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DAMAGES IN SUITS AGAINST LAWYERS: SEVERAL RECENT DEVELOPMENTS

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The main topic of this paper concerns several recent developments in the law governing damages in suits against lawyers.¹ In particular, we will discuss four recent topics. First, we will discuss the new legal refinement which may imply—and certainly suggests—that plaintiffs suing lawyers need more expert witnesses than they have obviously and always needed in the past. It will not appear immediately that this first discussion pertains to damages as opposed to injury—but it does. Second, damages for mental anguish have been substantially eliminated from malpractice actions against lawyers recently. We will be critical of the rule, and we will suggest that there may be an exception to it. Third, we will discuss fee forfeiture as an approach to damages when fiduciary duty breaches are at stake. Fourth, we will suggest a creative case-based way to think about damages in cases against lawyers; although we will have to concede that the approach we will suggest may not only be creative but dangerously adventuresome.

¹ For an excellent pseudo-statutory summary, plus comments and explanations, see RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 53-58 (2000).

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Before we turn to these topics, however, we shall briefly discuss some central substantive legal themes concerning suits against lawyers. We will also outline some established damage rules, including one of which has recently been severely limited.

I. Client versus Lawyer Lawsuits: Some Substantive Rules.

In Texas, there are three principal methods for suing lawyers: attorney malpractice, attorney breaches of fiduciary duties, and attorney breaches of the Texas Deceptive Trade Practices Act.² We will discuss only the first two.

A. Attorney Malpractice.

The word *malpractice* is a rather ambiguous word. It comes from the Latin word *malpraxis* or the Latin phrase *malus praxis*. The Latin word *praxis* simply means *doing things* or *conducting an activity*. It is somewhat vague, since it refers to all sorts of things. It is not particularly ambiguous. The Latin word *malus*, (or *male* or *mal*) however, is somewhat ambiguous. It means *failing to do well* or *not getting things right* or *screwing up* or *fouling up*. So far there is vagueness but no systematic ambiguity. At the same time, the Latin word *mal* (and its synonyms) also mean *performing an activity evilly*, as opposed to simply *doing a bad job*, where the phrase *bad job* means *performing poorly*. The phrase *evil performance* refers to a deliberately vicious undertaking. These meanings are still present in the English language.³ At the same time, the principal meaning of

² See *Latham v. Castillo*, 972 S.W.2d 66 (Tex. 1998). For a summary of suits against lawyers in the DTPA, see Charles F. Herring, Jr., TEXAS LEGAL MALPRACTICE & LAWYER DISCIPLINE § 3.11, 70-78 (3d Ed. 2002). Herring's book is an excellent source for locating cases and case summaries.

³ WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (Philip Babcock Gove, Ed., 1986). In this dictionary, the word *mal* is defined in terms of such things as "badly," "evilly," "irregularity," "abnormality," "poorly," "inadequately," and so forth. *Id.* at 1365. The term *malpractice* is defined as "a dereliction from professional duty whether intentional, criminal, or merely negligent by one rendering professional services that result in injury, loss, or

malpractice refers to non-deliberate failures to perform well. As a consequence, the major idea of *malpractice* is *not measuring up*. The main idea is *not doing as well as is usually done* or *not doing as well as reasonably competent performers of the practice do*. Another idea is *not performing in the usual manner* or *not performing in the manner that reasonably competent performers of the practice do*. The idea of deliberateness is gone from both of these quite different approaches. At the same time, the idea of a specialized activity is imported, to some degree, so that the idea of *malpractice* is associated with the idea of a *profession* or the idea of *professionalism*. Thus, historically, the principal activities in which there could be malpractice were medicine and law.

In Texas, attorney malpractice actions are based upon negligence, possibly including gross negligence.⁴ The same is true for most jurisdictions. In general, in Texas at least, legal malpractice claims are **not** contract claims.⁵ We will be suggesting later that contract theory may play a useful

damage to the recipient of the services or to those entitled to rely upon them or that affects the public interest adversely[.]” It is also defined as “the failure of one rendering professional services to exercise that degree of skill and learning commonly applied among all the circumstances in the community by the average prudent reputable member of the profession with the result of injury, loss, or damage to the recipient of those services or to those entitled to rely upon them[.]” More generally, it is defined as “an injurious, negligent, or improper practice.” Some of its synonyms are *malfeasance* and *wrongdoing* and perhaps *cheating*. *Id.* at 1368. The SHORTER OXFORD ENGLISH DICTIONARY (2002) is similar. It defines *mal* in terms like bad, wrong, and improper, along with badly, wrongly, or improperly. *Id.* at I.1678. It defines *malpractice* in two ways: (1) “Improper treatment or culpable negligent [*sic*] of a . . . client by an attorney[.]” and (2) “a criminal or illegal action, wrong doing, misconduct.” *Id.* at I.1683. Similarly, BLACK’S LAW DICTIONARY (4TH ED. 1968) defines malpractice this way: “Any professional misconduct, unreasonable lack of skill or fidelity in professional or fiduciary duties, evil practice, or evil or immoral conduct.” *Id.* at 1111. Notice how ambiguous all the definitions are. Both negligent and deliberate conduct are included in the area of malpractice. Notice also how ambiguous the definition is in BLACK’S LAW DICTIONARY. It includes both what is usually called *attorney malpractice* and what is called *breach of fiduciary duty*. Of course there is truth here: lawyers can breach their fiduciary duties either by fouling up or by deliberately acting badly.

⁴ *Cosgrove v. Grimes*, 774 S.W.2d 662, 664 (Tex. 1989). See *Barcelo v. Elliot*, 923 S.W.2d 575, 579 (Tex. 1996). See also *SMWNPF Holdings, Inc. v. Devore*, 165 F.3d 360, 364 (6th Cir. 1999). The nature of attorney malpractice is something of a jurisprudential concern. See Benjamin C. Zipursky, *Legal Malpractice and the Structure of Negligence Law*, 67 FORDHAM L. REV. 649 (1998).

⁵ *Willis v. Maverick*, 760 S.W.2d 642 (Tex. 1998). (“A cause of action for legal malpractice is in the nature of a tort.”) *Peeler v. Hughes & Luce*, 909 S.W.2d 494 (Tex. 1995). This is avoiding the issue to some degree: *Id.* at 502 n.1.

role in thinking about damages, even though it is not, generally speaking, part of the aggregation of sources for substantive civil claims against lawyers.

As with all pure negligence cases, there are several necessary components for any such malpractice case. As a rule, they are formulated as four elements. The plaintiff must prove each of the following:

1. The defendant owed a duty to the plaintiff;
2. The defendant breached the duty he owed the plaintiff;
3. The defendant's breach of the owed duty proximately caused an injury to the plaintiff; and
4. The injury caused resulted in damages to the plaintiff.

When translated into legal malpractice, these elements become the following:

1. The defendant is a lawyer ("*L*") and the plaintiff is his/her client ("*C*");
2. *L* breached to duty to *C* that a lawyer would owe a client under the circumstances;
3. *L*'s breach of duty proximately caused an injury to *C*; and
4. *C* sustained damages as a result of the injury.⁶

Section 60.01 of the TEXAS PATTERN JURY CHARGES provides a definition of negligence for non-medical professionals. Obviously, that definition includes lawyers. We have adapted it slightly so that it is restricted to a lawyer:

⁶ Here is the way the Texas Supreme Court formulated the matter in a recent malpractice case: "To prevail in a legal malpractice claim, a plaintiff must show 'that (1) the attorney owed the plaintiff a duty, (2) the attorney breached that duty, (3) breach proximately caused the plaintiff's injuries, and (4) damages occurred.' *Peeler v. Hughes & Luce*, 909 S.W.2d 494, 496 (Tex. 1995)." *Alexander v. Turtur & Associates, Inc.*, 47 Tex. Sup. Ct. J. 992, 2004 WL 1908325 (Tex. Aug. 27, 2004). Notice the difference between Element #4 in our text and Element #(4) in the quotation from the Texas Supreme Court. Logically speaking, there is a substantial difference between saying that damages result from an injury, and saying there is an injury and damages occur.

“NEGLIGENCE,” when used with respect to the conduct of *L* means failure to use ordinary care, that is failing to do that which a lawyer of ordinary prudence would have done under the same or similar circumstances or doing that which an attorney of ordinary prudence would not have done under the same or similar circumstances. “Ordinary care” when used with respect to the conduct of *L* means that degree of care that an attorney of ordinary prudence would use under the same or similar circumstances.

This is an adaptation of the definition of negligence to be found in the TEXAS PATTERN JURY CHARGES.

A classic case has established the need for proving proximate causation.⁷ In general, proximate causation is to be understood as causation-in-fact plus foreseeability.⁸ Of course, this is true in both legal malpractice cases and in all other negligence cases as well. The foreseeability component of proximate causation means that *L* should have anticipated the dangers that his negligence—whether act or omission—created for others. It does not require that *L* anticipate precisely the exact consequences of his negligence—whether act or omission.⁹ “All that is required is that the injury be of such a general character as might reasonably have been anticipated and that the injured party be so situated with a relation to the wrongful act [or omission] that injury might reasonably have been foreseen.”¹⁰

⁷ *Cosgrove v. Grimes*, 774 S.W.2d 662, 665 (Tex. 1989). Plaintiffs must prove *producing cause* when they proceed under the DTPA. *Haynes & Boone v. Bowser Bouldin Ltd.*, 896 S.W.2d 179, 181 (Tex. 1994) (interpreting § 17.50(a)).

⁸ *Federal Deposit Ins. Corp. v. Shrader & York*, 991 F.2d 216, 221 (5th Cir. 1993).

⁹ *Hall v. Stephenson*, 919 S.W.2d 454, 466 (Tex. App.—Houston 1996, writ denied). See *Dyer v. Shafer, Gilliland [et al.]*, 779 S.W.2d 474, 478 (Tex. App.—El Paso 1989, writ denied).

¹⁰ *In re Legal Econometrics Inc.*, 191 B.R. 331, 348 (Bankr. N.D. Tex. 1995) (affirmed in part and vacated in part by *Vaughn v. Akin Gump Hauer & Feld, L.L.P.*, 1997 WL 560617 (N.D. Tex. Aug. 29, 1997) (citations omitted)).

The cause-in-fact component of proximate causation pertains to whether the defendant's act or omission was a "substantial factor in bringing about injury,' without which the harm would not have occurred[.]"¹¹ A cause is a *substantial cause* when reasonable people would regard it as a cause and if it is the sort of thing which induces reasonable people to have ideas about responsibility. "Cause-in-fact is not shown if the defendants' negligence did no more than produce a condition which made the injury possible."¹² Causation-in-fact is *but for* causation. In other words, a cause of an event or situation is in fact its cause when the event or situation would not have come about, given the general circumstances of the process, if the alleged cause had not occurred. But for the cause in question (i.e., the alleged cause-in-fact) the injury as consequence would not have occurred.

