Duquesne Law Review

Volume 37 | Number 3 Article 8

1999

Legal Malpractice - Collectibility of Damages - Burden of Proving (Un)Collectibility of Damages

Elisa Recht Marlin

LEGAL MALPRACTICE—COLLECTIBILITY OF DAMAGES—BURDEN OF PROVING (UN)COLLECTIBILITY OF DAMAGES—The Pennsylvania Supreme Court held that collectibility of damages in the underlying suit was properly considered in a legal malpractice cause of action and that the burden of proving (un)collectibility of damages was on the attorney-defendant, who must plead uncollectibility as an affirmative defense and prove it by a preponderance of the evidence.

Kituskie v. Corbman, 714 A.2d 1027 (Pa. 1998).

On September 3, 1989, Leo Kituskie, a Pennsylvania resident and practicing periodontist, was injured in a two-car accident during a vacation in San Jose, California.[1] The accident report noted that Evan Trapp, who was driving while intoxicated and at a high rate of speed, crossed a highway on-ramp and hit Kituskie's vehicle.[2] On September 9, 1989, after his return to Philadelphia to begin treatment for his injuries, Kituskie retained Scott K. Corbman to pursue his claim against Trapp for the personal injuries he sustained in the accident.[3] Corbman was licensed to practice law in Pennsylvania and was a principal/shareholder in the law firm of Garfinkle, Corbman, Greenberg and Jurikson, P.C. (hereinafter the Garfinkle firm).[4]

Corbman obtained Kituskie's medical reports, then made a claim on Kituskie's behalf against the California State Automobile Association ("CSAA"), Trapp's insurance carrier.[5] While negotiating with CSAA, Corbman learned that Trapp's insurance policy limit was $25,000.[6] Not until September 17, 1990, more than one year after the accident, did Corbman discover that California's statute of limitations for Kitsukie's injuries was one year as opposed to

---

1. Kituskie v. Corbman, 714 A.2d 1027, 1028 (Pa. 1998). As a result of the accident, Kituskie suffers from a degenerative, arthritic back condition, making full-time work difficult. *Id.*

2. *Kituskie*, 714 A.2d at 1028.

3. *Id.*

4. *Id.* "The Garfinkel firm is a Pennsylvania professional corporation engaged in the practice of law with its principal place of business located in Philadelphia, Pennsylvania." *Id.* at 1028 n.1.

5. *Id.* at 1029.

6. *Id.*.

Pennsylvania's two-year statute of limitations.[7] CSAA informed Corbman that it would not make a settlement offer to Kituskie because Corbman had not instituted a formal legal action or settled within the one-year statute of limitations.[8] Corbman related this information to Kituskie and advised him that he should obtain other counsel and institute a claim against him for legal malpractice.[9]

On August 28, 1991, Kituskie brought suit against Corbman and the Garfinkle law firm in the Montgomery County Court of Common Pleas, alleging legal malpractice.[10] This court determined that the collectibility of damages in an underlying case is not relevant to a legal malpractice claim in Pennsylvania and granted each party's motion in limine[11] requesting that the other side be precluded from presenting expert testimony on the possibility that CSAA would have settled the matter within the policy limits of Trapp's policy.[12] The trial lasted six days, and on January 11, 1995, a jury found Corbman and the Garfinkle firm liable for legal malpractice in the amount of $2,300,000.[13]

Upon appeal, the superior court "vacated the judgment and remanded for further proceedings because it held that the collectibility of damages in an underlying case should be considered in a legal malpractice action."[14] The superior court also held that the attorney sued for legal malpractice bears the burden of proving as a defense (in the form of mitigation of damages) that

---

7. *Kituskie*, 714 A.2d at 1029. *See* the Pennsylvania Uniform Statute of Limitations on Foreign Claims Act ("borrowing statute"), which applies either the period of limitation provided or prescribed by the law of the place where the claim accrued or the law of the commonwealth, whichever first bars the claim. 42 PA. CONS. STAT. ANN. § 5521 (1981) (applying California's statute of limitation to preclude recovery in a cause of action filed in Pennsylvania).

8. *Kituskie*, 714 A.2d at 1029.

9. *Id.*

10. *Id.*

11. A "motion in limine" is defined as a "pretrial motion requesting court to prohibit opposing counsel from referring to or offering evidence on matters so highly prejudicial to moving party that curative instructions cannot prevent predispositional effect on jury." BLACK'S LAW DICTIONARY 1013 (6th ed. 1990).

12. *Kituskie*, 714 A.2d at 1029. Kituskie sought to preclude the testimony of Corbman and the Garfinkle firm's expert about what CSAA would have done if Corbman had instituted a timely lawsuit on Kituskie's behalf. *Id.* at n.3. Corbman and the Garfinkle firm sought to preclude testimony by Kituskie's expert that CSAA might not have settled for the policy limits and that Kituskie would have recovered a full judgment due to CSAA's bad faith refusal to settle. *Id.* at n.3.

13. *Id.* at 1029.

