

**SOLICITOR'S NEGLIGENCE:
LIFE AFTER WHITE V. JONES -
SUGGESTIONS FOR AN ESTATES PRACTICE**

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**SOLICITORS' OBLIGATIONS -
SUGGESTIONS FOR
AN ESTATES PRACTICE**

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One of our challenges as lawyers is to assist our clients to plan their affairs in a creative, thoughtful, effective manner, using our experience and legal parameters as planning tools rather than as restrictive devices. Our advice and counsel carry consequences for our clients and unless we are aware of the consequences, our advice and counsel may result in our clients and their beneficiaries suffering loss which may rebound on us.

This paper is an exploration of a number of estate planning circumstances where failure to understand the consequences of our counsel, or lack thereof, could cause loss to and create conflict among family members and relations and, in some cases, give rise to liability to us as solicitors. Several important court decisions will be reviewed in which solicitor's negligence in estate matters was alleged. The author's objective is to draw inferences from these decisions and formulate guidelines for an estate planning practice which reflect the needs of our clients.

In this paper, a Last Will and Testament will be referred to as a "Will" and the maker of a Will as the "Testator" or "Testatrix".

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THE WILL - LIABILITY IN NEGLIGENCE TO THE

DISAPPOINTED

BENEFICIARY

A number of articles have been written regarding the extent to which solicitors are liable for negligence in the drafting and execution of Wills and whether there is also a duty owed to beneficiaries who are disentitled or who fail to receive a gift under a Will due to the negligence of the solicitor who is responsible for drafting the Will. One of the earlier articles which dealt with these issues was written by Richard Jackman in 1971 entitled "Solicitor's Liability for Negligence in the Drafting and Execution of a Will".¹ He pointed out that "where a Will is caused to become partially or wholly impotent, the only one to suffer is the beneficiary".

Jackman initially considered the U.S. experience and the fact that until 1958, in every case beneficiaries who had brought actions against solicitors who had negligently drafted and directed the execution of Wills which deprived the beneficiary of any benefit under the Will, failed to obtain Judgments against solicitors because of the common law doctrine of privity of contract. However, he noted that in 1958, the California Supreme Court for the first time took the position that lawyers who undertake to draft Wills and supervise execution of them, cannot escape liability to beneficiaries because of a lack of privity of contract with them. For the first time, beneficiaries were entitled to recover against the solicitor for his or her negligence in an action in tort.

The Canadian experience at that point was represented by the Ontario Court of Appeal decision in *Re: Fitzpatrick*.² This was a case where a lawyer who drew the Will of Mr. Fitzpatrick inadvertently failed to properly witness the Will with the result that the widow of the late Mr. Fitzpatrick sued the lawyer for his negligence. In his article, Mr. Jackman states that the Court of Appeal

“said that the solicitor owed no duty to the beneficiary under the Testator’s Will and even if there was negligence on the solicitor’s part, there could be no recovery since there was no privity of contract between the Plaintiff and the Defendant”.

The author concluded that the law respecting solicitor’s liability to beneficiaries was in a development stage and that

“at common law a solicitor contracts to be skilful and careful: for failure to perform this obligation, the solicitor may be made liable in contract or even in tort for negligence. Why, then, should he not be liable in this instance?”

Until the 1979 English case of *Ross v. Caunters*³, the law remained static in Canada and Mr. Jackman’s challenge to make solicitors liable to beneficiaries was not taken up by the courts in Canada. *Ross v. Caunters* set the stage for the development of the law in Canada.

ROSS V. CAUNTERS

This case dealt with a gift to a third party beneficiary with whom the Testator was visiting when his Will was signed and who was known to the Testator's solicitors. The Testator had instructed his solicitors to prepare a Will which included a gift to the Testator’s sister-in-law, Mrs. Ross. The Testator instructed the lawyers to forward the unexecuted Will to him in care of

1 Richard Jackman, Ottawa Law Review, Volume 5 1971 at Page 242.

2 *Re: Fitzpatrick*, Ont. L.R. 3, at 4, [1924] 1 D.L.R. 981, 54 O.L.R. 3(S.C. App. Div.)

3 *Ross v. Caunters* [1970] 3 All E.R. 580, (Ch.D.) An English Chancery Division Case
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his sister-in-law whom he intended to visit. The lawyers did so and included in the covering letter instructions as to the manner in which the Will was to be executed - "in the presence of two independent witnesses (i.e. not somebody benefiting under the Will).....". The solicitors failed to warn the Testator in their letter that Section 15 of the 1837 Wills Act provided that attestation of a Will by a beneficiary's spouse would invalidate a gift to the beneficiary. Mrs. Ross' husband attested the Will and, when it was returned to the lawyers, they failed to notice the mistake. After the death of the Testator, the lawyers notified Mrs. Ross that the bequest to her of a share of the estate was void because her husband had witnessed the Will. As a result, she sued the law firm claiming damages in negligence for the loss of the gift under the Will.

