76 N.Y.2d 38 (1990)

Kathleen Campagnola et al., Respondents, v. Mulholland, Minion & Roe et al., Appellants. (And a Third-Party Action.)

Court of Appeals of the State of New York.

Argued March 22, 1990.
Decided May 8, 1990.

Peter L. Contini for appellants.

Harry Organek for respondents.

Judges KAYE, TITONE and BELLACOSA concur with Judge ALEXANDER; Judge KAYE concurs in a separate opinion; Judge SIMONS dissents and votes to reverse in another opinion in which Chief Judge WACHTLER and Judge HANCOCK, JR., concur.

39 *39ALEXANDER, J.

In this action for legal malpractice, defendant attorneys seek to offset against any damages recoverable by the plaintiff clients, the contingent fee provided for in the retainer agreement executed between them in respect to the underlying personal injury claim. We hold that in the circumstances of this case, such an offset is impermissible.

40 *40

This case having reached us on appeal in the pleading stage, we accept the essential facts as alleged in the complaint. In September 1984, plaintiff Kathleen Campagnola was struck by a car while working as a school crossing guard for the Nassau County Police Department. She alleges that as a result of the accident she has been rendered permanently disabled and is unable to work.

Shortly after the accident, she retained defendant law firm to pursue a claim for personal injuries against the driver of the car and its owner.[1] She entered into a contingency retainer agreement with the law firm giving the attorneys the exclusive right to take legal steps to enforce her claim for personal injuries and agreeing that the firm was to receive a contingency

fee of one third of any money recovered on the claim whether by "suit, settlement or otherwise." The fee was to be calculated on the net recovery, after deduction of the firm's expenses and disbursements. The individual defendant, George Repetti, handled plaintiff's case on behalf of the firm.

The owner of the car that struck plaintiff was insured under a policy issued by Metropolitan Property & Liability Insurance Company (Metropolitan) which provided liability insurance coverage of $10,000 for bodily injury per person injured in a single accident as a result of its insured's negligence.

Plaintiff was herself insured under a policy issued by Government Employee's Insurance Company (GEICO) which provided uninsured motorist coverage for "each person/each accident" of "$100,000/$300,000". The policy also provided $100,000/$300,000 supplementary uninsured motorist coverage (underinsured coverage). The GEICO policy required, as a condition precedent to eligibility for underinsured benefits, that written notice of the accident be provided, that the insured cooperate with GEICO in regard to any claim arising out of the accident and that GEICO's consent be obtained prior to the release or settlement of any claim against any tort-feasor deemed responsible for the insured's injuries.

Defendants allegedly negligently misinterpreted the coverage of the GEICO policy, failing to recognize that it provided underinsurance as well as uninsured coverage. They proceeded
41 *41 to negotiate a settlement of the claim against the Metropolitan policy, and counseled plaintiff to accept the policy limit of $10,000. They failed to notify GEICO of the proposed settlement or to secure GEICO's consent. The settlement was accomplished and plaintiff executed a general release in exchange for the $10,000 payment from which defendants deducted their expenses of $550 and their fee of $3,150. Plaintiff received the net $6,300.

Some time thereafter, through new counsel, plaintiff filed a claim under her GEICO policy, only to have the claim rejected because the settlement with Metropolitan without GEICO's consent destroyed GEICO's right of subrogation. This lawsuit in which plaintiff seeks $100,000 in damages for malpractice and breach of contract ensued. Defendants interposed a general denial and several affirmative defenses, including a fourth affirmative defense to reduce any recovered damages by the amount defendants would have received as attorneys' fees and expenses in the underlying personal injury action.

Supreme Court granted plaintiff's motion to strike this fourth affirmative defense, concluding under the authority of *Andrews v Cain* (62 AD2d 612) that deducting a "hypothetical" contingency fee such as would be payable to the attorney pursuant to the retainer agreement in the underlying action would prevent plaintiff from being fully compensated and that such a "hypothetical" fee therefore is canceled out by the attorney's fee the plaintiff incurred in retaining counsel in the action for legal malpractice.

