The Standard of Care Expected of a Lawyer Specializing in Medical Malpractice or Significant Injury Claims

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Clearly, medical malpractice is a complex and highly specialized area of the law. So what is the standard of care to which lawyers specializing in the litigation of medical malpractice or significant injury claims are held? Somewhat surprisingly, an examination of the relevant Canadian authorities suggests this question has received relatively little specific judicial consideration, and what judicial consideration there is has been in the context of other legal specialties.

This article thus seeks to identify and summarize the general trends within the Canadian cases pertaining to the standard of care expected of lawyers specializing in medical malpractice or significant injury personal injury litigation. In order to provide additional perspective, the article also references the prevailing approach to the standard of care for specialized lawyers in Australia and England.

THE GENERAL STANDARD OF CARE TO WHICH LAWYERS ARE HELD

The leading case in relation to the general standard of care owed by a lawyer to a client is ***Central Trust Co. v. Rafuse***, [1986] SCJ No. 52, [1986] 2 SCR 147 (SCC). There, the Supreme Court of Canada framed that standard as follows:

> "A solicitor is required to bring reasonable care, skill and knowledge to the performance of the professional service which he has undertaken: see Hett v. Pun Pong (1890) 18 S.C.R. 290 at p. 292. The requisite standard of care has been variously referred to as that of the reasonably competent solicitor, the ordinary competent solicitor and the ordinary prudent solicitor. See Mahoney, "Lawyers Negligence Standard of Care", 63 Can. Bar Rev. 221 (1985). …"[1]

As well, in the seminal case of ***Tiffin Holdings Ltd. v. Millican***, [1964] AJ No. 103, 49 DLR (2d) 216 (SCTD); rev'd, [1965] AJ No. 105, 53 DLR (2d) 674 (SCAD); rev'd and

trial judgment restored, [1967] SCJ No. 10, [1967] SCR 183 (SCC), Riley J offered the following, more detailed description of the overarching standard of care expected of all lawyers:

> "Lawyers are bound to exercise a reasonable degree of care, skill and knowledge in all legal business they undertake. Their liability arises out of a contract.
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> The standard of care and skill which can be demanded from a lawyer is that of a reasonably competent and diligent solicitor.
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> It is not enough to prove that the lawyer has made an error of judgment or shown ignorance of some particular part of the law; it must be shown that the error or ignorance was such that an ordinarily competent lawyer would not have made or shown it.
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> It is extremely difficult to define the exact limits by which the skill and diligence which a lawyer undertakes to furnish in the conduct of the case is bounded, or to trace precisely the dividing line between the reasonable skill and diligence which appears to satisfy his undertaking. It is a question of degree, and there is a borderland within which it is difficult to say whether a breach of duty has or has not been committed....
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> The obligations of a lawyer are, I think, the following:
>
> (1) To be skillful and careful;
> (2) To advise his client on all matters relevant to his retainer, so far as may be reasonably necessary;
> (3) To protect the interests of his client;
> (4) To carry out his instructions by all proper means;
> (5) To consult with his client on all questions of doubt which do not fall within the express or implied discretion left him;
> (6) To keep his client informed to such an extent as may be reasonably necessary, according to the same criteria."[2]

Generally speaking therefore, the standard of care expected of a lawyer is reasonable competence and diligence and the test for whether this standard has been met is an objective one asking: Would a reasonably informed and competent practitioner have done the same? This standard is universal: no forgiveness is given to the inexperienced practitioner, who is held to the same objective standard.[3]

In this regard however, it is important to recognize that an important limit on a lawyer's standard of care is that it flows from the contract between the lawyer and client. The scope of a lawyer's duty thus derives from the *purpose* for which that lawyer was retained. Consequently, "[i]n judging the standard of care exercised by a solicitor caution must be taken to ensure that the standard is judged within the confines of the retainer."[4]

THE STANDARD OF CARE EXPECTED OF A LAWYER SPECIALIZING IN A PARTICULAR AREA OF PRACTICE: THE "REASONABLY COMPETENT SPECIALIST"

An examination of the relevant Canadian authorities suggests there is a distinction between the standard of care required of the reasonably competent general practitioner and that which might be expected of a specialist. Thus, for a lawyer who holds him/herself out as having particular expertise in a given area of the law, a higher standard of care may apply.[5]

