New York University
Journal of
International Law and Politics
JILP

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VOLUME 24 SUMMER 1992 NUMBER 4

Reprinted from
New York University Journal of International Law and Politics
Vol. 24, No. 4

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I. INTRODUCTION

Austria, a country with approximately seven million people, has a rather small bar. Presently about three thousand attorneys are permitted to practice there. The number of legal malpractice cases nevertheless is substantial and continuously increasing. During the first half of 1990 at least nine decisions dealing with legal malpractice issues were handed down by the Austrian Supreme Court.[1] The reasons for this development are twofold.[2] First, the number of statutes and other normative provisions has increased dramati-

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1. Judgments of the Austrian Supreme Court (Oberster Gerichtshof) [OGH]: OGH Feb. 15, 1990, 8 Ob 700/89, 1990 ANWALTSBLATT [AnwBl] 457; OGH Feb. 27, 1990, 4 Ob 607/89, 1991 AnwBl 51; OGH Mar. 8, 1990, 7 Ob 501/90, 1990 AnwBl 653; OGH Mar. 27, 1990, 5 Ob 544/90, 1990 ÖSTERREICHISCHE JURISTENZEITUNG No. 135 [ÖJZ; decisions reported in this publication are cited by number]; OGH Apr. 5, 1990, 7 Ob 13/90, 1991 AnwBl 53; OGH May 2, 1990, 1 Ob 702/89, 1991 AnwBl 50; OGH May 8, 1990, 4 Ob 512/90 (not reported); OGH May 10, 1990, 6 Ob 549/90 (not reported); OGH May 20, 1990, 1 Ob 4/90 (not reported).

In Austria not all decisions of the Supreme Court or the Courts of Appeal are published. However, a substantial number of Supreme Court decisions are published in either the official court reporter, the Entscheidungen des Österreichischen Obersten Gerichtshofes in Zivil-(und Justizverwaltungs)sachen [SZ; decisions are cited by number rather than by page], or private legal publications, such as the Anwaltsblatt or the Österreichische Juristenzeitung.

Decisions are cited by their place of publication either with the page number or with the consecutive number within this publication, the official docket number and the date. Decisions which are not published are cited with their docket number and the date and referred to as not reported. Contrary to the United States, decisions are not cited with the names of the parties.

2. *See* MADELINE-CLAIRE LEVIS, ZIVILRECHTLICHE ANWALTSHAFTPFLICHT IM SCHWEIZERISCHEN UND US-AMER. RECHT 1-3 (1980); BRIGITTE BORGMANN & KARL H. HAUG, ANWALTSHAFTUNG 90 (2d ed. 1986); FERDINAND GRAF, ANWALTSHAFTUNG 1-4 (1991).

cally.[3] Therefore, it is becoming more and more difficult for lawyers to find their way through the large number of statutes and to advise clients correctly. Second, clients are to a greater extent willing to question their attorneys' performances.[4] They are less hesitant to sue their former legal adviser and see malpractice suits as opportunities to win an already lost process.

The attorney's failure to satisfy professional standards can cause various negative consequences. Although it is likely that the client will sue for damages, there remains the possibility of a criminal prosecution and disciplinary action by the bar.[5] While disciplinary liability is of great practical importance and can result in severe repercussions for the attorney,[6] it has little impact on civil liability.[7] Criminal liability on the other hand is unlikely. For these reasons neither the criminal nor the disciplinary consequences of legal malpractice will be examined.

This Note will discuss a specific aspect of legal malpractice under Austrian law, the "hypothetical appeal."[8] At issue is the proof of damages in cases where an attorney's negligence causes the client to lose the opportunity to appeal an unfavorable court decision. A typical scenario: the client in-

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3. *See* GRAF, *supra* note 2, at 1.

4. *See* LEVIS, *supra* note 2, at 77.

5. The organization of the bar is regulated by statute. Rechtsanwaltsordnung, Gesetz vom 6. Juli 1868, Reichsgesetzblatt [RGBl] No. 96 womit eine Rechstanwaltsordnung eingeführt wird (RAO) [hereinafter RAO]. According to § 33 RAO the bar itself is authorized to take disciplinary measures against members; the procedural and substantive rules governing such measures are laid down by statute: Disziplinarstatut, Gesetz vom 1. Apr. 1872, RGBl No. 40, betreffend die Handhabung der Disziplinargewalt über Rechtsanwälte und Rechtsanwaltsanwärter [hereinafter DSt].

6. *See* § 12 DSt. The disciplinary measures taken by the bar range from a warning to a permanent ban from practice.

7. *See* §§ 27-28, 33 RAO; § 2 DSt.

8. For a discussion of this problem under German law see F. Baur, *Hypothetische Inzidentprozesse,* FESTSCHRIFT FÜR KARL LARENZ 1063 (1973); J. Braun, *Zur schadensersatzrechtlichen Problematik des hypothetischen Inzidentprozesses bei Regreßklagen gegen den Anwalt,* 96 ZEITSCHRIFT FÜR ZIVILPROZEß 89 (1983); MAX VOLLKOMMER, ANWALTSHAFTUNGSRECHT 231-38 (1989); BORGMANN & HAUG, *supra* note 2, at 256. German and Austrian law governing the hypothetical appeal are comparable. Thus, relevant German scholarly publications and court decisions are discussed.

structs his or her attorney to bring an appeal against an unfavorable court or administrative decision. The attorney negligently fails to bring the appeal and the adverse judgment becomes final and nonappealable because the time period for bringing the appeal has expired.[9] Subsequently, the client institutes a malpractice action against the former attorney, claiming that the judgment would have been reversed by the appellate court, leaving the client in a better financial position provided an appeal had been filed.[10] Moreover, the client claims entitlement to compensation by the attorney for negative financial consequences suffered as a result of the attorney's error. The attorney, on the other hand, claims that the appellate court would have affirmed the lower court's decision, and that the client, therefore, did not suffer a loss but actually saved the cost of an appeal.[11]

This Note discusses the problem of determining the outcome of the hypothetical appeal.[12] The Note is divided into three parts. The first part provides a short introduction to the Austrian law of damages. The second part investigates how the law allocates the burden of proof between the parties with respect to proving the outcome of the hypothetical appeal. Two groups of cases will be discussed. The first group comprises cases in which there is no evidence available as to how the hypothetical suit would have ended; the second group consists of cases in which there is evidence that the court would have made a certain ruling. The third part examines the further requirement that the claimant in a

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9. *See* ZIVILPROZESSORDNUNG [ZPO] §§ 464(1), § 521(1) (Austrian Rules of Civil Procedure).