The Appellate Division affirmed, but on a different basis. That court adopted the rationale of *Strauss v Fost* (213 NJ Super 239, 242-243, 517 A2d 143), holding that, as a general rule, the negligent attorney should be precluded from receiving credit for a fee and therefore that the full amount sought in the original lawsuit should be recoverable by the plaintiff. The Appellate Division granted defendants leave to appeal, certifying the question of whether its order was properly made. We now affirm and answer the certified question in the affirmative.

II

We note at the outset that on this motion to strike the fourth affirmative defense, the parties, as did the courts below, have proceeded under the assumption that the full $100,000
42 underinsured motorist benefit under the GEICO policy would *42 have been recovered had there been compliance with the policy provisions. Consequently, we may conclude for purposes of this appeal that the plaintiff's underlying personal injury action has merit, that "but for" the defendant's malpractice, plaintiff's claim to the underinsured motorist benefits under GEICO policy would not have been rejected and the $100,000 maximum benefit would have been paid. (*See*, *Carmel v Lunney*, 70 **N.Y.2d** 169, 173; *Kerson Co. v Shayne, Dachs, Weiss, Kolbrenner, Levy & Levine*, 45 **N.Y.2d** 730, 732; *see also*, *Servidone Constr. Corp. v Security Ins. Co.*, 64 **N.Y.2d** 419, 425.)

While plaintiff's causes of action sound in both negligence and contract, the measure of damages in a legal malpractice action is generally the same (*Vooth v McEachen*, 181 **N.Y.** 28, 31; *Baker v Drake*, 53 **N.Y.** 211, 220). The object of compensatory damages is to make the injured client whole. Where the injury suffered is the loss of a cause of action, the measure of damages is generally the value of the claim lost (*see*, *Reynolds v Picciano*, 29

measure of damages is generally the value of the claim lost (see, *Reynolds v Picciano, 29* AD2d 1012; *see generally*, 1 Mallen and Smith, Legal Malpractice § 16.4 [3d ed]).

Defendants dispute the value of plaintiff's lost GEICO claim, arguing that under ordinary contract principles the $100,000 recovery from GEICO should be reduced by one third, the amount of their original retainer agreement, because that is the sum plaintiff would have recovered if defendants had performed the contract (*see*, *Lieberman v Templar Motor Co.,* 236 **N.Y.** 139, 149; *Spitz v Lesser,* 302 **N.Y.** 490, 492). They contend, therefore, and the dissent apparently agrees, that to permit her to recover the full $100,000 in a legal malpractice action, without deducting the amount of the contingent fee agreed upon, unjustly gives the plaintiff a windfall, and concomitantly, unfairly requires the defendants to pay the full $100,000 and suffer the loss of that fee.

We recognize that there is authority for the proposition that damages awardable in a legal malpractice action should be reduced by the fee agreed to be paid to the negligent attorney (*see*, *Childs v Comstock,* 69 App Div 160; *Moores v Greenberg,* 834 F.**2d** 1105; *McGlone v Lacey,* 288 F Supp 662; *Sitton v Clements,* 257 F Supp 63, 65, *affd* 385 F.**2d** 869; *In re Woods,* 158 Tenn 383, 13 SW2d 800). Other courts have reached the opposite conclusion, however. Some, as did the Appellate Division in this case, hold that such a reduction in the plaintiff's recovery is impermissible because a negligent attorney is precluded from collecting
43 a fee (*e.g.*, *Strauss v Fost,* 213 NJ Super 239, 517 A2d 143, *supra*); *43others reason that since a plaintiff must pay an attorney in the subsequent malpractice action, disregarding the original lawyer's fee when calculating damages "cancels out" the extra cost (*e.g.*, *Andrews v Cain,* 62 AD2d 612, *supra*; *Kane, Kane & Kritzer v Altagen,* 107 Cal App 3d 36, 165 Cal Rptr 534; *Togstad v Vesely, Otto, Miller & Keefe,* 291 NW2d 686 [Minn]; *Christy v Saliterman,* 288 Minn 144, 179 NW2d 288; *Winter v Brown,* 365 A2d 381 [DC App]; *Duncan v Lord,* 409 F Supp 687); and at least two courts have held that an injured client may recover the additional attorney's fees incurred in the malpractice action as consequential damages *(e.g.*, *Foster v Duggin,* 695 SW2d 526 [Tenn]; *Winter v Brown,* 365 A2d 381 [DC App], *supra)*.

