INFORMATION LIABILITY OF THE LEGAL PROFESSION: A COMPARISON OF AUSTRIAN AND ANGLO-AUSTRALIAN LAW

CHRISTOPH WIELAND*

I INTRODUCTION

An increasing number of legal experts today are faced with compensation claims filed by their clients. This is either because people are more and more becoming aware of their rights and dare to challenge their lawyers' propositions or the result of a general tendency to impose a stricter liability regime on certain professions. Lawyers as well as physicians and other highly qualified professionals are no longer regarded as infallible. It seems that people have lost their fear not to question a professional's advice. It may also be seen as 'trendy' to sue one's lawyer because the outcome of the law suit was not satisfying and the legal expert could have done better.

At first sight it looks as if it is the lawyer's client who benefits from a stricter liability, making these developments welcome. But it should not be forgotten that in the final analysis it is the client who has to bear the costs, in the form of increased costs of insurance against liability claims.

This article is a comparative study about legal experts' liability for incorrect advice and information. The statute law of a civil law country such as Austria will be compared with Anglo-Australian common law. The aim of the article is twofold: to examine the area of information liability as it pertains to legal experts and to demonstrate how two different legal systems tackle a similar problem.

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It remains more important than ever for legal experts to know their obligations as regards the provision of advice. Lawyers must always ask themselves whether advice is required on a particular subject, and if so, to what extent. In today's climate, thinking about these questions should begin even before a lawyer concludes a retainer with a client.

The article is divided into two main parts. Part II deals with the Austrian statute law. Part III explores the Anglo-Australian common law. Each part contains a short introduction of the applicable legal profession, followed by an examination of lawyers' information liability with regard to clients as well as third parties. The basis of the liability will be explored and numerous information duties will be mentioned. The conclusion highlights the differences and similarities of both legal systems.

II AUSTRIAN LAW

A *The Austrian Legal Profession*

There is no divided legal profession in Austria. Legal services are mainly rendered by the Austrian lawyer called 'Rechtsanwalt', although 'notaries public'[1] or 'tax advisors'[2] do give special legal advice as well. Austrian lawyers combine the functions of both barristers and solicitors. On the one hand they may represent clients in civil and/or criminal matters in all courts throughout the country[3] and on the other hand also advise clients, prepare documents, contracts[4] or wills and perform conveyancing. Sometimes lawyers act as custodians or trustees in bankruptcy.[5]

In order to become an Austrian lawyer, one must have a law degree from university,[6] five years of practice in the legal profession[7] and the successful completion of the rather strict bar exam.[8] There are approximately 3600 currently practising lawyers in Austria.[9] Compared to many common law countries, this is a small number,

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[1] In German the word is *Notare*. See Collin et al, *Pons-Fachwörterbuch Recht: Englisch-Deutsch, Deutsch-Englisch* (1993) 209; also Graf, 'Austria' in Campbell ed, *Professional Liability of Lawyers* (1995) 1.

[2] In German the word is *Steuerberater*. See Collin, above n 1, 314; Graf, above n 1, 1.

[3] Graf, above n 1, 3. See art 8 [1] G 6. 7. 1868 RGBl 96 womit eine Rechtsanwaltsordnung eingeführt wird idF BGBl I 1997/140 ('RAO'), cited in Walter Schuppich and Helmut Tades, *Rechtsanwaltsordnung und Disziplinarstatut Sowie Einschlägige Vorschriften samt Erläuternden Bemerkungen und Verweisen* (1994) 11. The RAO is a statute called 'Rechtsanwaltsordnung' and contains provisions about lawyers' duties towards the profession as well as towards their clients. Hereafter, all references to the RAO come from Schuppich and Tades unless otherwise noted.

[4] Graf, *Anwaltshaftung* (1991) 41.

[5] Graf, above n 1, 3.

[6] See RAO, above n 3, art 1 [2].

[7] See RAO, above n 3, art 1 [2] and art 2 [2].

[8] See RAO, above n 3, art 1 [2].

[9] See Homepage of the 'Österreichischer Rechtsanwaltskammertag' <http://www.oerak.or.at/-unsere_organisation/mitgliederzahlen.htm> at 3 February 1999.

considering Austria's total population of eight million. Much of this is due to the Bar's rigorous entry rules.

B *Information Liability of Lawyers Towards their Clients*

1 *Contractual Liability*

The basis of information liability will, in most malpractice cases, be a contractual one by virtue of the retainer. In order to collect an award of damages the client-plaintiff has to establish the following prerequisites: (i) some kind of loss which will typically be a financial one (for example, frustrated expenses or a lost trial);[10] (ii) that the lawyer's conduct caused the damage;[11] and (iii) that the lawyer acted unlawfully towards the client—the lawyer must have breached one of the terms of the retainer or violated a 'protective provision'.[12]

The first obstacle to face in order to determine the limits of contractual liability is that the contract between a lawyer and client is usually an informal oral agreement to handle the client's affairs. Although lawyers are often engaged to devise sophisticated contracts, strangely in Austria they themselves rarely have a written contract with their clients.[13] This makes it difficult to determine what advice and information a client is entitled to expect and especially difficult to determine what the quality of that advice should be.

The second difficulty is that statute law as contained in the *General Civil Code*[14] or RAO stipulates general duties of care, diligence, loyalty or confidentiality but no specific ones. So in determining the scope and extent of a lawyer's advice, information or warning to a client, judicial interpretation of general duties must be consulted. The courts resort to article 1299 of the *General Civil Code* in order to define a lawyer's standard of care when giving information. Article 1299 reads as follows:

> A person who claims publicly an office, art, trade or handicraft, or who assumes voluntarily without necessity a business which demands specialized knowledge or extraordinary diligence, warrants thereby that he trusts himself to possess the necessary diligence and extraordinary knowledge; therefore such person is liable for the lack thereof.

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[10] See Graf, above n 1, 5.

[11] Graf, above n 4, 141-2; Karl Vrba, Manfred Lampelmayer and Wolfgang Wulff-Gegenbaur (eds), *Schadenersatz in der Praxis* X (2 Lieferung Stand März 1997) chap 2; Fenzl, Wolfgang Völkl and Evelyn Völkl, *Die Haftung der Rechtsberatenden Berufe im Spiegel der Rechtsprechung* (1986) 394, 395.

[12] In German this is *Schutzgesetzbestimmung*—see Vrba, Lampelmayer and Wulff-Gegenbaur, above n 11, 1.

[13] Rogers, 'Introduction' in Rogers (ed) *Liability of Lawyers and Indemnity Insurance* (1995) 6.

[14] In German this is *Allgemeines Bürgerliches Gesetzbuch* KaisP 1. 6. 1811 JGS 946 idF BGBl 1997/140 (see Baeck, *The General Civil Code of Austria* (1972). See also Schilcher and Posch, 'Civil Liability for Pure Economic Loss: An Austrian Perspective', in Banakas, ed, *Civil Liability for Pure Economic Loss* (1996) 149. All references to the *General Civil Code* are to the Baeck version unless otherwise stated.

The test is generally treated as how would an average lawyer in a similar situation act? What information would she or he give? Which risks would he or she warn of? Which procedural steps would she or he advise? The reference point is an average lawyer who possesses average knowledge and diligence. This objective standard of care is a question of law but not of fact and has to be determined by the courts.[15] This means that a lawyer cannot avoid liability for negligence by referring to the lower standard of professional care exercised by the majority of his or her colleagues.[16] It is no excuse for a lawyer to argue that 90% of other lawyers would have acted likewise, if they all fell below the standard of an average lawyer.

Although lawyers ought to know all the law they can specialise in certain fields of law. If a lawyer claims to be an expert, then a more stringent standard of care will apply.[17] The conduct will be compared with the average diligence and care of a lawyer who specialises in a given field.

Once a plaintiff has proven damage, causation and unlawfulness, the lawyer must show that acts were committed without fault—that is that the objective standard of care was met.[18]

(a) *Incorrect Advice*

Broadly speaking a lawyer might incur liability either by giving incorrect advice or by failing to advise at all. As it is one of the principal tasks of a lawyer to give legal advice, a lack of knowledge regarding positive statutes makes a lawyer liable for any of his client's damage.[19] Even specialist lawyers still have to know all other positive statutes and regulations outside their field of specialisation. This might be seen as an onerous duty, especially given the ever growing number of statutes. A number of arguments, however, favour this strict duty.[20] First, knowing all positive statutes is not equivalent with having an encyclopaedic knowledge of their contents. Those statutes of general importance should be known, but the more esoteric statutes can be readily accessed, allowing all lawyers to inform themselves easily. Secondly, lawyers can avoid contracting with potential clients in areas which the lawyer has little knowledge. No lawyer is obliged to accept a mandate. Thirdly, lawyers can and must always take out third-party insurance to protect themselves against the risks of compensation claims.

Similarly a lawyer can become liable for wrongful advice due to a lack of knowledge regarding the 'prevailing legal opinion and practice of the courts.'[21] Prevailing practice of the courts means that there exists conformity between several Supreme

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[15] Graf, above n 1, 4.
[16] Graf, above n 4, 41.
[17] Graf, above n 1, 4-5.
[18] See *General Civil Code*, above n 14, art 1298.
[19] See Graf, above n 4, 46-8; Vrba, Lampelmayer and Wulff-Gegenbaur, above n 11, 3; Koziol, *Österreichisches Haftplichtrecht II* (1984) 191; Fenzl, Völkl and Völkl, above n 11, 395.
[20] Graf, above n 4, 47-8.
[21] Private translation from the German phrase, *herrschende Lehre und Rechtsprechung*.