According to ***Halsbury's Laws of Canada***,

> "**Specialists and level of experience.** There is Canadian authority to the effect that there should be a difference between the standard required of a general practitioner and that demanded of a specialist, as this division is being formally recognized in the Canadian legal profession. Although more is expected of specialists, less is not expected from inexperienced beginners, who are obligated to live up to the standard of the ordinary, reasonable solicitor from the first day after their call to the bar.
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> . . .
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> **Specialist Standard.** Canadian courts appear willing to recognize a distinction between the specialist and generalist practitioner in defining the standard of care. Thus, a specialist standard is likely to be found against a lawyer who: (1) has been certified by a law society as a specialist; (2) holds himself or herself out as a specialist; and (3) charges a rate commensurate with practising in a specialized area of law. **Most important, a lawyer who undertakes a legal matter requiring a certain degree of expertise must be judged by the same standard as that expected of the reasonably competent and diligent lawyer specializing in the area of law in question**."[6] (Emphasis added)

Both the standard of care to be exercised by a lawyer in the conduct of the litigation process and this higher, "specialist" standard of care were discussed in the recent Alberta decision of ***Malton v. Attia***, 2015 ABQB 135, 611 AR 200 (QB); rev'd on other grounds, 2016 ABCA 130, 35 Alta. LR (6th) 27 (CA).

There, in the context of the plaintiff's claim against a lawyer and his law firm for negligence in conducting a construction law trial on their behalf, Madam Justice Moen reviewed the lawyer's standard of care and the law that has emerged from the cases as to the competent conduct of a litigation file. She opined:

> "The standard of care for a lawyer's conduct of a lawsuit is no different from that which is generally expected: reasonable care, skill and knowledge. I believe it is nevertheless helpful to collect a number of basic criteria identified by courts for competent legal services that operate throughout the litigation process:
>
> 1. to be skillful and careful;
> 2. to advise a client in all matters relevant to his or her retainer, so far as may be reasonably necessary;
> 3. to protect the interests of the client;
> 4. to carry out the client's instructions by all proper means;
> 5. to consult with the client on all questions of doubt which do not fall within the express or implied discretion left to the lawyer;
> 6. to keep the client informed to such an extent as may be reasonably necessary on issues which do not fall within the express or implied discretion left to the lawyer;
> 7. to warn the client of possible risks of action or inaction;
> 8. to call appropriate witnesses, and, in particular calling an expert if the circumstances so require;
> 9. to explain the nature, effect, and significance of documents;
> 10. to investigate potential issues and uncertain points of law;
> 11. to proceed or advise only on complete instructions adequate to achieve the desired result;
> 12. to act expeditiously where there is time sensitivity; and
> 13. to protect the confidentiality of the clients' files. These general facets of competent legal practice are supplemented by the codified standards of practice required by the Law Society of Alberta. …" [7]

Moen J then discussed the standard of care required of a litigation lawyer *holding him/herself out as a specialist*, saying:

> "Where a lawyer holds him or herself out as having particular expertise then that may affect the relevant standard of care. Very few cases comment on a lawyer's standard of care being any more than that of a reasonably competent and diligent lawyer. There are two Ontario cases which purport to place a higher standard of care on lawyers who hold themselves out as specialists [*Confederation Life Insurance Co v. Shepherd, McKenzie, Plaxton, Little and Jenkins*, [1992] O.J. No. 2595, 29 RPR (2d) 271 (Gen Div); *Peppiat v Nicol*, [1998] O.J. No. 3370, 71 OTC 321 (Gen Div)]. Those cases have been followed and where the Ontario Court of Appeal has had an opportunity to opine on this matter, it has not. There are no cases outside of Ontario. While the Law Society of Alberta permits lawyers to restrict their practice and its current Code of Conduct authorizes the Law Society to certify lawyers as specialists it is wrong for a lawyer to say he is specialized without the proper certification."[8]

Interestingly, in the ***Malton*** case, Moen J ultimately declined to hold the defendant lawyer to the standard of a specialist because there was no evidence before her that the Law Society had or had not certified the lawyer as a specialist. However, she did accept the clients' evidence that the lawyer had held himself out to them as being an expert in the law relating to construction and litigation concerning construction and noted that, during the course of the trial, the lawyer had described how much he knew about construction by virtue of a large client and the fact that he had been involved in construction.