10. This Note deals mainly with cases in which an attorney failed to bring an appeal against a decision which consequently becomes unappealable; cases where an attorney failed to even institute a law suit at all are also examined. The problem of defining the content of a hypothetical judgement arises in both situations. The solution proposed in this Note applies to both.

11. *See* Baur, *supra* note 8, at 107. Baur points out the paradox that the attorney who had to enforce and protect a client's rights in the first action subsequently must show that the client's claim was invalid and unenforceable.

12. This Note will refer to the proceeding in which the attorney failed to bring the appeal as the "first" proceeding or the "hypothetical" proceeding. The proceeding in which the client claims damages will be referred to as the "malpractice" suit.

legal malpractice suit has to prove his or her ability to collect the sum awarded in the hypothetical suit.

II. Austrian Law on Damages

Austria is a civil law country.[13] The courts are obligated to interpret and apply the law as it is formulated and created by the legislature[14] and may not make law with respect to an issue if the legislature has failed to provide relevant rules. The relevant statutory basis for an attorney's civil liability is Title 30[15] (§§ 1293-1341) of the *Allgemeines Bürgerliches Gesetzbuch* (ABGB).[16]

The basic premise in Austrian law is that any loss must be borne principally by the person whose property has been damaged.[17] But Austrian law also contains numerous exceptions to this principle and in many cases allows for the recovery of damages that were caused by another person.[18] The norms describing and regulating the conditions under which a person who has suffered harm is entitled to collect damages constitute the law of damages.[19]

To collect damages under Austrian law, four requirements must be satisfied. These requirements will be addressed in the context of a claim of breach of contract, out of which legal malpractice suits usually arise.

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13. Article 18(1) of the Austrian Constitution mandates that all administrative and judicial acts be based on statutory authorization. *See* Klecatsky & Morscher, Die Österreichische Bundesverfassung 32-35 (1989).

14. *See* OGH Mar. 27, 1990, 5 Ob 544/90, 1990 ÖJZ No. 135.

15. Dreißigstes Hauptstück; Von dem Rechte des Schadensersatzes und der Genugtuung [Thirtieth Chapter; Damages and Full Satisfaction]. The translation of the relevant sections of the ABGB is drawn mainly from The General Civil Code of Austria (Paul L. Baeck trans., 1972) [hereinafter Baeck Translation].

16. Allgemeines Bürgerliches Gesetzbuch [ABGB], June 1, 1811, JGS 946. The ABGB has been amended more than 50 times. *See* Manz Texte, Zivilrecht 5-10 (1989).

17. *See* ABGB § 1311 ("Mere accidents affect only the person to whose property or person they occur."); ABGB § 1296 ("In case of doubt, the presumption prevails that damage has arisen without any fault on the part of another.") Helmut Koziol & Rudolf Welser, 1 Grundriß des Bürgerlichen Rechts 405 (8th ed. 1987).

18. *See* ABGB §§ 1295(1), 1313-1318.

19. *See* Koziol & Welser, *supra* note 17, at 405 (Schadensersatzrecht).

A. *Loss*

The first requirement is more or less self-evident. The plaintiff can bring suit only if she suffers a certain harm. Austrian law distinguishes between financial loss and non-monetary injury.[20] In the field of legal malpractice, only claims for financial losses are relevant.

The available remedies are restitution and monetary damages. A person causing a loss, therefore, either must return the damaged property to its former state, i.e. make restitution, or pay the estimated price thereof, i.e. pay monetary damages.[21] Because restitution usually is either impossible or impractical in a legal malpractice suit, restitution will not be discussed in this Note. The amount of damages is determined by considering the difference between the claimant's actual financial situation and the position in which he would have been if the harmful event had not occurred.[22] The difference is the monetary value of the loss caused, and the claimant is entitled to recover this amount.

B. *Causation*

The second requirement is causation. The plaintiff can collect damages only if a certain act or omission of the defendant can be regarded as the adequate cause of the harm done to the plaintiff.[23] There is no liability if the harm is the result of a highly uncommon and unlikely chain of causation.

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20. Damages for non-material harm are granted only in a limited number of cases, so for example, if a person has been bodily harmed the courts can award damages for "the suffering of the person," ABGB § 1325; similarly in the case of injury to personal freedom, ABGB § 1329. *See* OGH Mar. 27, 1990, 5 Ob 544/90, 1990 ÖJZ No. 135. As non-material damages are of no practical significance in the field of professional responsibility they will not be dealt with in this Note.

21. *See* ABGB § 1323 ("Um den Ersatz eines verursachten Schadens zu leisten, muß alles in den vorigen Stand zurückversetzt werden, oder, wenn dieses nicht tunlich ist, der Schätzwert vergütet werden." [In order to make amends for damages caused, the damaged property must be returned to the former state (status quo) or, if this is not possible, the estimated price thereof must be paid.]).

22. *See* OGH Mar. 3, 1982, 1 Ob 829/81, 55 SZ No. 29; OGH Aug. 27, 1980, 1 Ob 636/80, 53 SZ No. 107; KOZIOL & WELSER, *supra* note 17, at 423; VOLLKOMMER, *supra* note 8, at 231; Braun, *supra* note 8, at 100.

23. *See* KOZIOL & WELSER, *supra* note 17, at 412; OGH Feb. 27, 1990, 4 Ob 607/89, 1991 AnwBl 51.

This criterion is usually called adequate causation.[24] A person, therefore, is not liable for all damages he or she causes, but only for those damages which were not completely an unlikely result of a certain act or omission.[25]

Whether a certain act caused an event is a question of whether the act was a conditio sine qua non for the event. Thus, if the event would have occurred even without the action in question, the action was not its cause. The same standard is used to determine whether an omission caused a certain event. In this circumstance, the court investigates whether the harming event would have taken place even if the defendant had acted dutifully.[26]

C. *Unlawfulness and Fault*

Absent an agreement to the contrary there is no strict liability under Austrian contract law.[27] A party to a contract will be held liable only if he or she acted "unlawfully"[28] and with "fault."[29] A party to a contract acted unlawfully if he or she did not perform the contract in accordance with its terms. A person acts with fault if he or she could have per-

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24. *See* KOZIOL & WELSER, *supra* note 17, at 413; OGH July 15, 1981, 1 Ob 35/80, 54 SZ No. 108; OGH Jan. 25, 1984, 1 Ob 42/83, 57 SZ No. 16.

25. The first requirement—the causation in the literal sense—is a factual question. OGH May 8, 1990, 4 Ob 512/90 (not reported). On the other hand, the second requirement—whether the loss was an adequate consequence of a certain act—is a question of law. KOZIOL & WELSER, *supra* note 17, at 413.

26. *See* KOZIOL & WELSER, *supra* note 17, at 412; OGH Mar. 27, 1990, 5 Ob 544/90, 1990 ÖJZ No. 135.