We conclude that a reduction of the client's recovery should not be allowed in this case and for reasons of public policy, we decline to apply the traditional rules of contract damages to permit a negligent attorney to obtain credit for an unearned fee.

As we not too long ago observed, "[t]he unique relationship between an attorney and client, founded in principle upon the elements of trust and confidence on the part of the client and of undivided loyalty and devotion on the part of the attorney, remains one of the most sensitive and confidential relationships in our society." (*Demov, Morris, Levin & Shein v Glantz,* 53 **N.Y.2d** 553, 556.) Because of the role attorneys play in the vindication of individual rights in our society, they are held to the highest standard of ethical behavior (Code of Professional Responsibility, Preamble; EC 6-5). Yet without this relationship of trust and confidence an attorney is unable to fulfill this obligation to effectively represent clients by acting with competence and exercising proper care in the representation (*Demov, Morris, Levin & Shein v Glantz,* 53 NY2d, at 556, *supra*).

Because of the uniqueness of the attorney-client relationship, traditional contract principles are not always applied to govern disputes between attorneys and clients. Thus it is well established that notwithstanding the terms of the agreement between them, a client has an absolute right, at any time, with or without cause, to terminate the attorney-client relationship by discharging the attorney (*Shaw v Manufacturers Hanover Trust Co.,* 68 **N.Y.2d** 172, 177; *Teichner v W & J Holsteins,* 64 **N.Y.2d** 977, 979; *Demov, Morris, Levin & Shein v Glantz, supra*;
44 *Crowley v Wolf,* 281 **N.Y.** 59, 64-65; *Martin v Camp,* 219 **N.Y.** 170, 176). *44 Where that discharge is without cause, the attorney is limited to recovering in quantum meruit the reasonable value of the services rendered (*Teichner v W & J Holsteins, supra*; *Demov, Morris, Levin & Shein v Glantz,* 53 NY2d, at 557, *supra*). Where the discharge is for cause, the attorney has no right to compensation or a retaining lien, notwithstanding a specific retainer agreement (*Teichner v W & J Holsteins,* 64 NY2d, at 979, *supra*; *Crowley v Wolf,* 281 **NY**, at 65, *supra*). "Th[is] rule * * * is well calculated to promote public confidence in the members of an honorable profession whose relation to their clients is personal and confidential" (*Martin v Camp,* 219 **NY**, at 176, *supra*).

Camp, 219 **NY**, at 176, *supra*).

We view the public policy considerations that underpin this rule as both relevant and sufficiently compelling to warrant denying unearned attorney's fees, or credit for the monetary equivalent, to an attorney who is guilty of legal malpractice that results in the client's loss of recovery upon a valid claim. The attorney's malpractice constitutes a failure to honor faithfully the fidelity owed to the client and to discharge competently the responsibilities flowing from the engagement. It is especially appropriate to deny credit for a fee where, as here, the defendant attorneys performed absolutely no services in connection with the disputed claim, and thus, even if discharged by plaintiff without cause, would not have been entitled to any quantum meruit compensation (*cf.*, *Moores v Greenberg*, 834 F.**2d** 1105, 1112-1113, *supra*).[2] Of course, if plaintiff had learned of defendants' malpractice and discharged them for cause, they could not claim credit for their fee. We see no reason to allow the defendants to benefit by the fact that plaintiff belatedly learned of their misconduct and sued for recovery in legal malpractice. We conclude, therefore, that in these circumstances, the negligent attorney is precluded from claiming credit for an unearned fee. Thus, plaintiff's recoverable damages are the value of her GEICO claim, without any deduction for the fee she would have paid defendants had they performed the contract.[3]

45 *45We reject defendants' contention that this rule of damages permits plaintiff a windfall by allowing her to recover her attorney's fees in the legal malpractice action in contravention of the long-standing American rule that litigants pay their own attorney's fees (*see*, *Alyeska Pipeline Co. v Wilderness Socy.*, 421 US 240, 248). Contrary to the assertion of the dissent (dissenting opn, at 48), our decision is not premised on compensating plaintiffs for attorneys' fees incurred in actions for legal malpractice. We neither authorize the recovery of legal fees in this case as consequential damages, nor "shift[ ]" the amount of defendants' contingency fee to plaintiff as part of the value of her claim. We hold only that plaintiff's recovery is not to be diminished by the amount of defendants' unearned fee. Thus, under our analysis, the fact that, as a practical matter, plaintiff may expend some portion of her recovery on legal fees is of no moment; the legal fees are not an aspect of her damages and her recovery is the same whether she hires a lawyer to pursue her malpractice claim or proceeds *pro se*.