14. *Id.*

the underlying case would have been uncollectible.[15] On April 28, 1997, the Supreme Court of Pennsylvania granted allocatur[16] to decide two issues: (1) whether collectibility should be part of a legal malpractice action; and, if so, (2) which party bears the burden of proof as to collectibility.[17]

The supreme court noted that in a legal malpractice case, the plaintiff must prove not only that he or she has a cause of action against the party in the underlying case, but also that the attorney hired had been negligent in prosecuting or defending that underlying case (often referred to as proving "a case within a case").[18] Specifically, the court stated that a client-plaintiff must establish three elements in a claim of legal malpractice: (1) an attorney-client relationship or other basis for a duty; (2) failure on the part of the attorney to exercise ordinary skill and knowledge; and (3) damage to the plaintiff proximately caused by such negligence.[19] In addition, proof of actual loss rather than a breach of a professional duty causing only nominal damages, speculative harm, or the threat of future harm is required.[20] As the issue of whether collectibility of damages in an underlying case should also be part of a legal malpractice action was a case of first impression in Pennsylvania, the court reviewed decisions from California, the District of Columbia, Michigan, Maine, Massachusetts, New York, and New Jersey, which had unanimously held that collectibility of damages should be considered in a legal malpractice action.[21]

As a result, in a unanimous opinion written by Justice Castille, the court held that collectibility of damages in the underlying case should be considered in legal malpractice actions.[22] Furthermore,

---

15. *Id.*

16. "Allocatur" is defined as "[i]t is allowed. [It was] formerly used to denote that a writ or order was allowed." BLACK'S LAW DICTIONARY 75 (6th ed. 1990).

17. *Kituskie*, 714 A.2d at 1029.

18. *Id.* at 1030.

19. *Id.* at 1029-30 (citing Rizzo v. Haines, 555 A.2d 58, 65 (Pa. 1989)).

20. *Id.* at 1030 (citing *Rizzo*, 555 A.2d at 68).

21. *Id.* at 1030.

22. *Kituskie*, 714 A.2d at 1030. The court justified its holding on the distinctness of a legal malpractice action:

> A legal malpractice action is different because, . . . a plaintiff must prove a case within a case since he must initially establish by a preponderance of the evidence that he would have recovered a judgment in the underlying action . . . It is only after (that) . . . that the plaintiff can then proceed with proof that the attorney he engaged to prosecute or defend the underlying action was negligent in the handling of the underlying action and that negligence was the proximate cause of the plaintiff's loss since it prevented the plaintiff from being properly compensated for his loss.

Id.

the supreme court agreed with the superior court that "it would be inequitable for the plaintiff to be able to obtain a judgment against the attorney which is greater than the judgment that the plaintiff could have collected from the third party."[23] As to Kituskie's contention that the this "new rule" be applied purely prospectively, the court held that the "new rule" of collectibility in legal malpractice actions should rather be applied retroactively "so that it is at issue on remand in the case sub judice."[24]

Continuing, the court noted that, although jurisdictions have unanimously agreed that collectibility should be considered, they have been split on the additional question of who bears the burden of proof.[25] The majority of courts have placed the burden on the plaintiff, while a small minority have placed the burden of proving (un)collectibility on the attorney-defendant.[26] The Supreme Court of Pennsylvania adopted the minority position and held that an attorney-defendant "in a legal malpractice action should plead and prove the affirmative defense that the underlying case was not collectible by a preponderance of the evidence."[27]

As a result, the *Kituskie* Court affirmed the superior court's holding that the collectibility of damages is to be considered in a legal malpractice cause of action and that the burden of proving (un)collectibility of damages in the underlying case is borne by the attorney-defendant.[28] The court remanded the matter to the trial court for further proceedings.[29]

As Chief Justice Abbott proclaimed in an early English case,

---

23. *Id.* (citing Kituskie v. Corbman, 682 A.2d 378, 382 (Pa. Super. 1996)).

24. *Id.*, at 1030 n.5. "Sub judice" means " [u]nder or before a judge or court; under judicial consideration; [or] undetermined." BLACK'S LAW DICTIONARY 1425 (6th ed. 1990). The court explained that the general rule is that a decision announcing a new rule of law is applied retroactively so that a party whose case is pending on direct appeal is entitled to the benefit of changes in the law. *Kituskie*, 714 A.2d at 1030 n.5 (citing McHugh v. Litvin, Blumberg, Matusow & Young, 574 A.2d 1040, 1043 (Pa. 1990)).

25. *Kituskie*, 714 A.2d at 1031.

26. *Id.* The majority place the burden of proof on the plaintiff because proving collectibility is viewed as being closely related to the issue of proximate cause, which the plaintiff needs to prove as part of the prima facie case. *Id.* The minority reason that the burden of proof in a legal malpractice action requires only that the plaintiff prove a loss of judgment on a valid claim and that it would be unjust to add the additional burden of proving collectibility of damages. *Id.*

27. *Id.* at 1032. Furthermore, the court explained that "uncollectibility should be pled as New Matter pursuant to Pa. R.C.P. 1030. . . . Uncollectibility is a technical defense which could require extensive preparation by all parties. Therefore, the defendant should put the plaintiff on notice of the defense by raising it as New Matter." *Id.* at n.8.

