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# Disclosure and the Incurious Attorneys

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**A forum for the expression of readers' views on:**

# MORALITY IN LEGAL PRACTICE

The fourth problem presented in this section's series was in the general area of Disclosure. Following the problem solution,[1] which was limited by the question presented to the moral obligations of the defendant's attorney, reader comment indicated interest in a discussion of the moral position of the defendant employer and of the plaintiff-laborer's attorney.

In the Winter 1959 issue of THE CATHOLIC LAWYER[2] an added note framed the new issues. It is restated below with the original problem. The solution by Father William F. Cahill follows.

## *DISCLOSURE*

*A sixty-year-old immigrant laborer, admitted to premises to answer the owner's advertisement for Saturday help, fell because a step collapsed as he stepped upon it. A hitherto competent and reliable employee of the owner had known the condition of the step and had violated his employer's instructions to close immediately and repair any passage found to be unsafe.*

*The laborer sustained a dislocation of the shoulder and a laceration of the scalp which required three weeks' hospitalization. For a month after his discharge from the hospital, he could not return to his regular job.*

*The laborer, who spoke very little English, brought suit against the owner of the premises where he had fallen. The plaintiff claimed that the injury to his shoulder was of a serious and disabling nature. He also claimed that he suffered from headaches as a result of striking his head at the time of the accident.*

*Hospital records confirmed that the shoulder injury was sustained and indicated that four sutures were taken in the scalp. The plaintiff's attorneys had no medical examination made of their client. Nor did they ask for copies of the reports made by the physicians employed by the defendant.*

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[1] Cahill, *Solution of the Disclosure Problem*, 4 CATHOLIC LAWYER 254 (Summer 1958).

[2] 5 CATHOLIC LAWYER 84 (Winter 1959).

*The attorney for the defendant had the laborer examined by an orthopedic specialist, to ascertain the seriousness of the shoulder injury. In addition, but on the same occasion, examination was made by a neurologist, to meet the complaint of headaches.*

*The orthopedist confirmed the hospital report on the shoulder injury. The neurologist reported to the defendant's attorney that the plaintiff had not sustained a serious head injury and had no skull fracture, but that the laborer was suffering from an incurable, always fatal, malady of the nervous system called Parkinson's disease. The neurologist counselled that while there is now no known cure, the more painful and disabling stages of the disorder can be delayed in their onset and ameliorated by drug therapy, avoidance of anxiety and fatigue, regular exercise and light massage, and psychotherapy. The neurologist indicated that he did not personally subscribe to the theory that Parkinson's disease can be caused by trauma. Yet he cautioned the defendant's attorney that many eminent men in the field believe that trauma can cause Parkinson's disease and that there is much literature to support this view.*

*In pretrial conferences it became evident to the defendant's attorney that the laborer and his attorneys had no knowledge that the plaintiff was afflicted with Parkinson's disease, and that if the plaintiff's attorneys suspected that this condition existed, the case could not be disposed of without a protracted and expensive trial.*

*The defendant, his attorney and the doctors who made examinations in their behalf, at no time intimated to the plaintiff or his attorneys the diagnosis of Parkinson's disease. The court itself, which was instrumental in effecting the settlement, was not apprised that this diagnosis had been made since the defendant's attorney deliberately withheld the information. On the other hand, he freely turned over to the court and the plaintiff's attorneys the report of the orthopedic specialist, describing the shoulder injury only.*

*As a result of these negotiations, the case was settled between the parties without a trial. The defendant paid a sum which amply compensated the plaintiff for his shoulder injury, and the plaintiff gave a general release as to personal injuries, "whether developed or undeveloped, resulting or to result," from the accident.*

*Now, a month after the settlement was made, the defendant's attorney has come to feel that he may have a moral obligation to aid the plaintiff. Does such obligation exist, and if so, to what extent?*

## NOTE

It has been determined that the defendant's attorney is obliged, by the moral virtue of justice, (a) to compensate the loss which the laborer sustained in the settlement, which took no account of his affliction of

Parkinsonism as a probable consequence of the head injury, and (b) to prevent the harm which will come to the laborer if, while his Parkinsonism develops, he is left in ignorance of the character of his affliction.