Accordingly, the order of the Appellate Division should be affirmed, with costs, and the certified question answered in the affirmative.

KAYE, J. (concurring).

I concur in the majority opinion, but write separately to underscore the factors that compel me to that conclusion.

Four essential facts, to my mind, define and delimit the applicable legal principles in this case. *First*, this is a contingent fee case. *Second*, defendants rendered no legal services — indeed, they did absolutely nothing — with respect to plaintiff's claim against GEICO.[1] *Third*, plaintiff retained a second lawyer who thus far has had to prosecute plaintiff's claim through the trial court, the Appellate Division and now this court. *Finally*, this is a pleadings motion; the merits are yet to be adjudicated, and plaintiff's damages are yet to be determined.

46 In such circumstances, the motion to strike the fourth affirmative defense, which would immediately reduce plaintiff's maximum potential recovery, was correctly granted. In *46 lawyer malpractice cases, as in all negligence cases, the focus in damages inquiries must be on the injured plaintiff — not on whether damages will unduly harm the wrongdoer defendant — the objective being to put the injured plaintiff in as good a position as she would have been in had there been no breach of duty. Had defendants discharged their professional responsibility, and furnished the contracted-for legal services, plaintiff would have pocketed roughly $67,000 (the balance representing compensation for defendants' services).

In fact, defendants did not render those services, and plaintiff did not receive the $67,000. Plaintiff has had to retain a second attorney to pursue that same objective. There is therefore no basis for an affirmative defense that would at the outset reduce plaintiff's maximum

recovery to $67,000 — to be further reduced by the reality of a second counsel fee. If the affirmative defense were allowed, plaintiff could never be made whole; plaintiff could never be put in as good a position as she would have been in had defendants fulfilled their commitment to her. Should this plaintiff have the misfortune to suffer successive lawyer malpractice, on defendants' theory she could in principle win her rightful recovery and in fact receive nothing by virtue of deductions for unearned counsel fees.[2]

The dissent's speculation that attorneys who commit malpractice might settle those claims, in order to retain goodwill, or avoid adverse publicity, or out of a sense of moral obligation, may be ideals of professional behavior, but that speculation is not borne out by the facts of this case — which is all we have before us. Plaintiff already has been before *three courts* and is still at the pleadings stage. In these circumstances, it is right as a matter of policy to permit

plaintiff to seek the full maximum recovery against the allegedly negligent lawyers; that is the only way plaintiff can be made whole.

Should the application of this rule yield an absurd result in a future case presenting different facts (as the dissent suggests it might, when lawyers promptly settle such cases), lawyer
47 defendants can be trusted to bring such additional facts to *47 courts' attention, and the law can be trusted to respond sensibly in calculating and awarding damages. For the present class of cases, *this* is the correct and reasonable result, which is all we are deciding.

SIMONS, J. (dissenting).

I would reverse and deny the motion to dismiss defendants' affirmative defense. In my view, the rule adopted by the majority unjustly enriches plaintiffs and unfairly punishes defendants. It permits the clients to recover more from their attorneys in a malpractice action than they could recover if the attorneys had achieved complete success in the underlying action for which they were retained.

Under standard doctrine a successful plaintiff in a malpractice claim may recover from the negligent attorney "`the loss actually sustained'" (*Vooth v McEachen*, 181 **N.Y.** 28, 32; *Titsworth v Mondo*, 95 Misc **2d** 233, 244; *see generally*, Annotation, *Measure and Elements of Damages Recoverable for Attorney's Negligence with Respect to Maintenance or Prosecution of Litigation or Appeal*, 45 ALR2d 62). Under any view of the evidence in this case, "the loss actually sustained" by plaintiffs could not exceed $67,000 — the maximum recovery available, less the agreed upon one-third attorney's fee ($100,000 minus $33,000). Accordingly, the recovery of $67,000 in damages in the malpractice action will make them whole; they should not be permitted to recover more.