The idea of *proximate causation* is customary in the jury charge in legal malpractice cases. Here is a typical definition:

"PROXIMATE CAUSE," when used with respect to the conduct of *L*, means that cause which, in a natural and continuous sequence, produces an event, and without which cause such event would not have occurred; and in order to be a proximate cause, the act or omission complained of must be such that an attorney using ordinary care would have foreseen that the event, or some similar event, might reasonably result therefrom. There might be more than one proximate cause of an event.¹³

Notice, that there may be more than one proximate cause. This is not inconsistent with the idea of *but for* causation when it comes to causation-in-fact. There can be more than one cause, but each

¹¹ *Rodriguez v. Klein*, 960 S.W.2d 179, 184 (Tex. App.–Corpus Christi 1997, no pet.) (citations omitted).

¹² *Id.* at 185.

¹³ *Turtur & Associates, Inc. v. Alexander*, 86 S.W.3d 646, 651 (Tex. App.–Houston [1st Dist.] 2002), reversed on other grounds), *Alexander v. Turtur & Associates, Inc.* 47 Tex. Sup. Ct. J. 992, 2004 WL 1908325 (Tex. Aug. 27, 2004). The Court of Appeals decision will be hereafter referred to as *Turtur*, while the Supreme Court decision will be referred to as *Alexander*.

of them must be a *but for* cause. Thus, there can be more than one sufficient condition, but each of them must be a necessary condition under the circumstances.

In general, cases of attorney malpractice fall into two broad categories. On the one hand, malpractice pertains to litigation; on the other hand, it pertains to transactions and non-litigation-related-attorney-client work. Litigation-related malpractice can arise in a variety of ways. They may occur before, during, or after trial. In connection with litigation-related malpractice, generally the plaintiff must prove that he would have prevailed in the case or obtained a better settlement, had it not been for the negligence of his attorney. This form of proof is often called “the case within the case” (“CWC”).¹⁴

A variety of different types malpractice can arise in non-litigation related malpractice. These include: drafting documents (for example, in transactions, governmental petitions, wills, and closing documents); examining real estate titles, presenting notifications of contract-based actions (for example, notifications required in connection with the acceleration of notes); advising clients as to the meaning of contracts, statutes or regulations; incorporating or otherwise forming a business entity correctly; handling an adoption; administrating accounts; and so forth.¹⁵ For obvious reasons, CWC is not a required form of proof in transactional, advice, or counseling cases. Nevertheless, there has to be one or more analogies.

¹⁴ 1 Ronald E. Mallen and Jeffrey M. Smith, LITIGATION § 8.5 (2000).

¹⁵ See *Herring* § 3.03, pp. 30-38. (This is a marvelous list of cases processing various forms of legal malpractice actions.)

B. Breach of Fiduciary Duty.

In Texas, as in every other American and English jurisdiction, lawyers have fundamental fiduciary duties to their clients. Indeed, the attorney-client relationship is “highly fiduciary,” on at least the same level as the trustee-beneficiary relation.¹⁶ There must be “perfect fairness” and “adequate equity.”¹⁷

Fiduciary duties are crucial and fundamental. Fiduciary duties include undivided loyalty,¹⁸ commitment to the exercise of care, and commitment to creativity, perseverance, and nurturing trust. Lawyers should not treat their clients in such a way that the clients feel threatened. Sometimes, it is said that a fiduciary obligation is a duty of “perfect fairness” by an attorney.¹⁹

As indicated, the level of attorney-client fiduciary duties is quite high. Attorneys owe their clients a duty of “*uberima fides*,” which should be understood as the highest good faith.²⁰ There are no fiduciary duties higher than those an attorney owes the client.²¹

As a consequence of this very high duty of loyalty, there is a duty of complete disclosure. There must be full and fair disclosure of everything relevant at all times.²² Lawyers may not conceal

¹⁶ *Archer v. Griffith*, 390 S.W.2d 735, 739 (Tex. 1965).

¹⁷ *Archer* at 739.

¹⁸ *Burrow v. Arce*, 997 S.W.2d 229, 240 (Tex. 1999); see also David J. Beck, *Legal Malpractice In Texas*, 50 BAYLOR L. REV. § 2, 607-611 (1998).

¹⁹ *Archer* at 739.

²⁰ *Judwin Properties, Inc. v. Griggs & Harrison*, 911 S.W.2d 498, 507 (Tex. App.–Houston [1st Dist.] 1995, no writ). See *Smith v. Dean*, 240 S.W.2d 789, 791 (Tex. Civ. App.–Waco 1951, no writ).

²¹ *Archer* at 739; see *Judwin Properties, Inc. v. Griggs & Harrison*, 911 S.W.2d 498, 506 (Tex. App.–Houston [1st Dist.] 1995, no writ).

²² *Willis v. Maverick*, 760 S.W.2d 642, 645 (Tex. 1988). Failures to disclose are sometimes described as fraudulent. Sometimes, breaches of fiduciary obligations are characterized as “constructive fraud.” Ronald E. Malen and Jeffrey M. Smith, LEGAL MALPRACTICE §14.2, 535 (5th Ed. 2000).

anything important and relevant from their clients.²³ Lawyers must engage in absolute and complete candor in dealing with their clients.²⁴ There must be absolute and complete openness and honesty. Lawyers must disclose their personal interests to clients, if they are relevant to trust formation. This is especially true if there is any sort of conflict. Sometimes, the fiduciary duties a lawyer owes a client are described as duties of “perfect fairness” by the lawyer.²⁵

Generally speaking, actions for breaches of fiduciary duty, at least in Texas and many other states sound in tort. This is true even though the probable foundations of fiduciary duties are to be found in equity.

Finally, there is virtually universal agreement about these principles in Texas. The sources include the Texas Supreme Court as well as courts of appeals. Scholarship and work of commentators also endorse very strong fiduciary duties. Similarly, fiduciary duties have a very long history in American and English jurisprudence.

As a substantive matter, one should keep in mind that the fiduciary duties a lawyer owes a client do not cover absolutely everything. Lawyers do not have a duty to explain to clients how they spend all their time each and every day and evening, for example. The duty of disclosure is only with respect to matters that are material.

Generally, a lawyer’s fiduciary duties to a client, although extremely important, ‘extend[] only to dealings within the scope of the underlying relationship of the parties [w]hile it is true that an attorney owes a client a duty to inform the client of matters material to the representation, this duty to inform does not extend to matters beyond the scope of the representation. In fact, the lawyer may not act

²³ *State v. Baker*, 539 S.W.2d 367, 374 (Tex. Civ. App.–Austin 1976, writ ref’d n.r.e.).

²⁴ *Perez v. Kirk & Carrigan*, 822 S.W.2d 261, 265 (Tex. App.–Corpus Christi 1991, writ denied).

²⁵ *Jackson Law Office v. Chappell*, 37 S.W.3d 15, 21-22 (Tex. App.–Tyler 2000, pet. denied).

beyond the scope of the contemplated representation without additional authorization from a client.²⁶

In the *Joe* case, the Texas Supreme Court reversed the Dallas Court of Appeals and found that Harry Joe, a partner at Jenkins & Gilchrist, was protected by legislative and official immunity for legislators, so that the action by 239 JV against him and his law firm failed as a matter of law. Thus, it was decided correctly upon summary judgment by a Dallas District Court.

A variety of damages can be obtained in breach of fiduciary duty cases. Significantly, a recent and important remedy is fee forfeiture.²⁷ Outside the situation of fee forfeiture, injury, damages, and causation must be proven in a breach of fiduciary duty case, just as it must be proved in a malpractice case.²⁸ We will return to fee forfeiture shortly.

II. Some Standing Damage Principles.

As a general rule, ordinary negligence actions require injury to a tangible object such as physical property or a human body.²⁹ This is one reason why attorney-client negligence actions are to some degree separable from ordinary negligence actions. Attorney-client malpractice actions usually involve economic loss and not physical losses.

As a standard practice, in both Texas and on a national basis, the following are the usual principles governing the recovery of damages in attorney-client malpractice cases. As already set up, “L” will stand for the lawyer-defendant, while “C” will stand for the client-plaintiff:

²⁶ *Joe v. Two Thirty Nine Joint Venture*, 47 Tex. Sup. Ct. J. 1058, 2004 WL 1966000, at *6 (Tex. Sept. 3, 2004) (citations omitted). See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16 cmt. c; § 50 cmt. d (2000).

²⁷ *Burrow v. Arce*, 997 S.W.2d 229 (Tex. 1999).

²⁸ *In re Segerstrom*, 247 F.3d 218, 226 n.5 (5th Cir. 2001).

²⁹ *La. Ex. Rel Guste v. M/V Testbank*, 752 F.2d 1019, 1029 (5th Cir. 1985).

1. *L* is not liable for damages which he does not proximately cause. Thus, *L* is not liable for damages which are quite remote or only tenuously connected to his wrongful conduct.
2. *L* is not liable for damages which are speculative only. *C* must actually prove the approximate of his/her damages.
3. Damages in malpractice cases are measured as the difference between *C*'s actual economic position and what that economic position would have been had *L* not erred and caused loss.
4. The nature and extent of *C*'s actionable damages depends upon the nature of *L*'s undertaking for *C*.
5. The value of the injury is measured from the time of *L*'s error to the time that the error stops causing poor results.
6. If damages in the legal malpractice case pertain to property, the damages are measured by the difference between what the property is worth and what it would have been worth but for *L*'s malpractice. (The property here may be purely economic, such as shares of stock. Then again, it may be tangible property.)
7. If there has been malpractice, *L* may be liable for interest.
8. When *L* violates fiduciary duties, *L* may be liable for fee forfeiture.³⁰
9. If *L*'s malpractice is deliberate or results from gross negligence, *L* may be liable for punitive or exemplary damages.
10. *L* may be liable for settlement amounts *C* has had to pay.

³⁰ This remedy may not be damages, but it is damage-like. The Texas version will be discussed later. See § V.

11. *L* may be liable for his own negligence, or he may be liable for reasonable expenses *C* has undertaken to mitigate exposures he would have had resulting from *L*'s negligence.
12. Traditionally, if *L* caused economic losses as a result of malpractice, and in turn caused mental anguish in *C*, *L* would be responsible for paying damages arising out of the mental anguish. (We will discuss this matter in § IV.)
13. If *L*'s malpractice causes *C* to experience involuntary physical injury, *L* would be liable for it.
14. If *L*'s malpractice causes *C* at least the appearance of economic loss, and *C*'s credit suffers, so that *C* suffers economic loss with respect to credit, *L* will be liable for the loss.
15. If *L*'s malpractice causes a decline in *C*'s reputation, *L* will be liable for economic losses which result.
16. If *L*'s malpractice causes *C* to experience economic losses, *L* will be liable for consequential economic losses flowing from the original injury.

