SUE THE BA. . . RRISTER: 2005

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In order to find a lawyer negligent in the conduct of litigation, the conduct complained of must be egregious and not just an error in judgment. The standard of care must be judged in relation to the state of knowledge that existed at the time of the alleged negligent act and not with the benefit of hindsight.[2]

Introduction

The modern exposition of barristers' negligence was set out by Krever, J. in *Demarco v. Ungaro*:[3]

> It has not now, and should not be, public policy in Ontario to confer exclusively on lawyers engaged in Court work an immunity possessed by no other professional person.... In the light of recent developments in the law of professional negligence and the rising incidents of "malpractice" actions against physicians (and especially surgeons who may be thought to be to physicians what barristers are to solicitors), I do not believe that enlightened, non-legally trained members of the community would agree with me if I were to hold that the public interest requires litigation lawyers to be immune from actions for negligence.... Indeed, I find it difficult to believe that a decision made by a lawyer in the conduct of a case will be held to be negligence as opposed to a mere error of judgement. But

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[1] A British barrister's immunity from civil suit was justified on policy grounds in *Rondell v. Worsley*, [1967] 3 All ER 993 (HL), recently reversed in *Hall v. Simonds* (2000), HLJ No. 43, but not without caution. A barrister has never been immune from suit in Canada because of the joint profession of barrister and solicitor: *Leslie v. Ball* (1863), 22 UCQB 512; *Wade v. Ball* (1870), 20 UCCP 302.

[2] *GF v. Reardon*, [2004] OJ No. 434 (Ont. SCJ) per Jarvis J. ["*Folland* (Jarvis J.)"]. This definition of the standard of care owed by a lawyer conducting litigation enjoys wide support. See *Bertucci v. Marchioni* (2001), OJ No. 2198 (SCJ); *Bhagat v. Raby (Trustee of)*: [2000] OJ No. 1126 (SCJ) - both of which were relied upon by Jarvis J. See as well Campion and Dimmer, *Professional Liability In Canada*, Toronto, Carswell, 1994 at p. 7-41 and the authorities in footnotes 264 and 265, looseleaf revision, 2003.

[3] (1979) 21 OR (2d) 673 at 693.

> there may be cases in which the error is so egregious that a Court will conclude that it is negligence.

The issue of the quality of care expected of a lawyer conducting a trial on behalf of a client was canvassed recently by the Ontario Court of Appeal in *Folland et al v. Reardon*.[4] The plaintiff, Folland, was convicted of sexual assault and sentenced to five years imprisonment. After serving three years, Folland was released on bail pending his appeal which turned on the admission of fresh evidence. The appeal succeeded, the conviction was set aside and a new trial was ordered.[5] When the Crown elected not to retry him, Folland sued his lawyer alleging negligence, breach of contract and breach of fiduciary duty in the defence of the sexual assault charge.

The attack on the lawyer, Reardon, focussed on three issues: (i) his failure to obtain DNA testing of a third party who admitted committing the assault; (ii) his cross-examination of the complainant and (iii) his examination-in-chief of the accused.[6] Reardon succeeded on a summary judgment motion before Jarvis J. to have the action struck out. The Ontario Court of Appeal, however, permitted the action to proceed to trial. In its decision, the Court withdrew from the generally accepted "egregious" standard for barristers' liability and applied the standard of ordinary negligence.

The Criminal Case[7]

The victim, Folland and another male (Harris) were painting the victim's apartment on 22 November 1993 and drinking beer. In the early evening they purchased a "mickey" of vodka and, at the same time, the accused stole a 40-ounce bottle of vodka from the liquor store. They returned to the apartment and continued painting and drinking. At about 1:00 am on 23 November 1993, the victim removed her glasses and went to bed wearing a T-shirt, bra and pink underwear. Sometime later she awoke to find a man having sexual intercourse with her whom she identified as Folland. The police were called. Harris told them that he had raped the victim. Nonetheless, the police charged Folland based on the victim's identification.[8] The

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[4] 2005 Can LII 1403 (Ont. C. A.), ["*Folland* (Doherty J.A.)"]. The decision also reviewed the 'but for' test for causation and the merits of a 'lost chance' claim.