28. *Id.*

29. *Id.* at 1033.

"God forbid that it should be imagined that an attorney, or a counsel, or even a judge is bound to know all the law . . . ."[30] The English common law began to hold attorneys and other professionals claiming competency in certain fields liable for negligence as early as the eighteenth century.[31] As to the plaintiff's recovery, in 1841, the Pennsylvania Supreme Court held that if a client could not have recovered in the underlying action, the plaintiff in the malpractice action should recover nominal damages only.[32] The United States Supreme Court set forth the "American Theory" in 1880.[33]

An attorney's liability to a client could be founded on several different theories; however, the underlying basis for legal malpractice is most often negligence resulting from an implied contract.[34] An attorney is usually held to have agreed to undertake the representation at issue with an implied term of ordinary skill and knowledge.[35] Whatever theory of liability is claimed, the prerequisites remain the existence of a duty, a breach of that duty, and proximate causation of damage.[36]

In 1979, the Superior Court of Pennsylvania noted that, although the issue of damage assessment in cases of professional negligence had not yet been considered by the appellate courts of Pennsylvania, other jurisdictions had established three essential elements of such a case: "(1) the employment of the attorney or other basis for duty; (2) the failure of the attorney to exercise ordinary skill and knowledge; and (3) that such negligence was the proximate cause of damage to the plaintiff."[37] In 1989, the Supreme

---

30. DUKE NORDLINGER STERN, AN ATTORNEY'S GUIDE TO MALPRACTICE LIABLITY 4 (1977) (citing John W. Wade, *The Attorney's Liability For Negligence*, 12 VAND. L. REV. 755 (1959)) (quoting Montriou v. Jefferys, 172 Eng. Rep. 51, 53 (N.P. 1825)).

31. STERN, *supra* note 30, at 7 (citing Dennis L. Gillen, *Legal Malpractice*, 12 WASHBURN L.J. 281 (1973)) (citing Wade, *supra* note 30).

32. Cox v. Livingston, 2 Watts and Serg. 103, 107 (Pa. 1841).

33. STERN, *supra* note 30, at 9 (citing Gillen, *supra* note 31) (citing National Sav. Bank v. Ward, 100 U.S. 195, 199-200 (1880)). The Supreme Court declared:

> Unless the client is injured by the deficiencies of his attorney, he cannot maintain any action for damages; but if he is injured, the true rule is that the attorney is liable for the want of such skill, care, and diligence as men of the legal profession commonly possess and exercise in such matters of professional employment.

National Sav. Bank, 100 U.S. at 199-200.

34. RONALD E. MALLEN & JEFFREY M. SMITH, LEGAL MALPRACTICE § 8.1, at 555 (4th ed. 1996).

35. *Id.*

36. *Id. See id.*, § 8.2(duty), § 8.4 (causation), and Chapter 19 (damages).

37. Schenkel v. Monheit, 405 A.2d 493, 494 (Pa. Super. 1979) (quoting R. MALLEN & V. LEVIT, LEGAL MALPRACTICE 123 (1977)). In *Schenkel*, a client sued his attorney for failing to join

Court of Pennsylvania acknowledged these necessary elements to a legal malpractice action in *Rizzo v. Haines*.[38]

In *Duke & Co. v. Anderson*, the Superior Court of Pennsylvania was confronted with the issue of whether a client suing his attorney and his law firm in assumpsit for the alleged failure to file a defamation action needed to show some injury before he could recover damages.[39] The court ruled that when such a suit is filed, an essential element of the case, whether it is filed in assumpsit or trespass, is proof of actual loss.[40] In *Duke & Co.*, when retirees filed a complaint against the Duquesne Brewing Company (later known as Duke and Company), its pension plan and pension board, and two corporate officers for death benefits that the company was terminating, claiming that these defendants had been unjustly enriched by their actions, the *Pittsburgh Post-Gazette* published an article reporting the lawsuit.[41] The two officers met with corporate counsel, Anderson, and told him to file a defamation suit.[42] One year later, by the time one of the officers learned that the suit had never been filed, the defamation action was barred by the statute of limitations.[43]

Duke & Co. filed an action in assumpsit against Anderson and his firm; Anderson made a motion for nonsuit, which was granted.[44] Duke & Co. argued that because its claim was filed in assumpsit, not trespass, a jury should hear the evidence because it was possible that the jury might award at least nominal damages for breach of contract.[45] The Superior Court of Pennsylvania refused to base a decision on such distinctions and ruled that proof of actual

---

the tortfeasor's employer as a party to the underlying action. *Id.* Because the client, through his new counsel, had not properly challenged the adequacy of the jury's verdict and the tortfeasor's insurer had paid the full verdict amount, the court held that the client had failed to establish that he had been damaged by the attorney's alleged negligence, recognizing that "proof of damages is as crucial to a professional negligence action for legal malpractice as is proof of the negligence itself." *Id.* at 494-95.