Court decisions regarding a similar legal problem.[22] Legal advice contrary to the prevailing practice of the courts clearly causes liability. Lawyers unfamiliar with the prevailing legal opinion and practice of the courts have to inform themselves by studying commentaries, law books or law reports.[23] As for newly-published Supreme Court decisions, lawyers ought to inform themselves regularly and immediately.[24] In cases where there are divergent Supreme Court decisions and/or no prevailing legal opinions then—according to Graf—a lawyer has to find the 'safest way'[25] to accomplish a client's goal. This means that a lawyer has to choose from at least two options: the most successful and the least risky one.[26] What Graf deems to be the safest way is that of the legal point of view which has the highest probability to succeed in court. There are problems with this, however, as it is often difficult if not impossible for a lawyer to estimate exactly the chances of success for each legal point of view. This seems a little bit like weighing each legal option on an imaginative scale and sticking labels on them such as 75%, 83% or 90%. Similarly, lawyers are not liable for the result, nor do they have the magical power to predict the precise chances of different but legally acceptable options. The 'theory of the safest way' works as long as there are two legal options, one of which is very likely to succeed and one which has a lesser chance. The theory is weak when there are, for example, five competing options with similar chances of success.

There is an alternative view. A lawyer who advises on the basis of a 'legally acceptable opinion'[27] should not become liable for negligence if a court consequently does not share the same point of view.[28] This wrongful but legally acceptable stance also accords with the view of Fenzl, Völkl and Völkl.[29] 'Legally acceptable' is any point of view which is in accordance with parts of legal opinions and/or judicial decisions.

(b) *Failure to Advise or Warn*

Not only can wrongful advice cause liability but also omitting to inform clients or warn them of certain risks.

A lawyer in a contractual relationship with a client is obliged to comprehensively advise the client. Advice will only satisfy the criterion of comprehensiveness if it covers all relevant aspects of the client's legal position. The outer limits of these information duties are set by the following formula: as long as a lawyer can foresee that omitting to inform a client will cause loss, the lawyer is under a duty to ad-

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[22] Graf, above n 4, 50.
[23] See ibid 49.
[24] See ibid, n 72.
[25] In German this is *sicherster Weg*—see Graf, above n 4, 51, 54.
[26] See Graf, above n 4, 53, n 76.
[27] In German this is *vertretbare Rechtsansicht*.
[28] See Vrba, Lampelmayer and Wulff-Gegenbaur, above n 11, 4.
[29] Fenzl, Völkl and Völkl, above n 11, 395. See also, Wolfgang Völkl and Evelyn Völkl, *Die Haftung der Rechtsberatenden Berufe im Spiegel der Rechtsprechung* (1991) 617, 619.

vise.[30] Comprehensiveness of advice also means that a lawyer must inform a client about all legal aspects which are within the context of the advice.[31]

Generally, factors such as the contents of the retainer, the nature of the transaction and the client's intention determine the extent of contextual advice.[32] As it is assumed most lay clients do not know which facts are legally relevant, a lawyer is under a duty to give all information which might be of a certain relevance to a client. These include matters such as limitation periods, economic consequences of the proposed legal action or the availability of alternative dispute resolution. A lawyer who fails to address these points will be liable for negligence. Likewise, omitting to warn a client either about the excessive costs of a lawsuit or about a doubtful remedy makes a lawyer liable for negligence.[33]

'Comprehensive' advice is, however, relative. The extent of information a lawyer ought to tell his client depends on the client's knowledge of legal matters. If it is clear that a client has some legal understanding or is familiar with a certain area of law, a less stringent standard will apply to the lawyer. In contrast, inexperienced clients or foreigners are entitled to comprehensive advice in a strict sense.[34]

At the beginning of each representation a lawyer has to inform a client about the approximate chances of winning a case. Of course sometimes this can be difficult because many factors influence the outcome of a lawsuit. If there is no chance whatsoever to succeed in court because neither statutes nor judicial practice support the client's position, a lawyer must notify his client of this fact.[35] If it is not virtually impossible to win the case but the legal position is unclear, a lawyer must warn his or her client of the risks involved in a lawsuit. A lawyer who fails to do this will become liable and will have to pay compensation for any wasted lawsuit, provided that the client would have refrained from taking legal action had the lawyer advised the client appropriately. If a lawyer fails to advise on the impossibility of a case, the Austrian Supreme Court has denied the right to any remuneration for services.[36]

Once privity of contract is established by means of the retainer, principles of contractual liability will apply to the lawyer-client relationship. But what happens if somebody consults a lawyer for the first time and asks for advice without concluding a retainer? Is the lawyer only liable in tort? The short answer is no. During these pre-contractual talks the parties have already come under a legal obligation to which quasi-contractual principles apply. This legal obligation does not consist of primary duties of performance but secondary duties of protection and care—duties which

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[30] Ibid 7. See also Graf, above n 4, 64.
[31] Graf, above n 4, 63.
[32] Ibid 64.
[33] Ibid 6.
[34] Ibid 7.
[35] OGH 2. 2. 1989 WBl 1989, 160. See also Karl Vrba, Manfred Lampelmayer and Wolfgang Wulff-Gegenbaur, *Schadenersatz in der Praxis X* (4 Lieferung, 1998) 6; Graf, above n 4, 68-9.
[36] OGH 2. 2. 1989 WBl 1989, 160. See also Graf, above n 4, 70; Vrba, Lampelmayer and Wulff-Gegenbaur, above n 35, 11.

should ensure the integrity of the other party's legal interests.[37] A violation of these pre-contractual duties is called '*culpa in contrahendo*'. During this pre-contractual stage lawyers are not obliged to give advice, but if they do so, they have to do it carefully.[38] These secondary duties of care and diligence also demand that a lawyer inform a potential client 'without culpable hesitation'[39] whether or not the mandate will be accepted. Otherwise the lawyer will be liable for any damage caused by the hesitation.

As mentioned, a lawyer ought to know all statutes and therefore any legal advice is expected to be correct. However, a client's reliance upon legal advice will only be reasonable if a lawyer has enough time to research the subject matter. Only then can a client receive high-quality expert advice. There is a dangerous tendency amongst clients to think of a lawyer as legal superman who offers perfect solutions to all legal problems within seconds. Where a client is unwilling to allow a lawyer time for research and reflection, insisting on an immediate answer, lawyers have two options. They can turn down the mandate, or simply give the best possible advice in the circumstances. In the latter instance, a lawyer ought to inform a client about the provisional nature of the ad-hoc advice. A client must be aware of the possible inadequacies of the advice. A client who still relies on this ad-hoc advice is unable to blame anyone if a loss is subsequently suffered. Only a lawyer who fails to warn a client of the risks inherent in ad-hoc advice will incur liability.[40]

Another aspect is omitting to warn of detrimental orders. One of the primary duties of a lawyer is to comprehensively advise a client; but it is still the client who decides which option shall be taken.[41] A lawyer is bound to execute a client's orders.[42] Sometimes these orders can be detrimental to the solution of the client's legal problem not because of the lawyer's wrongful advice but because of the client's poor appraisal of the legal position. If the client's orders are not conducive to achieving the client's goal, then it is a lawyer's duty to warn a client of the hazards involved in these orders.[43] A client who ignores this warning and insists that the lawyer follows his or her previous orders must bear the possible consequences.

Lawyers must also inform a client about the costs of representation. It is commonplace that legal representation can be a costly service. If, however, no fee has been stipulated, an adequate fee is deemed owing due to an implied contractual term. Generally, there is no duty to inform a client about the costs of the representation, unless the client so asks. Exceptionally, a lawyer must actively inform a client about

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[37] Koziol, above n 19, 188; Erich Feil and Harald Hajek, *Die Berufshaftung der Rechtsanwälte und* Notare (1990) 24; Franz Bydlinski, *Vertragliche Sorgfaltspflichten zugunsten Dritter* (1960) 359.
[38] Koziol, above n 19, 188; Feil and Hajek, above n 37, 24.
[39] Private translation; in German the phrase is '*ohne schuldhaftes*'. See also Vrba, Lampelmayer and Wulff-Gegenbaur, above n 35, 8.
[40] Graf, above n 4, 48.
[41] Ibid 76.
[42] Ibid 75.
[43] Ibid 77.

the costs of the representation if the client is unused to legal services and seriously underestimates the true amount of costs.[44]

(c) *Multiple Representation*

Article 10 of the RAO sets out the general prohibition of double representation. It does not prohibit a lawyer representing several parties but prohibits the representation of conflicting interests.[45] Therefore, a lawyer may represent two or more parties as long as their interests are not in conflict with each other. Even in contractual bargains, a lawyer may represent both parties once they have reached an agreement because of their common interest. But as long as the parties remain in a state of negotiation regarding the subject matter they will have conflicting interests and a lawyer must not represent both parties.[46]

As an example, during the purchase of a house, at a stage where the parties have agreed on a price, they could instruct one lawyer to draw up the conveyance. At this stage, a lawyer is acting for both parties and this entails duties to warn both clients of certain risks. The purchaser must be told about the risk of paying the price without securing the vendor's obligation to convey a good title. Likewise a lawyer must inform the vendor about the risk of transferring property before receiving full payment. The balance should be secured by means of a mortgage. In order to avoid liability for negligence it is imperative for a lawyer to warn both parties of these inherent risks.[47]

2 *Tortious Liability*

Can a lawyer become liable in tort towards his client? Does tortious liability coexist with a lawyer's contractual liability? In other words, does Austrian law allow concurrent liability?

The short answer is no. The possibility of a tortious claim against another contractual party has not yet raised academic interest, mainly because there is no necessity for concurrent liability since a contractual claim allows the best protection for a contractual party.