27. *See* ABGB § 1295(1) ("Jedermann ist berechtigt, von dem Beschädiger den Ersatz des Schadens, welchen dieser ihm *aus Verschulden* zugefügt hat, zu fordern. . . ." (emphasis added). [A person is entitled to demand indemnification for the damage from a person causing an injury by his fault; the damage may have been caused either by violation of a contractual duty or without regard to a contract.]).

28. *See* ABGB § 1294 ("Der Schaden entspringt entweder aus einer *widerrechtlichen* Handlung, oder Unterlassung eines anderen. . . ." (emphasis added)).

Baeck, *supra* note 15, translates this sentence in the following way: "Damages arise either from an illegal act or an illegal omission of another. . . ." I, however, prefer "unlawfulness" as a translation of *widerrechtlich*, although there is not a great difference between the meaning of these two words.

29. *See* ABGB § 1295(1).

formed the contract but negligently or willfully failed to do so.

Therefore, in the case of a legal malpractice suit the client can recover damages only if the attorney has violated a contractual obligation. Then, the client must show that the attorney either negligently or willfully failed to comply with either the express or implied terms of the contract.[30]

Only in rare cases will the contract between an attorney and a client specify all the attorney's obligations.[31] Usually, only the main obligations are defined in the contract. One will not find provisions defining how carefully the attorney has to conduct research or on which legal theories or cases he or she must rely in preparing the case. For the most part, therefore, the terms of the contract are not very helpful for deciding whether the attorney acted unlawfully.

In determining an attorney's obligations under the contract with the client, courts usually will compare an attorney's actual conduct with the conduct required from a dutiful and responsible attorney. According to ABGB sections 1299[32] and 1300,[33] a member of a profession will be held liable if he fails to fulfill the standard which is required from

30. *See* KOZIOL & WELSER, *supra* note 17, at 419-20.

31. *See* Friedrich Scheffler, *Darf man vom Anwalt mehr verlangen, als das Kollegialgericht leistet*, 1987 VERSICHERUNGSRECHT, JURISTISCHE RUNDSCHAU FÜR DIE INDIVIDUALVERSICHERUNG 265. For further discussion see GRAF, *supra* note 2, at 41.

32. See the first sentence of ABGB § 1299:

> Wer sich zu einem Amte, zu einer Kunst, zu einem Gewerbe oder Handwerke öffentlich bekennt; oder wer ohne Not freiwillig ein Geschäft übernimnt, dessen Ausführung eigene Kunstkenntnisse, oder einen nicht gewöhnlichen Fleiß erfordert, gibt dadurch zu erkennen, daß er sich den notwendigen Fleiß und die erforderlichen, nicht gewöhnlichen, Kenntnisse zutraue; er muß daher den Mangel derselben vertreten. [A person who claims publicly an office, art, trade or handicraft, or who assumes voluntarily without necessity a business which demands specialized knowledge or extraordinary diligence, warrants thereby that he trusts himself to possess the necessary diligence and extraordinary knowledge; therefore, such person is liable for the lack thereof.]

33. *See* ABGB § 1300 ("Ein Sachverständiger ist auch dann verantwortlich, wenn er gegen Belohnung in einer Angelegenheit seiner Kunst oder Wissenschaft aus Versehen einen nachteiligen Rat erteilt." [An expert is liable when he gives, for a consideration, negligently bad advice in matters of his art or science.]).

an average and responsible member of his profession. The comparison, it should be stressed, is not to the actual conduct of most members of the same profession but to the conduct which could and should be required from the average member.[34] This comparison, therefore, is not a question of fact but of law.

D. *Burden of Proof*

The allocation of the burden of proof significantly affects the outcome of a law suit. The Austrian law of damages allocates the burden differently in tort and contract cases.[35] The general rule in tort is that all conditions—damage, unlawfulness, fault, and causality—have to be proven by the person claiming damages.[36] This rule is modified in contract cases. If the act causing the damage constitutes a breach of contract, then the person seeking recovery does not have to prove that the defendant acted with fault. Rather, the burden is on the defendant to prove otherwise.[37]

The same four statutory requirements determine the outcome of a malpractice suit brought by a client against his former attorney because the attorney failed to appeal. The client has to prove that he or she suffered a loss and that this loss was caused by the attorney's unlawful and negligent act or omission. Once the client satisfies this burden of proof it is up to the attorney to prove that he acted without fault.

The theoretical problem involved in the hypothetical appeal is essentially one of burden of proof. The discussion of the hypothetical appeal, therefore, will concentrate on problems of burden of proof in respect to causation and loss.

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34. *See* ABGB § 1296; KOZIOL & WELSER, *supra* note 17, at 421; OGH Feb. 27, 1990, 4 Ob 607/89, 1991 AnwBl 51.

35. However, this Note will deal only with the contractual liability to the attorney's client. For further discussion of tort liability see GRAF, *supra* note 2, at 131-40.

36. *See* ABGB § 1296: KOZIOL & WELSER, *supra* note 17, at 421; OGH Feb. 27, 1990, 4 Ob 607/89, 1991 AnwBl 51.

37. *See* ABGB § 1298 ("Wer vorgibt, daß er an der Erfüllung seiner vertragsmäßigen oder gesetzlichen Verbindlichkeiten ohne sein Verschulden verhindert worden sei, dem liegt der Beweis ob." [A person who asserts that he has been prevented from the performance of a contractual or legal obligation without any fault on his part must bear the burden of proof thereof.]).

This Note will investigate how a client who has lost the opportunity to appeal against an unfavorable decision because of her attorney's negligence can satisfy this burden of proof and how the outcome of the hypothetical appeal is to be determined.

III. The Hypothetical Appeal

A. *Key Issues*

A court deciding a malpractice suit faces two fundamental problems. The first question is how to assign the burden of proof. Does the plaintiff have to prove that she would have won the hypothetical suit or does the defendant have to prove that she would have lost it? Under the Austrian law of damages for breach of contract, it is up to the person seeking recovery to prove that he actually suffered a loss.[38] The plaintiff in the legal malpractice suit, therefore, has to prove that he would have prevailed in the hypothetical suit.[39]

The second issue which confronts the court concerns the manner in which the client must "prove" the outcome of the hypothetical suit. All statements about hypothetical events and causation are conditional and uncertain.[40] Should this unavoidable degree of uncertainty bar the client from being able to recover damages even though it is manifestly clear that the attorney acted negligently? Without question, the answer is no.[41]

It is well established that Austrian law does not require proof with one hundred percent certainty in cases where losses are caused by an omission.[42] Such a burden of proof would be impossible to sustain and would unjustly protect

38. *See* ABGB §§ 1295(1), 1296. ABGB § 1298 changes the burden of proof only in respect of fault. *See also* OGH Feb. 27, 1990, 4 Ob 607/89, 1991 AnwBl 51.