Notwithstanding this, the majority holds plaintiffs are entitled to the gross amount of the underlying claim. It bases its decision on public policy, reasoning that clients have the right to discharge the attorney at any time for cause without paying a fee (*see*, *Teichner v W & J Holsteins*, 64 **N.Y.2d** 977, 979) and that they are entitled, therefore, to have the attorney remit the whole amount of the claim as damages, including the agreed-upon fee. They would not only deny the discharged attorney his compensation, as our cases permit, but also augment the client's recovery by the amount of it though not otherwise a part of plaintiffs' recovery. They justify this because the attorney has performed no services and, therefore, should not have the benefit of his fee.

The short answer is that there is no $33,000 to be remitted. Defendants have received nothing for handling plaintiffs' claim and they are not enriched if plaintiffs' recovery from them is limited to the net recovery possible, $67,000. Defendants are exposed in liability for the full amount
48 available to plaintiff for successful completion of the services but they *48 should not be punished by adding to that sum the amount of an attorney's fee that plaintiffs are not now and never have been entitled to receive. To do so adds an amount of punitive damages to the claim for simple negligence, contrary to our decisions providing that punitive damages are allowable only when the high threshold of moral culpability is satisfied, cases involving gross or wanton negligence or willful, malicious conduct (*see*, *Giblin v Murphy*, 73 **N.Y.2d** 769, 772;

Walker v Sheldon, 10 **N.Y.2d** 401).

Finally, the majority decision implicitly rests upon the premise that, as a practical matter, if plaintiffs are required to retain attorneys in the malpractice litigation any recovery will be reduced by fees for those attorneys. That is not necessarily true. Plaintiffs do proceed *pro se* and attorneys do settle malpractice claims to retain goodwill, avoid adverse publicity or out of a sense of moral obligation. The amount that may be claimed in settlement should not exceed the amount available to plaintiffs after successful litigation. The concurring opinion would have a flexible rule to account for such situations but the rule stated is no rule at all because it permits the client to demand damages in excess of the actual loss at the risk of the time and cost of litigation to both parties.

But even if the claims are not settled, under the American rule, accepted in this State, prevailing litigants must pay their own attorney's fees and disbursements. They cannot recover them from their adversary as consequential damages unless an award is authorized by agreement between the parties, by statute or by court rule (*Alyeska Pipeline Co. v Wilderness Socy.*, 421 US 240, 248; *Hooper Assocs. v AGS Computers*, 74 **N.Y.2d** 487, 491; *Matter of A. G. Ship Maintenance Corp. v Lezak*, 69 **N.Y.2d** 1, 5). There is little justification for overriding this established rule by shifting the amount of a contingent attorney's fee to plaintiffs as if they were in fact part of the value of plaintiffs' claim. That is precisely what the majority opinion implicitly does and the concurring opinion explicitly advocates. We would not authorize such damages in malpractice suits against other professionals and I am unable to see why they should be allowed in an action against attorneys.

Accordingly, I dissent.

Order affirmed, etc.

[1] Joseph Campagnola has also asserted a derivative action. For purposes of this decision, however, references to the plaintiff shall refer only to Kathleen Campagnola.

[2] It is not disputed that defendants were fully compensated for the services they did render on plaintiff's Metropolitan claim.

[3] The dissent's argument premised on the assumption that plaintiff's "damages" are $67,000 because the contingency retainer agreement to pay a one-third contingency fee was a necessary cost of her recovering from GEICO is misplaced. As previously noted, plaintiff's "damages" are the value of the lost claim: $100,000. That her "recovery" would have been only $67,000 had defendants performed their agreed-upon services is irrelevant to our analysis, since defendants in fact rendered no service; thus they would not be entitled to even "quantum meruit" compensation.

[1] Given the posture of the case, the facts are presumed to favor plaintiff, the nonmovant.

[2] This opinion advocates neither a change in the law regarding attorneys' fees nor unreasonable damage demands by clients of their attorneys (dissenting opn, at 48). As with malpractice by any other professional, the objective of the law is to compensate clients for their losses; clients should not recover more because the professional is an attorney, nor should they recover less. In a situation where neither choice is absolutely perfect, the majority's policy determination better approximates the law's objective.