The head-note to the case summarizes Mrs. Ross' allegations and the solicitors' responses:

"The Plaintiff alleged that the solicitors were negligent in failing (i) to warn the Testator about the consequences of Section 15, (ii) on the return of the Will to check that it had been executed in conformity with the 1837 Act, (iii) to observe that the Plaintiff's husband was an attesting witness, and (iv) to draw that fact to the Testator's attention so that he could re-execute the Will or make a new and valid Will. The solicitors admitted negligence but denied that they were liable to the Plaintiff, contending (i) that a solicitor was liable only to his client and then only in contract and not in tort and could not, therefore, be liable in tort to a third party, (ii) that for reasons of policy, a solicitor ought not to be liable in negligence to anyone except his client, and (iii) that in any event, the Plaintiff had no cause of action in negligence because the damage suffered was purely financial."

The solicitors were held liable to Mrs. Ross for their negligence and she was awarded damages to the extent of the benefits she would have received under the Will of the Testator.

This case is particularly significant in that the solicitors' liability was based on an extension of the Hedley Byrne & Heller principle that there could be liability for financial loss resulting from reliance on a negligent misrepresentation of fact if the person making the

representation has some special skill and knows, or ought to know, that the other party is relying on that skill. Vice-Chancellor Megarry's main conclusions were summed up in his Judgment as follows:

1., there is no longer any rule that a solicitor who is negligent in his professional work can be liable only to his client in contract; he may be liable to his client and to others for the tort of negligence.
2. The basis of the solicitors' liability to others is either an extension of the Hedley Byrne principle, or, or more probably, a direct application of the principle of *Donoghue v. Stevenson*.
3. A solicitor who is instructed by his client to carry out a transaction that will confer a benefit on an unidentified third party owes a duty of care towards the third party in carrying out that transaction, in that the third party is a person within his direct contemplation as someone who is likely to be so closely and directly affected by his acts or omissions that he can reasonably foresee that the third party is likely to be injured by those acts or omissions.
4. The mere fact that the loss to such a third party caused by the negligence is purely financial, and is in no way a physical injury to person or property, is no bar to the claim against the solicitor.
5. In such circumstances, there are no considerations which suffice to negative or limit the scope of the solicitor's duty to the beneficiary.

This case left many questions to be answered which were not dealt with satisfactorily until the *White v. Jones* case. However at a minimum, *Ross v. Caunters* commenced the discussion of the exclusion from liability of economic loss to a beneficiary (third party) as a result of a solicitor's negligence.

The basis for this discussion was summarized in the head-note of the *Ross v. Caunters* decision as follows:

“The fact that the Plaintiff's claim in negligence was for purely financial loss and not for injury to the person or property, did not preclude her claim, for, having regard to the high

degree of proximity between her and the solicitors arising from the fact that they knew of her and also knew that their negligence would be likely to cause her financial loss, the Plaintiff was entitled to recover the financial loss she had suffered by their negligence.”

Extension of liability for financial loss to third party beneficiaries who were unknown to the solicitors for the Testator was the next logical step for the courts to take.

WHITE V. JONES

_____ *White v. Jones*⁴, like *Ross v. Caunters*, dealt with the question of whether a solicitor owes a duty of care in the preparation of a client’s Will to an intended beneficiary of the Testator. In giving an affirmative answer, the Court of Appeal unanimously concluded that the case against the solicitor passed the test of “duty” in terms of foreseeability, proximity and reasonableness.

Because of the importance of *White v. Jones*, it is worthwhile to review the facts of the case and the Judgments of both the Court of Appeal and the House of Lords.

In his paper, “*White v. Jones* [1995] 1 All E.R. 691 (H.L.)⁵”, Timothy Youdan summarized the facts of *White v. Jones* as follows:

“For a short period in 1986 the Testator was estranged from his two daughters and he executed a Will under which he gave nothing to them. By mid-June in 1986, the Testator and his daughters became reconciled and he decided to make a new Will under which he

4 *White v. Jones* [1993] 3 All E.R. page 481, Court of Appeal and [1995]1 All E.R. page 691

- House of Lords

5 Timothy Youdan, Case Comment: *Jones and Others v. White and Another*, CBAO Program - Righting Wills, 1995

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would leave a substantial proportion of his estate to each daughter. Unfortunately, the Testator died on September, 14, 1986 before the execution of his new Will and without effectively revoking his prior Will. The following was the sequence of events:

- ! During the period from mid-June to about July 17 the Testator and one of the daughters each telephoned the defendant Mr. Jones (a clerk in the office of the defendant solicitors) and told him of the Testator's wish to change his Will. Mr. Jones suggested that the Testator should jot down his wishes and he, Mr. Jones, would deal with the matter.
- ! The Testator signed a letter, which was received by the defendant solicitors on July 17, in which he stated among other things that he wished each of his daughters to receive ^9,000 (the entire estate was only worth about ^29,000).
- ! Appointments were made on three occasions for Mr. Jones to meet with the Testator at the Testator's house but Mr. Jones did not keep the appointments.
- ! On August 16, Mr. Jones dictated an internal memorandum to another member of the firm asking for the latter to draft a new Will for the Testator and stated: ΦI have an appointment to see [the Testator] on [blank] and if at all possible would you let me have the Will by that dateΘ. Nothing further was done by Mr. Jones or by the defendant solicitors and this memorandum was not in fact typed out until September 5.
- ! On August 17, Mr. Jones went on holiday and returned to the office on September 1. On his returning, one of the Testator's daughters made an appointment for the Testator to meet with Mr. Jones on September 17.
- ! On August 23, the Testator went on a holiday which was intended to last for two weeks. While away, he fell and hurt his head. He returned home on September 6 or 7 and died from a heart attack on September 14.Θ

This was an appeal from a Lower Court decision and, even though the solicitor defendants in the Lower Court had admitted negligence, they were found not to be liable on the basis that the principle of *Ross v. Caunters* did not apply to the failure to prepare a Will for execution and also that the damages were too speculative and uncertain in extent to be

recoverable. The Court of Appeal and House of Lords decisions are informative regarding practice issues, the subject matter of this paper.

In its decision, the Court of Appeal clearly stated that although the prospective beneficiaries played some part in the steps taken by the Testator towards the preparation of a new Will in that they were aware of his wishes, they were aware of his instructions to the solicitors and they even acted as a channel of communication between the Testator and the solicitors, those facts were irrelevant when considering the liability question. On these facts, the court decided there was no question of reliance and, accordingly, the reliance cases were not considered. The court specifically followed Vice-Chancellor Megarry's statement in *Ross v. Caunters* that

“in considering the liability question, it is of the utmost importance to keep in mind that if there is no liability, the result is striking: the only person who has a valid claim against the solicitor has suffered no loss, and the only person who has suffered a loss has no valid claim. The Executors can sue the solicitor for damages for professional negligence, but they can recover only nominal damages because the Estate has suffered no loss. All that has happened is that, by reason of the negligence, on the Testator's death, the entire Estate passes to a different beneficiary. The intended beneficiary suffers a loss, but he has no right of recourse against the solicitor for professional negligence which caused his loss. It would be a sorry reflection on English law if, indeed, that is the position today”.

Once again, we see the court taking into account the importance of redressing loss and extending the law to provide that redress.

It is also worth noting that the court followed the House of Lords decision in *Caparo Industries plc v. Dickman*⁶, which established the principle that for there to be a duty to take reasonable care to avoid causing damage of a particular type to a particular person or class of persons, three factors must coalesce:

Foreseeability of damage;

6 *Caparo Industries plc v. Dickman* [1990] 1 All E.R. 568 2 AC 605 [1990] 2 W.L.R. 358

A close and direct relationship characterized by the law as proximity or neighbourhood; and
The situation must be one where it is fair, just and reasonable that the law should impose the
duty of the given scope upon the one party for the benefit of the other.

The court had no difficulty in finding that the three factors coalesced in this case as a solicitor must foresee that a failure to prepare a Will as instructed by one's client and arrange for it to be duly executed, the disappointed beneficiaries will suffer financial loss. Once death occurs, nothing can be done to remedy the solicitor's negligence and the Estate will pass to those entitled under any valid, unrevoked Will and subject thereto to those entitled on an intestacy. It is then too late to prepare a new Will and further, payment of damages to a client's Estate would not provide a means of recompensing the disappointed beneficiary for the solicitor's professional negligence. Any monies paid to the Estate would pass under the testamentary dispositions which fail to carry out the Testator's instructions. Accordingly, money paid to the Estate would not go to the disappointed beneficiaries. Finally, in deciding whether there is, between a solicitor and intended beneficiary, a relationship of proximity and whether it is fair, just and reasonable that there should be a liability imposed on a solicitor to compensate the intended beneficiary, the court held that "a coherent system of law demands that there should be an effective remedy against the solicitor". The Court of Appeal also held that it was fair, just and reasonable that the solicitor should be liable in damages to the intended beneficiary; otherwise, there would be no sanction in respect of the solicitor's breach of his professional duty and "thus there is a special relationship between the solicitor and intended beneficiary which should attract a liability if the solicitor is negligent."