Now it is asked:

1. Do the plaintiff-laborer's attorneys have obligations similar to those determined for the defendant's attorney?
2. Does the defendant-employer have similar obligations?
3. In so far as either of the preceding questions is answered affirmatively, what are the consequent moral relations of the parties' attorneys and the defendant-employer *inter sese?*

# DISCLOSURE AND THE INCURIOUS ATTORNEYS

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IN THE EARLIER DISCUSSION OF THIS CASE,[1] it was determined that the defendant's attorney incurred two specific moral obligations to the plaintiff laborer. He is bound to make restitution for the loss which the plaintiff suffered through the attorney's fraud in the settlement negotiations. He is obliged also to prevent the harm which will come to the laborer if, while his diseased condition worsens, the deception which the attorney practiced continues to prevent the laborer from seeking a proper medical diagnosis.

### The Defense Attorney's Duty to Make Restitution for Damages Unjustly Inflicted

All duties to make restitution for damages one causes unjustly have three essential premises. We have shown[2] that each of these premises was established by the facts of the case in their reference to the attorney's defrauding the laborer of a significant factor in his cause of action.

The attorney's active concealment of the neurologist's report in negotiating the settlement was objectively unjust, for it violated the plaintiff's strict right to have a compensation proportioned to every aspect of the claim which he released. This right arose immediately from the defendant attorney's volunteered representation that his client's offer of compensation was proportioned to all aspects of the claim known to him and his client. The report was concealed to induce execution of a release of the laborer's entire claim, while the consideration actually given for the release represented compensation for only that part of the plaintiff's claim which related to the shoulder injury.

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1 Cahill, *Solution of the Disclosure Problem,* 4 CATHOLIC LAWYER 254 (Summer 1958).

2 *Id.* at 255; see PRUMMER, HANDBOOK OF MORAL THEOLOGY §§ 270, 271 (Nolan ed. 1957).

Secondly, the attorney's act efficaciously caused the plaintiff to lose all opportunity to exercise his right to sue on the head injury aspect of his claim. Though the release may not be legally effective to bar suit claiming damages for the head injury, the existence of the general release, in the circumstances of the case, prevents the plaintiff and his attorneys from realizing and exercising this right.

Finally, we determined that the attorney acted with theological fault[3] when he concealed the neurologist's report, for he then well knew that his act was: (1) morally wrong, (2) violative of the plaintiff's strict right created by the offer of settlement, and (3) potentially efficacious to bar (in fact, if not in law) any suit claiming damages for the head injury. Therefore he acted with theological fault.

### Has the Defendant a Similar Duty of Restitution?

Now we are asked whether the defendant himself has a similar obligation to make restitution for the loss inflicted upon the laborer in the dishonest negotiation. The facts given in the statement are insufficient to base a judgment that the defendant knew what his lawyer meant to do, or that he became aware of the situation before the settlement was concluded, or, consequently, that he participated in the wrong with theological fault, knowing his lawyer's act to be immoral, unjust, and efficacious of harm to the laborer.

Yet it is obvious that if the defendant participated, with theological fault, in his attorney's immoral and injurious conduct, he has a duty of restitution exactly parallel to his lawyer's duty. Provided only that he knew the situation at the time his lawyer acted, there is no doubt that he must have participated in the lawyer's act, either by directing the lawyer to act as he did, or by advising that course of conduct, or by at least consenting that his lawyer should so act. Given that the client was aware of the situation, the lawyer could not have done what he did without the client's mandate or consent, and the client may have advised the lawyer to proceed as he did. If the client participated in any of these ways in his lawyer's act, he was a positive co-operator in that act and, as such, he is bound with the lawyer to make restitution to the plaintiff. In such a case, there is no way of assessing to the co-operators portions or shares of the harm done, for they did not harm the plaintiff in different ways or by distinct acts. Each is bound to restore the whole harm.[4]

Yet there is an order of priority between the obligations of such co-operators. In the supposition advanced above the defendant's obligation would be prior to the lawyer's. Moralists set out this order of co-operators in respect of their several duties of entire restitution: (1) the person now enjoying the benefit of the wrong, (2) the one who commanded that the wrong be done, (3) the executor of the wrong, (4) the other positive co-operators, who counselled the wrong or consented to it, or commended or defended it, or had a part in the wrongful act itself, (5) negative co-operators, who, in violation of a duty, failed to prevent the wrong or concealed it.[5] Certainly the defendant is the beneficiary of the laborer's loss. In that character, and also as mandator of the wrong (if such he were in fact), the defendant's duty is prior to his

[3] See Cahill, *Solution of the Disclosure Problem, supra* note 1, at 255.