38. Rizzo v. Haines, 555 A.2d 58, 65 (Pa. 1989). In *Rizzo*, the client was injured in a car accident, and the attorney instituted two lawsuits on his behalf. *Id.* at 60. The attorney neither investigated all settlement offers nor communicated all such offers to his client. *Id.* at 66. The court adopted the *Schenkel* factors and noted that the duty of an attorney to use ordinary skill and knowledge extends to conduct during settlement negotiations. *Id.* at 65.

39. Duke & Co. v. Anderson, 418 A.2d. 613, 614-15 (Pa. Super. 1980).

40. *Duke & Co.*, 418 A.2d. at 617.

41. *Id.* at 614.

42. *Id.* Two months later the company terminated its relationship with Anderson. *Id.*

43. *Id.*

44. *Id.*

45. *Duke & Co.*, 418 A.2d at 615.

loss is required regardless of the form of action.[46] Although the *Duke & Co.* decision was contrary to precedent, the court declared that "the law changes."[47] As a result, in the commonwealth of Pennsylvania, a client-plaintiff must not only demonstrate the three basic elements set forth in *Schenkel* and *Rizzo* to establish a claim of legal malpractice, but he or she must also prove actual loss.[48]

Closely related to the issue of actual loss is the issue of collectibility, which the United States District Court for the Eastern District of Tennessee examined in *Sitton v. Clements*.[49] Fuller, a union business agent, had shot the plaintiff, resulting in the plaintiff's permanent paralysis from the waist down.[50] The plaintiff hired the attorney-defendant, Clements, to represent him in assisting the state in prosecuting Fuller and to file a civil suit against Fuller.[51] Although the plaintiff and the attorney-defendant had signed a written contract agreeing that a civil action would be instituted, the civil action was not filed within the one-year statute of limitations period.[52] After the jury had been advised that the burden of proof was on the plaintiff to show that he was entitled to damages from Fuller and to show that Fuller was solvent, it

---

46. *Id.* at 616-17. The court noted that if it held otherwise, a client who could not prove actual loss would nevertheless be able to maintain an action in assumpsit for nominal damages. *Id.* at 616. The court recognized that this could lead to disappointed clients being encouraged to resort to "oppressive" litigation and to attorneys filing actions that would otherwise be frivolous, in violation of the A.B.A. Code of Professional Responsibility. *Id.*

47. *Id.* at 617. The court noted that the other cases were decided before the law of malpracticed had developed to the point it had reached in 1980. *Id.*

48. The Supreme Court of Pennsylvania stated: "The mere breach of a professional duty, causing only nominal damages, speculative harm, or the threat of future harm—not yet realized—does not suffice to create a cause of action for negligence. . . ." *Rizzo*, 555 A.2d at 68 (quoting Schenkel v. Monheit, 405 A.2d 493, 494 (Pa. Super. 1979)) (quoting Budd v. Nixen, 491 P.2d 433, 436 (Cal.1971)).

The court continued:

> The test of whether damages are remote or speculative has nothing to do with the difficulty in calculating the amount, but deals with the more basic question of whether there are identifiable damages . . . Thus, damages are speculative only if the uncertainty concerns the fact of damages rather than the amount.

Rizzo, 555 A.2d at 68 (quoting Pashak v. Barish, 450 A.2d 67, 69 (Pa. Super. 1982)) (quoting R. MALLEN & V. LEVITT, LEGAL MALPRACTICE § 302, at 353-54 (2d ed. 1981)).

49. Sitton v. Clements, 257 F. Supp. 63 (E.D. Tenn. 1966), *aff'd*, 385 F.2d 869 (6th Cir. 1967).

50. *Sitton*, 257 F. Supp. at 64.

51. *Id.* at 65.

52. *Id.* The attorney-defendant testified that he advised the plaintiff that if a civil suit was filed while the criminal case was pending, it might damage the possibility of a conviction. *Id.* He testified that the plaintiff was more anxious to obtain a criminal conviction and decided against the institution of a civil suit. *Id.*

returned a verdict in favor of the plaintiff for $162,500.[53]

The district court rejected the attorney-defendant's contentions that the award was so large that it should be set aside as "shock(ing) the conscience of the court;" however, the court did grant a remittitur of $81,250.[54] Although the court observed that under Tennessee law, a judgment is good for ten years and may be renewed, it found that it was not reasonably clear that all of the $162,500 could have been collected from Fuller because the plaintiff did not prove the collectibility of the underlying judgment.[55]