These principles are not absolutely universal. Thus, in some jurisdictions, if *C* has to pay money to retain counsel to proceed against *L*, the money *C* pays his new lawyer will be part of the damages he can recover from *L*. That is probably not true in Texas. (In Texas, attorneys' fees are not recoverable in tort cases.) Generally speaking, if *C*'s physical injuries are wrongful death injury caused by suicide following *L*'s errors, plaintiffs cannot recover for *C*'s death. Moreover, if *C*'s original loss is the failure of business which never really got started, the recovery of consequential damages may be unlikely.

It is a good idea in contexts like this one to remember at least some of the criteria for what constitutes punitive damages. The topic of punitive damages is a topic for a different paper, at least at this time.

III. Recent Innovation: Expert Testimony and Causation.

Traditionally, virtually all legal malpractice actions required expert testimony on the issue of whether *L* has breached duties he owed *C*. That expert almost always has to be a lawyer. Similarly, second expert witnesses have usually been required when the damages are complex, require accounting testimony, require economic testimony, and so forth. Recently, the Texas Supreme Court has articulated the new, almost universal rule requiring expert testimony with respect to causation in legal malpractice cases. The rule is fairly simple and intuitively attractive: Juries need expert testimony to determine whether *C* would have prevailed in an underlying trial but for *C*'s attorney's negligence in preparing and trying the case. Juries need this kind of expert testimony whenever the causal connection between the lawyer's performance and the result of a trial is not obvious or a matter within common understanding of lay people. In the absence of such testimony, under such circumstances, the test of legal sufficiency will fail; the case will be reversed; and *C* will take nothing.³¹

The reasoning of the Supreme Court in *Alexander* is based on Texas precedent, Texas Rule of Evidence 702, precedents from other jurisdictions, straightforward logic, sound legal reasoning, and a detailed critique of testimony in the underlying case. Thus, it is necessary to review the case in some detail before discussing the reasoning of the court. The reasoning of this case needs to be discussed in symposium on damages, because injury and damages are ultimately connected. Injuries

³¹See note 12, *supra*.

must cause damages. And injuries themselves must be caused. The focus in the *Alexander* case is on cause-in-fact. Almost without question, the rule will be extended to the foreseeability element of proximate causation. In the end, we will be exploring the implications of *Alexander* for the presentation of the proof of damages.

A. Facts and Procedure In the *Alexander* Case.

There are two components of the *Alexander* case which are important to explore. The first one is what happened in the underlying case. The second one is what happened in the malpractice case.

1. *Turtur v. McKellar Ranch*

The Turtur firm was a securities firm. During the 1982-84 period, the firm entered into agreements with McKellar Ranch. Under the agreements, the Turtur firm was to sell “cattle embryo investment packages.”³² The Supreme Court describes the deals in a slightly different manner. According to it, Turtur agreed with McKellar Ranch to be the “exclusive marketer of two cattle-related investments: (1) donor cow interests and (2) cattle ‘embryo transplants.’”³³

The deals did not work out very well. In 1985 the securities firm, Turtur, filed suit against McKellar Ranch and Dr. Lee McKellar. It asserted breach of contract and fraud claims. Shortly

³² *Turtur* at 648 (Tex. App.–Houston [1st Dist.] 2002).

³³ *Alexander* at 1. The Supreme Court’s description of the economics of Turtur/McKellar Ranch deal is more detailed in its n. 1:

The purchaser of a ‘donor cow interest’ bought a half interest in a female Red Brahman donor cow which was periodically super-ovulated to produce multiple eggs; the eggs were then washed from the donor cow’s uterus, fertilized, and transferred to a “recipient cow.” The investor in this program was entitled to half the calves produced from the donor cow. The purchaser of an “embryo” interest bought a “unit” of ten implanted embryos paying for transplant work to the recipient cows. The investment worked as a tax shelter because the investor could immediately claim a deduction for these transplant expenses.

after suit was filed, the McKellar Ranch filed bankruptcy, so the lawsuits against Dr. McKellar and Turtur were split apart.

Approximately two years after bankruptcy was filed, the bankruptcy court in Tyler spent two days trying Turtur's suit against McKellar Ranch. (The bankruptcy judge had, long before the trial itself, set the case to be tried in two days only. This fact was known to both sides. There is no indication that either side attempted to persuade or cause the bankruptcy judge to lengthen the time for trial.) It took the bankruptcy judge approximately 25 months to decide the case. Eventually, he decided the case mainly in favor of McKellar Ranch and against Turtur, with some rights of the decision in favor of Turtur. The parties eventually settled, Turtur paid a sum and dismissed its case against Dr. McKellar.³⁴

2. Turtur v. Alexander: Trial Court

On November 30, 1989—just a few months after the bankruptcy court granted judgment—Turtur filed suit against Tom Alexander and the firm of Alexander & McEvily. It alleged malpractice. Pleadings were revised several times so that by the time of trial the allegations were for negligence, gross negligence, legal malpractice, breach of fiduciary duty, and violations of the DTPA.

The underlying lawsuit—the one tried in the Tyler bankruptcy court—had started with other lawyers involved. Eventually, Turtur hired Tom Alexander to be lead counsel. He was assisted by Judy Mingledorff, an associate in his firm. On June 15, 1987, two days before the trial of the action as an adversary proceeding, Alexander announced at a state district court docket call in Houston that

³⁴The Supreme Court's Opinion in *Alexander* contains more details. "McKellar Ranch predominately prevailed and was awarded net damages of \$105,718.80. In a subsequent settlement, Turtur, Inc. paid McKellar [Ranch] \$37,500.00 and dropped its state court claim against Dr. McKellar individually to set this judgment aside." *Id.* at 2.

he was ready for a trial there. The district judge in that court set the case to begin on the next day. Consequently, Alexander could not try the Turtur adversary proceeding in Tyler. He instructed Mingledorff to try it. She filed a motion for continuance on June 17, the first day the adversary proceeding was to be tried. McKellar Ranch opposed the motion, and the bankruptcy judge denied the request for continuance. The case was tried under the two-day restriction.

Turtur did not believe that Mingledorff had done a satisfactory job in trying the case, and this view was a central theme in the bankruptcy case. Although she had served as a prosecutor, Mingledorff had little experience in civil litigation and no experience at trying civil cases. Turtur alleged that she presented too few witnesses and did not examine the witnesses that she presented in a thorough manner. Turtur alleged that Mingledorff did not review certain documents produced by McKellar Ranch prior to trial. Turtur also alleged that Mingledorff did not depose certain witnesses nor called them to trial. Turtur alleged that these witnesses should have been deposed or called. Mingledorff also did not conduct depositions properly because there was insufficient material in depositions to function as cross-examination. Finally, Alexander never should have sent Mingledorff as his substitute, since she was unprepared. After all, she had never expected to try the case.³⁵

³⁵ Testimony was contradictory. Alexander said he never intended to try the case and he always intended Mingledorff to do so. This Mingledorff denied. Here is her testimony:

Mingledorff: I never expected to be trying their case. I never had any discussion with Tom that I would be trying their case. Tom had never expressed any inkling that I would be trying their case Tom always talked with the Turturs in front of me and talked with me alone, as if the case was his to try. I never heard anything different.

Q. So everything you saw or heard, until the Judge told you to go to trial in the courtroom in Tyler, Texas, everything that you had heard prior to that time was consistent with the idea that Tom Alexander was to try the case personally. Isn't that correct?

A. Absolutely.

Mingledorff at 655.

The malpractice case was tried twice. The first trial was fourteen (14) weeks and ended in a mistrial.³⁶ The trial which ended in a judgment took five (5) weeks to try. It began on October 21, 1996. (The Court of Appeals opinion was delivered in 2001. The Court of Appeals refused an en banc hearing. A dissenting opinion was issued on September 12, 2002. The Supreme Court heard the case on December 3, 2003, and issued an opinion on August 27, 2004.)

In the second—and completed—trial of the *Turtur v. Alexander* case, the jury made a number of findings:

- Alexander and the firm were negligent;
- The negligence of Alexander and the firm was or were the proximate cause of plaintiff's damages.
- Alexander was 60% negligent, while his firm was 40% negligent;
- Alexander and his firm violated the DTPA by engaging in false, misleading, or deceptive acts or practices that were the producing cause of Turtur's damages;
- The conduct of Alexander and his firm was unconscionable and that conduct was a producing cause of Turtur's damages;
- Alexander and his firm engaged in such conduct with actual awareness of its falsity, deception, or unfairness;
- Turtur would have received a more favorable judgment in the adversary proceeding but for the conduct of Alexander and his firm; and
- An appropriate and favorable judgment in the 1997-89 adversary proceeding would have been collectable.

³⁶ *Turtur* at 649 n. 4.

As a consequence, the jury awarded Turtur \$3 million in actual damages, plus punitive damages.

The defendants moved to set the verdict aside, partly on grounds that no evidence supported the causation component of the jury verdict. The trial court agreed and set the verdict aside. The trial court entered a take nothing judgment. Turtur appealed to the court of appeals.

3. *Turtur v. Alexander: Court of Appeals*

The court of appeals wrote about a number of issues. We will be concerned only with the issue of causation. The court of appeals started from the proposition that “expert testimony is necessary to prove the element of causation in a legal malpractice case[,]” at least “[a]s a general rule[.]”³⁷ Expert testimony is not always necessary, however, said the court of appeals. “[I]n some cases, expert testimony on causation is not necessary because the causal relationship between the attorneys negligence and the clients’ loss is so obvious that lay people are competent to resolve the issue.”³⁸

On the basis of the “General Rule” and the “Some Cases [Rule]” the court of appeals reversed the trial court judgment and remanded the case to the trial court so that an appropriate judgment might be entered. Most of the court of appeals opinion was a review of facts and testimony which tended to support the court’s view that causation was so obvious and commonsensical that judgment should be entered. A fair fraction of the testimony it reviewed was that of Steve Peterson who was the expert witness for Turtur. Formerly, he had been General

³⁷ *Turtur* at 652.