A comparison of some of the peculiarities of contract and tort law principles reveals the reasons why tort law does not play a significant role between contractual parties. First, tort law generally does not provide for the recovery of pure economic loss—which typically occurs between contractual parties—whereas contract law does. Pure economic loss is only exceptionally remedied by tort law such as loss caused by a 'breach of protective provisions',[48] 'loss caused by a violation of public morals'[49] or loss caused by 'knowingly giving false advice'.[50] Secondly, in tort law a

[44] Ibid 72. See also Vrba, Lampelmayer and Wulff-Gegenbaur, above n 35, 7-8.
[45] Graf, above n 4, 81.
[46] Ibid 82-3.
[47] Fenzl, Völkl and Völkl, above n 11, 264; Graf, above n 4, 85-6.
[48] In German the phrase is '*Schutzgesetzverletzung*'. See *General Civil Code*, above n 14, art 1311: 'Mere accidents affect only the person to whose property or person they occur. However, if another person has occasioned the accident by his fault, or if such person has acted in violation of a law in

loss caused by 'knowingly giving false advice'.[50] Secondly, in tort law a plaintiff has to prove the defendant's fault whereas in contract law there is a legal presumption that the defendant was at fault. According to art 1298 the defendant has to bear the difficult onus of proof that she or he was not at fault.[51] Thus a contractual claim puts the plaintiff in a strategically much better position. Thirdly, in tort law liability for culpable behaviour of servants is less stringent than in contract law.[52] According to art 1313a[53] a master who employs a servant for the discharge of his contractual duties will be liable for his servant's fault as if it were his own fault. Contrast this with a master's better position in tort where—according to art 1315[54]– he will only be liable for his servant's fault, if he 'employs an unfit person ... or ... knowingly uses a dangerous person.' Fourthly, unlike in English law, the limitation period for claims founded in tort is no different from that in contract. According to art 1489[55] tortious as well as contractual claims for damages are statute-barred after three years and accrue at the time of knowledge of both the tortfeasor and the damage.

C *Information Liability of Lawyers Towards Third Parties*

1 *Contractual Liability*

Imagine this problem: between A and B exists a contract according to which A advises B. C who is a third party relies on this advice and consequently suffers loss. Can C claim damages against A because of A's wrongful advice? If yes, what is the basis of the claim?

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endeavoring to prevent incidental injuries, or if he has interfered unnecessarily with the business of another, he is liable for any damages which would not otherwise have occurred.'

[49] In German the phrase is '*sittenwidrige Schädigung*'. See *General Civil Code*, above n 14, art 1295 [2]: 'A person who intentionally injures another in a manner in violation of public morals is liable therefor; however, if the injury was caused in the exercise of legal rights, the person causing it shall be liable therefor only when the exercise of this right obviously has the purpose to cause damage to the other.'

[50] In German the phrase is '*wissentlich falsche Raterteilung*'. See *General Civil Code*, above n 14, art 1300 [2]: 'An expert is liable when he gives, for a consideration, negligently bad advice in matters of his art or science. In other cases, a person giving advice is liable only for damage which he has knowingly caused to another by giving the advice.'

[51] 'A person who asserts that he has been prevented from the performance of a contractual or legal obligation without any fault on his part must bear the burden of proof thereof.' See also Graf, above n 4, 123.

[52] See *General Civil Code*, above n 14, art 1313a for contractual liability and art 1315 for tortious liability. See also Graf, above n 4, 123.

[53] 'A person who is under an obligation of performance to another is liable to the latter for the fault of his legal representative and of persons whom he has employed for the performance, in the same manner as for his own fault.'

[54] 'A person who employs an unfit person for the care of his own affairs, or who knowingly uses a dangerous person therefor, is liable for any damage caused by such persons acting in such capacity to third persons.'

[55] 'Every claim for damages is statute-barred after three years from that time on, when both, damage and tortfeasor are known to the injured person, the damage may have occurred by a breach of contractual duties or without regard to a contract. In case the injured person did not get to know the damage or the tortfeasor ... the claim for damages expires after thirty years (private translation).'

A similar situation arose in an Austrian case.[56] B asked A for an opinion regarding the value of his house and told him that he would need it for negotiations with the ministry. B did not mention that he would show the opinion to other persons. Later B asked C to extend credit to him. C lent the amount of 1,343,970 ATS after B mortgaged his house to C, who relied on the opinion of A. The opinion stated that the house was worth some 1,888,364 ATS. In fact this amount was exaggerated since the market value was only 1,170,000 ATS. As B could not discharge his debt C sued A for the sum of 718,364 ATS which was the difference between the negligently estimated value and the actual value. The Austrian Supreme Court upheld A's appeal and decided in favour of him.

However, experts who collaborate with their clients and maliciously give wrongful advice in order to cause damage to a third party are certainly liable according to art 1295 par 2[57] and art 1301[58] because their conduct violates public morals. A crucial issue therefore is whether an expert should be liable towards a third party for negligently incorrect advice. Opinions on this are divided among Austrian scholars. Scheucher asserts that experts should be liable to anybody who relied upon their opinion and consequently suffered loss.[59] Wolff agrees.[60] This legal opinion, however, seems to be obsolete today. In fact, according to Scheucher's view, experts' liability for losses—mainly economic—would be enormous in amount and number. As a logical consequence, some experts would be very cautious when giving advice and some would refrain from advising at all since such a high risk could not be insured against. Social and economic life would be impaired. Apart from these concerns over sociological effects of a too onerous liability, Bydlinski[61] strongly criticises Scheucher's view as typifying doctrinal weaknesses. He stresses that Scheucher's model of liability is only based on causation of damage but neglects the important requirement of unlawfulness. Contractual rights only exist between the parties to the contract, ie between an expert and his client. Therefore a breach of contractual terms, Bydlinski says, is unlawful only towards the client but not towards anybody else. In relation to a third party who relies upon an opinion, the expert did not act unlawfully. In accordance with Bydlinski's view, the issue therefore is, on which social or moral norms should a third party be justified taking the benefit of an expert's liability without paying for the expert's services? Today a majority of scholars and the Supreme Court hold the view that experts should be

[56] OGH 2. 12. 1964 JBL 1965, 319. See also OGH 5. 2. 1936 JBL 1936, 300.

[57] 'A person who intentionally injures another in a manner in violation of public morals is liable therefor; however, if the injury was caused in the exercise of legal rights, the person causing it shall be liable therefor only when the exercise of this right obviously has the purpose to cause damage to the other.'

[58] 'Several persons can become liable for damage illegally caused by having contributed thereto in common, directly or indirectly, by seducing, threatening, commanding, assisting, or concealing, or by omitting a special obligation to prevent the damage.'

[59] Otto Scheucher, *Die Haftung des Sachverstandigen fur sein Gutachten* (1961) 228; see also Bydlinski, above n 37, 320; Feil and Hajek, above n 37, 22; Koziol, above n 19, 189; Rudolf Welser, *Die Haftung für Rat* (1983) 81.

[60] Ernst Wolff, in Klang and Gschnitzer (eds), *Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch* (1951) 52.

[61] Bydlinski, *Vertragliche Sorgfaltspflichten Zugunsten Dritter* (1965), 320.

liable for their incorrect opinions or advice only as regards their clients.[62] This is the general rule, to which there are, of course, exceptions.

The doctrinal basis according to which, in exceptional circumstances, a third party will have a contractual claim against a contractual party even if the third party is not privy to the contract, may be explained as follows. Austrian contract law formally divides duties of contractual parties into primary duties of performance and secondary duties of protection and care.[63] Duties of performance are the core of a contract whereas duties of protection and care should ensure that parties do not suffer any damage to their legal interests such as life, personal integrity, property and health, during the performance of a contract.[64] For example A will be quite unhappy if B discharges her duty by delivering the agreed cupboard but at the same time breaking a valuable mirror in her house. It goes without saying that the performance of contractual duties must take place without causing damage to the other party's legal interests. Now what is crucial in the concept of contracts with protective effect for third parties is that these duties of protection and care are not only owed to the other contractual party but also to persons who are 'sufficiently close' to that contract so that they could possibly suffer damage as well.[65] Continuing the above example, A will be outraged if B delivers the stipulated cupboard but thereby injures his wife or children. So if we talk of 'sufficiently close persons', we mean those people who are not themselves parties to a contract but who are likely to be affected by side-effects of a contractual performance. Bydlinski has created a test which helps determine the range of those persons who come within the protective effect of a contract.[66] For better understanding of this rather complex formula it will be analysed in its component parts:

- The third party's contact with the contractual performance must have been foreseeable at the time of the conclusion of the contract; and
- one contractual party must have had either an obvious interest in this third party *or* wanted to benefit the third party by securing him the contractual advantages *or* was legally bound to maintain, or have a relationship with, the third party.

All persons qualifying under this test are within the protective effect of the contract which has been concluded between the other two parties.

Two examples provide a useful illustration: First, A concludes a contract of carriage with B who will travel with and is responsible for a small group of children. Each member of the group who suffered damage due to A's fault will have a quasi-contractual claim against A.[67] Second, Y has been negligent during the course of his

[62] See, eg, OGH 30. 3. 1927 SZ 9/76; OGH 5. 2. 1936 JBL 1936, 300; OGH 2. 12. 1964 JBL 1965, 319.
[63] Graf, above n 4, 89; Bydlinski, above n 37, 359.
[64] Graf, above n 4, 89; Bydlinski, above n 37, 359.
[65] Graf, above n 4, 89; Koziol, above n 19, 85.
[66] Bydlinski, above n 37, 363.
[67] OGH 22. 12. 1970 SZ 43/236.

professional service owed to X and thereby injures X's wife. She will have a quasi-contractual claim against Y.

Bydlinski explains this expansion of contractual liability with an 'objective interpretation of the contract'[68] whereas Koziol prefers a 'legal obligation'[69] as the basis for the extended liability towards persons 'sufficiently close' to the contract. The roots of this expansion of contractual liability lie deeper. In circumstances such as those mentioned above it was thought to be unacceptable that these third parties who were sufficiently close to the contract should just have a tortious claim against the negligent party.[70] As described earlier, a contractual claim affords a much better protection than a tortious claim particularly with regard to liability for servants. Therefore the 'contract with protective effect for third parties' was a doctrinal solution to a social demand for better legal protection.