Thus while Madam Justice Moen suggested that she would have expected the lawyer's conduct of the plaintiffs' file to achieve a higher standard of care than an ordinary litigation lawyer, she nonetheless opted to hold him to the standard of a reasonably competent and diligent civil litigation lawyer.[9]

The "reasonably competent specialist" standard was also referred by Stinson J in the Ontario family law case of ***Ristimaki v. Cooper***, [2004] OJ No. 2699 (SCJ), rev'd on other grounds, [2006] OJ No. 1559, 79 OR (3d) 648 (CA), as follows:

> "Where a solicitor holds himself or herself out as having particular expertise in a given area of the law, a higher standard applies. The requisite standard is not that of a reasonably competent solicitor or ordinary prudent solicitor, but that of a reasonably competent expert in the designated field: see Confederation Life Insurance Co. v. Shepherd, McKenzie, Plaxton, Little and Jenkins (1992), 29

> R.P.R. (2d) 271 (Ont. Gen. Div.), varied on other grounds, (1996), 88 O.A.C. 398."[10]

In that case, in light of the fact that the lawyer in question was a specialist in family law, that was the standard against which his conduct was assessed.

Another characterization of the specialist standard appears in the judgment of Madam Justice Young, in the New Brunswick case of ***Baniuk v. Filliter***, 2010 NBQB 272, 367 NBR (2d) 61 (QB). There, the plaintiffs claimed that the defendant solicitors were negligent in failing to communicate offers of settlement to them and in failing to properly advise them on income tax issues.

After ruling that the defendant solicitors had not failed to communicate offers of settlement to the plaintiffs, Madam Justice Young addressed the plaintiffs' contention that the solicitors had failed to properly advise of taxation issues arising from the sale of shares in issue, and had failed to advise their client to seek tax advice from an independent source.

After reviewing the leading cases outlining the general standard of care to which lawyers are held, Young J opined as follows:

> "**Generally however, a solicitor will be held to a higher standard of care where he or she has held themselves out as a specialist. It has been advocated that even though a formal division is not recognized in the Canadian legal profession, there should be a difference between the standard of care required of a generalist and that demanded of a specialist.** (*Elcano Acceptance Ltd. v. Richmond, Richmond, Stambler & Mills* (1985), 31 C.C.L.T. 201 (Ont. H.C.), at p. 213 per Smith, J.; Allen M. Linden, "Canadian Tort Law" 4th ed. (Butterworths, 1988) at p. 137.)"[11] (Emphasis added)

The Justice then went on to review the terms of the parties' retainer, concluding that the fact that the defendant Mockler held himself out as a solicitor knowledgeable in the field of taxation was persuasive evidence that he considered that the proffering of income tax advice to the plaintiff fell within the scope of his retainer. However, she opted not to hold the defendant Mockler to the standard of care of an income tax law specialist.

Rather, her analysis of liability employed the standard of care of a reasonably competent practitioner, and inquired as to what such practitioner would have done in the circumstances having regard to the standards normally adopted in his profession.[12]

Notably, Madam Justice Young's judgment also addressed the question of whether the standard of care should be lowered due to the fact that the client had an accounting background and some knowledge of taxation matters. She stated:

> "Mr. Baniuk was an experienced businessman who was a registered industrial accountant. He testified that his training in 1984 for this designation did not include courses on income tax. He personally prepared and filed both he and his wife's personal income tax returns. Following the sale of his shares, he claimed a capital gains deduction, the disallowance of which gave rise in part, to this claim.
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> I find that Mr. Baniuk's knowledge of income tax was not so comprehensive as to have enabled him to understand what has been described in the evidence as the relatively sophisticated sections of the *Income Tax Act* dealing with capital gains deductions, nor would it have been such as to have enabled him to comprehend the difference in tax treatment between a preferred dividend which results from the redemption of shares by a corporation, which is treated as income and the capital gain he would have realized had the shareholders purchased his shares which would have been eligible for exemption. Mr. Baniuk's knowledge of income tax was not in my opinion sufficient to result in the lowering of the appropriate standard of care owed by the defendants to him."[13]

In the end result therefore, after a review of the evidence as to the parties' interactions and discussions on the income tax aspects of the share purchase in issue, Young J ruled that the defendant solicitors' omissions in this regard indicated a failure to meet the applicable standard of care and constituted negligence which resulted in damages. This conclusion was upheld on appeal.[14]

Finally, in the very recent Ontario case of ***Pilotte v. Gilbert, Wright & Kirby, Barristers & Solicitors***, 2016 ONSC 494, 27 CCLT (4th) 1 (SCJ), the court discussed whether the lawyer under scrutiny had acted as a reasonable and competent practitioner specializing in insurance and personal injury law.