It is important to note that the Court of Appeal did not excuse the solicitors from their

failure to exercise due diligence in the preparation of the Testator's Will. Instructions were received on July 16th to prepare a document "which was, after all, a very simple Will" and it was not until a month later that the clerk went on vacation. The court also noted that there was no evidence before the court on the law firm's usual practice when carrying out instructions to prepare a Will. Comments such as these have led to the view of some in the profession, that a two-week turnaround time for drafting a Will is appropriate. Whether or not a two-week turnaround time is appropriate, will probably depend on the circumstances surrounding the giving of instructions by a Testator, the actions of the lawyer as a result of receiving the instructions, the usual practice of the law firm and special circumstances such as the consent by the Testator to delay in drafting the Will because of busyness of the lawyer and such things as research and the need to consult with other advisors that may be required in respect of preparation of the Will.

The appellate decision in *White v. Jones* was affirmed by the House of Lords and although each of the three Judges in the majority gave separate reasons, it is Lord Goff's reasons which are most instructive. After reciting the general rule that there is no liability in solicitor's negligence for an omission unless the Defendant is under some pre-existing duty, he stated that "the question arises how liability can arise in the present case in the absence of a contract". Lord Goff also concluded that a contractual solution was not available because of the privity of contract doctrine and because the case did not provide a suitable opportunity for reconsideration of such a fundamental doctrine.

As was the case in the Court of Appeal, Lord Goff was concerned that if a duty was not owed by the lawyer to the disappointed beneficiary, then the only person who had suffered a loss had no claim. He decided that in cases such as *White v. Jones*, the House of Lords should

extend

“to the intended beneficiary a remedy under the Hedley Byrne principle by holding that the assumption of responsibility by the solicitor towards his client should be held in law to extend to the intended beneficiary who (as the solicitor can reasonably foresee) may, as a result of the solicitor’s negligence, be deprived of his intended legacy in circumstances which neither the Testator nor his Estate will have a remedy against the solicitor. Such liability will not, of course, arise in cases which the defect in the Will comes to light before the death of the Testator and the Testator either leaves the Will as it is or otherwise continues to exclude the previously intended beneficiary from the relevant benefit..... As I see it, not only does this conclusion produce practical justice as far as all parties are concerned, but it also has the following beneficial consequences.

There is no unacceptable circumvention of established principles of the law of contract.

No problem arises by reason of the loss being of a purely economic character;

Such assumption of responsibility will, of course, be subject to any term of the contract between the solicitor and the Testator which may exclude or restrict the solicitor’s liability to the Testator under the principle in Hedley, Byrne. It is true that such a term would be most unlikely to exist in practice; but as a matter of principle, it is right that this largely theoretical question should be addressed.

Since the Hedley, Byrne principle is founded upon an assumption of responsibility, the solicitor may be liable for negligent omissions as well as negligent acts of commission.

I do not consider that damages for loss of an expectation are excluded in cases of negligence arising under the principle in Hedley, Byrne, simply because the cause of action is classified as tortious. Such damages may in principle be recoverable in cases of contractual negligence; and I cannot see that, for present purposes, any relevant distinction can be drawn between the two forms of action. In particular, an expectation of loss may well occur in cases where a professional man, such as a solicitor, has assumed responsibility for the affairs of another; and I for my part can see no reason in principle why the professional man should not, in an appropriate case, be liable for such loss under the Hedley, Byrne principle..... let me emphasize that I can see no injustice in imposing liability upon a negligent solicitor in a case such as the present where in the

absence of a remedy in this form neither the Testator's Estate nor the disappointed beneficiary will have a claim for the loss caused by his negligence. This is the injustice which, in my opinion, the Judges of this country should address by recognizing that cases such as these call for an appropriate remedy and that the common law is not so sterile as to be incapable of supplying that remedy when it is required."

Having established a duty to the disappointed beneficiary, the judiciary's next logical step was to develop and refine the duty. Another English decision, *Carr-Glynn v. Frearsons*⁷, also dealt with liability to a third party beneficiary; however, the assumption of responsibility by the Testatrix relieved the solicitor from liability. This case warrants a close examination as it contains important comments about solicitors' practice in the drafting of Wills.