[5] *R v. Folland* (1999), 43 O.R. (3d) 290 (CA) ["*Folland* (Rosenberg J.A.)"]

[6] *Folland* (Doherty J.A.), at para. 23.

[7] An extensive review of the facts is found in the decision of the Ontario Court of Appeal on the appeal in the criminal case, *Folland* (Rosenberg J.A.) at p. 293.

[8] There was other evidence implicating the accused at the trial: for example, (a) the victim testified she overheard the accused say to Harris: "I don't know why you're fucking lying for me, you don't have to lie, I did it, I had a good time, I think I'll do it again." (b) At the police station three hours later and while still intoxicated, the accused/plaintiff was asked if he knew why he had been arrested; he replied "I'm a rapist".

victim was examined at the hospital. No evidence of ejaculation was found in her vagina. The police did find a pair of men's underwear in the victim's bed which she said had not been there in the morning preceding the assault. At the trial, the DNA evidence established that Folland was not the source of the semen stain on the male underwear.

On the appeal the accused sought to admit fresh DNA evidence which matched the semen on the underwear to Harris. The Crown opposed the application arguing a lack of due diligence by the defence. The Court of Appeal allowed the appeal and ordered a new trial; the Court did not acquit because the evidence was not conclusive in light of the prior intimate relationship between the victim and Harris.

The Civil Action

On receipt of the statement of claim in the malpractice action, the lawyer brought a motion for summary judgment arguing, *inter alia*,[9] that there was no genuine issue for trial. In response, Folland filed an affidavit by Alan Gold, described by Doherty J.A. as "a well known and respected specialist in criminal litigation."[10] In that affidavit, Mr. Gold "opined" that the 'prime deficiency' in the criminal defence lawyer's conduct was "his failure to secure DNA testing of Mr. Harris prior to the trial to show that Mr. Harris was the source of the unknown semen on the [male] underwear found in the complainant's bed".[11] Furthermore Mr. Gold said that the lawyer's conduct fell below the standard required of a competent counsel when "he tested the complainant's eye sight during cross-examination at the trial despite the fact that she demonstrated that her vision was more than adequate under the same line of questioning at the preliminary inquiry".[12] Finally, there was the issue of the theft of the 40-ounce bottle of vodka and how this fact might affect the accused's credibility before the jury. Gold considered that Reardon failed to meet the requisite standard of care because the examination in chief created an impeachment opportunity in cross-examination by the Crown which was seized upon by the trial judge when instructing the jury on the issue of credibility.

The judge on the summary judgment motion held that while the lawyer's representation may not have been perfect, there was "no evidence of egregious errors by him".[13] On that basis, and on the alternative failure of the plaintiff to establish cau-

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[9] In addition, the action was challenged as an abuse of process, *res judicata* and issue estoppel.

[10] *Folland* (Doherty J.A.), at para. 23.

[11] *Ibid.*

[12] *Ibid.*, at para. 24.

[13] *Folland* (Jarvis, J.), at para. 26.

sation, the action was dismissed as there were no genuine issues for trial. Folland appealed to the Court of Appeal. Doherty J.A., for a unanimous court found that the motion judge "applied the wrong standard of care";[14] the reference by the motion judge "to 'egregious errors' and 'the clearest of cases' tells me that he erroneously demanded something more than a departure from the standard of a reasonably competent lawyer defending a criminal case."[15]

In reaching his conclusion Doherty J.A. considers the jurisprudence applying the 'egregious' test and finds the failure to hold courtroom lawyers to the common reasonableness standard marks them as different from other professionals. Noting the different standard of care expected of a solicitor (the reasonableness standard) from that applicable to a barrister (the egregious standard), which "would be difficult to make in some situations,"[16] Doherty J.A. concludes:[17]

> I see no justification for departing from the reasonableness standard. The standard has proven to be sufficiently flexible and fact-sensitive to be effectively applied to a myriad of situations in which allegations of negligence arise out of the delicate exercise of judgment by professionals. Without diminishing the difficulty of many judgments that counsel must make in the course of litigation, the judgment calls made by lawyers are no more difficult than those made by other professionals. The decisions of other professionals are routinely subjected to a reasonableness standard in negligence lawsuits. I see no reason why lawyers should not be subjected to the same standard: *Major v. Buchann* (1975), 9 OR (2d) 491 at 510 (HC).

