creative Inception, Inc. v. Andrews, 50 App. Div. 2d 553, 377 N.Y.S.2d 1 (1st Dep't 1975) (mem.); Fireman's Fund Am. Ins. Co. v. Patterson & Lamberty, Inc., 528 S.W.2d 67 (Tex. Ct. App. 1975). Often narrow definitions of "injury" have protected negligent attorneys. For example, if a client could not have collected the original judgment because of the defendant's insolvency, a court might decide that no "injury" resulted from the attorney's negligence. *See* Jackson v. Urban, Coolidge, Pennington & Scott, 516 S.W.2d 948, 949 (Tex. Ct. App. 1974). The Virginia Supreme Court has extended the principle to an absurdity: As long as the client (defendant in the original action) has not paid an outstanding judgment, he has suffered no injury. Allied Prods., Inc. v. Duesterdick, 217 Va. 763, 766, 232 S.E.2d 774, 776 (1977). "If the client has no cause of action until he has paid the judgment against him, then the larger the judgment, the greater the client's burden and the lawyer's impunity; the greater the injury wrongfully inflicted, the less the liability of the wrongdoer." *Id.* at 767, 232 S.E.2d at 777 (dissenting opinion, Poff, J.).

Traditionally, the defendant's good faith is no defense to a negligence action. In legal malpractice, however, some courts do recognize a good faith defense. *See* State v. Baker, 539 S.W.2d 367, 375 (Tex. Ct. App. 1976) (dictum); Note, *A Modern Approach to the Legal Malpractice Tort*, 52 IND. L.J. 689, 697-700 (1977).

[14] W. PROSSER, *supra* note 13, § 41, at 238-39. The "but for" test serves merely to exclude conduct that has not caused plaintiff's harm. Even if the test establishes causation *in fact*, defendant's liability does not necessarily follow. *Id.* at 239. There remains a question of law—whether the law will limit defendant's liability for the consequences caused in fact by his conduct. *See id.* at 239-41; *id.* § 42.

[15] *Id.* § 41, at 241-44.

[16] 32 Colo. App. 206, 509 P.2d 1293 (1973).

[17] *Id.* at 210, 509 P.2d at 1295.

damages as the result of the defendant attorney's negligence.[18]

Courts usually apply the "but for" test mechanically, without reasoned analysis.[19] Thus it is difficult to ascertain how demanding a standard of proof they in fact require. Few courts would impose a certainty requirement as explicitly as did the *Coon* court. Nevertheless, the facts in some cases suggest that, in effect, the courts may be requiring a standard of virtual certainty.[20] In *Weiner v. Moreno*,[21] for example, a Florida appellate court remanded a case for redetermination of an attorney's liability,[22] even though the plaintiff had conclusively demonstrated that the attorney had been negligent[23] and that, in the underlying medical malpractice case, two surgical packs had been left in the patient's

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[18] The court did not clearly label its certainty requirement as either a causation standard or a standard of proof. In either role, however, the requirement serves to insulate negligent attorneys from liability. A passage from an often-cited annotation demonstrates the common combination of standards of causation and burden of proof:

> In the great majority of the cases which have passed upon the questions it has been held that a client claiming that his attorney was negligent in connection with litigation has the burden of proving that damages resulted, this burden involving, usually, the difficult task of demonstrating that, but for the negligence complained of, the client would have been successful in the prosecution or defense of the action in question.

Annot., 45 A.L.R.2d 5, 21 (1956).

Jury instructions for a certainty requirement could take two different forms, theoretically distinct but effectively equivalent:

> 1) You must be convinced to a certainty that but for defendant's negligence, plaintiff would probably have won the first suit.
>
> 2) You must find it more probable than not that plaintiff would certainly have won the first suit but for defendant's negligence.