39. *See* OGH Oct. 28, 1986, 2 Ob 554/86, 1987 Das Recht der Wirtschaft [RdW] 96; OGH Nov. 30, 1983, 1 Ob 785/83, 56 SZ No. 181; OGH Nov. 7, 1985, 7 Ob 501/85, 58 SZ No. 165. For further references see Graf, *supra* note 2, at 145; Borgmann & Haug, *supra* note 2, at 167.

40. Braun, *supra* note 8, at 91.

41. *See id.* at 109.

42. *See* OGH Oct. 28, 1986, 2 Ob 554/86, 1987 RdW 96; OGH Nov. 30, 1983, 1 Ob 785/83, 56 SZ No. 181; OGH Nov. 7, 1985, 7 Ob 501/85, 58 SZ No. 165; OGH Feb. 27, 1990, 4 Ob 607/89, 1991 AnwBl 51; OGH Mar. 27, 1990, 5 Ob 544/90, 1990 ÖJZ No. 135.

wrongdoers to the detriment of persons suffering a loss. Therefore, a plaintiff who seeks to recover for losses caused by an omission has to show only with a high degree of probability that she would not have suffered the harm had the wrongdoer acted dutifully.[43] Furthermore, once the plaintiff has managed to establish facts which make it plausible that she had suffered a harm, the burden of proof will shift to the defendant.[44] The defendant has to produce facts that make it plausible, with the same degree of probability, that the harm was not caused by her omission.[45] This general rule also applies to the legal malpractice suit where the attorney negligently failed to bring an appeal.[46]

Usually, however, the client cannot establish, with a high degree of probability, the outcome of the hypothetical appeal. The plaintiff, in this circumstance, only can bring up the facts which the appellate court in the first proceeding would have considered in rendering its decision. She cannot prove the decision itself. There is no direct relationship between what the plaintiff can prove (i.e. the facts of the case) and what she has to prove (i.e. the content or outcome of the decision). The deliberate decision of a court stands between these two.[47]

B. *Cases of Reference*

The practical difficulties of predicting the outcome of the hypothetical suit with a high degree of probability are illustrated clearly in a few recent decisions of the Austrian

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43. *See* OGH Oct. 28, 1986, 2 Ob 554/86, 1987 RDW 96; OGH Nov. 30, 1983, 1 Ob 785/83, 56 SZ No. 181; OGH Feb. 27, 1990, 4 Ob 607/89, 1991 AnwBl 51; OGH Mar. 27, 1990, 5 Ob 544/90, 1990 ÖJZ No. 135; 2 ARMIN EHRENZWEIG, SYSTEM DES ÖSTERREICHISCHEN PRIVATRECHTS 45 (2d ed. 1928); HEINRICH MAYERHOFR, SCHULDRECHT ALLGEMEINER TEIL 260 (1986). For Germany see Braun, *supra* note 8, at 96; BORGMANN & HAUG, *supra* note 2, at 167.

44. *See* KOZIOL & WELSER, *supra* note 17, at 421.

45. *See* OGH Nov. 30, 1983, 1 Ob 785/83, 56 SZ No. 181; OGH Oct. 28, 1986, 2 Ob 554/86, 1987 RDW 96; OGH Jan. 26, 1988, 8 Ob 593/87 (not reported); OGH Feb. 27, 1990, 4 Ob 607/89, 1991 AnwBl 51; *see* Braun, *supra* note 8, at 96.

46. *See* OGH Oct. 28, 1986, 2 Ob 554/86, 1987 RDW 96; OGH Nov. 30, 1983, 1 Ob 785/83, 56 SZ No. 181; OGH Nov. 7, 1985, 7 Ob 501/85, 58 SZ No. 165.

47. *See* Baur, *supra* note 8, at 1064.

Supreme Court.[48] In the decision 1 Ob 785/83,[49] a client hired an attorney to sue a business partner for the payment of goods sold and delivered. Before the court reached a decision, the parties agreed to stay the proceedings in order to permit time to negotiate a settlement. The attorney failed to inform his client that the stay would not indefinitely toll the statute of limitations. The negotiations lasted for several years and were unsuccessful. Finally, the client, dissatisfied with his attorney's service, hired another attorney to pursue litigation. However, by this time, the statute of limitations had expired, and an action could no longer be brought before the court. The client then brought a suit against his former attorney claiming that the attorney's failure to inform him about the statute of limitations caused the loss.

In the case 7 Ob 501/85,[50] the attorney falsely told his client that an appeal against an unfavorable decision of a lower court had no chance of success and, therefore, the appeal should not be brought. In addition to this mistake, the attorney failed to inform his client of the lower court's decision before the last day for appeal. The client, therefore, did not have sufficient time to consider the attorney's advice; he did not file an appeal. He consulted another attorney, however, and brought a malpractice suit against his former attorney. He claimed that he had lost his opportunity to appeal because of the attorney's negligence, and that contrary to his attorney's advice, an appeal most likely would have been successful.

In the decision 1 Ob 620/87,[51] the client was involved in a proceeding in Norway. She advised her Austrian attorney to tell his Norwegian attorney to bring an appeal against a decision of the lower court. The Austrian attorney mailed a letter to the Norwegian attorney containing an authorization to bring an appeal. However, he did not send the letter by registered mail and did not even call the Norwegian attorney subsequent to the mailing to check whether the letter had

48. For further examples and actual cases see Baur, *supra* note 8, at 1064 and Braun, *supra* note 8, at 90.

49. OGH Nov. 30, 1983, 1 Ob 785/83, 56 SZ No. 181.

50. OGH Nov. 7, 1985, 7 Ob 501/85, 58 SZ No. 165.

51. OGH Sept. 23, 1987, 1 Ob 620/87, 1988 NOTARIATSZEITUNG [NZ] 200.

arrived. The Norwegian attorney never received the letter and the appeal was not filed. In the malpractice suit against her Austrian attorney, the client claimed that the attorney's action deprived her of her chance to appeal and that a timely filed appeal most likely would have been successful.

Although these three cases and other similar cases came before the Austrian Supreme Court, the court failed to resolve the issue of the hypothetical appeal. The Supreme Court in these and other similar cases[52] simply remanded the case with instructions to find out what result the hypothetical suit would have produced. However, the Supreme Court failed to address adequately the difficult problems entailed in determining the outcome of the hypothetical suit. This Note discusses some of these difficulties.