³⁸ *Id.*

Counsel for the State Bar of Texas. At the time of trial, his main focus was on attorney malpractice, legal ethics, and lawyer grievance matters.³⁹

The Court of Appeals quoted Peterson at some considerable length. Questions put to him, and answers given by him, take up approximately—just a shade under—four full columns in the printed version of the opinion. Some of the questions and answers are quite weak. Consider this one:

Q: So, with respect to evidence which may have appeared on these documents [i.e., documents that were produced and unread], I *guess*, formulating the overall strategy of how this case is to be presented, would that be something that *might* benefit from the expertise, and training, and experience *and* caginess of a more seasoned lawyer like Tom Alexander? [Emphasis added.]

A: I *would think so*, yes.

There are a number of problems with this question and answer. First, the expert witness has only said what *might* be true. Second, his answer is not unequivocal. It is not a flat, out-and-out assertion. The sentence, “I *would think so*,” Sounds very tentative. Third, the appearance of the word “guess” in the question makes the question problematic. Fourth, there isn’t really one question. There are four questions; they concern somewhat different things: (1) expertise, (2) training, (3) experience, and (4) caginess.

Other questions and answers are much clearer. Peterson asserts unequivocally that Alexander was negligent by handing the case over to Mingledorff, since she was rather inexperienced. He was negligent in failing to supervise her properly. No elaborate questions having to do with the details of such supervision were reprinted, however. One doesn’t know, therefore, whether they exist. They should have. At the same time, Peterson testifies that Alexander knew something about the embryo

³⁹ *Turtur* at 655 n. 8.

cattle business and had some familiarity with the livestock business, whereas Mingledorff did not have that kind of knowledge. Nor did she have familiarity with bankruptcy adversary proceedings, although Alexander apparently testified that he had done 50 of them.

Some other sequences of questions and answers are defective. Peterson testified that the lawyers in charge of the underlying adversary proceeding should have done a better job providing a witness list. At that point, the following occurs:

Q: And was the failure to evaluate and list those witnesses, to the extent this jury believes they *might* have been important to the overall outcome of this hearing, was a failure to list those witnesses negligent? [Italics added.]

A: Yes, it was.

Is the word “might” in the question appropriate? We are inclined to think not.

One other Q&A is fascinating. It pertains to a decision in the underlying case:

Q: [C]an you comment as to whether or not the failure to present this evidence [i.e., apparently certain documentary evidence and possibly witnesses] *caused* Judge Abel to make his finding?

A: I can comment that, in my opinion, the evidence that was offered and admitted at trial *caused* Judge Abel to make the decision that he made. [Italics added.]

One wonders about this answer. First, there is a deep philosophical question about the question and about the answer. Is human reasoning a causal process? Is the accurate and able use of logic a causal process? There is also a philosophical–epistemological–question that comes up in the law all the time. How could an expert possibly know precisely what led the judge to his conclusions? How could even an expert know precisely how a jury reached its decision?

There are at least two other things omitted from the court of appeal's opinion. First, although the jury awarded Turtur \$3 million, there is no testimony at all recorded or discussed in the court of appeals opinion as to what evidence there was in favor of that claim. Second, there is nothing in the appellate opinion which tends to justify its view that commonsensical people could understand with a high degree of accurate certainty that the errors of Alexander and Mingledorff caused Turtur's injury. There is also no discussion of the difference between *injury* and *damages* in a tort case in which economic loss is the only form of injury. This is important, as we shall show.

4. *Alexander v. Turtur*: Supreme Court

The decision of the Texas Supreme Court is in some way exactly the opposite of the decision of the court of appeals. Fundamentally, the Supreme Court agreed with the court of appeals with respect to the rules on expert witnesses and causation. There is a "General Rule," and there is an exception to the general rule, namely, the "Some Cases Rule" or better yet, the "Same Case Exception." Where the opinions differ is where the trial of *Turtur v. Alexander* fails. The court of appeals put it in the "Some Cases Exception," but the Supreme Court put it under the "General Rule." Probably, the Supreme Court increased the power of the "General Rule," and narrowed the scope and weakened the power of the "Some Cases Exception" to the "General Rule."

Here is what Justice Phillips wrote for the Supreme Court:

Breach of the standard of care and causation are separate inquiries . . . , and an abundance of evidence as to one cannot substitute for a deficiency of evidence as to the other. Thus, even when negligence is admitted, causation is not presumed. Moreover, the trier of fact must have some basis for understanding the causal link between the attorney's negligence and the client's harm. In some cases the client's testimony may provide this link, but in others the connection may be beyond the jury's common understanding and require expert testimony . . . [¶] Legal malpractice may include an

attorney's failure to exercise ordinary care in preparing, managing, and presenting litigation. But "[d]ecisions of which witnesses to call, what testimony to obtain or when to cross-examine almost invariably are matters of judgment. As such, the wisdom and consequences of these kinds of tactical sources made during litigation are generally beyond the ken of most jurors. And when the causal link is beyond the jury's common understanding, expert testimony is necessary."⁴⁰

Quite probably, many will interpret the Supreme Court discourse to imply that whenever *lawyerly wisdom* is one of the things that is being evaluated in determining malpractice, expert witnessing as to causation will be required. In this case, it looks like the Supreme Court emphasized two matters in support of the idea that an expert witness as to causation was necessary. First, the jury in effect held that the result in the underlying proceeding would have been different but for the negligence of Alexander and Mingledorff. As a consequence, there needs to be competent expert testimony on causation. Second, on the basis of the record presented to it, the Supreme Court concluded that

. . . [t]he errors allegedly made by Mingledorff in the preparation and trial of the admittedly complex , yet truncated, underlying proceeding were not so obviously tied to the adverse result as to obviate the need for expert testimony.⁴¹

If all of Mingledorff's deficiencies were mentioned in the court of appeals opinion, the Supreme Court is clearly right. For example, Peterson testified that it was negligent of Mingledorff to sign a pre-trial order without having reviewed numerous documents. He testified that it was negligent of her to have signed a pre-trial order which identified the witnesses of the McKellar Ranch as those witnesses listed in their discovery answers. There is no indication as to why that constituted negligence. The Supreme Court could have blamed this evidentiary weakness on the failure of

⁴⁰ *Alexander* at 6. (Citations omitted.) Justice Hecht wrote a concurring opinion. He shares our concern about Peterson's testimony about the mental causation of Judge Abel.

⁴¹ *Id.*

Alexander's lawyer to cross-examine Peterson or a failure to object to his testimony which was apparently not accompanied with details or specific facts.

Perhaps most interestingly, the Supreme Court focuses on the last Q-&-A quoted above concerning the causal element in Judge Abel's decision. The Supreme Court is quite critical of the court of appeals relying on this testimony:

The court of appeals did not explain what it believed the significance of this testimony to be. All we glean from it is that Peterson believed the bankruptcy judge decided the case on the evidence before him, praiseworthy in a judge but hardly probative on the issue of attorney malpractice.⁴²

In other words, Peterson should have testified as to what was left out and both how and why it would have changed the trial court's opinion. In other words, Peterson's expert opinion as to causation is fundamentally incomplete. (The Supreme Court does not explicitly make this point, yet that is clearly what it is.)

The Supreme Court is also critical of the fact that the court of appeals did not quote Peterson's full response to the question. Apparently, his full answer is this:

I can comment that, in my opinion, the evidence that was offered and admitted at trial caused Judge Able [*sic*] to make the decision that he made. *I can't tell you what other evidence might have been out there that might have resulted in a different opinion.*⁴³

The Supreme Court comments on the testimony as follows: "[it] does not support the inference that, had omitted evidence been presented, that would have been a different result in the underlying trial."⁴⁴ Thus, the Supreme Court fundamentally admits that there was expert testimony on

⁴² *Id.* at 7.

⁴³ *Alexander* at 6. (The emphasis is added by the Supreme Court.)

⁴⁴ *Id.*

causation. What it points out is that the testimony was defective because it was insufficient. The expert simply was not prepared enough.

Interestingly, the Supreme Court does not comment on the fact that there was no expert testimony on damages. It must be remembered that the jury came back with a verdict awarding \$3 million in damages. Obviously, there needed to be expert testimony on this matter.

B. “Injury” and “Damages”.

According to the elements of negligence and attorney malpractice (a version of negligence), there must be causation of injury. The damages must result from the injury. This means that there must be causation of the plaintiff’s injury, and the injury itself must cause the damages under the circumstances that occur and the circumstances that follow. Thus, there are two chains of causation. Ultimately, both of these chains of causation must be traceable back to the negligent acts or omissions of the defendant. Presumably, they will be. This rule is reinforced by the Texas rule that in a negligence action, the negligence must be the proximate cause of the damages as well as the injury.⁴⁵

In a case involving bodily injury, it is easy to distinguish between injury and damages. If the plaintiff is struck accidentally by a knife, his injury is being cut by a knife, and his damages are his medical expenses, his pain and suffering, his loss of work, and so forth. The same is true when it comes to property damage.

⁴⁵ *Hoover v. Larkin*, 2001 WL 1046266, *5 (Tex. App.–Houston [14th Dist.] Sept. 13, 2001, pet. denied). This is a legal malpractice case.

The situation is quite different in attorney malpractice cases, however. In such cases, there is generally speaking only economic loss.⁴⁶ Thus, the injury to the plaintiff is economic loss. That economic loss must cause his damages. Unfortunately, this idea makes little sense. His economic loss is identical to his damages. That is the nature of economic losses. They constitute a form of damages. Consequently, if there must be expert testimony about the cause of the injury, there must also be expert testimony characterizing the injury, and that is expert testimony about the nature and extent of the damages.

What we don't know is whether the expert testimony on the cause of injury must include testimony as to the nature of the injury, i.e., the nature and extent of the damages. The answer is *Probably not*. Nevertheless, there must be testimony about that. Since the damage testimony is in a way logically prior to the causation-of-injury testimony—since it is in effect a characterization of the injury—one would expect that the damage expert testimony may have to come first in a trial. But that sequence of testimony may create problems of clarity when it comes to the trial of attorney malpractice actions. Consider how difficult it might be to have testimony as to damages first before there is testimony as to the cause-in-fact as well as the foreseeability of injury.

It should be kept in mind, of course, that since the injury and the damages are identical in economic loss cases, not only the injury but the damages themselves must be foreseeable. If the damages are extraordinarily large, that may create a different problem.