[4] PRUMMER, *op. cit. supra* note 2, §§ 309, 310.

[5] *Id.* §§ 273, 310.

lawyer's. Thus his lawyer may delay making restitution until he is reasonably sure that his client will not do so.

Even if the defendant did not participate in his lawyer's misconduct, having been, perhaps, at that time unaware of how the negotiations were being conducted, he may still have a duty of restitution. He may have come into possession of his immunity from suit by the laborer without knowing that the immunity was unjustly procured. But he may since have come to realize that it was procured unjustly. In such case, he has been a "possessor in good faith of another's goods," and his duty to make restitution arises when he comes to know that he enjoys this immunity contrary to the laborer's rights.[6] Here, as in the situation supposed above, his duty to make restitution is prior to his lawyer's duty.

### Have the Plaintiff's Attorneys a Similar Duty of Restitution?

The attorneys for the plaintiff did not participate in the active concealment of the neurological report. They might be classed as negative co-operators in the wrongdoing of the defendant's attorney if they knew or had any reason to know that he was concealing the report, but none of the given facts indicates that they had such knowledge. Therefore, if they have a duty to make restitution to their client analogous to the duty falling upon the attorney for the defendant, their duty of restitution must have a different foundation.

The plaintiff's attorneys could have procured an independent and adequate medical examination of their client, or they could have assured themselves that the examination made by the defendant's doctors was adequate and that its full findings were made known to them, their client, and the court. Their omission to do either of these things violated the strict rights of their client.

An attorney who engages to represent a client claiming damages undertakes that the claim is at least arguable and that he will advance that claim with skill and zeal. None of the elements of a cause of action for bodily injuries can be established, either in negotiation or on trial, unless the character and scope of the plaintiff's injuries be known. To know these things is the first of all the duties of the plaintiff's attorney. Without this knowledge, he cannot decide whether the client has a cause of action, whether that action will likely succeed on trial, or what may be a proper monetary demand on trial or in negotiation for a release. Thus, without knowing well the character of the bodily injuries, the attorney cannot justly advise his client to press or to abandon the claim, much less can he assume to negotiate or to sue the claim.

This duty of knowledge does not, of course, require the attorney to press his inquiries to the theoretically possible ultimate. It binds him to use means of inquiry which are reasonably proportioned to the character of the injuries, the client's resources, and the opportunities which the circumstances of the case afford. If, when a cause is presented to him, an attorney finds himself unable to pursue the lines of inquiry thus indicated, he is morally bound to decline the employment. He is, of course, unable to pursue the necessary inquiry if he does not know and has not opportunity to learn the practical means of inquiry appropriate to the type of case presented.

Here the client alleged a head injury; the hospital record indicated scalp sutures,

[6] *Id.* § 306.

and the patient complained of headaches after discharge from the hospital. In the face of these facts, the attorneys' most elementary duty imposed the necessary task of securing a good medical examination specifically directed to the complaint of head injury. If the client, being a laborer, could not pay for such an examination, the attorney might explore the facilities of public agencies. If the defendant offered an examination, as he did in the case presented, the plaintiff's attorneys had a clear duty to assure themselves that in the examination adequate and competent attention should be given to the head complaint, and that the full and exact results of the examination should be available to them. It is, then, perfectly clear that this laborer's attorneys breached their duty to him, and violated his strict right.