[19] *See, e.g.*, Pusey v. Reed, 258 A.2d 460, 461 (Del. Super. Ct. 1969); Freeman v. Rubin, 318 So. 2d 540, 543 (Fla. Dist. Ct. App. 1975); Christy v. Saliterman, 288 Minn. 144, 150, 179 N.W.2d 288, 290-91 (1970); Jackson v. Urban, Coolidge, Pennington & Scott, 516 S.W.2d 948, 949 (Tex. Ct. App. 1974); Gibson v. Johnson, 414 S.W.2d 235, 238-39 (Tex. Ct. App. 1967), *cert. denied*, 390 U.S. 946 (1968).

[20] *See, e.g.*, Better Homes, Inc. v. Rodgers, 195 F. Supp. 93, 95 (N.D.W. Va. 1961) (plaintiff must show that "result could only have been in its favor"). *See also* Gladden v. Logan, 28 App. Div. 2d 1116, 1116, 284 N.Y.S.2d 920, 921 (1967) ("Whether this [standard] is called 'that she would recover' or that 'she probably would recover' is merely a matter of phrasing."); Annot., *supra* note 18, at 21. The *Gladden* court rejected plaintiff's request that "probably" be added to the jury instruction on causation.

Whatever the standard of proof imposed, it is clear that the "but for" test of causation creates difficulties for malpractice plaintiffs. Comment, *Legal Malpractice*, 27 ARK. L. REV. 452, 466-68 (1973). *See* Note, *supra* note 11, at 1307-08; Note, *supra* note 13, 52 IND. L.J. at 693-94. "Courts . . . are given the 'easy out' of finding that while, yes, the attorney was negligent, his negligence did not 'proximately cause' the client's damages since the client might well have lost the first suit anyway." D. ROSENTHAL, *supra* note 2, at 126.

[21] 271 So. 2d 217 (Fla. Dist. Ct. App. 1973).

[22] *Id.* at 220.

[23] *Id.* at 219.

body.[24] *Weiner* is particularly disturbing because it purports to follow *Maryland Casualty Co. v. Price*,[25] a case that enunciates a simple "but for" test.[26] Since a majority of jurisdictions look to *Maryland Casualty* for the standard of causation in legal malpractice,[27] cases that read its rule to require virtual certainty may influence other jurisdictions also to attach a demanding standard of proof to the "but for" test.

A standard of proof that requires a plaintiff to prove to a virtual certainty that, but for the defendant's negligence, the plaintiff would have prevailed in the underlying action, in effect immunizes most negligent attorneys from liability. No matter how outrageous and morally reprehensible the attorney's behavior may have been, if minimal doubt exists as to the outcome in the original action, the plaintiff may not recover in the malpractice action. Except in those rare instances where the initial action was a "sure thing," the certainty requirement protects attorneys from liability for their negligence.

A strict "but for" test also ignores settlement opportunities lost due to the attorney's negligence. The test focuses on whether the client would have won in the original action. A high standard of proof of causation encourages courts' tendencies to exclude evidence about settlement as too remote and speculative.[28] The standard therefore excludes consideration of the most common form of client recovery.

In addition, stringent standards of proving "but for" require the plaintiff to conduct a "trial within a trial" to show the validity of his underlying claim.[29] A full, theoretically complete recon-

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[24] *Id.* at 218.

[25] 231 F. 397 (4th Cir. 1916).

[26] *See id.* at 402.

[27] Weiner v. Moreno, 271 So. 2d at 219. The *Weiner* court estimated in 1973 that 45 states had adopted the *Maryland Casualty* rule. *Id.*

[28] *See, e.g.*, Fuschetti v. Bierman, 128 N.J. Super. 290, 296, 319 A.2d 781, 784 (1974). A procedure for recovering lost settlement opportunities is described in the text accompanying notes 65-69 *infra*. Evidence on settlement would require speculation as to the amount of settlement, a factor only partly dependent on the merits of the action.

[29] *See* Coggin, *Attorney Negligence . . . A Suit Within a Suit*, 60 W. VA. L. REV. 225 (1958); Wade, *supra* note 11, at 769-71; Note, *supra* note 13, 52 IND. L.J. at 691-95. *See also* Note, *supra* note 13, 7 U. TOL. L. REV. at 330. One lawyer even prosecuted a "suit within a suit within a suit" when the first legal malpractice action was itself badly handled. Rothstein, *Lawyers' Malpractice in Litigation*, 21 CLEV. ST. L. REV., May 1972, at 1, 13-14.