Once the range of persons who can make a quasi-contractual claim is ascertained, the question arises as to what type of damage the claimants should be able to recover. There is no doubt that damage to absolutely protected legal interests of third parties such as life, bodily integrity, personal freedom or property should be compensated for.[71] However, legal opinions are divided as to whether a third party's pure economic loss should be recoverable under a quasi-contractual claim. According to Koziol only privity of contract creates a relationship which justifies the protection of all legal interests including pure economic ones.[72] The relationship between a debtor and a third party is weaker than between contractual parties; therefore a third party should not be able to recover pure economic loss. Nevertheless, if a third party could recover pure economic loss, Koziol fears an 'opening of the floodgates', ie an 'indeterminate and economically unbearable expansion of liability'[73] and a blurred demarcation line between claims *ex contractu* and *ex delicto*. Therefore—according to Koziol—a third party should recover pure economic loss only in exceptional circumstances, for example, when the 'primary duty of contractual performance' should benefit that third party. This is regularly the case with 'contracts for the benefit of third parties' such as a life insurance where the third party also possesses a right to claim for performance.

Reischauer suggests an alternative point of view.[74] Once a third party is granted a quasi-contractual claim why should the recoverability of pure economic loss be excluded? When professional services cause damage they mainly cause pure economic loss, therefore those third parties who qualify under Bydlinski's formula

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[68] In German the phrase is '*objektive Vertragsauslegung*'—see Bydlinski, above n 37, 360.
[69] In German the phrase is '*gesetzliches Schuldverhältnis*'—see Koziol, above n 19, 85.
[70] Graf, above n 4, 90; Byklinski, above n 37, 359; Koziol, above n 19, 90.
[71] Koziol, above n 19, 87; Graf, above n 4, 90.
[72] Koziol, above n 19, 87.
[73] In German the phrase is '*uferlose, wirtschaftlich untragbare Ausweitung der Haftung*'. See OGH 6. 9. 1972 JBL 1973, 579; OGH 18. 4. 1972 JBL 1973, 581.
[74] See Graf, above n 4, 91.

should not be excluded from claiming it. The Supreme Court has adopted Reischauer's view and awards damages for pure economic loss to third parties.[75]

The final issue to be discussed can be referred to as the 'disappointed beneficiary'. Often, people consult a lawyer or notary public to have their wills drawn up. Sometimes a legal expert's malpractice may be wrongful advice which will lead to a very unsatisfactory result: the intended beneficiary will suffer a typical pure economic loss by not receiving the legacy and the lawyer will be faced with a negligence claim.

In a case concerning a notary public and another one concerning a lawyer the Supreme Court awarded damages for a lost legacy.[76] The legal factors for consideration are identical: the intended beneficiary's claim is based upon the lawyer's contract with his or her client to draw up a will. This contract is being interpreted as one which creates a protective effect for the intended beneficiary. Applying Bydlinski's formula: first, it is easily foreseeable for a lawyer that a testator's intended beneficiary will be adversely affected by his or her malpractice; and secondly, it is obvious that the testator wanted to benefit the third party by means of the will. Therefore the lawyer owes a duty of protection and care not only to the testator but to the legatee as well. Surprisingly, this case has striking similarities to a contract for the benefit of a third party because the primary duty of performance—the writing of a valid will—benefits not the contractual party but the third party. Furthermore, a breach of contractual terms will only affect the third party—a situation very similar to a contract for the benefit of a third party where A and B conclude a contract from which C derives its rights.[77] Because of these similarities to a contract for the benefit of a third party a disappointed beneficiary is justified in recovering pure economic loss.[78] Viewed from a different angle it is essential that disappointed beneficiaries can claim damages for their pure economic loss because otherwise lawyers would go unpunished for negligence.[79] The words of Lord Goff in *White v Jones*[80] similarly apply: '[T]he only persons who might have a valid claim (i.e., the testator and his estate) have suffered no loss, and the only person who has suffered a loss (i.e., the disappointed beneficiary) has no claim.'[81]

Koziol's fears about indeterminate liability for pure economic loss are not valid in the case of a disappointed beneficiary because only a very small and limited number of persons will ever come within the protective effect of a lawyer's contract with her or his client. In conclusion it is clear that a beneficiary's contractual claim is

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[75] See OGH 3. 11. 1981 JBL 1983, 253; OGH 22. 12. 1970 SZ 43/236.
[76] See OGH 19. 6. 1986 SZ 59/106 (concerning a notary public); OGH 23. 2. 1933 ZBL 1933/182 (concerning a lawyer).
[77] See Graf, above n 4, 95.
[78] Ibid 95.
[79] Ibid 95.
[80] [1995] 1 All ER 691 (quoting Megarry V-C in *Ross v Caunters* [1979] 3 ALL ER 580).
[81] See *Ross v Caunters* [1979] 3 All ER 580, 583 (Megarry V-C) cited in *White v Jones* [1995] 1 All ER 691, 702 (Lord Goff) and *Hill v Van Erp* (1997) 142 ALR 687, 690 (Brennan CJ), 707 (Dawson J), 719 (McHugh J).

based on a 'contract with protective effect for third parties' which has similarities with a 'contract for the benefit of a third party'.[82]

2 *Tortious Liability*

The principal aim of tort law is to protect those legal interests which rank highest on a scale of social values: life, bodily integrity, personal freedom and property.[83] The Austrian legal system does afford overall protection to these interests.

Professional legal services, however, if negligently performed, will mainly cause pure economic loss. Therefore a lawyer's tortious liability towards third parties is of very limited extent. Only in the following three situations might a third party succeed with a tortious claim and recover pure economic loss from a legal expert:

1) A lawyer violates 'protective provisions'[84] which specifically try to prevent pure economic loss. Protective provisions are spread throughout the legal system and aim at preventing a certain type of harm. The one who breaches these provisions will become liable in tort. Judicial interpretation determines whether a provision is protective according to art 1311. For example, art 52 of the 'Notariatsordnung'[85] (a statute regulating professional duties of a notary public) requires that a notary public must search for the true intentions of both parties before drawing up a notarial deed in their presence. The Supreme Court construed art 52 as a provision protecting third parties from pure economic loss.[86] They can, therefore, sue the notary public in cases where they rely on the notarial deed and suffer loss.

2) A lawyer 'intentionally acts *contra bonos mores*'[87] and causes pure economic loss to a third party. *Bonos mores* is a very ambiguous term which allows a multitude of constructions. The virtual standard of public morals might be high or low but finally it is the courts which will decide about the legal standard. Two examples of a lawyer violating public morals could be: first, if a lawyer bribes a witness in order to make his client's opponent lose the court case, he or she will certainly be liable for the damage provided that the bribery was causal. The loss will usually be pure economic one since the losing side has to pay costs. In addition to the civil liability, a lawyer would face an exclusion from the Bar. Secondly, a lawyer will be liable for pure economic loss, if she or he abuses procedural law deliberately in order to harm his or her client's opponent.[88] It is the function of the court system to settle equivocal claims but it will definitely run counter to public morals if a lawyer intentionally pursues a legal action—although knowing of the impossi-

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[82] Graf, above n 4, 96.
[83] Ibid 123.
[84] In German the phrase is '*Schutzgesetze*'. See *General Civil Code*, above n 14, art 1311.
[85] G 25. 7. 1871 RGBL 75 betr. die Einführung einer neuen Notariatsordnung idF BGBL 1993/692.
[86] OGH 13. 12. 1988 EvBL 1989/105. See also Vrba, Lampelmayer and Wulff-Gegenbaur, above n 11, 14.
[87] In German the phrase is '*absichtlicher Verstoß gegen die guten Sitten*'. See *General Civil Code*, above n 14, art 1295 [2] (quoted in full above at n 49).
[88] Graf, above n 4, 131-2.

bility of winning a lawsuit—and thereby abuses the judicial system, harming a third party.

3) A lawyer gives 'knowingly false advice with the intention to harm.'[89] Article 1300, second sentence, of the Civil Code 254 reads: 'In other cases, a person giving advice is liable only for damage which he has knowingly caused to another by giving the advice.' This sentence embodies the principles of information liability in tort law as the words 'in other cases' describe the lack of any contractual or other civil obligation between the advisor and the recipient. 'To cause damage knowingly' means 'wilfully harming somebody'.[90] The advisor must have 'knowledge about the falsity of the advice and the intention to harm.'[91] The principle of tortious information liability can be summarised as follows: any person who gives advice as a favour, ie outside a contractual or other civil obligation, is liable for any damage caused by providing knowingly false advice with the intention of producing harm. Because of the malicious motives in proffering advice in the above example, any damage, including pure economic loss, may be recovered.[92] For example, a lawyer who misleads a third party by giving wrongful advice on purpose will become liable for any loss. The lawyer might collaborate with his client or another person in order to harm the client's business partner or anybody else—either way the lawyer will incur liability. Strictly speaking, the two articles are complementary as harming somebody intentionally is per se a violation of public morals.