Analysis

With respect, there may be very good reason for treating courtroom lawyers differently than other professionals such as doctors, engineers and accountants. In relation to those professionals, there is (at least to some extent) a generally accepted objective science underlying their field of endeavour. No seasoned courtroom lawyer would suggest for a moment that there are commonly accepted methods of conducting a trial. Much depends upon the particular lawyer's appreciation of the particular

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[14] *Folland* (Doherty J.A.), at para. 46.

[15] *Ibid.*, at para. 45.

[16] *Ibid.*, at para. 42.

[17] *Ibid.*, at para. 41.

[18] The many textbooks on Advocacy support this view:

(1) "All lawyers understand that there is no "right way" to try a case." *Modern Trial Advocacy*, Steven Lubet, Canadian Edition, Sheila Block and Cynthia Tape, Editors, (NITA, 1995) page xxvii;

circumstances at play - facts, opposing counsel, witness, judge, jury - at the particular time and place. Indeed, it is fair to say that no two experienced lawyers would run a trial - from the development of the theory of the case to examining and cross-examining of witnesses - in the same way.[18]

While it may be said that the acquisition of fundamental trial skills and, to some extent the preparation for trial, reflects a certain methodology, the minute to minute conduct of the trial itself means many spur-of-the-moment decisions which depend upon a multitude of factors at that precise instant in time. The jurisprudence prior to the recent decision of the Ontario Court of Appeal in *Folland*, and even in that decision itself, acknowledges the hurley-burley of the courtroom. It is common

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(2) [...Advocacy] requires histrionic gifts, that it gains by a sense of music and by the dramatic sense, and that it requires as much of the art of a dialectician as a man can achieve, and as much of the art of the rhetorician as he can keep under control. It undoubtedly requires the logical faculty and a sense of design. It calls for control of temper and emotion. It is then in truth an art." ....

But he is an actor who creates the part he plays. He must select the words that make his lines. He must be the thought they express and the arrangement of the argument they convey. He must be ready in a moment to alter, to cut and to recreate, to suit the sudden and unforeseeable events of the day's hearing, and these changes of front he must make without their being apparent to anyone. *Duty and Art In Advocacy*, Sir Malcolm Hilbery, Stevens and Sons, London, 1951, pages 25 and 27.

(4) *"Advocacy as an Art*

Advocacy is not a science, like law, but an art, and therefore, to a great extent, it is a highly individual attainment. Like every other art - and like knowledge of law, for that matter - it cannot be developed with *some* initial aptitude, and it cannot be mastered without practical experience of handling cases. On the other hand, again like every other art, it does not depend on aptitude and experience alone, but it has its rules of technique. These rules of technique can be explained and learnt. They are like the principle of perspective and the use of colours in painting, or scales and arpeggios in music, or the making of incisions and the insertion of stitches in surgery.

The difference between the science of law and the art of advocacy can be simply stated. So far as law is concerned, once its principles are known and understood, there is an end to the matter. To know the technique of advocacy, however, it is only the starting point: it has to be handled and used in varied circumstances, and according to one's own individual style. *The Technique of Advocacy*, The John H. Munkman, Stevens and Sons Limited, London: 1951, page 4.

(5) "It requires the greatest ingenuity; a habit of logical thought; clearness of perception in general; infinite patience and self control; power to read men's minds intuitively, to judge their characters by their faces, to appreciate their motives; ability to act with force and precision; a masterful knowledge of the subject matter itself; an extreme caution; and, above all, the *instinct to discover the weak point* in the witness under examination. One has to deal with prodigious variety of witnesses testifying under an infinite number of differing circumstances. It involves all shades and complexions of human morals, human passions, and human intelligence. It is a mental dual between counsel and witness. *The Art of Cross-Examination*, Francis L. Wellman, McMillan Publishing Company, Collier Books Edition, 1936, page 28.