One pattern jury instruction on causation in malpractice requires the "trial within a trial":

> Even though you find that defendant was negligent in failing to bring an action . . . on plaintiff's behalf, plaintiff may not recover in this action unless you

struction of the original trial would require evidence about such matters as the size of jury verdicts in the original jurisdiction. For example, an experienced attorney could testify that juries in that jurisdiction typically award verdicts of x dollars in similar cases. But such evidence is too remote and speculative;[30] the new fact-finder must try the merits of both the malpractice suit and the underlying claim to make an independent determination of the damage award. The cost and complexity of such a proceeding may well discourage the few plaintiffs otherwise willing to pursue the slim chance of success.[31]

Other problems await those who do proceed with the "trial within a trial." For example, the attorney in the original action may have negligently failed to pursue the discovery that would have insured success. If the results of that same discovery are now necessary to prove the merit of the underlying claim—and the passage of time has precluded obtaining that information—the attorney by his own negligence will have protected himself from liability. In such a case, the more negligent the attorney, the more difficult is the plaintiff's task of proving causation.[32]

To some extent, a legal malpractice suit must consist of this "trial within a trial." The very requirement of causation dictates that the merits of the malpractice action depend upon the merits of the original claim. If, however, a less stringent standard of proof were imposed, such a *full-scale* reenactment would be unnecessary.[33]

Nonetheless many judges remain insensitive to the harsh effects of a stringent "but for" test. For instance, in *Brown v. E.W. Bliss Co.*,[34] the court extended *Link*'s reliance on the malpractice

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> further find that he would have been successful in an action . . . had one been brought. In order to decide the latter question, you must, in effect, decide a lawsuit within a lawsuit, for unless you decide that on the evidence presented in this case plaintiff would have been successful in an action . . . had one been brought, your verdict must be for defendant. In such an action [*insert rules that would govern burden of proof and substantive law in the action . . .*].

1 NEW YORK PATTERN JURY INSTRUCTIONS—CIVIL 404 (2d ed. 1974) (italics in original).

[30] *See* Coggin, *supra* note 29, at 234.

[31] Data on potential but uninitiated legal malpractice suits would provide strong evidence of the deterrent effect of present requirements. Such data, however, do not exist. In fact, data about all legal malpractice problems are sparse. *See generally* Note, *Improving Information on Legal Malpractice*, 82 YALE L.J. 590 (1973).

[32] For a discussion of one court's attempt to deal with this procedural complexity, see notes 65-69 and accompanying text *infra*.

[33] *See* text accompanying notes 76-77 *infra*.

[34] 72 F.R.D. 198 (D. Md. 1976).

suit as a remedy for aggrieved clients[35] by concluding that judges should strictly enforce procedural rules to promote prosecution of malpractice claims:

> The time has come for lawyers to be responsible for their mistakes and their lack of attention to their professional responsibilities. . . . Yet few are the attorney malpractice suits which are brought. And few will be brought if trial judges look the other way in the face of clear incompetence and regularly give attorneys another chance where they have disregarded schedules reasonably set for the disposition of litigation . . . .[36]

The court naively viewed the legal malpractice suit as a routine matter and overlooked barriers to recovery:

> *All* that plaintiffs need do for a full recovery is to sue their attorney, prove that they had a proper claim and are entitled to damages, and further allege and show that their failure to recover on their claim was due to the negligence of their attorney.[37]

This view ignores the obstacles imposed by the "but for" test, as well as the inconvenience to a plaintiff who must face delays in initiating and prosecuting a second suit after losing the initial claim.

Because of its harshness the "but for" test has not served the judicial system well in legal malpractice cases. Although the test remains the majority test for causation in legal malpractice actions,[38] a few courts have breached its imposing walls.

II

Recent Attempts to Modify the Causation Standard

Reacting to the harshness of the "but for" test, some courts have adopted one of three techniques to facilitate prosecution of legal malpractice actions: (1) retaining the language of the "but for" test while creating presumptions and shifting the burden of proof to mitigate its harsh effects; (2) adopting an entirely new standard of proof of causation; or (3) bifurcating the malpractice trial.