III ANGLO-AUSTRALIAN LAW

The overall framework of the legal profession in Australia has been inherited from England. The only difference, and it is slight, is that some Australian states[93] have a unified legal profession, ie a legal practitioner is admitted to practice as both solicitor and barrister. Only two states, New South Wales and Queensland, have a divided profession like England.[94] Each state has its own professional body to control the standards of the profession, to issue guidelines for professional conduct or to discipline its members.[95] In order to become a solicitor and/or barrister in Australia one has to be admitted by the State Supreme Court or an equivalent Admission Board.[96] Admission requirements are: a university degree in law, a practical training course which is of varying length in the different States and good character.[97] Before a legal practitioner can carry on a business he or she needs a practising certificate

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[89] In German the phrase is '*wissentlich falsche Raterteilung mit Schädigungsabsicht*'. See *General Civil Code*, above n 14, art 1300 (quoted in full above at n 50).
[90] In German the phrase is '*vorsätzliche Schädigung*'.
[91] In German the phrase is '*wissentlich falsche Raterteilung mit Schädigungsabsicht*'.
[92] See Welser, above n 59, 12.
[93] They are Western Australia, South Australia, Victoria, Tasmania. See Hughes and Leane, *Australian Legal Institutions* (1996) 265, 273.
[94] Ibid 265. See also Turner, *Australian Commercial Law* (20th ed, 1995) 44.
[95] Hughes and Leane, above n 93, 263.
[96] Ibid 270.
[97] Ibid 271.

which is granted (sometimes on different conditions) by the professional body.[98] Although admission by the Supreme Court and the practising certificate operate only within a State's jurisdiction, the *Mutual Recognition Act 1994* (Cth) guarantees the mutual recognition of qualifications obtained in jurisdictions of other states.[99] The aim of the Act is 'to create a national market for ... legal services'.[100]

A *Solicitor's Information Liability Towards Clients*

The relationship between a solicitor and a client will normally be governed by the terms of a retainer, which is the contract between these parties.[101] For this reason a solicitor's liability for wrongful advice or for a failure to disclose relevant information will, in most cases, be a contractual one which comprises the recovery of pure economic loss. Nevertheless, the existence of a contract does not per se prevent a client from making a tortious claim against his solicitor.[102] It is even possible that the same conduct attracts both kinds of liability. Then a defendant is concurrently liable.[103] For example, solicitors who give bad advice to a client can be sued for negligence because they are in breach of a tortious duty of care. Likewise solicitors are liable in contract because of a breach of an implied contractual term to perform services with due care.[104] The solicitor is liable in contract and tort with both duties having the same contents.[105] He or she is concurrently liable.

In English common law history there have been several instances of concurrent liability but also there have been cases to the contrary.[106] Today concurrent liability seems to be accepted in England[107] as well as Australia.[108] A fundamental query is: what is the relevance of there being two parallel liabilities?

The answer is simple. Because a plaintiff who can choose between an action in contract or tort is often in a more advantageous position since each category has different legal consequences when it comes to matters such as limitation periods, assessment of damages or defences like contributory negligence.[109] Most significant

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[98] Ibid 272-3.
[99] Ibid 271.
[100] Ibid.
[101] Jackson and Powell, *Jackson and Powell on Professional Negligence* (4th ed, 1997) 409; *The CCH Macquarie Dictionary Of Law* (2nd ed, 1993) 151.
[102] Jackson and Powell, above n 101, 41-2.
[103] Ibid 41.
[104] Ibid 8-9. See also Francis Trindade and Peter Cane, *The Law of Torts in Australia* (2nd ed, 1993) 369; Turner, above n 94, 804.
[105] *Hawkins v Clayton* (1988) 78 ALR 69, 100 (Deane J).
[106] Jackson and Powell, above n 101, 43-5, 412-13. See generally, John L Dwyer, 'Solicitor's Negligence – Tort or Contract?' (1982) 56 *Australian Law Journal* 524, 526-37.
[107] Since the decision of the House of Lords in *Henderson v Merrett Syndicates Ltd* [1994] 3 All ER 506. See Jackson and Powell, above n 101, 414.
[108] Since the decision of the High Court of Australia in *Hawkins v Clayton* (1988) 78 ALR 69, 100 (Deane J). See also Jackson and Powell, above n 101, 414.
[109] See *Hawkins v Clayton* (1988) 78 ALR 69, 100-1 (Deane J). See also Trindade and Cane, above n 104, 70, 369; Jackson and Powell, above n 101, 485, n 38; Kevin Nicholson, 'The Duty of Care Owed by

is the difference regarding the date when limitation periods accrue. A cause of action founded in contract accrues when the breach of contract occurs whereas in tort the limitation period starts to run when damage occurs, not when the duty of care was being breached.[110] It can be of vital interest for a client to have the option of choosing between a cause of action. If a client decides to pursue a contractual claim, she or he has to prove a breach of contractual terms of which the exercise of reasonable skill and care is but one. If a client prefers an action in tort, then she or he has to prove that the solicitor owed him a duty of care, that the solicitor was in breach of that duty and that the client consequently suffered foreseeable loss.

There is no doubt that a solicitor-client relationship is one of fundamental proximity which gives rise to a tortious duty of care. The question which usually arises is whether a solicitor is in breach of the duty of care. The answer depends on the expected standard of care.

Whether or not there was a breach of an existing duty of care depends upon the standard of care. Generally, professionals must work with 'reasonable skill and care'[111] and must comply with the standards of 'reasonably competent members of the profession.'[112] As for solicitors the required standard was formulated in the case of *Midland Bank Trust Co Ltd v Hett Stubbs & Kemp*.[113] A solicitor must 'devote to the client's business that reasonable care and skill [which can] be expected from a normally competent and careful practitioner.'[114] What exactly does the notion of a normally competent practitioner mean? Two interpretations are possible: first, one could look at the standards actually adopted by the majority of solicitors. Then as a question of fact it follows that any solicitor who complies with this standard acts in a reasonably competent way. The disadvantage of such a subjective approach is that the legal profession as an entity could independently decide about its own standards of care regardless of community expectations. This view is not tenable. Secondly, one could look at the standards which solicitors ought to adopt. Then as a question of law, courts finally decide about this objective standard of care thereby considering the general practice of solicitors as a guideline which is not necessarily conclusive.[115] If judges think that general practice falls below the expected higher standard of care, then reference to the general practice does not exculpate. In order to define the standard of care, courts prefer the objective test with minor modifications: what is required is 'that degree of skill and care which is ordinarily exercised by reasonably competent [solicitors], who have the same rank and the same specialisation (if

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a Solicitor: Recent Developments – an Australian Perspective' (1989) 5(1) *Professional Negligence* 1, 4; Dwyer, above n 106, 524-5.

[110] See *Hawkins v Clayton* (1988) 78 ALR 69, 100 (Deane J).

[111] Lapraik, 'England and Wales' in Campbell ed, *Professional Liability of Lawyers* (1995) 74; Jackson and Powell, above n 101, 446.

[112] *Saif Ali v Sydney Mitchell & Co* [1978] 3 All ER 1033, 1043 (Lord Diplock). See Ralph Tiernan, *Nutshell Torts* (4th ed, 1996) 32.

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

[114] *See Midland Bank* [1978] 3 All ER 571, 611 (Oliver J.). See also Lapraik, above n 111, 75.

[115] Jackson and Powell, above n 101, 451.

any) as the defendant.'[116] If a solicitor claims to possess some special skill and/or knowledge in a particular field of law, then the standard of care will be more stringent than for a solicitor in general practice.[117]

Another question is whether or not the defendant's personal qualifications and experience should raise the standard of care in a particular situation. Although opinions are divided, the proposition that personal qualifications should not lift the standard of care, carries more weight.[118]

The standard discussed above applies to breaches of both solicitors' tortious duty of care towards their own clients and third parties as well as to solicitors' contractual duty to use reasonable skill and care which is implied by law.[119]

Whenever people seek help from a legally competent person they are usually in some form of trouble and do not know how to handle their matters. A layperson usually does not know much about the law and its peculiarities, therefore the client retains a solicitor to handle his or her affairs. This includes the provision of advice, some of it being more general and some specific. Often negligent advice goes hand in hand with negligent acts such as drawing up documents such as wills and conveyances improperly, or omitting to do so.[120] Therefore negligent misstatements ought to be seen in the broader context of professional negligence, including acts and omissions.

In the following paragraphs some of the more common situations where a solicitor becomes liable for giving negligently wrongful advice to the client are considered.

1 *Wrongful Advice*

If a solicitor gives wrongful advice about a point of law, such as an incorrect interpretation of a statute, then he or she will be liable for negligence provided that the circumstances 'would have alerted the reasonably prudent solicitor'[121] to make further inquiries about the law. Of course no solicitor is expected to know all the existing law.[122] This is simply impossible, if one looks at the vast and ever expanding areas of law. But a professional is expected to know where to find correct answers to a certain legal problem.[123] Every practising solicitor needs to know statutes and cases of fundamental importance; otherwise the solicitor will fall below the standard of reasonable skill and will be liable for loss. Sometimes the law can be ambiguous and may be difficult to construe. A solicitor who then advises improperly will incur liability for negligence only if his or her opinion was not a reason-

[116] Ibid 54.
[117] Ibid.
[118] Ibid 53.
[119] Ibid 484-5.
[120] Trindade and Cane, above n 104, 368.
[121] Ibid 449.
[122] Ibid.
[123] Ibid.

able one.[124] To determine the reasonableness of an opinion, courts will usually have regard to the general practice of solicitors.

2 *Failure to Advise*

Apart from wrongful advice there are situations when a solicitor fails to disclose information. Contractual or tortious liability for an omission to advise will only arise where there is a duty to do so.[125] This duty to advise will mostly be of contractual origin with its contents depending on the retainer. However, there are a few exceptional cases where the duty to inform has a tortious basis.[126]

Among those cases where the duty to advise is a contractual one, two categories may be formed according to:

- Circumstances where a certain advice was requested. If a solicitor then withholds this advice, it is a breach of contract but instances like this rarely occur because either the client insists on getting the advice or the retainer is terminated.[127]
- Circumstances where no specific advice has been asked for. As a general rule a solicitor is not under a duty to investigate or advise on matters which are beyond the client's instructions.[128] Nevertheless, a duty to make inquiries and to inform the client may arise because of the nature of the transaction.[129] *Hall v Meyrick*[130] is an example of a solicitor who knew that his client, a testator, intended to marry. The solicitor failed to advise him that a marriage would revoke the will. The terms of the contract were to set up a will but since the solicitor knew about his client's intended marriage a duty to inform him about the legal consequences arose despite the absence of an express or implied contractual term to do so. The solicitor was found to be negligent.[131]

Of course, there are no safe rules as to determine the existence of a duty to advise. Generally a solicitor ought to know which facts and which information could be vital for her or his client and it is then the solicitor's duty to disclose this information.[132] It is also a solicitor's task to decide which information is essential and needs to be reported and which is not. The 'reasonably competent solicitor' should be a guideline for the sometimes onerous question of which details ought to be communicated to the client. The answer depends on the one hand on the nature of the transaction which the solicitor is handling for the client and on the other hand on the

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[124] *Bell v Strathairn & Blair* (1954) 104 LJ 618.
[125] *White v Jones* [1995] 1 All ER 691, 700 (Lord Goff).
[126] See, eg, *Hawkins v Clayton* (1988) 78 ALR 69.
[127] See Jackson and Powell, above n 101, 487.
[128] Ibid 490.
[129] Lapraik, above n 111, 78.
[130] *Hall v Meyrick* [1957] 1 All ER 208.
[131] See ibid 218 (Ashworth J).
[132] Jackson and Powell, above n 101, 489.

client's demand for advice. In *Carradine Properties Ltd v D J Freeman & Co*[133] the English Court of Appeal held that it was justified to accept a wider duty to advise inexperienced clients than those who have comprehensive business experience.