(6) "The definitive book about trial work hasn't been written yet - and in that observation I include this book. Neither is it probable that the *locus classicus* about the art of trial ever will or can be written because the proper way to try every case (or even any case) has not yet been established. That is at least partly because there is no universal case. The facts change from trial to trial and so do the witness,

ground that lawyers are not held to a standard of perfection, their decisions at the trial should not be viewed with the benefit of hindsight, and errors of judgment cannot be characterized as negligence.[19] It was, under the former jurisprudence, only when the error was "egregious" (i.e. remarkable, extraordinary, flagrant) that the lawyer was liable in negligence; a standard which in practice proved relatively easy to apply.

After *Folland* the question becomes more ephemeral: does an error of judgment reflect a decision not expected of a "reasonably competence defence counsel"?[20] Of course, the "egregious" standard can be incorporated into the notion of reasonableness. To make this very point, Doherty J.A. referred to *Blackburn v. Lampkin*[21] and quoted from *Farcas v. Rashwan*[22] where Boyko J. said:

> To succeed at trial, the respondents would have to demonstrate that the conduct of Farcas in representing Rashwan at her trial on assault charges fell below the conduct expected of a reasonably competent lawyer. The case law indicates that an error in judgment does not constitute negligence. A lawyer's error must be egregious to rise to the level of negligence.[23]

It is the final sentence in this extract that Doherty J.A. found to be the real problem. It suggests that the barrister's professional responsibility is less than that expected of other professionals. When we judge ourselves we are not as vigorous, or the law is not as rigorous; i.e. trial counsel are held to a more forgiving standard,[24] when compared to the standard applied to other professionals, including solicitors.[25] As

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counsel and tribunal. In rare instances when an appeal court orders a retrial, it is not uncommon for there to be variations even from trial to trial of the *same* case. There are practically limitless combinations of judge, counsel and cause, and the introduction of juries raises the level of complexity that would make even an astronomer envious. Further, the law does not hold still and people have good days and bad days, brilliant days and days when they should not go to court or anywhere else." *The Art of Trial*, Robert B. White, Q.C., Canada Law Book Inc. Aurora, Ont., 1993, page vii.

(7) "Finally, great advocates must be possessed of personal qualities that give them the fortitude to proceed as they deem best upon their judgment alone, and not to waver in the face of what may appear to be initial ridicule and rebuke from bench or bar." *On Trial, advocacy skills law and practice* Geoffrey D. E. Adair (2nd ed.) LexisNexis Canada Inc., Markham, Ont., 2004, page 1.

[19] *Blackburn v. Lapkin* (1996), 28 OR (3d) 292 at 309: *Folland* (Doherty J.A.) at para. 44.

[20] *Folland* (Doherty J.A.), at para. 43.

[21] (1996), 28 OR (3d) 292 at 309.

[22] (July 26, 2001) 99/CU/175869 (Ont SCJ), aff'd [2002] OJ No. 42 (CA).

[23] *Folland* (Doherty J.A.), at para. 6.

[24] *Folland* (Doherty J.A.), at para. 35.

[25] See the reference to *Hagblom v. Henderson* (2003), 232 Sask. R. 81 at para. 52-72 and *Folland* (Doherty J.A.) at para. 40.

[26] *Folland* (Doherty J.A.), at para. 43.

Doherty J.A. says:[26]

> Courts should avoid using phrases like 'egregious error' and 'clearest of cases' when describing the circumstances in which negligence actions will succeed against lawyers. These phrases invite the application of an inappropriately low standard of care to the conduct of lawyers. At the very best, these phrases create the appearance that when an allegation of negligence is made against a lawyer, judges (former lawyers) will subject those claims to less vigorous scrutiny than claims made against others: see *Kitchen v. Royal Air Forces Association et al.*, [1958] 2 All ER 241 at 245 (CA).