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[35] *See* notes 1-4 and accompanying text *supra*.

[36] 72 F.R.D. at 200.

[37] *Id.* (emphasis added).

[38] *See* note 27 and accompanying text *supra*.

A. *Presumptions and Burden Shifting*

Two recent cases, *Baker v. Beal*[39] and *Winter v. Brown*,[40] illustrate the first technique for lightening the plaintiff's load. In *Baker*, the Iowa Supreme Court used the language of presumption to make more difficult the attorneys' attempt to show the invalidity of their client's original claim.[41] Defendant attorneys had brought a statutory dramshop action, but failed to allege one of the statutory elements, proof that a licensee or permittee operated the tavern involved.[42] In the subsequent legal malpractice action, the former client failed to prove precisely the same element.[43] This, the defendant attorneys argued, required dismissal of the action, since the plaintiff had not proved that the failure to allege the statutory element was the cause of her defeat in the original action.[44] The Iowa court, however, held that the attorneys' decision to bring the original action under a particular statute was enough, on these facts, to create a presumption of the missing element's existence:

> We will not assume after they had the case in their office for two years they selected a statutory cause of action upon which no relief could be granted. We hold plaintiff is entitled to the same presumption defendants rely on in another context: everyone is presumed to have discharged his duty, whether legal or moral, until the contrary is made to appear.[45]

Because *Baker* involved a statutory action and a two-year delay before the action was filed, the argument for attorney liability was unusually strong.[46] The premise underlying *Baker*, however, is one that other courts can extend to more difficult fact situations: If an attorney brings an action on behalf of his client and makes no effort to dissuade the client of the likelihood of success, the attor-

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[39] 225 N.W.2d 106 (Iowa 1975).

[40] 365 A.2d 381 (D.C. 1976).

[41] 225 N.W.2d at 110.

[42] *Id.* at 108.

[43] *Id.* at 109.

[44] *Id.* at 110.

[45] *Id.*

[46] The plaintiff's failure to prove one element of the underlying claims was not merely a technical error that the court was willing to overlook. The identity of a licensee or permittee of the tavern was legitimately in issue. The court suggested that, in the absence of a licensee or permittee, the attorneys should have brought a different statutory action. By their particular choice, however, the attorneys subjected themselves to the presumption of that claim's validity. *Id.* at 110. To rebut the presumption, the attorneys would presumably have had to show the absence of any valid cause of action.

ney shall not then be heard to say that the suit was meritless.[47] Indeed, the attorney's assurances that the suit is proceeding satisfactorily and even his failure to suggest that the client go elsewhere might be sufficient to create a presumption of the claim's merit.

In *Winter*, the court employed a similar procedural device—shifting the burden of proof—to facilitate plaintiffs' proof of causation. In the underlying medical malpractice action, defendant attorneys had missed a statutory deadline, rendering the plaintiffs' claims against the county and its hospital unenforceable.[48] When the clients sued the attorneys for loss of these claims, the attorneys argued that plaintiffs could still sue the treating resident physician and so had not yet suffered injury.[49] At least, the attorneys argued, plaintiffs' damages (the value of the lost claims) should be reduced by the amount plaintiffs could recover from the intern. Since a jury could not calculate the difference in the values of the claims, the defendant attorneys argued that there should be no recovery.[50]

The District of Columbia Court of Appeals strongly disagreed:

> Appellants [defendant attorneys] have precipitated a situation in which the difference in value between the cause of action of which they deprived appellees and the cause of action which appellees still retain against hospital agents or employees is not subject to fair measurement or calculation. It is they, rather than appellees, who must bear the onus of their error and the resultant impossibility of ascertaining the value of what was lost.[51]

Relying on this rationale, the court permitted an inference of causation of the total injury from the finding that defendants caused some harm. Thus, in effect, the court shifted to the negligent attorneys the burden of proving the extent of the loss *not* attributable to their own negligence.