That the laborer suffered real loss as a result of that breach seems equally clear from the statement of facts: "The defendant paid a sum which amply compensated the plaintiff for his shoulder injury, and the plaintiff gave a general release as to personal injuries, 'whether developed or undeveloped, resulting or to result' from the accident." In our earlier discussion, it was shown that the laborer's Parkinsonism would serve as sufficient matter for a statement of a cause of action. An assertion of a physical ill which reasonably may be related to an impact for which the defendant is or may be legally responsible states a cause of action for damages. With nothing more, the laborer had a moral right, created by the law, to come into court with evidence of the facts and argument on the question of law. That right he unknowingly abandoned, at least for practical purposes, because his lawyers advised him to sign the general release without knowledge of the facts that he had Parkinsonism and that his diseased condition may be causally related to the head impact.

It may be said that while the plaintiff's attorneys' undutiful omissions were, in themselves, sufficient to cause his harm if the settlement had been reached upon their statement of the nature of his injuries, yet the deception practiced by the defendant's attorney intervened and became the immediate cause of that harm. The proper answer to this difficulty is the principle "causa causae est causa causatae" (the cause of a cause is the cause of that cause's effect). Their undutiful omissions made it possible for the fraud to harm their client, and the prevention of any harm which might come to him by such fraud was an integral part of their duty to him. If the facts showed that they had taken any step to control the conduct and reports of the examination made by the defendant's doctors, we would have to examine two further questions: "Was the step taken a reasonably adequate performance of their duty?" and "If not, was it such part performance as might require the duty of restitution to be pro-rated between them and the defendant and his attorney?" Since they failed completely in their duty to prevent fraud, their omissions can be taken as fully efficacious of their client's harm. If they had theological fault in making these omissions, they are as fully bound to make restitution as are the defendant and his attorney. The defendant, as presently enjoying the fruits of the harm inflicted, would have the prior duty, but it would seem that the plaintiff's attorneys cannot claim that the duty of the defendant's attorney is prior to their own.

Now we come to the third premise necessary to establish that the duty of restitution has been incurred by the plain-

tiff's attorneys. It seems impossible to judge whether or not they acted with theological fault, realizing that their omissions were immoral and unjust acts, endowed with a probable potential to harm their client in the way he has been harmed in fact. This difficulty arises, of course, because the case is stated upon information given by the defendant's attorney only. For this reason, we know nothing of the actual state of mind in which the plaintiff's attorneys made their undutiful omissions. We could speculate that men of average intelligence must have acted in a guilty manner, either at the time when they were dealing with this case, or at an earlier time when they settled their policy for dealing with such cases. It is not too much to suppose that no man with a modicum of legal training could be totally unaware of the duty to inform himself of the nature of his client's cause of action. And it is not an attribution of the ultimate in perspicacity to say that he must have realized that to omit proper medical examination and report in personal injury actions must result in some clients' giving releases not adequately compensated. But to pursue the discussion upon such generalities would not be very fruitful.

### The Defense Attorney's Duty to Warn the Laborer of His Present Peril

One is bound by the virtue of justice to prevent or to stop a direct, though unintended, effect of his unjust act if that effect is now bringing or threatening to bring harm to another. In our prior discussion of this case, it was established that the attorney for the defendant acted unjustly when he made the laborer believe he has no diseased condition symptomatized by the headaches he has suffered since leaving the hospital.[7] This belief, as was seen, practically prevents the laborer from getting a diagnosis of his Parkinsonism. If the disease continues long to develop without diagnosis and treatment, its effects will be very much more painful and disabling. Therefore, it is concluded, the defendant's attorney is bound in justice to let the laborer have such knowledge of his condition as will offset the present peril created directly by the lawyer's wrongful deception.

It does not seem that the lawyer is in such ignorance of this duty that he may be subjectively guiltless if he fails to perform it. A month after the settlement was made, this lawyer realized that his past conduct may have imposed upon him some present duty to aid the laborer. It was this realization which caused him to inquire whether such duty exists and what its scope may be. He has had a reasoned answer. Unless he can find flaws in the reasoning which warrant him to reject the answer as incorrect or inconclusive, he will act immorally if he does not act according to the counsel given.

### Has the Defendant a Similar Duty to Warn the Laborer?

If the defendant was a positive co-operator, as this term was explained above, in the deception practised by his attorney, then the laborer's peril is a direct effect of an unjust act of the defendant. In such case, there is no doubt that the defendant's duty to warn the laborer is the same as his attorney's duty.