The facts of the case indicated that the plaintiff Pilotte was seriously injured in a motor vehicle accident in Jamaica in 1993. Significantly though, Pilotte's insurance policy contained a territorial restriction limiting the insurer's liability to accidents occurring in North America.

In 1994, about 21 months after the accident, Pilotte contacted the defendant lawyer, an expert in insurance and personal injury law, to ascertain whether insurance coverage existed to assist her with her ongoing treatment and expenses. At the time of the accident, there was no jurisprudence or legal authority which raised any question as to the legality, validity, or enforceability of the territorial restriction in the policy. The lawyer thus concluded that any claim for benefits under the plaintiff's policy would therefore be unsuccessful since the accident had occurred in Jamaica.

While the lawyer claimed he explained to Pilotte what her rights would have been under the policy had the accident occurred in North America, and indicated that he had advised the plaintiff that in this case any claim against the insurer would be unsuccessful, she denied that he did so. In any event, the lawyer did not apply for accident benefits under the policy within the two-year limitation period.

Later, in light of new and unexpected developments in the case law in 1996 and 1997, the lawyer contacted Pilotte to advise her of these developments. He also made an application to the insurer on her behalf for accident benefits. Ultimately though, the claim was refused as being out of time.

The case was thus one of a well-recognized lawyer practising in the insurance field and missing a limitation period within which his client might have been entitled to accident benefits to a maximum of one million dollars. The court was thus required to ascertain whether the lawyer breached the standard of care expected of a reasonably competent and diligent professional at the time and place in question.

In ruling that the lawyer had not breached this standard of care, Chapnik J provided extensive commentary on the law of solicitor's negligence and the standard of care relevant in such an action.[15]

More importantly, the Justice discussed the standard of care to which a specialist (as opposed to a general practitioner) ought to be held, saying:

> "**The standard of care of a reasonably competent solicitor can be affected by the terms of the retainer agreement and any representations made to the client concerning the lawyer's expertise. For example, a specialist in a certain area of law will be held to a higher standard than a generalist.** See *Elcano Acceptance Ltd. v. Richmond, Richmond, Stambler & Mills*, 1985 CarswellOnt 445 (Ont. H.C.), at para. 37; reversed on other grounds, (1986), 55 O.R. (2d) 56 (Ont. C.A.); *Confederation Life Insurance Co. v. Shepherd, McKenzie, Plaxton, Little & Jenkins* (1992), 29 R.P.R. (2d) 271 (Ont. Gen. Div. [Commercial List]), at para. 105, varied on other grounds (1996), 88 O.A.C. 398 (Ont. C.A.)."[16] (Emphasis added)

Generally speaking therefore, the relatively limited body of Canadian jurisprudence in this respect seems to suggest that in certain situations, the courts are willing to consider and apply a higher standard of care to those lawyers specialized in a particular area of the law and who either hold themselves out as specialists or experts, or have received Law Society accreditation as such.

Thus, where a lawyer identifies him/herself as having a particular expertise in medical malpractice law, it is possible that s/he may be held to the standard of care of a reasonably competent and diligent lawyer specializing in that area of law.

EXPERT EVIDENCE ON THE STANDARD OF CARE REQUIRED IN CASES ALLEGING LAWYER NEGLIGENCE

Given that the issue in a lawyer's negligence case is whether the lawyer fell below the standard of a reasonably competent lawyer (or, in the case of a medical malpractice specialist, a reasonably competent lawyer engaged in the conduct of a medical malpractice claim), the case law suggests that it may be necessary for the plaintiff to call

expert evidence to prove how such a lawyer would carry out such a retainer at the time and place in question.

For example, in ***Krawchuk v. Scherbak***, 2011 ONCA 352, 82 CCLT (3d) 179 (CA), in the context of an allegation of negligence against a real estate broker, the court commented that while the authorities indicated that "as a general rule, it will not be possible to determine professional negligence in a given situation without the benefit of expert evidence,"[17] there were two exceptions to this general rule:

> "**The first exception applies to cases in which it is possible to reliably determine the standard of care without the assistance of expert evidence.** As explained by Southin J.A. at para. 44 of [*Zink v. Adrian* (2005), 2005 BCCA 93, 37 B.C.L.R. (4th) 389 (C.A.)], this will be the case only where the court is faced with "nontechnical matters or those of which an ordinary person may be expected to have knowledge."
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> . . .
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> **The second exception applies to cases in which the impugned actions of the defendant are so egregious that it is obvious that his or her conduct has fallen short of the standard of care, even without knowing precisely the parameters of that standard**: see *Cosway v. Boorman's Investment Co.*, 2008 BCSC 1482, at para. 35. As can be seen, this second exception involves circumstances where negligence can be determined without first identifying the parameters of the standard of care rather than identifying a standard of care without the assistance of expert evidence."[18]

In ***Malton v. Attia***, 2013 ABQB 642, 573 AR 200 (QB), however, Moen J provided a comprehensive review of the law across Canada and concluded that judges of superior courts are generally in a position to determine such cases without the benefit of expert opinion evidence, except where there are gaps in a judge's knowledge such that expert evidence becomes necessary to assist the court in making a determination.[19]

Later, in ***Tran v. Kerr***, 2014 ABCA 350, 584 AR 306 (CA), in the context of a negligence claim against a lawyer who represented multiple parties in what turned out to be a fraudulent real estate transaction, the Alberta Court of Appeal provided the following overview of the bar's practice in this regard, saying:

> "When a suit is brought for professional malpractice (either in the form of a breach of contract claim, or for negligence) it is customary, and usually necessary, for there to be expert evidence on the standard of care: *Krawchuk v Scherbak*, 2011 ONCA 352, at para. 130, 106 OR (3d) 598; *Kopp v Halford*, 2013 SKQB 128 at para. 102, 418 Sask R 1. There are cases where the breach of the standard of care will be apparent without expert evidence: *ter Neuzen v Korn*, [1995] 3 SCR 674 at paras. 44, 51-2. There is also possibly a narrow exception with respect to malpractice by lawyers. Since all judges were once lawyers, and are familiar with the practice of law and the legal system generally, there are cases where a judge can take judicial notice of the standard of care expected of lawyers."[20]

And most recently, in the British Columbia case of ***Jose v. Johnston***, 2016 BCSC 202, [2016] BCJ No. 224 (SC), Mr. Justice Thompson expressed the view that "expert evidence is not invariably required in solicitor's negligence actions."[21]

Suffice it to say therefore, that at least in Alberta, where a suit is brought for professional malpractice, it is customary, and usually necessary, for expert evidence on the standard of care to be adduced. It may be however, that where legal malpractice is alleged, the judge in the particular case can be argued to be familiar enough with the practice of law and the legal system that s/he can simply be urged to take judicial notice of the standard of care expected of lawyers.

THE AUSTRALIAN AND ENGLISH APPROACHES TO THE SPECIALIST'S STANDARD OF CARE

As the Canadian jurisprudence on the "specialist" standard of care - particularly as it relates to lawyers possessing a specialization in medical malpractice - appears still to be developing, the Australian and English characterizations of this standard may provide some additional context and perspective.

As a starting point, reference may be had to the following summary of the Australian approach to the general standard of care expected by a lawyer provided by Harrison J in the Australian decision of ***Pappas v. Brezniak Neil Smith & Co.***, [2001] NSWSC 726, a case involving lawyer negligence:

> "In ***Arthur J S Hall & Co v. Simons*** [2002] 1 AC 615, [2000] 3 All ER 673 (TCC), Lord Hobhouse set out the general standard to be applied at page 737:
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> > "'The standard of care in negligence actions against an advocate is the same as that applicable to any other skilled professional who has to work in an environment where decisions and exercises of judgment have to be made in often difficult and time constrained circumstances. It requires a Plaintiff to show that the error was one which no reasonably competent member of the relevant profession would have made.'

As in Canada therefore, the required standard or measure of care, skill and diligence generally required of all Australian lawyers appears to be that of a qualified and ordinarily competent and careful solicitor (ie. "a prudent solicitor").