In each of the cases discussed it was clear and not contested that the attorney had acted negligently.[53] Each malpractice suit focused on the issues of the client's financial losses and how these losses had to be proved. The client in each case claimed that she would have won in the last instance had the attorney acted correctly. Therefore, the client argued, it was the attorney's negligence that deprived her of this favorable decision and the subsequent financial benefits. The attorney's defense, on the other hand, was that even if he had acted correctly and carefully and even if the appeal had taken place, the appeal would have been unsuccessful. Therefore, the attorney maintained that his former client had not suffered any loss due to his negligence.[54]

The next part of this Note presents the argument that the client can prevail in the malpractice suit if he can show with a high degree of probability that the hypothetical appeal

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52. OGH Sept. 23, 1987, 1 Ob 620/87, 1988 NZ 200; OGH Mar. 4, 1987, 1 Ob 710/86, 1987 WBI 212; OGH Oct. 28, 1986, 2 Ob 554/86, 1987 RDW 96; OGH Nov. 30, 1983, 1 Ob 785/83, 56 SZ No. 181.

53. In 1 Ob 785/83 the attorney should have noticed the statute of limitations and advised his client accordingly; in 7 Ob 501/85 the attorney should have informed his client immediately of the lower court's decision and advised the client correctly of the legal situation; in 1 Ob 620/87 the attorney should have sent the letter by registered mail or at least should have called the Norwegian attorney to confirm receipt of the letter.

54. Some attorneys even claimed that their negligence had saved their clients money as the hypothetical suit would have resulted in additional costs. *See* VOLLKOMMER, *supra* note 8, at 231.

would have resulted in a favorable decision. The client can satisfy the burden of proof by proving the facts on which the court in the first proceeding would have rendered its decision.

C. *The Content of the Hypothetical Decision*

The problem the court faces in deciding the malpractice suit arises from the fact that in determining the result of the hypothetical suit, it will have to speculate about the mind of the judge or judges who would have rendered the decision. Many factors can influence that decision.[55] This problem, of course, is not limited to the legal malpractice suit. It arises in all cases where there are questions regarding whether an event would or would not have been caused by a human decision.

For example, suppose an employee notes that one of her colleagues who operates a very expensive machine drinks too much alcohol. She does not report this observation to her employer. Subsequently, the drunken employee causes an accident which results in extensive damage. The employer then sues the employee for having failed to inform him of her observation and argues that he, the employer, could have prevented the accident if he had had this information.

In a case of this type, the court has to decide whether the employer actually would have transferred or fired the drunken employee. The court, in other words, must determine the "hypothetical" content of a decision which had never been made. A court in a malpractice suit faces the same problem.

It is important to note that the problems involved in determining whether an omitted act caused a certain event and in deciding the content of a hypothetical decision are not the same. In the case of causation, the problem arises from the fact that there is always the chance that another event could have prevented the omitted act, if performed, from becoming effective. Even if the attorney in the case 1 Ob 620/87[56]

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55. *See* Judgment of Jan. 15, 1981, Bundesgerichtshof [BGH], 79 Entscheidungen des Bundesgerichtshofes in Zivilsachen [BGHZ] 223 (F.R.G.); Braun, *supra* note 8, at 94.

56. OGH Sept. 23, 1987, 1 Ob 620/87, 1988 NZ 200.

had sent the letter by registered mail, it would have been possible due to extraordinary circumstances that it would not have reached the addressee. With respect to the content of the human decision, the uncertainty arises from the fact that one can never say with absolute certainty how a person would have acted, since human behavior is not predetermined.

In order to resolve such cases, it is necessary to rely on general rules of human behavior. The employer will be successful in his suit against the employee because it is most likely that no employer will allow an inebriated person to operate an expensive machine. The problem posed by a legal malpractice suit, of course, is more difficult. There is no such experience from which the court can conclude that certain facts automatically will result in the rendering of a certain decision. In order to solve this problem, it is necessary to assume that two courts deciding the same case based on identical facts and operating under the same legal norms will render the same decision.[57] The presumption that there should be only one "right" decision for every given set of facts is a necessary concept for a legal system based on the rule of law. The fact that courts actually decide similar cases differently does not affect this presumption which is a conceptual requirement rather than a description of reality.[58]

With this premise in mind, the problem of the hypothetical suit can be solved in the following way. The court deciding the malpractice suit has to ask how it would have decided the appeal. If it comes to the conclusion that it would have decided in favor of the client then it can assume, under the foregoing premise, that the court in the hypothetical suit also would have rendered a decision favorable to the client. It is then entitled to base its own decision on this result. If it concludes that the client would have lost the appeal, then it is entitled, pursuant to the presumption, to come to the opposite conclusion.[59] In other words, the court's determination of how it would have decided the hypothetical suit establishes with a high degree of probability that the court

57. *See* Braun, *supra* note 8, at 109; VOLLKOMMER, *supra* note 8, at 235. For further references see GRAF, *supra* note 2, at 145-46.

58. Braun, *supra* note 8, at 99, 109.

59. *See* Baur, *supra* note 8, at 1078.

which would have had to decide the hypothetical suit would have handed down the same decision. This finding of the court becomes part of the facts and, absent any further evidence, establishes a presumption that the attorney's negligent omission caused the client's loss.

In applying this analysis, two groups of cases must be distinguished. In most cases, no additional evidence is available regarding how the court of the first proceeding would have decided. The only evidence the plaintiff can present is the facts which were relevant in the first proceeding. However, there remains a certain number of cases in which either side can present additional evidence to indicate that the court of the hypothetical appeal would have rendered a particular judgment. Two examples of this additional evidence are: a decision in a parallel case or an already drafted decision for the first proceeding.

1. *Cases Without Additional Evidence*

This section comments on cases where there is no additional evidence available on how the hypothetical suit would have ended. The majority of malpractice cases will be of this type.[60] In these cases, the client can present only the facts which she would have presented in the hypothetical proceeding. Her claim is that based on these facts, not only would she have been entitled to a favorable decision, but that the court of the hypothetical proceeding actually would have rendered such a decision. In the malpractice suit, the client seeking recovery must present the facts which would have been essential for a decision in the appellate court. The court of the malpractice suit then will apply the method described above: it will consider these facts and determine how it would have decided the case had the appeal been before it.[61] The outcome of this consideration establishes a presumption about how the first court would have decided the case.[62] This finding of the court becomes part of the facts. If it establishes that the appellate court would have decided in favor of the plaintiff, then the court will conclude that the attorney's negligent omission caused the client's financial

60. *See* Braun, *supra* note 8, at 112.
61. *See* Baur, *supra* note 8, at 1068-69.
62. Braun, *supra* note 8, at 109.

loss. However, if the court of the malpractice suit determines that the court of the hypothetical suit would have rendered a decision unfavorable to the client then it will decide in favor of the attorney.