CARR -GLYNN V. FREARSONS (A FIRM)

The facts of the case as described in the head-note were as follows:

- ! In 1989 the Testatrix executed a new Will drawn up by the Defendant's solicitors leaving the Plaintiff her half share in a property in lieu of another bequest contained in a previous Will.
- ! The solicitors advised the Testatrix that there was some doubt as to whether her share in the property was held by her as a joint tenant or as a tenant in common and that if it was held on a joint tenancy, a gift to the Plaintiff would not be effective unless she severed the

joint tenancy.

! The Testatrix stated that she would obtain the deeds to clarify the position and the solicitors did not pursue the matter further. The Testatrix died in August 1993 and the property, which was held on a joint tenancy, passed by survivorship to the remaining joint tenant, the Plaintiff's brother. The brother refused to give the Plaintiff a share in the property.

! As a result, the Plaintiff received nothing under the Will and brought an action for negligence against the solicitors contending that they had breached their duty of care to her as an intended beneficiary in failing to ensure on what basis the Testatrix held her share in the property, in failing to ensure the joint tenancy was severed and, thereby, in failing to give effect to the Testatrix's wishes.

The defendant law firm, Frearsons, not only prepared the Will for the Testatrix but had prepared the previous Wills and had also acted both on the purchase of the property and on the execution of a deed of gift by which the property was conveyed to the Plaintiff's brother and the Testatrix as joint tenants. The lawyer, a partner in the defendant law firm, who prepared the Will of the Testatrix and attested to its execution, had not acted on the purchase of the property or on the subsequent deed of gift. She discovered upon a note in the file which was enough to concern her as to the manner in which title to the property was held and, after determining that the file

was no longer available, she wrote the Testatrix, advising her of her concerns regarding title to the property and informing her that the law firm no longer had the file relating to the property. The Testatrix did not give her instructions to obtain the deeds and, in fact, when she attended on the lawyer to execute the Will, the lawyer made the following note: “Mrs. L. to get Deeds so ownership of ‘homelands’ can be checked”. The Testatrix failed to pursue the issue of getting the deeds to clarify the ownership and eventually died without having done so.

After reviewing relevant cases and, in particular, after an extensive consideration of *White v. Jones*, the court distinguished *White v. Jones* on the basis that in the present case, the Estate will have suffered a loss if there was negligence on the part of the lawyer and that the Estate ought to have been enhanced by the half-share of the property which would have resulted from severance. Lloyd J. then considered that the case would be subject to the double recovery objection: namely, if the Plaintiff has a cause of action on the basis that the lawyer was negligent in her advice to the Testatrix, so would the personal representatives. The benefit of such a claim would not thereby go to the Plaintiff but to the residuary beneficiary. He then went on to state

“it seems to me unacceptable that solicitors should be at risk of two separate claims for identical loss at the suit both of the personal representatives and a beneficiary, when recovery by one would not bar recovery by the other”. He then held that “a solicitor does not owe a separate duty to a person in the position of the Plaintiff in a case such as this”.

From a practice perspective, it is informative to note that Lloyd J. was of the view that “even if there were such a duty, the Plaintiff would not have established a breach of that duty”. He agreed the lawyer had correctly drawn the Testatrix’s attention to the desirability of getting the deeds and offered to take the necessary steps, but the Testatrix decided to do it herself. Lloyd J. also took comfort in the fact that the Testatrix decided to execute her Will at once rather than wait until the title to the property was established.

As far as the practice of the lawyer was concerned, Lloyd J. considered the failure of the lawyer to take steps after execution of the Will to determine ownership of the property, even though the Testatrix decided that she would obtain the deeds. He stated that “at most, she might after awhile, have sent a reminder letter to the deceased to remind her that this was still an outstanding point”.

However, he decided that the failure of the lawyer to send a reminder letter “is something which no reasonably competent solicitor could have done in a situation where the deceased.....decided to retain the initiative herself as regards obtaining the Deeds 'and he held that the lawyer 'acted in an entirely reasonable and proper way”. The judge was also of the view that the failure by the solicitor to suggest an immediate notice of severance be sent without determining ownership by reviewing the deeds was “something which no reasonably competent solicitor could have done in 1989”.

Practitioners may derive comfort from this decision as it appears to limit the developing responsibility of solicitors to beneficiaries in two ways: first, by supporting the double recovery objection, and second, by confirming that as solicitors, we are entitled to respect decisions of our clients, i.e. the Testatrix wishing to obtain the deeds herself. Nonetheless, lawyers should be cautioned by the care exhibited by the lawyer in keeping careful notes and by the suggestion of Lloyd J. that the lawyer might have sent a reminder letter to the deceased to remind her that the matter of the deeds was an outstanding point. This view, releasing the solicitor of the obligation to serve a notice of severance, was short-lived as the Frearsons’ case was overturned on appeal to the Court of Appeal in 1998,⁸ and leave to appeal to the House of Lords was refused.