⁴⁶ In pure (normal) negligence cases, purely economic loss is not actionable. *Express One International, Inc. v. Steinbeck*, 53 S.W.3d 895 (Tex. App.—Dallas 2001, no pet.).

he form **IV. Mental Anguish Damages**

When an injurious thing happens to a person, he or she is often very upset for quite a long time. This kind of injury can take the form of depression, shame, obsessive worry, rage, grief, and the like. It can lead to disabilities of a variety of forms, including the inability to work, the inability to concentrate, the inability to think, and so forth. All of these, whether individually or in combination, are described in the law as *mental anguish*—a good, descriptive name. Generally, mental anguish damages are not recoverable in contract cases, and never have been.⁴⁷

A. Two Texas Cases

Over the last 125 years or so, the willingness of courts to award damages for mental anguish has grown and become more flexible. At the same time, Texas courts have been unwilling to create a cause of action for negligent infliction of mental distress.⁴⁸ Somewhat more recently, the Texas Supreme Court has grown more suspicious of—or at least more skeptical about—claims of mental anguish. Although it acknowledges that “mental anguish is a real and serious harm[,]”⁴⁹ it is also concerned about difficulties inherent in awarding damages for mental anguish. As a consequence, it is “not willing to recognize [mental anguish] as a compensable element of damages in every case where it occurs.”⁵⁰

There are two reasons stated for this reserve. First, the occurrence of mental anguish is not easily predictable. Two people may suffer similar injuries, but as a result one of them will

⁴⁷ *Farmers & Merchants Estate Bank v. Ferguson*, 617 S.W.2d 918, 921 (Tex. 1981); *Stewart Title Guar. Co. v. Aiello*, 941 S.W.2d 68, 72 (Tex. 1997).

⁴⁸ *Boyles v. Kerr*, 855 S.W.2d 593 (Tex. 1993).

⁴⁹ *City of Tyler v. Likes*, 962 S.W.2d 489, 494 (Tex. 1998).

⁵⁰ *City of Tyler* at 494-95.

experience mental anguish and the other one will not. When that is true—and mental anguish is not easily predictable—it is difficult to describe mental anguish as a foreseeable injury. (Notice that mental anguish—a type of injury—is not identical to damages.) Under many circumstances the occurrence of mental anguish is causally “remote” and therefore highly “speculative.” Second, the occurrence in mental anguish—not to mention its extent—is “inherently difficult to verify.”⁵¹ This is true even when this occurrence is foreseeable given the type of conduct that has occurred. This truth has been known for a long time. Traditionally, Texas courts demanded that claims of mental anguish be accompanied by physical symptoms. In relatively recent years, the Texas Supreme Court has backed away from this view to some degree, “after concluding that physical symptoms are not an accurate indicator of genuine mental anguish.”⁵² At this time, the Supreme Court often requires “direct evidence of the nature, duration, and severity of [the] mental anguish . . . , establishing a substantial disruption in the plaintiff’s daily routine.”⁵³

In the 1998 *Likes* case, the Supreme Court recognized the three general areas where mental anguish damages are appropriately recognizable. First, there are intentional and malicious torts (e.g., liable and battery), and knowing violations of the DTPA.⁵⁴ Mental anguish damages are appropriate

⁵¹ *Id.* at 495.

⁵² *Boyles* at 598.

⁵³ *Parkway Co. v. Woodruff*, 901 S.W.2d 434, 444 (Tex. 1995).

⁵⁴ The tort of intentional infliction of emotional distress is treated somewhat differently. “To recover damages for intentional infliction of emotional distress, the plaintiff must establish that: (1) the defendant acted intentionally or recklessly; (2) defendant’s conduct was extreme and outrageous; (3) the defendant’s actions caused the plaintiff emotional distress; (4) the resulting emotional distress was severe. Extreme and outrageous conduct is conduct “so outrageous in character and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized community.” Liability does not extend to mere insults, indignities, threats, annoyances, petty impressions, or other trivialities. It is for the court to determine, in the first instance, whether a defendant’s conduct was extreme and outrageous. But when reasonable minds may differ, it is for the jury, subject to the court’s control to determine whether, in the particular case, the conduct was sufficiently extreme and outrageous to

here because of the “high level of culpability affects the determination of proximate cause and makes it just that the defendant should bear the risk of any over compensation that an award of mental anguish damages in a particular case might entail.”⁵⁵ Second, mental anguish damages are appropriate in negligence cases where serious bodily injury is inflicted. In such cases, one can reliably infer that mental anguish is a “necessary result.”⁵⁶ [WHY DOUBLE QUOTE?] Third, damages for mental anguish are appropriate when they have a foreseeable result of a breach of duty in certain “special relationships.” These relationships include physicians and patients, preparing corpses for burial, a delivery of news pertaining to family emergencies, and, historically only, the relationship between railroad into passenger. This rule does not apply to most types of relationships, including landowners and invitees, plus certain types of intimate relationships, including casual sex.⁵⁷

On the basis of its historical analysis, in *City of Tyler* the Supreme Court formulated the following holding:

Without intent or malice on the defendant’s part, serious bodily injury to the plaintiff, or a special relationship between the two parties, we permit recovery for mental anguish only in a few types of cases involving injuries of such a shocking and disturbing nature that mental anguish is a highly foreseeable result. This includes suits for

result in liability.” *Hoffmann-LaRoche Inc. v. Zeltwanger*, 47 Tex. Sup. Ct. J. 981, 2004 WL 1908322, *4 (Tex. Aug. 27, 2004).

⁵⁵ *Id.*

⁵⁶ *Id.* (citing *Brown v. Sullivan*, 10 S.W. 288, 290 (Tex. 1888)).

⁵⁷ The tort of bad faith committed by an insurance company against an insured who has made a claim is not discussed, although it has been described as involving a “special relationships.” To some degree, courts have permitted punitive damages when there is bad faith. *Universal Life Insurance Company v. Giles*, 950 S.W.2d 48, 54 (Tex. 1997). That case was decided several years ago, and a challenge to the awardability of punitive damages was not a central issue. Some jurisdictions currently permit the recovery of mental anguish damages under this circumstance. *Goodson v. American Standard Insurance Company of Wisconsin*, 89 P.3d 409 (Colo. 2004).

wrongful death, and actions by bystanders for a close family member's serious injury.⁵⁸

Thus, mental anguish is always possible in a wrongful death case and always possible when someone runs over a child and a parent somehow observes it.

More or less on the basis of the logic, reasoning, and decision in *City of Tyler*, the Texas Supreme Court excluded mental anguish damages from attorney malpractice cases.⁵⁹ Economic losses only will not support a claim for mental anguish.⁶⁰ Of course, not all courts around the country during the last decade or so are aligned with this position,⁶¹ although some courts do agree with the Texas position.⁶² The Supreme Court mainly follows *City of Tyler*:

Although *Likes* did not involve an attorney-client relationship, we think the principles announced in *Likes* support our conclusion that when the injuries caused by an attorney's negligence are economic, the plaintiff can be fully compensated by the recovery of any economic loss. Restoration of the pecuniary interest suffices to return the plaintiff to [his or her] prior conditions.⁶³

⁵⁸ *City of Tyler*, 962 S.W.2d at 496.

⁵⁹ *Douglas v. Delp*, 987 S.W.2d 879 (Tex. 1999).

⁶⁰ *Douglas v. Delp* at 885; see also *Green v. Brantley*, 11 S.W.3d 259, 268 (Tex. App.—Fort Worth 1999, pet. denied).

⁶¹ *McAlister v. Slosberg*, 658 A.2d 658 (Me. 1995); see also *Vallinoto v. DiSandro*, 688 A.2d 830 (R.I. 1997) (attorney-client sex).

⁶² *Lawrence v. Grinde*, 534 N.W.2d 414 (Iowa 1995); *Boros v. Baxley*, 621 So.2d 240, 244 (Ala. 1993); *Reed v. Mitchell & TinVanard, P.C.*, 903 P.2d 621, 626 (Ariz. Ct. App. 1995)

⁶³ *Douglas* at 885.

Shortly after this quote, the court states that it is a “well-established principle that a plaintiff should receive an amount of damages sufficient to make [him or] her whole,” in any legal malpractice case.⁶⁴ On this basis, the court entered a holding:

When a plaintiff’s mental anguish is a consequence of economic losses caused by an attorneys negligence, the plaintiff may not recover damages for that mental anguish.⁶⁵

The court goes on to remark that it expresses “no opinion as to what standard may be appropriate when additional or other kinds of loss are claimed or when heightened culpability is alleged.” In other words, if a plaintiff suffers physical injury or property damage to tangible property or if the plaintiff alleges gross negligence or deliberate conduct, the court does not express an opinion as to whether mental anguish is recoverable.

B. Critical Discussion

As the Supreme Court points out, the rule against recovering from mental anguish in economic loss attorney malpractice cases is probably a majority rule.⁶⁶ The leading scholars in this field have certainly endorsed the view.⁶⁷ A majority rule is hardly unanimous rule. Our guess is that courts are either trying to protect lawyers, or they are growing more and more skeptical about mental anguish claims. Of course, sometimes, plaintiffs use mental anguish claims to increase damages. Sometimes juries want to help them. In our experience, however, proofs of mental anguish at jury trials which do not involve serious bodily injuries are usually overly brief and ill organized.

⁶⁴ *Id.* at 885.

⁶⁵ *Id.*

⁶⁶ *Id.* at 884.

⁶⁷ See 3 Ronald E. Malen & Jeffrey M. Smith, *LEGAL MALPRACTICE* § 20.11 at 141 (5th Ed. 2000).

In our view, the trend towards eliminating mental anguish from economic loss cases, including attorney malpractice cases is a mistake—although not one which is easily correctable. Precedent is after all binding. Cases like *Douglas* are not easily overruled. Nor do we think that mental anguish ought to be awardable in every case.

Nevertheless, if attorney malpractice leads to economic losses which are huge, protracted, and most especially if they are ruinous, mental anguish is quite foreseeable. Consider a middle-aged widow who loses all of her assets or all of her rights of recovery (where that is the only asset she has) as the result of attorney malpractice. Suppose that the only source of genuine substantial income would be from a wrongful death action, where mental anguish is recoverable, and the attorney's negligence causes the wrongful death action to be lost, or perhaps never get off the ground. (Imagine that the lawsuit is filed late, outside the statute of limitations.) This may not be the best example. Perhaps, the punitive damages that the widow could have recovered in the underlying case will become part of her actual damages against the lawyer, and perhaps the Supreme Court would say that that was enough. We doubt that that view is correct. Nevertheless, perhaps another example would be better.

So consider an elderly family who has a business but where the business and all of the related property are lost as the result of attorney malpractice. Suppose the family's heart and soul—as well as its brains—are invested in the business, not to mention their life savings. Isn't the occurrence of mental anguish quite predictable?

If we are right about these observations, then wiping out the recovery of mental anguish in attorney malpractice cases is a mistake. Although *stare decisis* mistakes are not easily or quickly correctable—at least explicitly—they can sometimes be avoided by other means. We turn now to that.

C. Ways Out

There are several ways attorneys representing clients suing lawyers may be able to avoid the rule against recovering mental anguish. Some of them are more usable than others.