The court deciding the malpractice suit must put itself in a position as similar as possible to the position the court of the hypothetical suit would have been in. Therefore, it can only use such witnesses, documents and other evidence that would have been available and admissible in the first proceeding.[63] The same principle applies to new statutes or court decisions that are relevant for the problem in question. The court must limit its consideration only to those laws and precedents that would have been available to the first court.

2. *Cases with Additional Evidence*

This section addresses those cases where additional evidence is available as to what the decision of the court of appeals would have been. This additional evidence can be, for example, a draft of the judgment that the court of the first proceeding would have rendered, or a decision by the court of the first proceeding in a "parallel case," that is, a case in which nearly identical facts had to be decided.

In the cases described in the previous section, the court deciding the malpractice suit had to determine the facts of the first case to determine the likely outcome of the first proceeding. The assumption that two courts would decide identical cases in the same way was essential. In the group of cases covered by this section, this assumption is not necessary because there is evidence as to how the first proceeding would have ended. This additional evidence raises two questions. First, is this new evidence admissible, and second, if the court deciding the malpractice suit and the court of the first proceeding would have decided the hypothetical suit differently, which view should determine the outcome of the malpractice suit? In other words, how should the malpractice suit be decided if the two courts disagree upon the "right" decision of the hypothetical proceeding?

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63. *See id.* at 106.

a. *Illustrative Cases*

One case and one example will illustrate the issue of additional evidence as to the outcome of the hypothetical proceeding.[64]

The case is a decision of the *Oberlandesgericht Saarbrücken*,[65] which dealt with a malpractice suit against an attorney. The attorney had brought on behalf of his client an appeal against a decision by a lower court. While the appeal was already under way, the appellate court determined that the attorney had overlooked a certain procedural time limit, and dismissed the case. However, since the appellate court had already considered the case, it had already drafted a decision, which showed a result favorable for the client. Partly based on this draft, the client brought a malpractice suit against the attorney. The draft opinion was made available to the court of the malpractice suit, which faced the question of whether it could use this draft to conclude that the hypothetical proceeding would have resulted in the decision reflected in the draft opinion without having to decide how it would have decided the case itself.

The example is given by Braun.[66] In his example, which was based on actual decisions by German courts, the client had a claim of DM 20,000 and hired an attorney to bring an action against the debtor. The attorney brought an action for only DM 10,000 in order to reduce the costs of the proceeding. The lower court awarded the DM 10,000, and an appeal by the other party against the decision was unsuccessful. The attorney, however, obviously overlooked the possibility that the claim for the remaining DM 10,000 could be barred by the statute of limitations. When he finally tried to sue for the remaining DM 10,000, the client's recovery was

64. There have been no decisions in Austria regarding this problem. Since the legal situation in Germany is comparable, decisions by German courts will be used to demonstrate the problem.

65. Decision of February 7, 1973, 1973 deutsches Versicherungsrecht 929. *Oberlandesgericht* is the German equivalent of a court of appeals; the case never reached the BGH. *See* Braun, *supra* note 8, at 109 n.66.

66. Braun, *supra* note 8, at 89-90. Braun's example was formed according to a decision of the *Reichsgericht*: Oct. 24, 1933, 1933 Das Recht No. 738. The *Reichsgericht* was the highest German court in civil matters until it was replaced by the BGH. In the actual decision the *Reichsgericht* held that the malpractice suit should be dismissed.

barred by the applicable statute of limitations. In this case, it would have been possible for a court deciding the malpractice suit to use the court's prior decision in the suit for the first DM 10,000 in order to determine how it would have decided the claim had the attorney sued for the remaining DM 10,000 within the statute of limitations. It could have concluded that the court would have awarded this amount of money. The problem again is whether it could use this further evidence.

b. *Discussion*

In order to answer the questions raised by this case and Braun's example, it is important to know that, according to Austrian law, a court is obliged to make use of all evidence provided by the parties.[67] The party for which the hypothetical proceeding would have ended favorably will undoubtedly present evidence to prove such a favorable outcome. The court then has to admit and use such evidence. This, however, leads to another problem, since there is a possibility that, notwithstanding this evidence, the court deciding the malpractice suit could arrive at the conclusion that it would have decided the case differently from the court of the hypothetical appeal. The evidence regarding the content of the decision in the hypothetical suit, therefore, creates the possibility of disagreement between the two courts. In the decision of the *Oberlandesgericht Saarbrücken* the court could disagree with the content of the drafted decision. Similarly, in Braun's example, the court deciding the malpractice suit might find that the second DM 10,000 should not have been awarded if the suit had been filed in time.

In such a situation of disagreement the question is whether the plaintiff satisfied his burden of proof. In the malpractice suit, the plaintiff is required to show that it was attorney's error which deprived him of a favorable court decision. The plaintiff can prove that he actually would have succeeded in the hypothetical trial. But he faces the problem that the court in which the malpractice suit is litigated disagrees with this hypothetical, favorable decision and would have decided in the first proceeding against the client. Then

67. *See* ZPO § 266 et seq.

the question is whether the decision of the first court or the decision the court hearing the malpractice suit would have rendered, should be relevant for the outcome of the malpractice suit.[68]

According to the German *Bundesgerichtshof* (BGH), the view of the second court must prevail.[69] Whether the court of the hypothetical trial would have decided the case differently is not relevant. Therefore, if the BGH had decided the case of the *Oberlandesgericht Saarbrücken*, it would have held that the content of the draft decision was not decisive. Similarly, in Braun's example, the BGH would hold that the court deciding the malpractice suit could dismiss the action if it disagreed with the court of the hypothetical appeal's decision in the parallel case. According to the BGH, the important consideration is how the hypothetical proceeding *should* have ended, rather than how it *would* have ended.[70]

The BGH offers two arguments in support of its position. First, it argues that the outcome of the hypothetical proceeding cannot be established. In the overwhelming majority of cases, it is impossible to produce any facts which would show that the court in the hypothetical proceeding would have rendered a certain decision. Furthermore, even in the small number of cases where there is some evidence available pertaining to the content of the hypothetical decision, such evidence is too vague to base a court decision on. Even evidence like a draft decision or a decision in a parallel case does not prove with a satisfactory degree of certainty how the court of the hypothetical proceeding would have decided.[71]

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68. *See* Braun, *supra* note 8, at 92; VOLLKOMMER, *supra* note 8, at 232.

69. BGH Jan. 15, 1981, VII ZR 44/80 (Stuttgart), 1981 NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 920; BGH June 11, 1981, III ZR 34/80 (Schleswig), 1982 NJW 36; BGH Mar. 26, 1985, VI ZR 245/83 (Celle), 1985 NJW 2482 (2483); BGH Nov. 14, 1963, III ZR 144/61 (München), 1964 NJW 405; BGH Feb. 23, 1959, III ZR 77/58, 1959 NJW 1125; *see also* VOLLKOMMER, *supra* note 8, at 236; BORGMANN & HAUG, *supra* note 2, at 258.