The Court of Appeal clarified the Lower Court finding that there was no reason to suppose that there was a particular urgency by stating that it was necessary to bear in mind that the Testatrix was 81 years of age when she made her Will in 1989. The fact that the solicitor completed the Will within a few days of receiving instructions was acknowledged by the court. However, the solicitor was criticized for allowing execution of the Will when the manner of

holding title to the property was unknown. Lord Justice Chadwick decided nothing could be gained by waiting to see what the position was in the deeds. He stated that:

“...a competent solicitor, acting reasonably, would have advised the Testatrix that, in order to be sure her testamentary wishes should have effect, she should serve a notice of severance in conjunction with the execution of the will.”

Lord Justice Chadwick made no reference to the possibility that the Testatrix may have had good reason for not wishing to serve a notice of severance. That was not unreasonable in the circumstances as there does not appear to be any evidence of that before Lord Justice Chadwick. Is it not therefore reasonable to interpret Lord Justice Chadwick’s comments to the effect that, as solicitors, we must meet a standard of care which requires us to advise our clients as to alternatives and risk so that our clients may make informed decisions? Rather than a letter reminding the Testatrix to check the deeds, a letter, for example, confirming instructions of the Testatrix not to serve a notice of severance for whatever reason or confirming instructions to serve a notice of severance might have sufficed. The taking of instructions to prepare a Will and the actions or restrictions on actions emanating from instructions can be a potential minefield for solicitors. The final English case of *Walker v. Medlicott and Son*⁹ is illustrative of this point.

WALKER V. MEDLICOTT AND SON (A Firm)

_____ This is a Court of Appeal decision which once again dealt with a claim in negligence by a disappointed beneficiary against a solicitor. The facts of the case were as follows:

On April 4, 1986, the Testatrix, a woman in her 70's presented herself without an appointment at a solicitor’s office and met with Mr. Medlicott.

- ! She brought with her a note of her wishes in her own handwriting.
- ! Mr. Medlicott interviewed her for eighteen minutes (his note) and made a handwritten attendance note of her instructions. He kept both notes in his file.
- ! The Testatrix’s intentions as reflected in her note differed in six instances from her instructions as reflected in Mr. Medlicott’s notes. In particular, a nephew, Mr.

8 Carr-Glynn v. Frearsons [1998] 4 AER 225

9 Walker v. Medlicott and Son (A firm) E.W.J.

Walker, received 1/6th of the residue rather than a specific bequest of her home which was her original intention as reflected in her note.

- ! Mr. Medicott drew the Will that evening in accordance with his notes from the meeting with the Testatrix.
- ! The draft Will was forwarded to the Testatrix on April 8th with a covering letter in which the lawyer requested that the Testatrix “read this through”.
- ! On April 9th, after a four-minute interview at Mr. Medicott’s office, the Testatrix executed the Will while Mr. Walker waited outside in a car - a fact of which the lawyer was unaware.
- ! Mr. Walker’s evidence and evidence of other family members was that the Testatrix reported to Mr. Walker and other family members after signing the Will that she had left “the house” to her nephew, Mr. Walker. Other family members testified it was the habit of the Testatrix to joke about the contents of her Will.

Mr. Walker claimed that Mr. Medicott, contrary to the Testatrix’s instructions, had negligently failed to include in the Will a specific devise of the house in favour of Mr. Walker.

The Court of Appeal supported the weight given to the evidence of Mr. Medicott by the trial judge as follows:

- § the experience of Mr. Medicott - 20 years in practice with 40 Wills drawn in the seven months immediately before the Will in question and 700 Wills drawn since drawing the Will in question;
- § his habitual practice in making attendance notes;
- § his usual routine when clients would bring in their own notes: namely, a review to ensure the client’s notes represented the client’s uninfluenced wishes, to clarify any ambiguity, placing the points in the same order as they would be dealt with in the Will and ensuring the client fully understood the effect of the notes;
- § to avoid “the risk of muddle”, his own notes would reflect only final instructions and not the discussion itself.

The Plaintiff’s submission that an eighteen-minute interview to take instructions was not enough time for instructions to “have been accomplished carefully and accurately” was rejected

by the Court of Appeal. The court held that Mr. Walker did not prove by convincing evidence on a balance of probabilities that Mr. Medlicott failed to carry out the instructions of the Testatrix to leave a gift of the house to Mr. Walker.

The lessons for practice are obvious - habitual, routine practice, retention of materials (notes) and careful note-taking are a must to overcome lack of recollection of specific events by the lawyer and accusation by the disappointed beneficiary.