First, the court has already almost said that if there are provable physical damages, then mental anguish may be recoverable. Possibly, the court would require that the physical injury be *serious*. Then again, that was not actually part of the holding in *Douglas*. We will assume that this restriction could be avoided. Still, it is not quite clear what counts as a physical injury. In particular, it is not clear whether severe headaches, non-departing stomachaches, over-all bodily discomfort, and the like count. Nevertheless, clients should be carefully interviewed to try to find all such possibilities. If there is substantial mental anguish, there may very well be related physical symptoms. These physical manifestations will quite often be themselves injurious, for example: prolonged weeping sometimes strains and burns the eyes. Complications from shortness of breath; hives and rash from stress; hair loss; and eating disorders. Severe or constant headaches can prevent protracted work.

Second, the court does not actually say precisely what all is eliminated. It says that “negligence” is eliminated as a basis for recovering mental anguish in *attorney malpractice* cases. In this context, that term is somewhat ambiguous. On the one hand, it could mean any cause of action where negligence plays a role. This would include breaches of fiduciary duties. On the other hand, it might mean attorney malpractice only and not breaches of fiduciary duties. After all, the word “negligence” is mostly associated with attorney malpractice, as opposed to fiduciary duty breaches. If the word “negligence” is interpreted in the second way, then any action for breaches of

fiduciary duties would still possibly generate recovery for mental anguish injuries, assuming that they exist in the plaintiff.

Third, the court makes it quite clear that gross negligence is not included in the restricted rule. Thus, plaintiffs in legal malpractice cases should always consider bringing actions for gross negligence and alleging mental anguish recovery on that basis. (Notice how a pleading of gross negligence, together with related discovery, may be intimately connected with how damages are recovered.)

Fourth, plaintiffs should consider pleading attorney malpractice as an intentional tort. It is difficult to see how to prove it up, but if there have been conflicts between *L* and *C*, it might be provable. This might happen in contexts where *C* has not always paid the bills, or has paid them quite late.

D. Proving Mental Anguish Damages

The most important thing in the proof of damages is preparation. Again, the client needs to be quizzed repeatedly concerning mental anguish problems. This needs to be done gently but repeatedly. Careful notes need to be kept. As trial approaches, *C* needs to be prepared to testify as to his or her mental anguish. If the mental anguish is quite genuine, it may be a good idea to get other family members, or close friends, to testify as to the same thing. If subtle physical injuries are also alleged, expert testimony may be necessary as to the relationship between the mental anguish and the physical causes, symptoms, correlations, or manifestations.

Naturally, the coming testimony of *C* should be mentioned in the opening statement of *C*'s lawyer. It should also be discussed in the closing argument. It should not be merely *mentioned* in the closing argument, it should play a much more significant and central role, and the lawyer giving

the argument should make a suggestion as to the amount of damages. Where possible, that suggestion should be substantial.

V. Fee Forfeiture

When a lawyer breach is clear on serious fiduciary duties owed to a client, the lawyer may be required by the court to forfeit all or part of the fee collected. It does not matter whether the fee is fixed, hourly, or contingent. In order to owe fiduciary duties as a lawyer, there must be an attorney-client relationship. Lawyers owe fiduciary duties only to their clients, at least as lawyers.⁶⁸ Although, lawyers could owe fiduciary duties for other reasons, for example, if the lawyer was a trustee of an estate or a trust, or if the lawyer was the legal agent for somebody. Lawyers can also owe fiduciary duties to the law firms by which they were employed or of which they are partners.⁶⁹

The Supreme Court of Texas established this rule as Texas law in *Burrow v. Arce*, a 1999 case.⁷⁰ It is clear that the *Burrow* case is establishing a general rule—one which is not restricted to the fact pattern of that case. It applies to any clear and serious breach of fiduciary duties. The rule in that case, which is applied to attorneys, is not restricted to attorneys, nor is it based purely on the duties attorneys owe their clients. It is based on the law of equity which applies to agents and trustees, and thus to attorneys representing clients. The principal sources of the rule are various RESTATEMENTS. These include (1) the RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 37 (2000), (2) the RESTATEMENT (SECOND) OF TRUSTS § 243 (1959), and (3) the RESTATEMENT

⁶⁸ *McConnell v. Ford & Ferraro*, 2001 WL 755640 (Tex. App.—Dallas July 6, 2001, pet. denied).

⁶⁹ *Johnson v. Brewer & Pritchard*, 73 S.W.3d 193, 203-204 (Tex. 2002). (In this case, an associate of a law firm deferred a case to someone else and profited from the referral. See *Kinzbach Tool Co. v. Corbett-Wallace Corp.*, 160 S.W.2d 509, 572-73 (Tex. 1942).

⁷⁰ *Burrow v. Arce*, 997 S.W.2d 229 (Tex. 1999).

(SECOND) OF AGENCY § 469 (1958).⁷¹ The *Burrow* Court also relies upon the fact that a number of courts, both in Texas and in other jurisdictions, have favored forfeiture,⁷² as have certain leading commentators.⁷³

The court explores forfeiture and the law of fiduciary duties by discussing, in some detail, three out of four issues:

- (a) Are actual damages a pre-requisite to fee forfeiture?
- (b) Is fee forfeiture automatic and entire for all misconduct?
- (c) If not, is the amount of fee forfeiture the question of fact for a jury or one of law for the court?⁷⁴ The fourth issue is
- (d) Would the client's allegations, if true, entitle them to forfeiture of any or all of the attorney's fees?

The fourth issue is discussed only briefly and it involves a remand to the district court to determine the issue.

⁷¹ The court cites § 49 of the RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS repeatedly. The court is citing the proposed Final Draft No. 1 published in 1996. The section relied upon by the court is now § 37, as stated in the text. (A copy of this crucial passage is attached.)

⁷² *Burrow*, 997 S.W.2d at 240 nn.35-36.

⁷³ One Geoffrey C. Hazard, Jr. & W. William Hodes, THE LAW OF LAWYERING § 1.5:108 (2d Ed. 1998).

⁷⁴ *Burrow* at 237.

A. Fee Forfeiture and Actual Damages?

The law of equity does not require actual damages as the foundation for the forfeiture.⁷⁵ ““A lawyer engaged in clear and serious violation of duty to client may be required to forfeit some or all of the lawyers’ compensation for the matter.””⁷⁶ The court describes this rule as founded upon both principle and pragmatics. Here is the principle:

[A] person who agrees to perform compensable services in a relationship with a trust and violates that relationship, breaches the agreement, express or implied, upon which the right to due compensation is based. The person is not entitled to be paid when he has not provided the loyalty bargained for a promised.⁷⁷

Since attorneys owe clients the highest degree of fiduciary duties, including the extraordinarily high duty of loyalty, this principle fits attorney liability almost perfectly.

The pragmatics of the court’s holding is this:

The possibility of forfeiture of compensation discourages an agent [not to mention an attorney] from taking personal advantage of his position of trust in every situation no matter the circumstances, whether the principal may be injured or not. The remedy of forfeiture removes any incentive for an agent [and this includes a lawyer] to stray from his duty of loyalty based on the possibility of the principal will be unharmed or may have difficulty in proving the existence or amount of damages.⁷⁸

⁷⁵ The law of fiduciary duties, of course, as its foundation in the law of equity. *Texas Bank & Trust Co. v. Moore*, 595 S.W.2d 502, 508 (Tex. 1980); *International Bankers Life Ins. Co. v. Holloway*, 368 S.W.2d 567, 584 (Tex. 1963); see *Duncan v. Lichtenberger*, 671 S.W.2d 948, 952 (Tex. App.–Fort Worth 1984, writ ref’d n.r.e.); and *Cardwell v. Wilson Trophy Company of Fort Worth-Dallas, Inc.*, 622 S.W.2d 651, 652 (Tex. App.–Fort Worth, writ ref’d n.r.e.).

⁷⁶ *Burrow* at 237 (citing what is now § 37 of the RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS).

⁷⁷ *Id.* at 237-38.

⁷⁸ *Id.* at 238.

Thus, the forfeiture of fees can be an effective deterrent. The court emphasizes the pragmatics of its forfeiture rule:

It is the agent's disloyalty, not any resulting harm, that violates the fiduciary relationship and thus impairs the basis for compensation. An agent's compensation is not only for specific results but also for loyalty.⁷⁹

Notice that there is a kind of contract theme in some of the court's language. The logic of fee forfeiture involves two themes. The first one is that disloyalty should be punished, thereby deterring it under other circumstances. The second one is that fiduciaries do not have the right to keep the compensation they have received when they have failed to perform their contracts in a fundamentally important way, i.e., in a way which has failed to include the duty of loyalty. The court makes this point several times. Here is another one:

Fee forfeiture for attorney misconduct is not a windfall to the client. An attorney's compensation is for loyalty[,] as well as services, and his failure to provide either impairs his right to compensation. While a client's motives may be opportunistic and his claims meritless, the better protection is not a pre-requisite of actual damages but the trial court's discretion to refuse to afford claimants who are seeking to take unfair advantage of their former attorneys[,] the equitable remedy of forfeiture.⁸⁰

Thus, fee forfeiture is neither principally compensatory nor principally punitive. Rather, it is a relationship building deterrent:

[T]he central purpose of the remedy [of forfeiture] is to protect relationships of trust from an agent's disloyalty or other misconduct. Appropriate application of the remedy cannot therefore be measured by a principal's actual damages. An agent's breach of fiduciary duty should be deterred even when the principal is not damaged.

⁷⁹ *Id.* at 238.

⁸⁰ *Id.* at 240.

Thus, the plaintiff-client need not prove his actual damages in order to obtain fee forfeiture.

B. Fee Forfeiture: Neither Automatic Nor Entire.

The court holds that automatic forfeiture of an entire fee is unfair. It held that automatic and complete forfeiture is unnecessary for the remedy of forfeiture to serve its purpose. According to the court:

[T]o require an agent [obviously, including an attorney] to forfeit all compensation for every breach of fiduciary duty, or even every serious breach, would deprive the remedy of its equitable nature and would disserve its purpose of protecting relationships of trust.⁸¹

Following and adopting language from the RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS, the court indicates that lawyers would be liable for forfeiture when their breaches of fiduciary duty are both “clear and serious.”⁸² According to the court, the violation is *clear* “if a reasonable lawyer, knowing the relevant facts and law reasonably accessible to the lawyer, would have known that the conduct was wrongful.” (Notice that the clarity pertains to the conduct and not to any injury.” Conduct constitutes a serious violation of a duty to a client when at least some of the following considerations apply:

- The extent to which the public interest in maintaining the integrity of attorney-client relationships has been triggered,⁸³
- Violation is relatively grey,

⁸¹ *Id.* at 241.