In *McDow v. Dixon*, the Court of Appeals of Georgia considered whether an attorney was negligent for failing to file an action for damages on the plaintiff's behalf.[56] The court observed that in a legal malpractice action, a client must prove not only that the claim was valid and would have resulted in a judgment, but also that some portion of the judgment would have been collectible.[57] The plaintiff claimed to have lost a personal injury claim against the Decatur School of Ballet because the attorney-defendant failed to file suit within the statute of limitations, but he offered no direct evidence of the school's solvency.[58] This court noted that, although a litigant's solvency was normally considered to be too prejudicial to jurors and to have no probative value as to the claim, in legal malpractice claims, "the possession of some assets by the original alleged tortfeasor is essential to the plaintiff's ability to collect a judgment."[59] As the record did show that an offer had been made to settle for $2,500, the court affirmed the trial court's decision for the plaintiff on the condition that damages be reduced to $2,500.[60]

In *DiPalma v. Seldman*, the California District Court of Appeal considered whether a nonsuit was improper with respect to alleged malpractice if a client presented substantial evidence that the

---

53. *Id.*

54. *Id.* at 66-67. "Remittitur" is defined as "the procedural process by which an excessive verdict of the jury is reduced." BLACK'S LAW DICTIONARY 1295 (6th ed. 1990).

55. *Sitton*, 257 F.Supp. at 66. The court noted that Fuller could not have satisfied the $162,500 judgment either before or immediately after serving a jail sentence for the same assault. *Id.*

56. McDow v. Dixon, 226 S.E.2d 145, 146 (Ga. App. 1976).

57. *McDow*, 226 S.E.2d at 147.

58. *Id.* at 148.

59. *Id.* The court distinguished solvency in this context from the bankruptcy standard. *Id.* at 147. Here, the term is used to illustrate the underlying defendant's ability to pay a judgment. *Id.*

60. *Id.* at 148.

underlying judgment was collectible.[61] The court found that a client suing his or her attorney for malpractice must also prove that careful management of the lawsuit would have resulted in a favorable judgment and collection thereof.[62] DiPalma had invested money with the Blooms for real estate development in Florida and retained Seldman when he became concerned over certain papers Mr. Bloom gave him to sign.[63] Seldman negligently advised DiPalma to sign a quitclaim deed, thereby transferring any rights and interests he had in certain property to the Blooms before DiPalma had obtained payment of $240,000 from the Blooms.[64] Although Seldman had the settlement entered as a stipulated judgment in the United States District Court for the Central District of California, it was nearly eleven months before he forwarded the judgment to a Florida attorney to commence collection work.[65] The trial court granted Seldman's motion for nonsuit because the Blooms had filed for bankruptcy and there was no evidence the judgment against the Blooms could have been collected.[66]

As to Seldman's negligent advice to file a quitclaim deed, the California Court of Appeal acknowledged that collectibility was irrelevant; however, collectibility was an element of the case to the extent that the alleged malpractice consisted of Seldman's failure to enforce the stipulated judgment.[67] As DiPalma had presented substantial evidence that the underlying judgment was collectible, the court concluded that the nonsuit was improper and the suit should have gone to the jury.[68]

In *Klump v. Duffus*, the United States Court of Appeals for the Seventh Circuit held that the district court had abused its discretion by precluding introduction of evidence concerning the underlying defendant's financial ability to pay the judgment against him.[69] When Loretta Klump's attorney did not file an action on her behalf within the applicable statute of limitations period, she sued him for legal malpractice.[70] Prior to trial, the district court granted

---

61. DiPalma v. Seldman, 33 Cal. Rptr. 2d 219, 222 (Cal. App. 1994).

62. *DiPalma*, 33 Cal. Rptr. 2d at 222-23 (citing Campbell v. Magana, 8 Cal. Rptr. 32 (Cal. Dist. Ct. App. 1960)).

63. *Id.* at 221.

64. *Id.*

65. *Id.* Seldman was licensed to practice in California only. *Id.*

66. *Id.* at 221-22.

67. *DiPalma*, 33 Cal. Rptr. 2d at 224.

68. *Id.* at 225.

69. Klump v. Duffus, 71 F.3d 1368, 1375 (7th Cir. 1995).

70. *Klump*, 71 F.3d at 1370. Loretta Klump was injured by Curt Eaves in an automobile

Klump's motion in limine[71] to preclude any evidence regarding Eaves' ability to pay.[72] Although the attorney-defendant did not dispute the jury's determination that $424,000 was the judgment that Klump would have been awarded against Eaves, he did successfully argue that the district court erred in precluding the introduction of evidence regarding Eaves' ability to pay that judgment.[73] The court of appeals not only reversed the district court's finding, but it also concluded that the plaintiff should bear the burden of proving the amount she would have actually collected from the underlying defendant as an element of her malpractice claim.[74] This practice, the court held, would be more consistent with a plaintiff's burden of proof in negligence actions generally.[75] The case was remanded for a new trial in which evidence as to the underlying defendant's employment status, financial position, asset ownership, insurance coverage, and other relevant information would be presented to determine the amount the plaintiff would have actually collected from the underlying defendant had the attorney filed the lawsuit within the statute of limitations.[76]

Many other jurisdictions have similarly treated the issue of collectibility as part of the plaintiff's prima facie case.[77] As collectibility relates to both causation and damages, courts understandably find this to be a necessary element of the plaintiff's

---

accident. *Id.*

71. *See supra* note11.