THE CANADIAN EXPERIENCE

Although there do not appear to be any reported cases in Ontario which have dealt with a claim by third party beneficiaries, there are two important cases, one in British Columbia and the other in Saskatchewan which deal with the issue of a solicitor's responsibility to a beneficiary. Both cases considered the English authorities, and in particular, *White v. Jones* referred to earlier in this paper.

The first case *Smolinski v. Mitchell*¹⁰, a British Columbia Supreme Court case, was decided on August 16th, 1995 and the second case, *Hickson v. Wilhelm*,¹¹ a decision of the Saskatchewan Queen's, Bench was decided on September 26th, 1997.

SMOLINSKI V. MITCHELL

This was an action for negligence against a lawyer who, in 1988, had prepared a Will for the Testator which included a residue clause directing that the distribution of the Estate would be determined at a later date. It was not until some three years later that the Testator who was then in poor health contacted the lawyer to discuss his testamentary wishes. When the lawyer attended on the Testator in

10 *Smolinski v. Mitchell* (1995) 10 B.C.L.R. (3d) 366, 1995, 8 E.T.R. (2d) 247

11 *Hickson v. Wilhelm* (2000) 31 E.T.R. (2d) 193

hospital he learned that, among other things, the Testator wished to give the lawyer his house and car. The lawyer agreed to draft the Will but he refused to do anything further. He delivered the new Will to the Testator at the hospital two days later and advised the Testator to obtain independent legal advice and complete the execution of the Will elsewhere.

The facts of the case illustrate that the lawyer was unaware that the Testator was terminally ill and he left it to the Testator to arrange an appointment with another lawyer for independent legal advice and to sign the Will. Although the Testator was discharged from hospital one day after receiving the Will, he was admitted to hospital one week later and died within two days of having been readmitted, without having signed the Will. The residue of the Estate was therefore distributed on intestacy among the Testator's aunts and uncles. The Plaintiff, who was the Testator's cousin, was to have received all of the Testator's cash in the unsigned Will. He sued the lawyer in negligence arguing that the Defendant owed him, as a disappointed beneficiary, a duty to take reasonable care to ensure that the new Will was signed in a timely fashion.

In this case, the nature of the retainer between the solicitor and the Testator was considered from two perspectives. First, Sigurdson J. specifically noted that upon receiving instructions to include in the Will a gift to him, the lawyer immediately made it clear to the Testator that he required independent legal advice and that the lawyer would not participate in the execution of the Will. He did not agree or accept as part of his retainer attending either promptly or properly to the execution of the Will.

Second, Sigurdson, J. decided that any circumstances calling for the lawyer to attend to the immediate or expeditious

execution of the Will created a conflict. He held that the lawyer's duty to the Testator under the terms of the retainer did not march with any co-existing duty to the intended beneficiary. Because the lawyer had a duty to ensure that the Testator obtained independent legal advice, that obligation does not march with or coincide with any obligation to get the Will executed immediately or expeditiously which presumably might be a duty owed to the third party in normal circumstances."

The court decided that there were unusual circumstances such that there was no duty of care owed by the Defendant lawyer to the Plaintiff to see to the immediate or expeditious execution of the Will. Sigudson, J. relied on English authority to the effect that the court will not impose a duty on a solicitor to a third party when that duty conflicts with his duty to his client, the Testator. The court found that the lawyer's advice that the Testator obtain independent legal advice and execute the Will before an independent solicitor cannot be said to be in breach of a duty of care to the Testator "because not to take such steps would be in breach of the solicitor's duty to his client, in these circumstances, to ensure that he receive independent advice.

In considering whether the lawyer should have taken more active steps to ensure the Testator met with and received advice from an independent solicitor, the Judge considered factors such

as the lawyer's understanding of the Testator's health, the Testator's apparent and actual condition, the Testator's capacity to understand advice, the apparent mobility of the Testator and the actual advice given to the Testator. These considerations offer solicitors a hint as to how the courts will consider these matters – a hint which should not be lost on solicitors when determining appropriate standards of practice. More on this later.

Hickson v. Wilhelm, is somewhat alarming in its result. The case suggests that where a client deals with more than one lawyer in the same law firm, it may be incumbent of each of these lawyers to be aware of the work done for that client by every other lawyer in the firm, to the extent it may be relevant to the lawyer's specific retainer. It may be seen as an extension of the Carr-Glynn decision.

HICKSON V. WILHELM

The facts of the case are relatively straightforward. In 1976, the Testator's accountant referred him to a law firm for the purpose of incorporating his farm properties. The farm was transferred to a corporation but to avoid Land Transfer fees, the deed was not registered. However, the financial statements and tax returns of the corporation reflected the farm properties as corporate assets. The solicitor who acted on the incorporation

and the transfer of the property was appointed to the bench in 1984, at which time another member of his firm (Wilhelm) assumed responsibility for the Testator.