3 *Other Information Duties Owed to a Client?*

A fundamental duty is to explain legal documents and to ensure that the client has understood its provisions.[134] Often, the difficult and ambiguous wording of a legal text is the reason why a layperson consults a solicitor and the client then expects to get a practical answer which is easy to understand. A solicitor explaining legal documents should avoid using technical legal terms as far as possible.

The duty to warn a client about risks involved in a business deal derives from a solicitor's general duty to 'protect the client's interest'.[135] A failure to warn the client will usually cause liability for negligence. Examples are: failing to warn the client of numerous risks involved in a conveyancing transaction;[136] failing to warn a mortgagee of the risk of lending money when the mortgage could not be registered;[137] or failing to warn trustees of circumstances which may render them personally liable for the loss of trust moneys.[138]

Equally, solicitors must ensure that their clients are well informed 'of the progress of the transaction.'[139] This obliges a legal practitioner to advise his or her client on any relevant matter of the cause at any time in order to obtain further instructions. If a solicitor fails to report on new developments, she or he will be held liable for consequential loss. Acting on the client's instructions will not provide a defence to a negligence claim since these instructions are based on a lack of information for which the solicitor is responsible.

B *Solicitor's Information Liability Towards Third Parties*

Generally, solicitors owe a duty of care only to their clients but not to any third parties such as the client's business partners or beneficiaries.[140] Strictly speaking no person other than the solicitor's client is entitled to rely upon the expert advice, but this is in conflict with community expectations. Solicitors, like any other professionals, have special knowledge and skills, know certain techniques in their field of practice and enjoy a high reputation for the quality of their services. Therefore it is commonplace that many persons often trust professionals and rely on their services

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[133] (1989) 5 Cons LJ 267 ('*Carradine*').
[134] Jackson and Powell, above n 101, 494.
[135] *Groom v Crocker* [1939] 1 KB 194, 222 (Scott LJ).
[136] See, eg, *Major v Buchanan* (1975) 9 OR (2d) 491 (HC).
[137] See, eg, *Income Trust Co v Watson* (1984) 26 BLR 228 (Ont HC).
[138] *Re A Solicitor, Ex parte Incorporated Law Society* (1894) 1 QB 254.
[139] Jackson and Powell, above n 101, 488.
[140] *Hill v Van Erp* (1997) 142 ALR 687, 696 (Dawson J); *White v Jones* [1995] 1 All ER 691, 698 (Lord Goff); Jane Swanton and Barbara McDonald, 'Common Law' (1997) 71 *Australian Law Journal* 825, 827; Nicholson, above n 109, 7.

even if they do not pay them.[141] This is the core problem of third party liability. On the one hand most people rely upon expert advice and professional skills even if they are not a professional's client. (For example, a mortgagee will usually rely upon the report of a surveyor employed by the mortgagor.[142]) On the other hand professionals cannot be liable to every person if she or he reasonably relies upon them. A golden rule to solve this problem does not exist. Instead courts have either accepted or denied a professional person's liability towards third parties depending on the profession and the situation. Common law has created certain 'pockets of law'[143] in which a solicitor is held to be liable to other persons than the solicitor's client. The doctrinal basis for a solicitor's liability towards third parties will now be examined.

A solicitor's liability towards third parties is founded solely in tort. Unlike civil law countries English contract law does not recognise any *ius quaesitum tertio* which is a right duly acquired by a third party.[144] The explanation for the lack of such third party rights is found in the doctrines of consideration and privity of contract.[145] Consideration means that for any legally valid contract a price must be paid in exchange for the benefit one receives. This price may be an act or a thing or a promise itself. For example, a beneficiary who receives a legacy but has not given or promised anything to the testator has no contractual claim. Privity of contract is a synonym for the relationship between two contracting parties with the contract being enforceable only between them.[146] Because of these two common law doctrines it was impossible for Anglo-Australian law to develop principles equivalent to the Austrian 'contract for the benefit of a third party'[147] or 'contract with protective effect for third parties.'[148] Because of the rigidity of Anglo-Australian contract law, tort law is sometimes used to fill its gaps.[149]

This leads to the 'pockets of law' in which common law holds a solicitor liable to other persons than his client. Below are set out three main cases in this area. The first case deals with a solicitor's ad-hoc contact with an enquirer. The two Australian cases that are subsequently discussed demonstrate extensions of the *Hedley Byrne & Co Ltd v Heller & Partners Ltd*[150]principles of assumption of responsibility and reliance into the field of professional negligence.

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[141] Jackson and Powell, above n 101, 47.
[142] Ibid.
[143] Ibid 50.
[144] Dieter Meyer, *Juristische Fremdwörter, Fachausdrücke Und Abkürzungen* (10th ed, 1993) 75. See also *White v Jones* [1995] 1 All ER 691, 695 (Lord Kinkel), 699, 705 (Lord Goff); *Hill v Van Erp* (1997) 142 ALR 687, 696 (Dawson J).
[145] See *White v Jones* [1995] 1 All ER 691, 705, 708 (Lord Goff).
[146] Collin, above n 1, 248.
[147] See above at Part II.C. See also *White v Jones* [1995] 1 All ER 691, 705 (Lord Goff).
[148] See above at Part II.C. See also *White v Jones* [1995] 1 All ER 691, 698, 705 (Lord Goff).
[149] See *Hill v Van Erp* (1997) 142 ALR 687, 742 (Gummow J); Frank Riley, 'A Solicitor's Liability in Negligence to an Intended Beneficiary Under a Will', (1998) February *Law Society Journal* 7 < http://www.lawsocnsw.asn.au/resources/lsj/archive/feb1998/692.html>; Swanton and McDonald, above n 141, 829.
[150] [1964] AC 465 ('*Hedley Byrne*').

1 *Incomplete Advice*

Sometimes telling only half the truth can cause loss in exactly the same way as telling a whole lie. The case of *Crossan v Ward Bracewell & Co*[151] reflects a solicitor's typical ad-hoc contact with a non-client in the course of professional business:

The plaintiff was accused of reckless driving and was summoned. He sought legal advice and the solicitor with whom he never entered into a contract told him that he had the choice of either going to court and representing himself or instructing the solicitor and paying a deposit. Nevertheless, the solicitor failed to advise that the plaintiff's insurer would pay for legal representation. Because of that incomplete advice the plaintiff chose to represent himself, lost the trial and had to pay damages to third parties.[152]

A contract of engagement did not exist between the solicitor and the plaintiff and therefore contractual liability was excluded. Nevertheless, the legal practitioner was found liable in tort by negligently giving incomplete advice. Applying the 'threefold test' to the facts it becomes clear that the solicitor owed a duty to give careful and complete advice even though the plaintiff was not the solicitor's client. First, the solicitor's incomplete advice could cause foreseeable damage, especially a purely economic one, to the recipient of the advice. Secondly, the solicitor also assumed some responsibility by deciding to give advice. He could have refused to advise Mr. Crossan at all but since he did not do so he put himself in a position to use reasonable skill and care.[153] The solicitor's assumption of responsibility and the recipient's reliance upon the advice were sufficient for a relationship of proximity. Thirdly, it was 'fair, just and reasonable' to impose liability upon the solicitor since he was obliged to have indemnity insurance against the risk of negligence claims. Public policy considerations such as the redistribution of money via insurance systems sometimes influence judges in determining what is fair. All requirements of the threefold approach were satisfied and therefore the solicitor was under a duty to give careful and complete advice. He was in breach of that duty since a 'reasonably competent practitioner' would have mentioned the possibility of insurance coverage for legal costs. Causation seems to be established: with the solicitor's complete advice the plaintiff would have taken professional representation and would not have lost the trial. This of course has to be assumed on the basis of a hypothetical trial. Since all the elements of a negligence claim were present, the solicitor was found liable in tort for pure economic loss.

2 *Tortious Duty to a Third Party Beneficiary*

In *Hill v Van Erp*[154] a solicitor negligently advised the husband of a potential beneficiary to sign a will as witness. With this misinformation the solicitor failed to com-

[151] (1989) 5 Professional Negligence 103 ('*Crossan*').
[152] See ibid 103-05.
[153] See Nicholson, above n 109, 7.
[154] (1997) 142 ALR 687.

ply with a statutory provision of the Queensland *Succession Act 1982* with the consequence of the disposition of property as stated in the will being null and void. The potential beneficiary did not receive his legacy and thus sued the solicitor for negligence.

The principal issue in this case was whether a solicitor should owe a duty of care to a beneficiary of the solicitor's client. It was a question of whether there was sufficient proximity between these parties as to impose a duty of care upon the solicitor. The High Court of Australia by a majority of five to one found that the solicitor owed a duty of care and was in breach of this duty.[155] Consequently the court awarded damages for pure economic loss suffered by the beneficiary as she missed out on her legacy. According to the proximity doctrine which Australian courts have favoured since the decision of *Hedley Byrne*, the two main indicators for proximity—assumption of responsibility and reliance—were absent.[156] The respondent could not rely on anything which the solicitor did or said since they never had any contact whatsoever with each other. For the same reason the majority of the Justices (except for Dawson J[157]) could not see how the solicitor should have assumed some responsibility towards the beneficiary.[158] An assumption of responsibility would have been fictitious but its absence was not regarded as an obstacle for establishing a duty of care since *Hedley Byrne* was only seen as one type of case where pure economic loss was recoverable but that case did not rule out the possibility of other types of cases.[159] The ingredients of a relationship of proximity can be manifold and need not necessarily comprise an assumption of responsibility. The majority of the Justices found a relationship of proximity between the solicitor and the beneficiary under the will but their justifications varied.