70. *See* Braun, *supra* note 8, at 92; VOLLKOMMER, *supra* note 8, at 234; BORGMANN & HAUG, *supra* note 2, at 178.

71. BGH Jan. 15, 1981, VII ZR 44/80 (Stuttgart), 1981 NJW 920; BGH Nov. 14, 1963, III ZR 144/61 (München), 1964 NJW 405; BGH Feb. 23, 1959, III ZR 77/58, 1959 NJW 1125. *See* VOLLKOMMER, *supra* note 8, at 236; Braun, *supra* note 8, at 98.

The argument that the evidence for a certain outcome of the hypothetical suit is usually neither available nor reliable and, therefore, should not be used is neither convincing nor on point. Although it is conceded that the BGH is correct that in the majority of cases it is impossible to prove the probable outcome of the hypothetical suit, there is no compelling reason why courts should not accept and use certain evidence when such evidence is available. In other words, an often occurring problem of proof should not result in the inadmissibility of evidence in the few cases in which it can be produced.[72]

The only argument that can be made in favor of BGH's position is that it is impossible to prove with one hundred percent certainty that the attorney's negligence was the cause of the client's harm. However, as this Note has argued, certainty is not required.[73] The BGH neglects the fact that, in most other cases, i.e. cases not involving legal malpractice, in which a plaintiff sues for damages, the available evidence will yield a result that falls short of complete certainty. The connection between evidence and the fact to be proven will always be empirical and therefore not absolutely certain. But the law accepts that in certain circumstances liability can be based on a high degree of probability rather than on certainty. This concept is essential to protect the law abiding person against the negligent. Since the draft opinion or the decision in a parallel case is at least as strong as the evidence with which a court is usually confronted, there is no reason why this evidence should not be used.

The BGH's second argument is more sophisticated. The BGH observes that, if the court in the malpractice suit would have rendered a different decision than the one that would have been handed down by the court of the hypothetical appeal, then one of these decisions must be wrong.[74] The second court, which would have to consider the relationship between the two competing decisions, cannot be asked to regard its own decision as wrong. Therefore, it

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72. *See* VOLLKOMMER, *supra* note 8, at 236; Braun, *supra* note 8, at 98.

73. *See supra* text accompanying notes 43-45.

74. BGH Jan. 15, 1981, 79 BGHZ 223; BGH Mar. 26, 1985, 1985 NJW 2482; BGH July 2, 1987, 1987 NJW 3255. *See* VOLLKOMMER, *supra* note 8, at 236-39.

must be assumed that the decision of the court that decides the malpractice suit is the right decision, since no court can consciously hand down a wrong decision. Thus the hypothetical decision of the first court would have to be wrong. However, as this Note argues, the question is not whether the first court was right or wrong, but what the outcome of the underlying claim would have been had the appeal been filed. The decision of the malpractice suit has to be based on this outcome.

According to the reasoning of the BGH, the client should not be entitled to recover damages that would have been brought about by a wrong legal decision.[75] The allegedly "false" judgment is the hypothetical decision the court in the first proceeding would have reached. The BGH argues that the attorney is not obligated to protect the client against losses that result from the denial of a judgment that would have been wrong.[76] Furthermore, according to the BGH's reasoning, the attorney is only obligated to enforce and protect her client's rights. Benefits resulting from a "false" judgment are lucky chances to which the client has no legally enforceable right. Therefore, the BGH argues that the loss of such "lucky chances" is not protected under the contract between the attorney and the client.

This second argument is not convincing. First, it is incorrect to address a decision as "false" only because another court disagrees. The legal system has certain procedural rules in place which should guarantee that disputes are decided in a way that is legally correct. Once a decision is rendered according to these rules, it is final and binding between the parties. It will be enforced by the state, and the prevailing party is entitled to receive whatever is awarded by the decision. The fact that another court disagrees with the decision does not affect its enforceability. These rules are also applicable in the case of the hypothetical decision.

The client's right in the malpractice suit is to be placed in the same financial position as one would have been in had

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75. BGH Jan. 15, 1981, 79 BGHZ 223; BGH Nov. 14, 1963, III ZR 144/61 (München), 1964 NJW 405. *See* VOLLKOMMER, *supra*, note 8, at 236-39.

76. BGH Mar. 26, 1985, 1985 NJW 2482; VOLLKOMMER, *supra* note 8, at 236.

one's attorney acted according to his obligation. If the attorney had not acted negligently, the client would have had a favorable and enforceable decision. The enforceability of this decision would not depend on whether this decision is right or wrong.[77] The legal system assumes that a decision rendered within the framework of the governing procedural rules is right. Therefore a court decision, for which there is no further appeal, has to be accepted by other courts as well. If these arguments apply to rendered decisions, then there is no reason why they should not apply to the hypothetical decision if, of course, there is a high degree of certainty about its content.

Second, the BGH's argument should not be followed because it is based upon an improper premise. It assumes that the court hearing the malpractice suit has to deal with the content of the first proceeding as an issue of law rather than an issue of fact. On the contrary, the court only has to establish what the content of the hypothetical decision would have been, but not whether this content is "right" or "wrong." What is at issue is the existence of a fact which logically is neither right nor wrong. For example, in cases where a loss was caused by omission, the court has to compare the actual events with a set of hypothetical events which would have occurred had the wrongdoer acted as required by law or contract. The court would award damages if the actual events left the plaintiff in a worse position than if the wrongdoer had acted properly. In this process, the court does not inquire whether the hypothetical event itself is correct or not.[78]

Thus the view of the BGH is incorrect. The court deciding the malpractice suit has to take into consideration all available evidence. Both parties are free to produce such evidence.[79] This view has the obvious consequence that the court may not award damages if the first court would not have decided the appeal in favor of the client. Since it is es-

77. *See* Braun, *supra* note 8, at 103.

78. How the court of the malpractice suit would have decided the facts which were to be decided in the first proceeding is only relevant in cases where there is no or not sufficient indication of the likely outcome of the first—hypothetical—proceeding.

79. *See* Braun, *supra* note 8, at 96; VOLLKOMMER, *supra* note 8, at 232-33.

tablished by the evidence, the hypothetical decision of the first court is the relevant one.[80]

Such a solution of the problem of the hypothetical appeal protects both the rights of the client and the attorney. The client is in the same position as if the attorney had not acted negligently: a court decides the substance of his claim. On the other hand, the attorney cannot object to this solution, as it requires the client first to establish that the attorney acted negligently.