⁸² *Id.*

⁸³ All of the bullet-points on this list come from the RESTATEMENT. That observation does not apply to this one. This one is supplied by the Supreme Court. *Burrow* at 243. Here, the court is emphasizing “‘the extent to which the attorneys or firms conduct offends a public sense of justice and propriety’—concern for the integrity of attorney-client relationships is at the heart of the fee forfeiture remedy.”

- The violation is ill-timed,
- The effect of the violation on the value of the attorney’s work for the client,
- “Other threatened or actual harm to the client,”⁸⁴ and
- “The adequacy of other remedies.”⁸⁵

Serious and willful violations may very well lead to forfeiture which extends to all attorney fees accumulated in the matter for which the attorney was retained. Of course, this is not always true.

Notice that the last two points on the list determining seriousness are related to injuries to and damages of the client. This fact is not entirely consistent with the idea that clients need not prove actual damages in order to obtain fee forfeitures. Still, that is not all they need to prove. Forfeiture is not justified when a lawyer’s violations are “inadvertent.” Similarly, they are not justified when they “do not significantly harm the client.”⁸⁶ Thus, plaintiffs need to prove both the nature of the violation and the kind of injuries and damages they have sustained. The proof of damages may not determine how much they are entitled to. However, they do influence the seriousness of the lawyers breach, and therefore the amount the lawyer will have to forfeit.⁸⁷

C. Who Decides?

Since the remedy of forfeiture is an equitable remedy, courts will decide both whether there should be a forfeiture and how much it should be. However, if there are fact issues to decide, first, the jury will do that. Here is the court’s language:

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

... [w]hen forfeiture of an attorney's fee is claimed, a trial court must determine from the parties whether factual disputes exist and must be decided by a jury before the court can determine whether a clear and serious violation of duty has occurred, whether forfeiture is appropriate, and if so, whether all or only part of the attorney's fees should be forfeited.⁸⁸

There are a variety of factual disputes which might be relevant: whether or when the misconduct complained of occurred, the attorney's mental state at the time, and the existence or extent of any damage to the client."⁸⁹ After the factual issues are decided, the court decides clarity and seriousness. "Most importantly, in making [its] determinations[,] the court must consider whether forfeiture is necessary to satisfy the public's interest in protecting the attorney-client relationship."⁹⁰

D. Discussion and Evaluation.

Fee forfeiture is an important potential remedy in attorney malpractice cases. If breaches of fiduciary duty are pleaded, the plaintiff may have a right to recover money through the remedy of fee forfeiture. If breaches of fiduciary duty—such as breach of the duty of loyalty, breach of the duties of disclosure, and perhaps most importantly a breach of the duty of truthfulness—the plaintiff-client may well succeed in obtaining forfeiture. Justice Hecht, who wrote for the unanimous court emphasized the importance of public interest. To some degree, the clarity and (more significantly) the seriousness of the breach of fiduciary duties can be established by legal briefing. Plaintiff-clients should also consider calling an expert witness to try to establish these ideas in the mind of the court.

For reasons which often influence venue, lawyers representing plaintiff-clients should consider where a lawsuit seeking fee forfeiture in part, is filed. Obviously, it should not be filed in

⁸⁸ *Id.* at 246.

⁸⁹ *Id.*.

⁹⁰ *Id.*

the jurisdiction where the judges tend to know the lawyers quite well and—perhaps—play cards with them or golf with them at various times.

VI. Legal Malpractice and Contract Claims.

We wish to suggest that contract law and contract damages may play a significant role in legal malpractice claims. This is to some degree paradoxical, since legal malpractice claims are usually thought of as tort claims, as opposed to contract claims.

A. The Legal Malpractice as a Tort Claim.

There is a growing trend—and it has existed for a number of years—that legal malpractice claims should be treated as tort claims, as opposed to contract claims. Mallen and Smith remark as follows:

Few modern actions against attorneys are for breach of a written or express contract. Although the subject matter of the representation and the fee arrangement are common contractual terms, seldom do attorneys guarantee or promise a specific result.⁹¹

Authors emphasize the crucial importance of the “specific promise” in contract actions.⁹² This is quite different from attorney’s professional and fiduciary obligations.

Under Texas law, legal malpractice is a tort, and the common law remedy for malpractice lies in tort, and not in contract.⁹³ This is very odd in view of the fact that the foundation of the

⁹¹ 1 Ronald E. Mallen and Jeffrey M. Smith, *LEGAL MALPRACTICE* § 8.6 at 816-17 (5th Ed. 2000). (In footnote #1 the authors cite two full columns of 20th Century cases, and one case from the 19th Century. The 19th Century case is a Texas Supreme Court case: *Morrill v. Graham*, 27 Tex. 646 (1864).

⁹² *Id.* at 818.

⁹³ *Barcelo v. Elliott*, 923 S.W.2d 575, 579 (Tex. 1996). See *Willis v. Maverick*, 760 S.W.2d 642 (Tex. 1988). (“A cause of action for legal malpractice is in the nature of a tort and thus governed by the two-year limitation statute.” *Id.* at 644.) There are also a number of court of appeals cases to similar effect. Occasionally, courts recognize that there may be contract issues between clients and their lawyers. See *Peeler v. Hughes & Luce*, 909 S.W.2d 494 (Tex. 1995) (criminal offense); see also *Jampole v. Matthews*, 875 S.W.2d 57 (Tex. App.—Houston [1st Dist.] 1993, writ denied) (contract actions limited to actions against attorneys for excessive fees); but see Ray Ryden Anderson and Walter W.

attorney-client relationship is contractual.⁹⁴ Moreover, there is some tension among Texas courts about the role of contract in attorney malpractice litigation.⁹⁵

Our conjecture as to why legal malpractice is a tort involves several reasons. The contract simply sets up a relationship. Legal malpractice is an offense against the relationship, not against the contract. Contract law tends towards the precise, whereas tort law tends to be more flexible and amorphous. Moreover, almost all contractual obligations can be waived. The courts feel as though they have much more flexibility in regulating favor when it comes to torts. In addition, of course, mental anguish damages are recoverable in tort, and not usually in contract, as are punitive damages. Still, the theoretical point at the foundation of all of this is the idea that legal malpractice is a violation of a relationship, and not simply an agreement. Human relationships always have fuzzy edges, and one of the driving forces in contract law is to make arrangements precise. Thus, lawyers are frequently advised to formulate retainer agreements stating precisely what the scope of the representation is. This is a good idea. On the other hand, it is inevitable that legal malpractice may arise outside the precise scope of a specified relationship. Thus, in *Moore v. Yarbrough, Jameson*

Steele, Jr., *Fiduciary Duty, Tort & Contract: A Primer on the Legal Malpractice Puzzle*, 47 SMUL REV. 235, 244 n.54 (1994) (this is hardly a mere *primer*).

⁹⁴ “The attorney-client relationship is a contractual relationship whereby an attorney agrees to render professional services for a client. The relationship may be expressly created by contract, or it may be implied from the actions of the parties.” *Mellon Service Co. v. Touche Ross & Co.*, 17 S.W.3d 432, 437 (Tex. App.--Houston [1st Dist.] 2000, no pet.); *Honeycutt v. Billingsley*, 992 S.W.2d 570 (Tex. App.--Houston [1st Dist.] 1999, *writ denied*) (considering novation as well as accord and satisfaction in the context of a contingency fee agreement).

⁹⁵ See *Roberts v. Healey*, 991 S.W.2d 873 (Tex. App.--Houston [14th Dist.] 1999, *writ denied*) (summary judgment not complete because it failed to deal with a breach of contract and breach of warranty allegations). Many states do not see the matter this way. See Ronald Mallen & Jeffrey M. Smith, *LEGAL MALPRACTICE* (4th Ed. 1996). See also *Leak-Gilbert v. Fahle*, 55 P.3d, 1054 (Okla. 2002) (legal malpractice both tort and contract).

& Gray,⁹⁶ a woman sued her husband for divorce and physical abuse. Two separate lawyers were utilized. The divorce judgment came first. The husband set up *res judicata* in the personal injury case. He succeeded. The woman sued her divorce lawyer for failing to advise her as to the significance of the divorce in the judgment case. The lawyer defended on the grounds that he was not prosecuting the personal injury case and that that was outside the scope of his representation. The court rejected this gambit and said that both lawyers—the divorce lawyer and the personal injury lawyer—should have advised the woman about consequences of prosecuting the cases separately.

If legal malpractice actions are tort actions, not contract actions, then, presumably, a disappointed client, turned plaintiff, has no action for legal malpractice based upon breach of an express warranty to obtain specific results.⁹⁷ Why then are lawyers so consistently told not to promise specific results? Is it because there may still be a contract in the nature of a guaranty? Isn't that what warranty is? Is it because the promise might be a statement of fact and therefore become a fraud case? Is it because the line between tort and contract blurs when it comes to express warranties?

Courts in other jurisdictions have suggested other approaches to explain why legal malpractice actions are best viewed as torts, as opposed to contracts. Contracts involve specific promises to perform this or that action. Agreements between lawyers and clients are often quite different. In addition, lawsuits brought against lawyers are even more different. They are usually not for the violation of quite specific agreements. Instead, they are for the violation of general

⁹⁶ *Moore v. Yarbrough, Jameson & Gray*, 993 S.W.2d 760 (Tex. App.--Amarillo 1999, no pet.)

⁹⁷ *Holy Loch Distributors, Inc. v. Hitchcock*, 531 S.E.2d 282 (S.C. 2000).

principles. These general principles arise, not from any express or implied specific contract, but from the social order.

To the extent that perfectly general principles are involved—principles which bind all lawyers when serving clients—if there is a contract, it is a contract implied in law. Interestingly, these are “not true contracts at all. They are obligations ‘created by the law without regard to expressions of assent by either words or acts.’ Historically, contracts implied at law arose as a species of obligation created to achieve a just result in a case, even though there had been no expression of assent ‘and sometimes even against a clear expression dissent.’”⁹⁸ The great legal scholar of contract law, “Corbin[,] remarks in effect that it might be ‘better not to use the word ‘contract’ at all,’ and today the term ‘quasi-contract’ is often used in its place.”⁹⁹

Interestingly, this quite technical approach is not entirely dissimilar from the rather more pragmatic view we have suggested.

Some states have rather different rules. In New Hampshire, a cause of action by a client against a lawyer can sound in either tort or contract. However, when the same facts support both, the remedies for them are not likely to differ.¹⁰⁰ Things may be a little different where attorney’s fees can be recovered on one theory but not the other or where the two theories have different limitation periods.