An act of the defendant, co-operating in his lawyer's fraud by mandate, counsel, or consent, would be an act efficaciously caus-

[7] Cahill, *Solution of the Disclosure Problem*, 4 CATHOLIC LAWYER 254, 257-58 (Summer 1958).

ative of the laborer's deception and his present danger. That such act's causation was not immediate, having operated through the lawyer, would not make the causation indirect. The causation is direct because the mandate, advice or consent had, in its circumstances, an inherent tendency to produce the deception and the peril.

Even if the defendant was not a guilty co-operator, because he was ignorant of his lawyer's tactics in the negotiation, the defendant has now a duty not to increase the laborer's peril. He would increase it if, in fulfilling his duty to make restitution in respect of the laborer's claim, he directly confirmed the laborer's persuasion that the headaches are not symptomatic of any disease for which he can have effective diagnosis and treatment. Justice forbids him to permit his restitution to have that effect. Charity imposes the duty to use such methods of making restitution as will not confirm the laborer's dangerous persuasion even indirectly. Charity also imposes the duty affirmatively to warn the laborer, if the defendant now knows of the laborer's peril, even though the defendant, because he knew not the character of his lawyer's tactics, was not a guilty co-operator therein.

### Have the Plaintiff's Attorneys a Similar Duty to Warn the Laborer?

Whether or not they acted with theological fault when they caused the laborer's mistaken estimate of his present condition, they are bound by justice to warn him of his danger, provided, of course, that they are now aware of the evil which threatens him.

The duty which justice imposes, to prevent or to stop the unjustly harmful direct effects of one's conduct, does not, as does the duty of restitution, postulate that the conduct was done with theological fault. The laborer's peril is a direct effect of his attorneys' omissions because their failure to deal skillfully and zealously with their client's claim had, in the circumstances, an inherent tendency to harm their client unjustly by putting him in this peril of greater suffering and disability.

### The Obligations of the Wrongdoers Inter Sese

Because the defendant himself and the attorneys for the plaintiff made no contribution to the statement upon which we have attempted to resolve the case, we cannot say confidently that these three men incurred subjective guilt or theological fault in the acts by which the plaintiff was unjustly led to release the head injury aspect of his cause of action and defrauded of compensation therefor. Since theological fault is a necessary premise of the duty of restitution for harm, we can say that these men have this duty only by supposing, without clear support from the statement of the case, that when they caused this harm they acted with knowledge that their acts or omissions were immoral, unjust to the plaintiff, and capable of causing him the harm which has eventuated. With respect to the plaintiff's attorneys, we make a further supposition: that each of them was at least a positive co-operator with the member or members of their firm who handled the plaintiff's case.

Upon these hypotheses, all three attorneys and the defendant are severally bound in justice to make entire restitution for the plaintiff's harm. The priority of obligation is clearly against the defendant, as present possessor of the fruits of injustice. None of these men has a duty of justice

to contribute to the one who actually makes restitution.

Upon the alternative hypothesis that the defendant was not a theologically guilty co-operator in the injustice, but that he now knows that he has been a "possessor in good faith of the goods of another" by reason of the immunity he enjoys as against suit by the plaintiff, the defendant is still bound to make restitution, and his obligation is prior to the obligations of the attorneys. This alternative does not change the conclusion that none of the four has a duty of contribution to any other wrongdoer.

Supposing that all four men know now of the laborer's peril, each is bound by justice to warn him of it. There is no priority here, and no right of contribution for damages incurred by one who gives the warning.

Finally, each of these duties is subject to postponement for cause, that is, by reason of physical or moral impossibility. Those causes were explained in the initial discussion.[8]

[8] *Id.* at 258, 261.

## THE LEGAL COUNSELOR

### *(Continued)*

the Divine Master and the fruit of His work of Redemption. The same ideal which inspires your daily activity on behalf of individuals will motivate the endeavors which you have undertaken on an international plane. Who can fail to see the priceless contribution which you will thus make to the consolidation of this larger community and to the maintenance of the peace desired by all men of good will? The Church, which labors with all its might to the same end, cannot but rejoice.

And so, in repeating Our wishes for your success, We implore the blessings of Almighty God on you and your families. As a token of these good wishes, We impart to you Our paternal Apostolic Blessing.