72. *Klump*, 71 F.3d at 1370. Eaves was unemployed, had no assets, and had only a $25,000 insurance policy with respect to the accident. *Id.*

73. *Id.* at 1373-74. The district court stated that Klump was entitled to the full amount of the judgment if she could prove that any portion of the underlying hypothetical judgment would have been collectible. *Id.* at 1374.

74. *Id.* at 1374.

75. *Id. See* Joseph H. Koffler, *Legal Malpractice Damages in a Trial Within a Trial – A Critical Analysis of Unique Concepts: Areas of Unconscionability*, 73 MARQ. L. REV. 40, 52 (1989) ("To predicate an award of damages upon both the requirement that a judgment would have been recovered and that it would have been collectible . . . requires a showing of causation . . . that is conceptually no different from that required in negligence cases generally.")

76. *Klump*, 71 F.3d at 1375.

77. *See* Lawson v. Sigfrid, 262 P.1018 (Colo. 1927); Palmieri v. Winnick, 482 A.2d 1229 (Conn. Super. 1984); Sheppard v. Krol, 578 N.E.2d 212 (Ill. App. 1991); Whiteaker v. State, 382 N.W.2d 112 (Iowa 1986); Jernigan v. Giard, 500 N.E.2d 806 (Mass. 1986); Christy v. Saliterman, 179 N.W.2d 288 (Minn. 1970); Eno v. Watkins, 429 N.W.2d 371 (Neb. 1988); Larson v. Crucet, 481 N.Y.S.2d 368 (N.Y. App. Div. 1984); Rorrer v. Cooke, 329 S.E.2d 355 (N.C. 1985); Hammons v. Schrunk, 305 P.2d 405 (Or. 1956); Taylor Oil Co. v. Weisensee, 334 N.W.2d 27 (S.D. 1983); Mackie v. McKenzie, 900 S.W.2d 445 (Tex. App. 1995); Tilly v. Doe, 746 P.2d 323 (Wash. App. 1987).

case in a legal malpractice action.[78]

Other courts have agreed that collectibility is relevant, but have held conversely that collectibility must be demonstrated by the attorney-defendant. According to at least one scholar, this has the effect of shifting the issue of collectibility to an affirmative defense and properly relieving the plaintiff of an extra burden that was not necessarily part of the original claim.[79]

In *Hoppe v. Ranzini*, the New Jersey Superior Court considered whether proof of (un)collectibility of the judgment against the underlying defendant was a proper consideration for a jury in a legal malpractice suit.[80] The defendant attorneys were sued for malpractice when they failed to file a claim against the underlying defendant within the statute of limitations period.[81]

In advance of trial, the judge ruled that judgment should not be limited to the maximum amount (then $10,000) set forth in a New Jersey statute governing the state's unsatisfied claims and judgments.[82] The defendants contended that DePoe's solvency at the time of the accident or the malpractice action must be considered; otherwise, the plaintiff would be in a better position than he would have been if he had succeeded in the underlying claim against DePoe.[83] As New Jersey's appellate courts had not previously considered what damages could be recovered in such a legal malpractice action, the court noted that in adopting a new rule, it should be careful to balance the rights of, and burdens on, both clients and attorneys.[84] The court concluded that a trial in such a case should be bifurcated[85] and that the burden of proof with respect to (un)collectibility should be the defendants'.[86]

---

78. John H. Bauman, *Damages for Legal Malpractice: An Appraisal of the Crumbling Dike and the Threatening Flood*, 61 TEMP. L. REV. 1127, 1135 (1988).

79. *Id.* at 1137.

80. Hoppe v. Ranzini, 385 A.2d 913, 916-17 (N.J. Super. 1978). The plaintiff had been injured in a car accident by DePoe, who was uninsured, had no assets, had an income of $45 a week at most, and had been in and out of jail. *Id.* at 915.

81. *Hoppe*, 385 A.2d. at 915.

82. *Id.* The judge reasoned that the judgment would be viable for twenty years, during which time DePoe might be able to pay the amount that the jury might award and that to ask the jury to determine DePoe's future earning power or accession to assets would require it to speculate. *Id.* at 915-16.

83. *Id.* at 916.