Winter suggests a new allocation of the burden of proving causation in malpractice actions arising from previous litigation. The

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[47] *Cf.* Kohler v. Woollen, Brown & Hawkins, 15 Ill. App. 3d 455, 304 N.E.2d 677 (1973) (defendant attorneys estopped from denying facts in untimely but otherwise meritorious demand for arbitration). *See also* Note, *supra* note 13, 52 IND. L.J. at 703. "The *Baker* court thus appears to support the creation of a presumption in a litigation malpractice action that the underlying action was valid on a bare showing of the existence of the attorney-client relationship." *Id.*

[48] 365 A.2d at 382-83.

[49] *Id.* at 383.

[50] *Id.*

[51] *Id.* at 385 (footnote omitted).

approach, however, derives from an established line of cases, dating from *Summers v. Tice*,[52] that puts the burden on negligent defendants to prove difficult allocations of causation among themselves.

With *Winter* as precedent, courts in malpractice cases might look to analogous medical malpractice cases to resolve allocation of liability among multiple causes. In *Fosgate v. Corona*,[53] a medical malpractice action, the New Jersey Supreme Court extended the *Summers* rationale to a case in which the defendant was the sole wrongdoer but there was another cause of the plaintiff's injury. While the *Fosgate* plaintiff clearly showed misdiagnosis by the defendant physician,[54] this malpractice only aggravated a preexisting disease. The trial judge had instructed that the plaintiff could recover only to the extent that she could isolate the harm attributable to such aggravation.[55] The supreme court disagreed. Once the plaintiff showed that the defendant's negligence was one of two contributing causes of harm, the court shifted the burden to the defendant to show that *all* harm was not due to his misdiagnosis. The court realized that its decision might create an impossible burden for malpractice defendants. It nevertheless held that

> the innocent plaintiff should not be required to establish what expenses, pain, suffering, disability or impairment are attributable solely to the malpractice or tortious act, but . . . the burden of proof should be shifted to the culpable defendant who should be held responsible for all damages unless he can demonstrate that the damages for which he is responsible are capable of some reasonable apportionment and what those damages are.[56]

The allocations of burdens in *Winter* and *Fosgate* related to slightly different elements of the malpractice tort. *Winter* dealt with the extent of harm caused when it was clear that the defendant caused some harm. *Fosgate* involved harm that might have occurred despite the physician's negligence. The underlying principle is, however, the same in each case: When the defendant's negligence hinders proof of one element of the cause of action, the burden of proof on that issue shifts to him. The legal malpractice analogue of the preexisting natural disease in *Fosgate* is the imperfection in the

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[52] 33 Cal. 2d 80, 199 P.2d 1 (1948).
[53] 66 N.J. 268, 330 A.2d 355 (1974).
[54] *Id.* at 274, 330 A.2d at 358-59.
[55] *Id.* at 272, 330 A.2d at 357.
[56] *Id.* at 272-73, 330 A.2d at 358.

plaintiff's underlying claim. Shifting the burden of proof while maintaining a high standard of proof would impose a difficult requirement on the attorney, even though he need prove only that one element of the plaintiff's claim was missing. But it is easier for the attorney to prove the absence of one element in the underlying claim than for the plaintiff to prove the presence of all elements. Thus, such a shifting of burdens to the negligent attorney is reasonable.

Presumptions and burden shifting enable judges to achieve just results by tinkering with the "but for" test in select cases. Since, however, the heart of the problem lies with that test's stringent standard of proof, a better starting point is the standard itself.[57] A new standard would render judicial analysis more elegant and more predictable.