In ***Yates Property Corporation v. Boland*** (1998), 157 ALR 30, the court discussed the standard of care required of a solicitor in respect of duties within that solicitor's retainer. "Generally," the court said, "the standard is expressed to be that of a reasonably competent and diligent solicitor." However, their Honours went on to note the recent trend towards specialization, stating at pages 50-51:

> "When a client retains a firm that is or professes to be specially experienced in a discrete branch of the law that client is entitled to expect that the standard of care with which his retainer will be performed is consistent with the expertise that the firm has or professes to have. Such a client would no doubt be justifiably dismayed if he was told that the firm that he has retained because of its experience is only required to act in accordance with the standards laid down for a solicitor who has only a general or even only a little knowledge of the law that is to be applied to the facts of the client's case.
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> Thus, the content of the standard of care that is to be owed by a solicitor to his client under the general law should not be confined to the standard of care and skill that is possessed by a person of ordinary competence exercising the same calling. The standard should reflect the fact that within any one calling practitioners have or profess to have varying degrees of expertise. The standard of care and skill required of such a person must bear some relationship to that expertise. *In the case of a solicitor who is an expert in a particular branch of the law the requirement should be that the solicitor must carry out his retainer as would a reasonably competent solicitor who is an expert in that particular area of the law*. That is the manner in which the content of the duty of care that is owed by a specialist medical

> practitioner has been described. See Rogers v Whitaker (1992) 175 CLR 479 at 483 where the High Court described the standard as 'that of the ordinary skilled person exercising and professing to have that special skill, in this case the skill of an ophthalmic surgeon specialising in corneal and anterior segment surgery.' There is no reason in principle why the standard of care of a solicitor having special skill should not be regarded in the same way." (Emphasis in original)

Moreover, as noted by the court in the unreported Australian judgment of ***Goddard Elliott (firm) v. Fritsch***, 2012 VSC 87, BC201201151 (Lexis),

> "The High Court has not yet directly determined that the standard of care which is expected of a barrister or solicitor practicing in a specialized area is the application of the skill or competence which an ordinary practitioner in that area would bring to bear. However, the underlying rationale of the general standard of care which has been enunciated by that court would suggest that this is the correct approach. I would refer to the general statement of the scope of the standard of care in *Rogers* which I have already cited. According to that statement, the standard of care which is expected of "a person with some special skill or competence" is that of "the ordinary person exercising and professing to have that special skill" or competence. It would therefore seem appropriate for a professional having or professing to have a degree of specialized skill or competence within a particular area to be judged according to the standard of what would reasonably be expected of an ordinary practitioner with that specialized skill and competence. If we return to first principles, that conclusion would seem to be demanded. If the practitioner has held themselves out as possessing that degree of expertise, this would usually be the basis of their engagement by (in contract) and relationship with (in tort) the client. The application of the standard in this manner would appear logically to follow from those incidents."[22]

That the standard of care expected of a specialist accredited by one of the Australian Law Societies is that of a "'specially competent practitioner' in the core skills and practical capabilities in their selected area of practice, as assessed against the spectrum of capability of all practitioners in that area of practice. …" is further confirmed within the literature of those Law Societies.[23]

Turning to the English case law, it appears that the standard to be applied is that the barrister must conduct himself in his professional work with the competence (care and skill) of a barrister of ordinary skill who is competent to handle that type of and weight of

work and a breach of that duty occurs when the error is one which no reasonably competent member of the profession possessing those skills should have made.

Thus, where English lawyers hold themselves out as having expertise in a particular area of law, then, as described above (in both the Australian and certain Canadian scenarios) they raise the bar for their own level of responsibility and a client is entitled to expect from his/her lawyer the standard of care consistent with the expertise that that lawyer or firm professes to have.[24]

The overarching standard of care imposed on English lawyers (barristers and solicitors) was aptly described by Hamblen J in the recent case of ***Wright v. Lewis Silkin LLP***, [2015] EWHC 1897 (QB):

> "A helpful summary of the standard of skill and care required of a specialist solicitor such as Mr Burd is set out in *Jackson & Powell on Professional Liability* (7th edition) at 2 - 131 **"The standard of skill and care which a professional person is required to exercise is that degree of skill and care which is ordinarily exercised by reasonably competent members of the profession, who have the same rank and profess the same specialisation (if any) as the Defendant"**.
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> . . .
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> To similar effect to the summary set out in *Jackson & Powell* is *Eckersley v Binnie & Partners* (1998) 18 Con LR 1 or (1955-1995) PNLR 348 at p 382 per Bingham LJ "**The law requires of a professional man that he live up in practice to the standard of the ordinary skilled man exercising and professing to have his special professional skill.**""[25] (Emphasis added)

In that case, a former company CEO brought a negligence claim against his former solicitors who had acted on his behalf in relation to contractual dealings with Indian companies in regard to a sports venture.