According to Brennan CJ several factors contributed to a finding of proximity:[160] Negligence on the part of the solicitor will cause a reasonably foreseeable damage to the intended beneficiary. A duty of care would not create indeterminate liability since only intended but disappointed beneficiaries could qualify as plaintiffs. A tortious duty owed to the beneficiary corresponds with the solicitor's contractual duty to the testatrix. Brennan CJ was the only Justice who did not invoke the concept of proximity.

In the opinion of Dawson J the solicitor assumed responsibility towards the beneficiary by accepting the testatrix's instructions.[161] He further advanced reasons of

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[155] Ibid.
[156] Swanton and McDonald, above n 141, 825.
[157] See *Hill v Van Erp* (1997) 142 ALR 687, 705 (Dawson J). See also Swanton and McDonald, above n 141, 826.
[158] See *Hill v Van Erp* (1997) 142 ALR 687, 695 (Brennan CJ), 716 (Gaudron J), 717 (McHugh J), 741 (Gummow J). See also Swanton and McDonald, above n 141, 825-6.
[159] See *Hill v Van Erp* (1997) 142 ALR 687, 693 (Brennan CJ).
[160] Ibid 691, 694 (Brennan CJ). See also Riley, above n 150, 4.
[161] See *Hill v Van Erp* (1997) 142 ALR 687, 705 (Dawson J). See also Swanton and McDonald, above n 141, 826; Riley, above n 150, 5.

public policy favouring a duty of care: society places 'general reliance'[162] on solicitors for the execution of wills and in the present case justice demanded a remedy.

Gaudron J stressed the importance of the solicitor's position of control because it depended upon the solicitor's proper performance of services whether or not a beneficiary would acquire his or her legacy.[163] The element of control created a relationship of proximity.

Only McHugh J dissented in *Hill v Van Erp*. Although he conceded that the present case did not involve the problem of indeterminate liability[164] he did raise alarm bells. Obviously he feared that this case could set a precedent for further extensions of professional liability because 'the analogous treatment of analogous situations was inevitable.'[165] Ideally the disappointed beneficiary should have a direct claim against the unintended beneficiary.[166] Despite this powerful dissenting judgment, it has to be kept in mind that the recovery of pure economic loss by a disappointed beneficiary is in a very special and rare category of cases with no possibility of indeterminate liability.

It is interesting to compare the House of Lord's decision in the case of *White v Jones* which had similar facts, as solicitors failed to alter a will before the testator died thus leaving two intended beneficiaries empty-handed. The House of Lords held that the solicitor assumed responsibility towards his client to ensure the preparation of the will and that this assumption of responsibility towards the client 'should be held in law to extend to the intended beneficiary'.[167] Assumption of responsibility as a key principle of *Hedley Byrne* was taken one step further in *White v Jones*. Despite the fact that the beneficiaries had no prior contact with the solicitor and therefore could not rely on his statements, the House of Lords accepted a duty of care based on this extension of the *Hedley Byrne* principle.[168] *White v Jones* is a good example of how the law develops incrementally by analogy to existing categories of cases.

Are the House of Lord's extended assumption of responsibility and the Australian High Court's proximity concept good and doctrinally clear reasons to recognise a duty of care? Arguably 'yes', but the impetus for the outcome of these cases was to be found in considerations of equity and justice.[169] During a testator's lifetime the latter has a contractual right of proper performance against the solicitor but after the testator's death nobody can take legal action against the negligent solicitor unless

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[162] See *Hill v Van Erp* (1997) 142 ALR 687, 706 (Dawson J). See also *White v Jones* [1995] 1 All ER 691, 718 (Lord Browne-Wilkinson) cited in *Hill v Jones* (1997) 142 ALR 687, 713 (Gaudron J).
[163] See *Hill v Van Erp* (1997) 142 ALR 687, 716-17 (Gaudron J). See also Riley, above n 150, 7.
[164] See *Hill v Van Erp* (1997) 142 ALR 687, 730 (McHugh J). See also *White v Jones* [1995] 1 All ER 691, 712 (Lord Goff).
[165] See Swanton and McDonald, above n 141, 823.
[166] See *Hill v Van Erp* (1997) 142 ALR 687, 730 (McHugh J.). See also Swanton and McDonald, above n 141, 829.
[167] See *White v Jones* [1995] 1 All ER 691, 710 (Lord Goff), 712 (Lord Browne-Wilkinson).
[168] See Jackson and Powell, above n 101, 26.
[169] See *White v Jones* [1995] 1 All ER 691, 707 (Lord Goff).

the beneficiary is granted a remedy. These peculiar circumstances were accurately expressed by Lord Goff in *White v Jones* when quoting Megarry V-C in *Ross v Caunters*:[170] '[T]he only persons who might have a valid claim (ie, the testator and his estate) have suffered no loss, and the only person who has suffered a loss (ie, the disappointed beneficiary) has no claim.'[171] The fact that somebody performed a negligent service and nobody was to have a remedy was seen to be a serious gap in the law.[172] Someone who works negligently to the detriment of another person should not go unpunished. *Hawkins v Clayton* and *Hill v Van Erp* both show that in the Anglo-Australian jurisprudence a solicitor's duty to advise carefully as well as to perform services with due diligence and care can reach far beyond contractual obligations.

C *The Advocate's Immunity*

Advocacy is defined as the 'skill of pleading a case orally before a court.'[173] In England this can be done now by barristers as well as solicitors acting as advocates since the *Courts and Legal Services Act 1990* abolished the barristers' monopoly of advocacy in the higher courts. In those Australian states which have a fused legal profession, both solicitors and barristers can act as advocates. Historically only barristers pleaded a case before a court on behalf of a client and for as much as 200 years they enjoyed immunity against actions for negligence.[174] Today barristers, as well as solicitors acting as advocates, still benefit from this immunity which is an essential defence against a claim for professional negligence. In a certain field of work, an advocate's misstatement or negligent advice will have no legal consequences. In the following discussion, immunities applying to barristers apply equally to solicitors acting as advocates.

Originally, a barrister's immunity from a negligence claim was absolute and covered all conduct.[175] This immunity was thought to rest upon a barrister's 'incapacity to sue for fees'[176] since there was no contract between the barrister and the lay client. In *Rondel v Worsley*[177] this argument was dropped. Public policy was adopted to be the reason lying behind a barrister's immunity.[178] In that case doubt was cast on the overall immunity and the majority of the Law Lords indicated that immunity from

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[170] [1979] 3 All ER 580.
[171] Ibid 583 (Megarry V-C); quoted in *White v Jones* [1995] 1 All ER 691, 702 (Lord Goff); and in *Hill v Van Erp* (1997) 142 ALR 687, 690 (Brennan CJ), 707 (Dawson J), 719 (McHugh J).
[172] See *White v Jones* [1995] 1 All ER 691, 702 (Lord Goff).
[173] Collin, above n 1, 9.
[174] See *Rondel v Worsley* [1967] 3 All ER 993, 998 (Lord Reid). See also Jackson and Powell, above n 101, 571; Ashley Underwood and Stephen Holt, *Professional Negligence* (1981) 19.
[175] See Jackson and Powell, above n 101, 575.
[176] See *Rondel v Worsley* [1967] 3 All ER 993; *Saif Ali v Sydney Mitchell & Co* [1978] 3 All ER 1033, 1040 (Lord Diplock); *Giannarelli v Wraith* (1988) 81 ALR 417, 428 (Wilson J).
[177] [1967] 3 All ER 993.
[178] Ibid 1000 (Lord Reid), 1012 (Lord Morris), 1038 (Lord Pearson). See also P M North, '*Hedley Byrne* to *Rondel v Worsley* – II' (1968) *The New Law Journal* 149.

negligence should only exist in the course of litigious work but not for pure paper work.[179]

There are two strong public policy arguments which support a barrister's immunity. First, a barrister's immunity shall prevent re-litigation of an already settled trial. If a convicted man could sue his barrister for professional negligence and if the civil court would affirm such negligence, then the outcome of the criminal proceeding would be, at least, doubtful.[180] The civil court's decision would amount to an attack on the criminal court's jurisdiction. Secondly, the barrister's duty to the court could be impaired, if he or she must fear a claim for negligence from the client. This matter deserves some explanation. Contrary to a civil lawyer appearing in court, a barrister, '[a]s an officer of the court concerned in the administration of justice, . . . has an overriding duty to the court ... Counsel must not mislead the court, ... he must not withhold authorities or documents which may tell against his clients.'[181] This duty to a court clearly conflicts with a barrister's duties to a client 'to raise every issue, advance every argument, and ask every question [in court], however distasteful, which he thinks will help his client's case.'[182]

Since a barrister's duty to the court has got priority it is possible that counsel may cause a disadvantage to the client. Unless immunity existed, a barrister's duty to the court could be impaired by a negligence claim.