B. *An Alternative Standard of Causation*

Despite the pressing need for reform, courts have been slow to revise the "but for" test and to reject the standard of certainty. Moreover, the most significant recent attempt at reform has left the law in California awkward and unpredictable. In *Smith v. Lewis*,[58] the California Supreme Court affirmed a decision imposing liability on an attorney who, after skimpy legal research in a divorce action, had failed to assert his client's community interest in her husband's retirement benefits. The retirement benefits had two components: state benefits, "unquestionably community property according to all available authority,"[59] and federal benefits, only arguably community property.[60] In imposing liability on the attorney, the court set high standards of care for legal research.[61] In addition, the court, without clearly phrasing any new test, considerably lowered the causation standard. The court refused to upset the jury's inference of causation despite the absence of traditional proof of causation.[62]

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[57] Presumptions and burden shifting have their adherents among legal malpractice commentators. *E.g.*, Haughey, *Lawyers' Malpractice: A Comparative Appraisal*, 48 NOTRE DAME LAW. 888, 893 (1973); Note, *supra* note 13, 52 IND. L.J. at 701-04 ("modified res ipsa loquitur").

[58] 13 Cal. 3d 349, 530 P.2d 589, 118 Cal. Rptr. 621 (1975).

[59] *Id.* at 358, 530 P.2d at 594, 118 Cal. Rptr. at 626.

[60] *Id.*

[61] An attorney, according to the court, should reject a position learnedly, only after research. The attorney must "exercis[e] informed discretion with regard to his client's rights." *Id.*, 530 P.2d at 595, 118 Cal. Rptr. at 627.

[62] *Id.* at 361 n.9, 530 P.2d at 596-97 n.9, 118 Cal. Rptr. at 628-29 n.9.

Because the *Smith* causation test imposed liability for the attorney's failure to assert a merely arguable claim, it may be characterized as a test of "lost opportunity." The "injury" remains the amount of the underlying claim. From a showing of "lost opportunity" to prevail on that claim, the jury may infer that the defendant in fact caused the injury.[63] Almost all litigation presents "opportunities" that the competent attorney will routinely bypass without research, concentrating instead on the primary claims. Under the *Smith* standard, the lawyer does so at his peril. Once the plaintiff shows the loss of a minimal opportunity, he has created a causation issue for the jury. Of course, the defendant may still introduce evidence to rebut the plaintiff's claim. But the first critical step for a plaintiff in a negligence trial is getting the issue to the jury.[64] *Smith* makes that step a short, easy one.

Although it reached an extreme result, *Smith* at least attempted to modify the troublesome causation standard. The "lost opportunity" test creates the potential for unjust decisions against attorneys, but the fault lies with the choice of standard and not the decision to forge a new rule.

C. *The Bifurcated Trial*

In *Fuschetti v. Bierman*,[65] the New Jersey Superior Court proposed a third approach aimed at the procedural horrors of the trial within a trial: bifurcating the trial of the legal malpractice claim. Under the *Fuschetti* procedure,[66] the first trial determines whether the attorney breached his duty of care to his client. If the jury finds a breach of duty, a second trial determines the client's loss by ascertaining the validity of the underlying claim. If the attorney's

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[63] Although the court found a breach of the standard of care, the case does not strictly stand for the proposition that the jury could infer causation from such a breach alone. *Contra*, Note, *supra* note 13, 52 IND. L.J. at 704 ("That the attorney caused the malpractice plaintiff's harm is presumed from a jury determination of negligence."). Both claims were at least arguably valid; the plaintiff did indeed lose an opportunity.

In fact, juries probably often do their own discounting based on the probability of success of the original claim and despite the lack of instruction from the court on the point. The *Smith* jury seems to have done such discounting. Testimony indicated that the present value of the state benefits was $272,954; the federal, $49,078. A one-half share would have been $161,016, but the jury awarded only $100,000. 13 Cal. 3d at 361, 530 P.2d at 597, 118 Cal. Rptr. at 629.

[64] Jury concern for the wronged plaintiff may overwhelm its consideration of causation, particularly if the defendant attorney's negligence was egregious.

[65] 128 N.J. Super. 290, 319 A.2d 781 (1974).

[66] The court ordered bifurcation and provided instructions for the proceeding. *Id.* at 297-98, 319 A.2d at 785.

negligence led to the loss of evidence crucial to the client's claim in the underlying action, the jury in the second trial should understand the reason for the evidentiary deficiency. To ensure this, the same jury sits for both trials, with at most one day between sessions.[67]

The *Fuschetti* procedure takes one step toward keeping separate the various elements of the malpractice claim. In addition, it lets the plaintiff regain settlement opportunities lost in the initial action. If in the first trial the attorney is found negligent, then in the second trial the plaintiff faces the attorney as he would have faced the original defendant. The possibility of settlement thus depends on the merits of the initial claim.