In ruling that the lawyer was not in breach of duty in failing to consider or advise on securing effective means of enforcement of his client's obligations under the severance

guarantee, but was in breach of duty in failing to include an exclusive jurisdiction clause with provision for service of proceedings in the United Kingdom, Hamblen J:

(i) confirmed the above-described standard of care,
(ii) emphasized that the lawyer's 'special professional skill' was as a specialist in employment law, including multi-national, cross-border work,
(iii) noted that the precise content of the duty of care depended on the circumstances of the case and the nature and scope of any retainer, and
(iv) stressed that the breaches of duty had to be causative of some loss.

The requisite "specialist" standard of care was also referenced by Field J in ***Williams v. Leatherdale and another***, [2008] EWHC 2574 (QB), a decision in which a divorce client argued (amongst other things) that her solicitor, one specialized in the financial aspects of divorce, was negligent in failing to appraise her of the possible implications of a particular case before the House of Lords, including the fact that it was likely that the case would lead to a change in the law in her favour. The client also contended that the solicitor's failure to advise her of the pending judgment prevented her from making an informed decision whether to wait until after the case had been decided before settling her claim.

With respect to the standard of care to which the "specialist" solicitor was to be held, Field J stated:

> "The relevant standard of care is that expected of a competent barrister of Mr. Francis' seniority in 2000 who holds himself as being an expert in ancillary relief. …"[26]

With particular reference to the skill and competence expected of a firm *specializing in personal injury*, the court in ***Boyle v. Thompsons Solicitors***, [2012] EWHC 36 (QB), a case involving the legal representation received by the plaintiff by her solicitors in representing her in an appeal to the Criminal Injuries Compensation Authority, opined as follows:

"I derive the following propositions from the authorities:

i) The court "must be aware of imposing upon solicitors . . . duties which go beyond the scope of what they are required and undertake to do . . . the test is what the reasonably competent practitioner would do having regard to the standards normally adopted in his profession": see *Midland Bank v Hett, Stubbs and Kemp* [1979] Ch 384, [1978] 3 All ER 571, [1978] 3 WLR 167, per Oliver J at p 403.

ii) This test must be applied by reference to the reasonably competent practitioner specialising in whatever areas of law he or she holds himself out as a specialist. Thus, in *Matrix Securities Ltd v Theodore Goddard* [1998] STC 1, [1997] NLJR 1847, [1998] PNLR 290, a case concerned with tax advice, the standard was that to be expected of a reasonably competent firm of solicitors with a specialist tax department, whereas in *Balamoan v Holden & Co* [1999] NLJ Prac 898, where the Defendant was a solicitor in a small country town instructed by a legally aided client in a comparatively small claim for nuisance, the Court of Appeal held that it was inappropriate to apply too rigorous a standard of care.

iii) On matters of procedure, the solicitor is not negligent if he fails to display exceptional ingenuity in matters of tactics or procedure. What is required of a solicitor is reasonable competence and reasonable familiarity with the procedures of the courts in which he practices: see *Hayward v Wellers* [1976] QB 446, [1976] 1 All ER 300, [1976] 2 WLR 101 (CA).

iv) Errors of judgment, as opposed to errors that no reasonably well informed and competent member of the profession could have made, will not give rise to liability: see *Saif Ali v Sydney Mitchell* [1980] AC 198 at 218, [1978] 3 All ER 1033, [1978] 3 WLR 849. To put it another way, where the solicitor is in a dilemma, not of his own making, and is forced to choose between two or more evils, the court will be slow to castigate his actual decision as negligent (see para 11-103 of "*Professional Liability"* by Jackson and Powell, 7th edition).

v) Hindsight may prove advice wrong, but "hindsight is no touchstone of negligence": see *Argyll v Beuselinck* [1972] 2 Lloyd′s Rep 172.

In the present case, the Defendant is a specialist personal injury firm. It is I think agreed that the standard of care to be expected from them was that of the reasonably competent <u>specialist</u> PI firm pursuing a CICA claim."[27] (Emphasis added)

As regards English barristers and solicitors with specialized practices therefore, it appears relatively well settled that they are duty bound to exercise all such skill and care as reasonably competent barristers or solicitors professing the same specialist expertise.