What has been cautiously mentioned in *Rondel v Worsely* was made clear in *Saif Ali v Sydney Mitchell & Co.*[183] There it was held that a barrister's immunity only extends to courtroom work and pre-trial work. Thus, there is no doubt that immunity during courtroom work is established and simple to characterise, but which conduct qualifies as pre-trial work seems to be more uncertain. In order to define the scope of a barrister's conduct constituting pre-trial work the House of Lords in *Saif Ali* adopted a test which was first introduced in New Zealand. This is that immunity will protect a barrister 'only where the particular work is so intimately connected with the conduct of the cause in Court that it can fairly be said to be a preliminary decision affecting the way that cause is to be conducted when it comes to a hearing.'[184] This means that any conduct outside the court—be it acts or advice—which is so closely related to the conduct in court that it strongly influences the latter comes within the immunity. For example, if a barrister negligently advises to plead guilty to a criminal charge,[185] although evidence would allow an acquittal, then he

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[179] See *Rondel v Worsley* [1967] 3 All ER 993, 1000-1 (Lord Reid), 1036 (Lord Upjohn), 1041 (Lord Pearson). See also North, above n 178, 148.
[180] See *Rondel v Worsley* [1967] 3 All ER 993, 1000 (Lord Reid).
[181] Ibid 998. See also *Giannarelli v Wraith* (1988) 81 ALR 417, 421 (Mason CJ).
[182] See *Rondel v Worsley* [1967] 3 All ER 993, 998 (Lord Reid).
[183] [1978] 3 All ER 1033 ('*Saif Ali*').
[184] See *Rees v Sinclair* [1974] 1 NZLR 180, 187 (McCarthy P); quoted in *Saif Ali* [1978] 3 All ER 1033, 1039 (Lord Wilberforce), 1046 (Lord Salmon); and in *Giannarelli v Wraith* (1988) 81 ALR 417, 424 (Mason CJ).
[185] See *Somasundaram v M Julius Melchior & Co* [1988] 1 WLR 1394, 1403.

cannot be sued. What qualifies as pre-trial work and what does not still has to be defined by the courts which apply the above test.

In Australia the position as to a barrister's immunity from suit is similar. In *Giannarelli v Wraith*[186] the majority of High Court Justices founded a barrister's immunity on public policy grounds[187] very similar to those in *Rondel v Worsley*. First, without immunity, negligence claims against barristers would mean that the original trials had to be re-litigated and this could cause a serious loss of confidence in the legal system if the outcome of the two proceedings were contradictory. Secondly, barristers are officers of the court and in this position they are responsible for the administration of justice. They owe an overriding duty to the court which may cause some disadvantage to their clients. Without immunity a barrister could act for the sole advantage of his client in order to avoid a negligence claim but then would cease to act as an independent judicial advisor which the courts rely on. As for the extent of the immunity, reference was made to the test of *Rees v Sinclair*.[188]

In the context of non-litigious work, a barrister's liability for negligence does not differ from any other professional person who has special skills and competencies.[189] If counsel does mere advisory work outside the court, she or he will be liable for negligent advice to a client based on the special relationship concept of *Hedley Byrne* because a barrister knows that his or her opinion is relied upon and for the client it is very reasonable to do so.[190]

IV Conclusion

Much has been said and written about comparative law and its goals and methods. Some argue that comparative law should contribute to the development of internal, ie national law,[191] others reflect a rather pessimistic view by asserting that comparative law is 'the law of non-transferability of law'.[192] Whatever the benefits of comparative law may be, a comparative method enables us to grasp the essentials of our own legal system[193] by which one might get a more critical perspective. This is exactly what dawned on me, an Austrian, when studying the common law's conception of torts. I realised the benefits of a clearly structured and codified civil law but on the other hand appreciated common law's fascinating adaptability to new social circumstances. In this sense the comparative study was a revealing experience.

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[186] (1988) 81 ALR 417.
[187] Ibid 421-2 (Mason CJ), 433 (Wilson J).
[188] See *Rees v Sinclair* [1974] 1 NZLR 180, 187 (McCarthy P). The test was cited by both Mason CJ and Brennan J in *Giannarelli v Wraith* (1988) 81 ALR 417, 424 and 439.
[189] See Jackson and Powell, above n 101, 571.
[190] See North, above n 178, 149.
[191] See Bernhard Großfeld, *Macht und Ohnmacht der Rechtsvergleichung* (1984) 77.
[192] See ibid 127 citing Hiller.
[193] Ibid 30.

Lord Macmillan in *Donoghue v Stevenson* stated that '[t]he categories of negligence are never closed.'[194] What he wanted to express was that in English common law there is an unlimited number of duties of care. Nobody ever knew and will know how many duties of care there were and will be. Each duty of care will be carved out by the courts in an uncertain future. It is the Law Lords who have to respond to the changes of time and society and finally the social necessity for a certain duty of care. Therefore, in whatever direction the common law will steer, it will adapt itself to new challenges. Common law is *dynamic*. It is under constant change. The advantage of this is that new legal problems can be solved with newly created principles and rules. Tort law, especially, provides an excellent 'training field'[195] for the existence of a legal rule. On the other hand this high degree of flexibility has some negative side-effects, mainly that common law sometimes resembles a chaos of rules and principles. At least this is the impression a jurist from a civil law country might get. Because of common law's susceptibility to change there is often a multitude of divergent court decisions which are only justified by the peculiarity of their own facts. Legal principles might have been overruled, amended, newly created. Especially in tort law, a lot of cases have their own formula of how to establish a duty of care.

Contrast this with the differently structured civil law system of Austria. The general civil law has been systematically codified in 1811 and has not much changed since then. Most significant amendments occurred in the years 1914-1916 and in the 1970s. Still, civil law is—if compared with common law—*static*. Adverse effects of social changes are absorbed either by new legislation or by a slightly different interpretation of existing statutes but not by the judicial creation of law. The *General Civil Code* as a clearly structured work contains legal principles in a more or less precise language.

Common law is pragmatic and problem-orientated,[196] and this has led to some inconsistencies in the law. Methodologically, common law jurists develop a general rule from the particularities of a single case, well exemplified by a case such as *Hedley Byrne v Heller*.

The legal culture of civil law countries is characterised by its inclination for dogmatic precision. New principles must fit into the existing body of law. The major method of legal thinking is to deduce a rule from generalisms, as can be seen in the general clause system of the Austrian Civil Code.[197]

The pragmatic approach of the common law is one of the reasons for the judiciary's strong position. Judges of the highest judicial institution sit in juridical think tanks and create general law by solving legal disputes. This fact explains why writings of

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[194] *Donoghue v Stevenson* [1932] AC 562, 639 (Lord Macmillan).
[195] See Efstathios K Banakas, 'Injuria in the New Anglo-American Law of Negligence' in Walter de Gruyter (ed), *Festschrift Für Erich Steffen Zum* (1995) 65.
[196] Weber, *Wirtschaft und Gesellschaft*, quoted in Konrad Zweigert and Hein Kötz, *Einführung in die Rechtsvergleichung* (1996) 190.
[197] Ibid.

jurists only play a relatively minor role in common law systems. The opposite is true of civil law countries. In Austria the opinion of renowned scholars often carries much weight and frequently the Supreme Court refers to their propositions in its decisions.

In addition to the observations above as to general differences between the two systems, there are four more specific points of divergence. First, and most strikingly, is the profession's separation into solicitors and barristers in England and, to a limited extent, Australia. The Austrian 'Rechtsanwalt' combines the work of both.

Secondly, the Austrian lawyer can turn down a brief but once it is accepted, he or she will be contractually liable towards the client. A solicitor can also decide whether or not to be retained but in case the service is negligent the solicitor will incur contractual as well as tortious liability to the client. Neither a solicitor nor an Austrian 'Rechtsanwalt' enjoy immunity from a negligence claim.

On the other hand, in Anglo-Australian systems, a barrister cannot be sued in contract but only in tort. The barrister's liability for negligence is limited to paper work and opinions since there is full immunity for courtroom-work and pre-trial work. A barrister is bound to accept any case. It is also one of the special features of a common law system that an advocate—be it a barrister or solicitor—has an overriding duty to the court. She or he is therefore part of the judiciary—which can lead to serious conflicts with his other role as a party's representative. A barrister is more like an 'objective narrator to the court' rather than a loyal legal representative. Contrast this with an Austrian lawyer who is obliged by law to represent his party's rights with loyalty and eagerness[198] and who is independent from the courts.[199] Of course, the role of the judge in civil law jurisdictions does, to some extent, balance the barrister's duty in common law jurisdictions.

Thirdly, in a common law system legal practitioners need to know a complex variety of cases in order to succeed in a legal dispute. An Austrian lawyer also has to know the important Supreme Court decisions but case law plays a minor role compared to a common law system. Instead a lawyer more often has to construe statutes and regulations. As for the required standard of care there seems to be no difference between the Austrian and English/Australian jurisdictions. A lawyer is expected to exercise special skill and care. Although common practise is decisive in both systems, the courts finally determine this objective standard of care.

Fourthly, there is a lawyer's liability towards third parties. In Austria, the UK and Australia, a disappointed beneficiary under a will can claim damages against a lawyer. However, the way this result is achieved differs. Austrian law reflects its preference for the contractual approach. A disappointed beneficiary can claim to be within the protective effect of the contract concluded between the lawyer and the testator. This contract is interpreted as one which has a protective effect for third parties. With a quasi-contractual claim the legatee can recover for pure economic

[198] See RAO, above n 3, art 9, [1].
[199] Ibid, art 33, [1].

loss. In Anglo-Australian law there is neither a principle equivalent to the Austrian 'contract for the benefit of a third party' nor something similar to a 'contract with protective effect for third parties.' The explanation for the lack of any *ius quaesitum tertio* in English common law is to be found in the doctrines of consideration and privity of contract.[200] Due to the rigidity of Anglo-Australian contract law the Law Lords had to be creative. They resorted to tort law which was used to fill the gap.

Although the law is a fascinating structure which helps us to satisfy our longing for justice and enables us to organise human behaviour in such a way that we can live together with as much peace and well-being as seems possible we should not forget that the law is only as good as those who make it and that justice is fraught with intrinsic difficulties. In this respect, the words of the 17th century mathematician Pascal could not be bettered: 'the only thing which is certain is: that according to pure rationality nothing is just per se, everything tumbles with time.'[201]

[200] See *White v Jones* [1995] 1 All ER 691, 705, 708 (Lord Goff).
[201] Pascal, *Pensées*, Fragment 294.