He then rejects the "egregious" standard expressly: "Plaintiffs who sue their lawyers should not be required to show their claims of negligence are any stronger than any other claims of negligence before they are allowed to proceed to trial".[27] Hence the "new" and "higher" standard of reasonableness required of a lawyer in the conduct of a trial.

How then is this new standard to be applied? Despite the fact that the Court of Appeal in the criminal case admitted the fresh DNA evidence over the Crown's due diligence argument, Doherty J.A. held that the failure to obtain Harris' DNA before the trial constituted, in the context of the summary judgment motion, a genuine issue for trial given the expert affidavit evidence. The other allegations of negligence relating to the cross-examination of the victim and the examination-in-chief of the accused were summarily addressed and again sustained as issues for trial:

> Mr. Gold's report constituted some evidence that Reardon did not meet the appropriate standard in these two respects. It was not for the motion judge to decide the ultimate question of whether Reardon did or did not meet this standard, even if the two errors identified by Mr. Gold were established. The motion judge's implied qualitative analysis of these alleged shortcomings, while consistent with the trial judge's role, is inconsistent with the limited function assigned to him on a motion for summary judgment. The motion judge was wrong in holding there was no triable issue as to whether Reardon was negligent.[28]

A more detailed examination is warranted. Firstly, the responsibility of the motion judge on a summary judgment application is to take a "hard look" at the evidence to determine if there is a genuine issue for trial.[29] Notwithstanding a dispute on facts or

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[27] *Ibid.*, at para. 45.

[28] *Ibid.*, at para. 56.

[29] *Irving Ungerman Ltd. v. Gallanis* (1991), 4 OR (3d) 545 at 555 51; *Rozin v. Ilitchev* (2003), 66 OR (3d) 410 (CA).

a question of credibility, a defendant will succeed on a summary judgment motion in striking the plaintiff's claim if, assuming the resolution of those issues in favour of the plaintiff, the plaintiff's case still fails to establish genuine issues to be tried. Indeed, this was the argument made on behalf of the lawyer before the motion judge and accepted by him, i.e. "none of the alleged deficiencies ... rose to the level of negligence."[30] It is precisely this kind of analysis that is required of the motion judge on a summary judgment application.[31]

Bearing in mind the admonition against the use of hindsight and the fact that lawyers are not to be held to a standard of perfection, did the allegations of misconduct against Reardon amount to negligence?

1. DNA Evidence

Was the lawyer at fault for failing to obtain Harris' DNA in advance of the trial in order that it might be tested against the semen stained underwear found in the victim's bed following the assault? Harris had admitted committing the assault to the police on the night of the offence and he had confessed to his friends and relatives of the accused; the lawyer "repeatedly pressed crown counsel, in writing, to have the police conduct a fuller investigation of Harris' role in the affair and suggested to Crown counsel that he should call Harris as a witness at the trial so the full story could be told before the jury".[32] Further the lawyer reasonably expected, leading up to the trial, that Harris would admit to having had intercourse with the victim on the night of the assault.[33] Attempts to subpoena Harris for the trial were unsuccessful. At that point it was apparent that he was no longer cooperative with the defence and might deny the assault if he testified. As noted on the appeal, this would necessitate having Harris declared adverse or hostile and confronting him with his apparent inconsistent statements.[34] Finally, it should be remembered that Harris and the victim had been intimate previously and thus this DNA evidence would not be determinative. These facts alone would defeat any suggestion that the lawyer was negligent, on any standard, in failing to obtain Harris' DNA. But, in addition, the judge on the summary judgment motion had before him - as a fact - the finding of Rosenberg J.A. on the fresh evidence application in the Court of Appeal. In that context, the issue is whether trial counsel had exercised due diligence. The Crown raised this argument.

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[30] *Folland* (Doherty J.A.), at paras. 3-4.

[31] *Pizza Pizza Limited v. Gillispie* (1990), 75 OR (2d) 225 (Gen. Div.).

[32] *Folland* (Rosenberg J.A.), at pp. 300- 301.