And finally, a point well made by Arnold J in the case of ***Mason and others v. Mills & Reeve (a firm)***, [2011] STC 1177; [2011] EWHC 410 (Ch), is that where the retainer involves different areas of specialization, the English courts suggest that an aspect of the duty of care involves coordination between the specialists.[28]

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[1] ***Central Trust Co v. Rafuse***, [1986] SCJ No. 52, [1986] 2 SCR 147, QL at para. 58

[2] ***Tiffin Holdings Ltd. v. Millican***, [1964] A.J. No. 103, 49 D.L.R. (2d) 216 (SCTD); rev'd, [1965] A.J. No. 105, 53 D.L.R. (2d) 674 (SCAD); rev'd and trial judgment restored, [1967] S.C.J. No. 10, [1967] S.C.R. 183 (SCC), at paras. 7-12 (SCTD); see also ***Hummelle v. Advani***, 2014 ABQB 619, [2014] A.J. No. 1123 (QB), at para 26

[3] ***Marques v. Alexander***, [2000] O.J. No. 1629 (SCJ), QL at para. 40; leave to appeal refused [2000] O.J. No. 1987 (Div Ct), QL

[4] ***Malton v. Attia***, 2015 ABQB 135, 4 WWR 260 (QB), QL at para. 65, citing ***Spence v. Bell***, 1982 ABCA 282, 39 AR 239 (CA), QL at para. 23

[5] ***Confederation Life Insurance Co. v. Shepherd McKenzie, Plaxton, Little and Jenkins***, [1992] O.J. No. 2595, 29 R.P.R. (2d) 271 (Gen Div), var'd on other grounds, [1996] O.J. No. 177, 88 O.A.C. 398 (CA) (Gen Div)

[6] ***Halsbury's Laws of Canada* – Legal Profession**, IV.5.(2)(b), at para. HLP-236; ***Halsbury's Laws of Canada* – Negligence and Other Torts**, IV.7.(3)(a), at para. HTO-95

[7] ***Malton v. Attia***, supra note 4, QL at para. 80

[8] ***Malton v. Attia***, supra note 4, QL at para. 111

[9] ***Malton v. Attia***, *supra* note 4, QL at para. 112

[10] ***Ristimaki v. Cooper***, [2004] OJ No. 2699 (SCJ), QL at para. 95

[11] ***Baniuk v. Filliter***, 2010 NBQB 272, 367 NBR (2d) 61 (QB), QL at paras. 111-114

[12] Ibid, QL at paras. 149-151

[13] Ibid, QL at paras.143-144

[14] ***Filliter and Mockler v. Baniuk et al.***, 2011 NBCA 110, 381 NBR (2d) 352 (CA)

[15] ***Pilotte v. Gilbert, Wright & Kirby, Barristers & Solicitors***, 2016 ONSC 494 (SCJ), QL at paras. 32-40

[16] Ibid, QL at paras. 39-44

[17] ***Krawchuk v. Scherbak***, 2011 ONCA 352, 106 O.R. (3d) 598 (CA), QL at para. 132

[18] Ibid, QL at paras. 133, 135

[19] ***Malton v. Attia***, 2013 ABQB 642, 573 AR 200 (QB), QL at paras. 210-214

[20] ***Tran v. Kerr***, 2014 ABCA 350, 584 AR 306 (CA), QL at para. 21

[21] ***Jose v. Johnston***, 2016 BCSC 202, [2016] BCJ No. 224 (SC), QL at para. 61

[22] ***Goddard Elliott (firm) v. Fritsch***, 2012 VSC 87, BC201201151 (Lexis), Lexis at para. 412

[23] Law Society of New South Wales' "Specialist Accreditation Scheme - 2016 Personal Injury, Assessment Requirements," at p. 4, online at: https://www.lawsociety.com.au/cs/groups/public/documents/internetcontent/1086771.pdf ; see also, Queensland Law Society, Personal Injuries Law, Assessment Criteria 2015 – Specialist Accreditation, online at: www.qls.com.au/files/b284b80b-8003-4053-8a2e-a17400d365a1/2013_Personal_Injuries_Specialist_Accreditation_Assessment_Criteria.pdf

[24] ***Matrix Securities v. Theodore Goddard***, [1998] STC 1, [1998] PNLR 290 (Ch)

[25] ***Wright v. Lewis Silkin LLP***, [2015] EWHC 1897 (QB), LEXIS at paras. 110, 113

[26] ***Williams v. Leatherdale and another***, [2008] EWHC 2574 (QB), LEXIS, at para. 67

[27] ***Boyle v. Thompsons Solicitors***, [2012] EWHC 36 (QB), LEXIS, at paras. 54-55

[28] ***Mason and others v. Mills & Reeve (a firm)***, [2011] STC 1177, [2011] EWHC 410 (Ch), LEXIS, at para. 150