84. *Id.* at 918. The court noted that the fiduciary relationship between an attorney and client and the practice of law's effect on the public welfare should also be considered. *Id.*

85. A "bifurcated trial" is defined as a "[t]rial of issues separately[.]" BLACK'S LAW DICTIONARY 163 (6th ed. 1990).

86. *Hoppe*, 385 A.2d at 919-920. The court explained that the first trial should include questions of malpractice and the amount of judgment that would have been recoverable

In *Jourdain v. Dineen*, the Supreme Judicial Court of Maine determined that the (un)collectibility of an underlying cause of action in a malpractice suit was an affirmative defense that must be pleaded and proved by the defendant.[87] The Jourdains had been injured in an automobile accident and retained Dineen to represent them in a personal injury suit against the other driver.[88] Not only did Dineen fail to file the personal injury action within the six-year statute of limitations period, but he also failed to tell the Jourdains about the true status of their claim for more than twenty-two months after the statute had run.[89] After a jury trial, which resulted in a $35,000 award to the Jourdains on the malpractice claim, Dineen appealed on the grounds that the Jourdains' claim against him must fail because evidence at the trial did not establish that they would have collected a judgment against the underlying defendant.[90] The court rejected this argument and concluded that "because uncollectibility of a judgment should be treated as a matter constituting an avoidance or mitigation of the consequences of one's negligent act, it must be pleaded and proved by the defendant."[91]

In *Teodorescu v. Bushnell, Gage, Reizen, & Byington*, a divorce client sued her attorney for malpractice and was awarded damages by a jury.[92] The attorney-defendant appealed on the grounds that the plaintiff did not satisfy her proximate causation burden because she did not prove the collectibility of the underlying judgment.[93] The Michigan Court of Appeals announced that it would follow the

---

against DePoe had suit been timely filed. *Id.* at 919. DePoe's income, solvency, or insurance coverage would not be admissible in that trial. *Id.* If the jury awarded a money verdict, then the attorney-defendants could move for a second trial as to the (un)collectibility of that judgment and introduce evidence of income, solvency, and insurance coverage. *Id.* at 919-920.

87. Jourdain v. Dineen, 527 A.2d 1304, 1306 (Me. 1987).

88. *Jourdain*, 527 A.2d at 1305.

89. *Id.*

90. *Id.* at 1306.

91. *Id.* The court adopted this rule despite its recognition that many jurisdictions have placed the burden of proof of collectibility on the plaintiff. *Id.*

92. Teodorescu v. Bushnell, Gage, Reizen, & Byington, 506 N.W.2d 275, 276 (Mich. App. 1993). The plaintiff had been awarded the marital home, free and clear of the mortgage, during her divorce hearings. *Id.* When she received notice that her husband had stopped making mortgage payments and informed attorney-defendant, she was told the firm would handle the matter. *Id.* The mortgagee foreclosed, and the firm did not take any action regarding the proceeding. *Id.* at 276-77.

93. *Teodorescu*, 506 N.W.2d at 278. The attorney-defendant argued that if the underlying defendant (the husband) could not have satisfied a greater judgment, then the wife was left in the same position she would have been if there had been no legal malpractice. *Id.*

minority view and hold (un)collectibility to be an affirmative defense to a legal malpractice action that must be pleaded and proved by the defendant.[94]

In *Smith v. Haden*, the United States District Court for the District of Columbia first addressed the issue of collectibility.[95] The *Smith* Court held that the burden was on the attorney-defendant to prove (un)collectibility in a legal malpractice action.[96] Although the court acknowledged that a plaintiff in a legal malpractice claim must prove a "case within a case,"[97] it noted that it did not necessarily follow that the plaintiff must prove the collectibility of the judgment, as "normally, enforcement of the judgment remains for another day."[98]

The court listed four reasons why burdening the plaintiff with proving the degree of collectibility of the underlying judgment is unfair: (1) the attorney-defendant's failure to act in a timely manner has resulted in the plaintiff's delay in filing the underlying suit; [99](2) the underlying suit might have been settled, if it had been actively litigated;[100] (3) the passage of time can significantly affect the collectibility of a judgment;[101] and (4) a judgment on the merits of the plaintiff's case is itself "vindication of the legitimacy of the claim, and has value regardless of whether it is wholly collectible."[102]

Therefore, although courts in other jurisdictions have agreed upon the importance of considering the collectibility of the underlying judgment, they differ as to who bears the burden of proving (un)collectibility. Consistent with the trend of other jurisdictions, the Pennsylvania Supreme Court in *Kituskie* correctly held that (un)collectibility of damages in the underlying action of a legal malpractice suit should be considered. However, the court

---

94. *Id.*

95. Smith v. Haden, 868 F.Supp. 1, 2 (D.D.C. 1994), *aff'd*, 69 F.3d 606 (D.C. Cir. 1995). The plaintiff claimed that she had employed the attorney-defendant to file a civil action and that the attorney had breached his duty because the statute of limitations had expired before any action was filed. *Id.* at 1.

96. *Smith*, 868 F.Supp. at 3.

97. *Id.* at 2. The court explains this to mean that a plaintiff must show that she had a good cause of action in the underlying case. *Id.* (citing Niosi v. Aiello, 69 A.2d 57, 60 (D.C. 1949)).