[33] *Ibid.*, at p. 300.

[34] *Folland* (Jarvis J), at para. 9.

The Court of Appeal admitted the fresh evidence of Harris' DNA and stated:

> The failure to take extraordinary measures to try to obtain bodily substances from Harris was not unreasonable.[35]

It is difficult to imagine a more explicit statement on the issue of the defence lawyer's alleged lack of due care. In the civil appeal, however, Doherty J.A. was not convinced.[36] He concluded that the reasoning of Rosenberg J.A. in the criminal appeal established (i) that it was reasonable for the lawyer to have relied on Harris' cooperation prior to the trial stage; (ii) that the Crown's lack of cooperation with the defence to pursue Harris' DNA precluded it from arguing a lack of due diligence and (iii) even assuming a lack of due diligence, the failure would not foreclose the admission of DNA evidence on the appeal. As a result, Doherty J.A. concluded:

> None of these observations are relevant to Folland's allegation that Reardon was negligent in not taking steps to obtain the DNA evidence prior to proceeding to trial. In my view, nothing in the comments of Rosenberg J.A. should be taken as negating or diminishing the opinion advanced by Mr. Gold.[37]

It is clear from a reading of the decision in the criminal appeal that the conduct of the lawyer was scrutinized under the light of due diligence and the lawyer was not found wanting. With respect, for Doherty J.A. and a differently constituted panel of the Court of Appeal, to suggest on the civil appeal that the criminal appeal context is distinguishable and that the remarks made in that decision on the propriety of the lawyer's conduct are not relevant reminds one of that high authority Humpty Dumpty: "When I use a word, it means just what I chose it to mean, neither more, nor less."[38] At the very least, it is a distinction without a difference.

2. Cross-Examination of the Complainant

Before going to bed, the victim removed her glasses. Following the assault she said "that she told the man to get out of her room. As the man exited, she could see him because of the light coming into her darkened room through the open door. The complainant identified Folland as her assailant."[39] Her eyesight was the significant com-

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[35] *Folland* (Rosenberg J.A.), at p. 301.

[36] *Folland* (Doherty J.A.), at para. 52.

[37] *Ibid.*, at para. 53.

[38] L. Carroll, *Alice in Wonderland (Through the Looking-Glass)* (Harpers & Brothers: New York and London, 1902.) at 117 and see *Liversidge v. Sir John Anderson*, [1942] A.C. 206 (H.L.), per Lord Atkin at 245.

[39] *Ibid.*, at para. 12.

ly, not. At the annual Sopinka Trial Moot and the regional competitions leading up to it, the same case is tried at least 20 times by law students, carefully advised, across the country. The experience indicates that at the regional level and at the national competition in Ottawa, no two trials are ever conducted the same way and it is impossible to say that any one of these presentations failed to meet the standard of a reasonably competent counsel. This, of course, illustrates – as Jarvis J. recognized[46] – "the different styles of advocacy and strategic decisions of trial counsel".

However the standard of care is articulated, differences in advocacy must be accommodated. It is not a question of holding the barrister to a lower standard, rather the examination of his or her conduct of the trial must reflect a very real appreciation of the disparate nature of the task performed. Perhaps a sound beginning is found in the words of Borins J. (as he then was) in *Blackburn*:[47]

> The authorities support the conclusion that the standard of care required of a lawyer is not one of perfection. An error of judgment alone does not constitute negligence. A lawyer who acts in good faith, and in an honest belief that his or her advice in the conduct of a client's litigation are well founded, and in the best interest of the client, is not answerable for an error.

The difficulty lies in the next step. Perfection is not expected and errors of judgment are tolerated, but the issue is: when does the error in judgment amount to negligence? When is it unreasonable? Or, more particularly and clearly, when it is outside the wide parameters of acceptable performance of a barrister? When it is remarkable? extraordinary? Flagrant? ... In a word reflecting a genuine understanding of the context, *egregious*?

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[46] *Folland* (Jarvis J.), at para. 35.

[47] *Supra* note 19, at p. 309.