D. *Summary*

The following summarizes the results of this Note to this point. It has been established that the loss of financial benefits resulting from a favorable court decision is a recoverable financial loss within the meaning of ABGB § 1293. In the legal malpractice suit based on a breach of contract, the client has the burden of proof with respect to the issues of damages, unlawfulness, and causation. The attorney has the burden of proof with respect to fault.

Finally, it has been demonstrated that the question of how the hypothetical proceeding would have ended can be solved through a two-step procedure. First, the court of the malpractice suit has to consider how it would have decided the hypothetical proceeding. Its decision, absent any further evidence, establishes a presumption that the court which would have had to decide the hypothetical proceeding would have decided the case in the same way. Second, it was established that the court of the malpractice suit must not stop at this point. It must pursue the matter further and determine whether there is any evidence showing that the hypothetical proceeding would have resulted in a different decision. If there is such evidence, then the court of the malpractice suit must not only consider this evidence, but must also follow the decision of the hypothetical proceeding.

Assuming that the client can establish that the hypothetical proceeding would have been successful, yet another obstacle must be overcome before the client can be awarded damages. The client has to prove the financial loss actually

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80. *See* Braun, *supra* note 8, at 92. For further discussion see GRAF, *supra* note 2, at 152.

suffered because of the attorney's negligence. The final section of this Note addresses the issue of the amount of damages that the client would be entitled to recover. The amount is determined by the extent to which the client would have been able to collect under the hypothetical judgment and by the additional expenses incurred due to the attorney's negligence.

IV. The Amount of Damages

The final section of this Note argues that the amount of damages the client is entitled to will not necessarily be identical to the amount of money the client has to pay or did not receive as a result of his attorney's failure to appeal the unfavorable judgment.

A. *Collectability*

The reasons for this situation are twofold. First, the amount to be awarded in the malpractice suit will be as large as the "face amount" of the hypothetical judgment only if the client can prove[81] the actual ability to collect whatever would have been awarded in the first proceeding.[82] Vice versa, the client suffered no loss if he would have been unable to collect anything.[83] The difference between the face amount of the judgment and the amount the client would have been able to collect does not represent a financial loss

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81. This burden of proof is twofold. First, the client has to prove that he would have been able to collect under the judgment, and second, he has to prove the amount he could have recovered from the other party in the first proceeding. If the client was a defendant in the first proceeding and was required to pay his opponent in the first suit, then the attorney's liability is determined by the face amount of the judgment against which the attorney failed to appeal. In this case it is not important how much the client actually paid because his liability against the other party is determined by the face amount. The loss caused by the attorney's negligence in this case is the amount of the liability rather than the amount actually paid.

82. Borgmann & Haug, *supra* note 2, at 181. For further references see Graf, *supra* note 2, at 143. Other parts of the client's claim against the attorney—attorney's fees, costs of the court proceeding—can, of course, be awarded even if the client cannot prove that he would have been able to receive payment from the other party in the first proceeding.

83. However, one has to take into consideration that the opponent though not able to pay at the time of the judment may be able to pay in the future. *See also* Borgmann & Haug, *supra* note 2, at 181.

caused by the attorney's negligence.[84]

Contrary to established rules, the Austrian Supreme Court in 5 Ob 318/66[85] placed the burden of proof with respect to this issue upon the defendant. In this case, the client hired an attorney to bring a suit against Ing. U. for AS 24,000. The attorney brought suit and obtained a judgment favorable to the client, but subsequently failed to pursue collection. Ing. U. died some years later, and his estate was too small to pay the judgment.

The client brought a malpractice suit against his former attorney and claimed that he would have recovered the full amount had the attorney immediately tried to collect the judgment. The attorney, however, claimed that collection would have proven fruitless, since Ing. U. did not have any money during the years a collection action could have been brought.

The Supreme Court did not sustain the attorney's argument and awarded damages in the full amount of the judgment. The court held that it would have been up to the defendant, i.e. the attorney, to prove that the client would not have been able to collect under the judgment. The attorney was not able to overcome this burden of proof and was therefore held liable.

However, this analysis is inconsistent with certain sections of the ABGB.[86] Under Austrian law of damages[87] a person claiming damages has to prove that he suffered a loss. In the context of a legal malpractice suit, the client would have suffered a loss only if she would have been able to collect under the judgment. It is therefore the client's responsibility to provide evidence of the ability to collect the money. Only by proving this should the client prevail.

Notwithstanding the court's abstract reasoning, the decision was not wrong. On the contrary, it was the right decision since evidence was adduced that other creditors of Ing.

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84. *See* Baur, *supra* note 8, at 1067.

85. OGH Nov. 3, 1966, 5 Ob 318/66, 39 SZ No. 186.

86. *See* ABGB §§ 1295(1) (first sentence), 1298 (expressly stating that the defendant—in contract cases—has the burden of proof only in respect of fault; all other conditions therefore have to be proved by the person claiming damages).

87. *See* ABGB § 1297 et seq.

U. were able to recover significant amounts at a time when the attorney could have proceeded with collection. In addition, it was shown that Ing. U. had obtained a bank loan at this time. Therefore, the court could have accepted prima facie that Ing. U. was liquid at the time of the attorney's negligence. This evidence, produced by the plaintiff, shifted the burden of going forward with the evidence from the plaintiff to the defendant. Because the defendant was not able to provide any further evidence, the defendant rightly lost the suit.

B. *Additional Cost*

Second, the amount of money to be awarded to the client in the malpractice suit will be larger than the amount he had to pay or did not receive due to the attorney's negligence because under Austrian law, the party succeeding in a proceeding is entitled to collect from the losing party the costs for the proceeding and attorney's fees.[88] These costs include the court costs in the amount paid by the client;[89] the other party's attorney's fees incurred in the first proceeding;[90] and one's own attorney's fees, if any. The client would not have incurred all of these costs if the attorney had acted dutifully.

V. CONCLUSION

This Note has argued that the problems of the hypothetical appeal can be solved by resorting to the general principles of the law of damages as set forth in the ABGB.[91] The loss of a favorable court decision is a loss within the statutory meaning. The burden of proof in respect to the outcome of the hypothetical decision can be satisfied by establishing that outcome with a high degree of probability. This result is consistent with the statutory requirements of the law of damages and with the Austrian Supreme Court's decisions in other cases in which a loss was caused by an omission.[92]

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88. *See* ZPO § 41(1)-(2); *see also* VOLLKOMMER, *supra* note 8, at 238.
89. *See* ZPO § 41(1).
90. *See id.* § 41(2).
91. *See supra* text accompanying notes 20-39.
92. *See supra* text accompanying note 47.