Unfortunately, the bifurcated procedure obscures the causation issue. Only the carry-over jury provides any consideration of the causal relationship between the attorney's negligence and the client's loss on the original claim. Because the *Fuschetti* procedure does not require the trial judge to instruct the jury on causation, only the jury's common sense would lead it to consider the causation issue. An attorney's negligence may have no connection with subsequent loss of a meritorious claim,[68] so *Fuschetti*'s assumption that causation exists is not justified. In addition, although bifurcation helps to keep some analytic distinctions clear, it does so by blurring the interlocking nature of the elements of the malpractice claim. Without knowing the nature of the underlying claim, for example, the factfinder cannot determine whether a breach of duty has occurred.[69] Thus, *Fuschetti* adds procedural complexity while creating as many problems as it solves.

None of the alternative approaches found in recent cases adequately remedies the defects of a strict "but for" test, and some provide their own new, potentially burdensome defects. Yet within an existing body of tort law, medical misdiagnosis cases, lies an acceptable new standard of causation for legal malpractice actions.

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[67] *Id.*

[68] A perhaps absurd but telling example is that of an attorney who does absolutely nothing for a client with a meritorious cause of action. If the cause of action fails because the client independently decides not to prosecute, then the attorney's negligence does not cause the client's loss.

[69] A related problem that has yet to reach its full litigation potential is the quality of work attorneys should be expected to perform on small claims. If attorneys must exhaustively research every case, they will tend not to accept small claims, no matter how meritorious.

III

A New Standard: "Lost Substantial Possibility of Recovery"

In medical misdiagnosis cases, close analogues to litigator malpractice cases, most courts have abandoned stringent standards of proving "but for" causation. In the archetypal case, deterioration of an already ill or injured patient follows the misdiagnosis. In suing the physician, the patient must show that his deterioration would not have occurred without the physician's mistake. The Fourth Circuit, in *Hicks v. United States*,[70] adopted a "lost substantial possibility of survival" as the standard of causation in such cases:

> When a defendant's negligent action or inaction has effectively terminated a person's chance of survival, it does not lie in the defendant's mouth to raise conjectures as to the measure of the chances that he has put beyond the possibility of realization. If there was any substantial possibility of survival and the defendant has destroyed it, he is answerable. Rarely is it possible to demonstrate to an absolute certainty what would have happened in circumstances that the wrongdoer did not allow to come to pass. The law does not in the existing circumstances require the plaintiff to show to a *certainty* that the patient would have lived had she been hospitalized and operated on promptly.[71]

Many jurisdictions have explicitly adopted the *Hicks* test for medical malpractice,[72] and others have adopted similar standards without mentioning *Hicks*.[73]

The *Hicks* rule meets the need for a new legal malpractice causation standard. Applying the standard to legal malpractice merely requires substituting "recovery" for "survival."[74] Upon a

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[70] 368 F.2d 626 (4th Cir. 1966).

[71] *Id.* at 632.

[72] *See, e.g.*, Jeanes v. Milner, 428 F.2d 598, 605 (8th Cir. 1970) (*Hicks* persuasive in determining Arkansas law); Schuler v. Berger, 275 F. Supp. 120, 123-24 (E.D. Pa. 1967) (*Hicks* cited as substantive law of Pennsylvania), *aff'd*, 395 F.2d 212 (3d Cir. 1968); Whitfield v. Whittaker Memorial Hosp., 210 Va. 176, 184, 169 S.E.2d 563, 568-69 (1969) (*Hicks* substantive law of Virginia).

[73] *See, e.g.*, Merriman v. Toothaker, 9 Wash. App. 810, 815, 515 P.2d 509, 512 (1973) ("probable or more likely than not").