⁹⁸ *Barmat v. John and Jane Doe Partners A-D*, 747 P.2d 1218, 1220-21 (Ariz. 1987). (Some of the language of the Arizona Supreme Court’s opinions comes from one A. Corbin, CORBIN ON CONTRACTS § 18 at 39 (1963); see *Collins v. Miller & Miller, Ltd.*, 943 P.2d 747, 754-55 (Ariz. App. 1997); see also *Premium Cigars Intern., Ltd. v. Farmer-Butler-Leavitt Ins. Agency*, 96 P.3d 555 (Ariz. Ct. App. 2004).

⁹⁹ *Barmat* at 1221 (citing CORBIN ON CONTRACTS).

¹⁰⁰ *Wong v. Ekberg*, 807 A.2d 1266 (N.H. 2002).

When legal malpractice cases are based upon negligence, then contributory negligence, comparative negligence, or something of the sort, is an affirmative defense in many jurisdictions.¹⁰¹ It is not negligent for a client to fail to check up on a lawyer's performance under ordinary circumstances. At the same time, if a client fails to follow an attorney's advice or if he provides the attorney with defective information, and there is no duty on the attorney to investigate, then the affirmative defense applies. (The *Gorski* case concerned a real estate transaction that went sour. The client's developers wanted a contract developed which would excuse them from performance if governmental entities failed to provide various services. The contract did not include an appropriate provision. The lawyers were found liable.)

Whether legal malpractice is conceived as tort or as breach of contract, someone convicted of a crime must prove his innocence in order to prevail in a legal malpractice claim against his lawyer.¹⁰² Not only must a client convicted of a criminal offense prove that he is innocent of the crime of which he was convicted, he must also prove that he was innocent of any lesser and included offenses.¹⁰³

Under Texas law, causes of action may not be fractured. There is one cause of action, and that is legal malpractice. There are not jointly pleadable three causes of action: negligence, breach of contract, and breach of fiduciary duties.¹⁰⁴ Comment: This rule makes very little sense. Other

¹⁰¹ See *Gorski v. Smith*, 812 A.2d 683, 700 (Pa. Super. 2003) (citing various cases).

¹⁰² *Van Polen v. Wisch*, 23 S.W.3d 510, 515-16 (Tex. App.—Houston [1st Dist.] 2000, pet. denied). This rule does not apply to a breach of contract against a lawyer for a failure to perform at all, e.g., if *L* does not show up for a hearing. Here, *L* claimed that *C* repudiated the contract by asking the court to appoint him a lawyer. However, *C* was under substantial pressure to have a lawyer. Thus, his actions did not meet the requirements of anticipatory repudiation.

¹⁰³ *Williams v. Sturm*, 110 F. Supp.2d 353 (E.D. Pa. 2000).

¹⁰⁴ *Haas v. George*, 71 S.W.3d 904, 910 (Tex. App.—Texarkana 2002, no pet.) (citing and discussing cases).

Texas cases have held that legal malpractice is a tort and not a breach of contract action at all, as we have already discussed. It is perfectly obvious that a negligence action and breach of fiduciary duty action are quite dissimilar, even if the facts are roughly the same.¹⁰⁵ At the same time, it makes sense not to permit the collection of double actual or punitive damages. (At least one case has expressed doubt about the claim just made. “A legal malpractice cause of action is a cause of action for negligence. Dividing a legal malpractice cause of action into separate actions for negligence, breach of contract, *and other causes of actions* [e.g. a breach of fiduciary duties] will not change the fact that the causes of action sound to negligence.”¹⁰⁶

B. Contracts and Damages.

It is helpful and appropriate to think about damages in attorney malpractice cases as if they were damages in a contract case. There are several reasons for this. First, most negligence cases do not cover damages resulting solely from economic loss. Generally, negligence cases are designed to cover cases in which there are physical damages of some sort or other.¹⁰⁷ Second, some courts have recognized that because there are mostly economic damages involved in legal malpractice cases, the model of contract law is perhaps most helpful:

Generally, the proper measure of damages in a legal malpractice case is that amount of damages that would have been collectible but for the wrongful act of omission of the attorney. . . . The measure of

¹⁰⁵ Thus, the language the Court of Appeals utilizes in *Cuyler, infra*, is erroneous and problematic.

¹⁰⁶ *Id.* at 11. (Emphasis added.) But see *Ersek v. Davis & Davis, P.C.*, 69 S.W.3d 268 (Tex. App.—Austin 2002, pet. denied). (Legal malpractice is a separate, status-based cause of action that cannot be “fractured” into other causes of action.) This includes fiduciary duty claims. See also *McDermott v. Nelsen*, 2001 WL 423287 (Tex. App.—Houston [1st Dist.] April 26, 2001, no pet.) (legal malpractice claim was not allowed to be raised under the pleaded theory of negligent misrepresentation). See *Cuyler v. Minns*, 60 S.W.3d 209, 216 (Tex. App.—Houston [14th Dist.] 2001, pet. denied).

¹⁰⁷ *Express One Intern, Inc. v. Steinbeck*, 53 S.W.3d 895, 898-99 (Tex. App.—Dallas 2001, no pet.) (citing a number of cases).

damages in a commercial relations tort may be “economic,” although they are damages for the tort Generally, a party is entitled to all actual damages necessary to put it in the same economic position in which it would have been had the contract been fulfilled. **Damages protect three interests: a restitution interest, a reliance interest, and an expectation interest.** A party’s expectation interest is measured by his anticipated receipts and losses caused by the breach less any cost or other loss he has avoided by not having to perform. To restore an injured party to the position in which he would have been **had the contract been performed**, it must be determined what additions to the injured parties wealth have been prevented by the breach and what subtractions from this wealth have been caused by it.¹⁰⁸

Thus, quite clearly, the court is using contract theories of damages to explain damages in a malpractice case, i.e., in a tort case.

Third, it is recognized that consequential damages are appropriately awarded in attorney malpractice cases.¹⁰⁹ Generally speaking, consequential damages—which are also known as special damages—are for contract disputes:

Special or consequential damages are damages which a party may recover for breach of contract which are incidental to and caused by the breach and may reasonably be supposed to have entered into the contemplation of the parties at the time of the contract.¹¹⁰

Here is a more elaborate explanation to the same effect:

Actual damages are those damages recoverable under contract law. At common law, actual damages are either ‘direct’ or ‘consequential.’ Direct damages are the necessary and usual result of the defendant’s

¹⁰⁸ *Two Thirty Nine Joint Venture v. Joe*, 60 S.W.3d 896, 910 (Tex. App.—Dallas, 2001), *rev’d on other grounds*, *Joe v. Two Thirty Nine Joint Venture*, No. 02-0218 (47 Tex. Sup. Ct. J. 1058, 2004 WL 1966000 (Tex. Sept. 3, 2004) (emphasis added and citations omitted); but see W. David Slawson, *Why Expectation Damages for Breach of Contract Must Be the Norm: A Refutation of the Fuller & Purdue “Three Interests” Thesis*, 81 NEB. L. REV. 839 (2003).

¹⁰⁹ *Steber v. Hunter*, 221 S.W.3d 701, 735 (5th Cir. 2000). (The reasonable value of C’s loss of time is not recoverable as consequential damages, however.)

¹¹⁰ *Smith v. Renz*, 840 S.W.2d 702, 705 (Tex. App.—Corpus Christi 1992, writ denied).

wrongful act; they flow naturally and necessarily from the wrong. Direct damages compensate the plaintiff for the loss that is conclusively presumed to have been foreseen by the defendant from his wrongful act. [¶] Consequential damages, on the other hand, result naturally, but not necessarily from the defendant's wrongful acts. Under the common law, consequential damages need not be the usual result of the wrong, but must be foreseeable, and must be directly traceable to the wrongful act and result from it.¹¹¹

Consequential—or special—damages can be extremely important. There are many very important types of consequential damages. They include losses of profits, costs resulting from a delay in performance, the costs of mitigation, the costs of arranging for a substitute performance (which can be like mitigation), and losses resulting from injury to a parties credit reputation.¹¹²

Notice that using contract theories to prove damages will not eliminate affirmative defenses, supposing they exist, which are more characteristic of tort claims. Contributory negligence is like this. On the other hand, some affirmative defenses, such as failure to mitigate, are characteristic of both tort claims and contract claims.

¹¹¹ *Arthur Andersen & Co. v. Perry Equipment Corp.*, 945 S.W.2d 812, 816 (Tex. 1997). See *Stuart v. Bayless*, 964 S.W.2d 920 (Tex. 1998) (holding that consequential damages flow from a breach of contract and are the sort which must be foreseeable at the time of contract formation).

¹¹² See *Mead v. Johnson Group, Inc.*, 615 S.W.2d 685, 688 (Tex. 1981) (not a malpractice case); see *LaChance v. Hollenbeck*, 695 S.W.2d 618, 662 (Tex. App.—Austin 1985, writ ref'd n.r.e.) (“It is trite learning that actual damages may be recovered in an action for breach of contract where the loss is the natural, probable and foreseeable consequence of the defendant's conduct . . . [i]n *Mead* . . . , the Texas Supreme Court cited *Hadley v. Baxendale*, 9 EXCH. 340 (1854) for the following proposition: “Where two or more parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally; *i.e.*, according to the universal course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract at the probable result of the breach.’ Actual damages may also include consequential damages[.]” In general, actual damages must be limited to losses proximately caused by the defendant's wrongful conduct. *Trenholm v. Ratcliff*, 646 S.W.2d 927, 933 (Tex. 1983) (delivered fraud case). See *Cantu v. Butron*, 921 S.W.2d 344, 354 (Tex. App.—Corpus Christi 1996, writ denied). (Also a fraud case). Thus, consequential damages are recoverable not only in contract cases but fraud cases. We have not located similar authority for negligence cases.

C. Tort Damages

Possibly, to some degree attorney malpractice cases integrate tort damages and contract damages. At least for the present, mental anguish damages have, to some extent, been eliminated. At the same time, punitive damages have not been eliminated, and they are still quite actionable in malpractice cases.¹¹³

VII. Conclusion.

Actions against lawyers involve proof of damages from the plaintiff-client. These proofs are almost invariably economic in foundation. Under almost all circumstances, such proof requires at least one expert witness, and possibly two—one on the cause of injury and one on the amount of damages. That situation may be slightly different when a breach of fiduciary duties is alleged and proved. In that case, at least possibly, mental anguish may be an issue, as well as fee forfeiture. In any case, whenever economic losses are at stake, a lawyer for a plaintiff-client may find it valuable to conceptualize damage proof in terms of the way its done in contract cases, as opposed to tort cases.

¹¹³ 3 Ronald E. Mallen and Jeffrey M. Smith, *LEGAL MALPRACTICE*, § 20.7 at 134-38 (2000).