98. *Id.*

99. *Id.*

100. *Id.*

101. *Smith*, 868 F.Supp. at 2. The court emphasized that a judgment is valid for many years. *Id.*

102. *Id.*

joined the minority of jurisdictions when it affirmed the superior court's decision that the burden should be on the attorney-defendant. The court's holding that the attorney-defendant should plead uncollectibility as an affirmative defense and prove it by a preponderance of the evidence[103] is surprising because of the number of jurisdictions comprising the majority (at least seventeen)[104] compared to the four jurisdictions included in the minority.[105]

It is not, however, as startling when one scrutinizes the court's justification for its holding. The court considered that the plaintiff need only prove a loss of judgment on a valid claim and that the malpractice action may be brought years after the incident that gave rise to the initial cause of action.[106] Indeed, at least one scholar claims that the trial within a trial, which the plaintiff is required to conduct, is contrary to common law principles.[107]

Concededly, a plaintiff bears many burdens in a legal malpractice case, and the cause of action may be very remote in time from the original underlying action. Not only might discovery be difficult, but the whole process can be quite expensive. Sometimes experts, such as accountants and economists, are needed.[108] One attorney notes that he and his firm refuse to even consider taking a legal malpractice case unless the yield of the underlying cause of action is estimated to be at least $100,000, and at least $500,000 if substantial doubt exists about the outcome.[109]

Nonetheless, it is important to remember that the plaintiff is instituting the cause of action and cannot merely claim negligence, for "(p)roof of negligence in the air, so to speak, will not do."[110] Furthermore, the claim for damages cannot be speculative.[111] The gravamen of a legal malpractice cause of action is actual loss.[112] The United States Court of Appeals for the Seventh Circuit, "in a

---

103. *Kituskie*, 714 A.2d at 1032.

104. *See supra* note 77, listing thirteen jurisdictions, in addition to the four cited *supra* notes 49-76.

105. *See* cases cited *supra* notes 80-102.

106. *Kituskie*, 714 A.2d at 1031.

107. Koffler, *supra* note 75, at 41. Koffler maintains that such a "trial" is not an adversarial proceeding between the real parties in interest in the underlying action. *Id.*

108. Paul D. Rheingold, *Legal Malpractice: Plaintiff's Strategies*, 15 No. 2 LITIG. 13, 14 (1989).

109. *Id.*

110. Koffler, *supra* note 107, at 75 n.61 (quoting P.A. LANDON, POLLOCK'S LAW OF TORTS 345 (15th ed. 1951)).

111. *See supra* note 48 and accompanying text.

112. *Id.*

case strikingly similar to this case,"[113] ruled that a plaintiff's "actual injury" is measured by the amount of money she would have actually *collected* had her attorney not been negligent,[114] and countless other jurisdictions have concurred.[115]

The Supreme Court of Pennsylvania, recognizing the seemingly overwhelming burden these other jurisdictions have placed on the plaintiffs, held that the attorney-defendant would bear this burden in the commonwealth. However, the harshness of requiring the plaintiff to prove collectibility could have been partially alleviated in another manner. In *Fernandes v. Barrs*, the District Court of Appeal of Florida held that ordinarily, the burden should be on the plaintiff to prevent him from receiving a windfall by recovering more from his attorney than he would have from the original tortfeasor; however, "when the negligence of the attorney makes it impossible to prove collectibility of the claim, the burden should be shifted to the attorney to prove that the judgment or any portion thereof was uncollectible."[116] The *Fernandes* decision preserves the traditional prima facie elements of a legal malpractice cause of action—duty, causation, and damages—while extending relief to the plaintiffs when the burden has become nearly impossible to prove.

The Pennsylvania Supreme Court could have done better. Its decision in *Kituskie* not only adopts the minority viewpoint, but it also allows a plaintiff whose original action may have been uncollectible to establish a prima facie case of legal malpractice against an attorney without proving actual loss and to possibly recover a windfall at the attorney's expense. "[A]s the issue is

---

113. Brief for Appellees/Cross-Appellants at 12, Kituskie v. Corbman, 714 A.2d 1027 (Pa. 1998). (No. 0030 E.D. Appeal Dkt. 1997, No. 0031 E.D. Appeal Dkt. 1997).

114. *Id.* (citing Klump v. Duffus, 71 F.3d 1368, 1374, 1375 (7th Cir. 1995)). *See supra* notes 69-76 and accompanying text, which include that court's holding that the burden of proving collectibility of the underlying judgment is more properly placed on the plaintiff.

115. *See supra* notes 77 and 49-76.

116. Fernandes v. Barrs, 641 So.2d 1371 (Fla. Dist. Ct. App. 1994), *disapproved of on other grounds by* Chandris v. Yanakakis, 668 So.2d 180 (Fla. 1995). In *Fernandes*, the plaintiffs could have sought recovery through a claims bill to the Florida legislature had it not been for the attorney's negligence. *Id.* at 1374. *Compare* Jernigan v. Giard, 500 N.E.2d 806, 807 (Mass. 1986) (dictum) (suggesting that an attorney defending a malpractice action may not rely on the consequences of his own negligence to bar recovery against him).

whether the client was damaged, it follows syllogistically that the client was not damaged if he or she would have been unable to collect upon a judgment, even if it had been recovered in the underlying action."[117]

Elisa Recht Marlin

117. Koffler, *supra* note 107, at 50.