[74] As formulated, the test is directed to plaintiffs who were also plaintiffs in the original action. For such plaintiffs, the word "recovery" emphasizes that the court may consider lost settlement as well as lost judgment opportunities. *See* note 28 and accompanying text

showing of a "lost substantial possibility of recovery," the factfinder may infer causation.[75] The requirement that the possibility be "substantial" eliminates the *Smith* problem—subjecting attorneys to catastrophic liability for failing to prosecute minimally viable claims. Although the plaintiff must still provide evidence of the merits of the underlying claim, the requirement of showing certainty, often precluded by the attorney's prior behavior,[76] no longer exists.[77] The client must show a substantial, but not flawless claim. Hence, the *Hicks* rule requires less than a full-blown "trial within a trial."

To be sure, courts have sometimes advocated different treatment of medical and legal malpractice cases. For example, the Oregon Supreme Court in *Hansen v. Bussman*[78] stressed the special nature of personal injuries and the need for greater judicial solicitude for them.[79] Strong policy reasons, however, justify bridging the medical-legal gap. Both bar associations and judges have proclaimed the special place of the legal profession in American society and the importance of high standards of care for attorneys.[80] But high standards of care do not safeguard that special place if a high standard of proof of causation makes malpractice recovery virtually impossible. Moreover, because of its control of the judiciary and dominance of the legislatures, the legal profession is self-protected. To the population in general and to the

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supra. For aggrieved clients who were defendants in the underlying action, the test may be modified to "lost substantial possibility of success."

[75] *Cf.* Orange v. Shannon, 284 Ala. 202, 206, 224 So. 2d 236, 239 (1969). ("There must be some evidence to the effect that such negligence probably caused the injury. . . . But this does not eliminate Alabama's 'scintilla' rule. If there is a scintilla of evidence that the negligence complained of probably caused the injury, a jury question is presented.").

[76] *See* notes 32, 67, and accompanying text *supra*.

[77] The presumption and burden-shifting cases recognize that defendants who make proof difficult should not be protected by high standards of proof. *See* notes 39-57 and accompanying text *supra*.

A sample jury instruction for the proposed standard is:

> If you find that the defendant's actions resulted in the plaintiff's losing a substantial possibility of recovery, either through settlement or judgment, you may infer that the defendant's action caused the plaintiff's injury.

[78] 274 Or. 757, 549 P.2d 1265 (1976).

[79] *Id.* at 784-85, 549 P.2d at 1280-81.

[80] "The time has come for lawyers to be responsible for their mistakes and their lack of attention to their professional responsibilities." Brown v. E.W. Bliss Co., 72 F.R.D. 198, 200 (D. Md. 1976). "Lawyers, as guardians of the law, play a vital role in the preservation of society. . . . A consequent obligation of lawyers is to maintain the highest standards of ethical conduct." ABA CODE OF PROFESSIONAL RESPONSIBILITY, PREAMBLE.

medical profession in particular, the legal profession appears to advocate a double standard.[81]

Conclusion

The assumption of *Link v. Wabash Railroad Co.*,[82] that attorneys may be held ultimately responsible for their negligence, remains unwarranted. A restrictive "but for" standard of causation has rendered the "client's remedy" no remedy at all. For *Link*'s logical structure to stand, courts must make malpractice recovery a realistic possibility. Judicial attempts to change "but for" have so far been misdirected. Use of presumptions and burden shifting fails to face squarely the need for a new standard. The California Supreme Court's sub silentio adoption of a new standard in *Smith v. Lewis*[83] overreacts to the harshness of the traditional rule. Bifurcating the malpractice trial merely substitutes one set of complications for another.

A workable, new standard, "lost substantial possibility of recovery," already exists in medical misdiagnosis cases. This standard would not threaten attorneys with unjustifiable, catastrophic liability. Such a standard would put liability where it is due and at the same time harmonize the law in two areas of professional malpractice.

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[81] *See* Haughey, *supra* note 57, at 889, 904-06.

[82] 370 U.S. 626 (1962). *See* notes 1-4 and accompanying text *supra*.

[83] 13 Cal. 3d 349, 530 P.2d 589, 118 Cal. Rptr. 621 (1975). *See* notes 58-64 and accompanying text *supra*.