The Testator's accountant testified in court that the Testator knew and fully understood the details of the incorporation and its consequences upon the farming assets, income and expenses.

When Wilhelm undertook responsibility for the Testator's farming corporation in 1984, he supervised the preparation of at least two annual returns for the corporation which recognized the Testator as a shareholder, director and officer and although he had never met the Testator at this point, Wilhelm supervised the preparation of the annual corporate returns. These returns reflected the farm properties as a corporate asset.

In 1986, Wilhelm met the Testator for the first time, at which time he prepared a Will for him that included gifts of the land then owned by the corporation. When the Testator died in 1988, the problem with the ownership of the land became apparent, that is the gifts of land in the Will of the Testator failed because the land was owned not by the Testator, but by the corporation. Accordingly, the beneficiaries who took the shares of the corporation realized the benefit of the land. As a result, the disappointed beneficiaries sued the lawyer, Wilhelm, for his negligence in drafting the Testator's Will.

In an extensive analysis of the jurisprudence (which included

the *Ross v. Caunters*, *White v. Jones* and *Hedly Byrne v. Heller* decisions), Mr. Justice Zarzeczny adopted the reasoning in *White v. Jones* to find that the lawyer Wilhelm owed a duty of care to the disappointed beneficiaries and that he was negligent in the preparation of the Will. The Judge accepted expert testimony from several lawyers that the circumstances presented by Thornton's (the Testator's) Will were out of the ordinary and would constitute a case of special circumstances to a lawyer exercising reasonable skill and diligence.

The Judge also decided that it was the responsibility of the lawyer to know of the existence of the farming corporation and the Testator as its principal because he had acted as the corporate solicitor for some two years prior to preparation of the Will by the Testator and that knowledge, if it had effectively acted upon the Defendant's mind at the time he took Thornton's Will instructions, should have alerted him to the issue of the Corporation's involvement in the ownership and/or conduct of Thornton's farming operations.

The Judge also decided the income tax implications of the gifts of land should have been considered. The accountant testified that, if contacted, he would without hesitation have identified the involvement of the corporation in the land ownership and the need for a very substantial and different approach in the Will to implement the intentions of the Testator and reduce tax burdens upon the Estate.

The following comments of Mr. Justice Zarzeczny are instructive:

⊕The normal other inquiries, which each of the expert witnesses suggested are undertaken, of a client wishing to have a Will prepared (including some general discussion of the client's personal circumstances, the reason for his attendance and choice of particular lawyer, his prior association, if any, with accountants or lawyers) all are fundamental to the process of identifying any unusual circumstances which might prompt further or other investigation⊙.

As a number of the expert witnesses observed, the nature and extent of the inquiries which a solicitor undertakes in taking instructions for the preparation of a Will depend on the particular circumstances of each case. The decision clearly makes the point that a solicitor has a duty to make the inquiries necessary to satisfy himself that the wishes of the Testator will be honoured and given proper legal expression through the provisions of the Will. Unusual circumstances, if presented, must be inquired into, the results analyzed, consultations taken where appropriate, all to ensure which the Will which is ultimately prepared meets the wishes of the client while, at the same time, minimizing adverse consequences which can be avoided by due diligence.

Finally, a comment of Mr. Justice Zarzeczny which will no doubt reappear in actions against solicitors for negligent Will drafting should be taken to heart by all solicitors, as it clearly states the expectations of the judiciary and provides a basis for the standard which Mr. Justice Zarzeczny appears to have established in the case:

ΦTo suggest that it is a sufficient discharge of a solicitor's duty to a Testator in circumstances such as these to simply inquire of him what he wishes, and then to record and thereafter prepare the Will without anything further is to relegate a solicitor and his obligations comparable to that of a parts counter-man or order taker. The public is entitled to expect more from the legal professionΦ.

It remains to be seen whether the courts in the future will place greater responsibility on Testators to know the ownership status of their assets and impart this knowledge to the lawyer when giving Will instructions. The next case is a British Columbia Supreme Court decision in May of 1999.¹²

KORPIEL V. SANGUINETTI

This is a decision which reflects excellent practice by a solicitor in very difficult

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circumstances.

The facts of the case were as follows:

§ Mr. Harper instructed Sanguinetti to have his wife appointed a committee of her sister's estate. Within a year of that appointment, Mr. Harper's wife was diagnosed as suffering from Alzheimer's Disease. Sanguinetti then began acting as solicitor for Mr. Harper in his role as committee of his wife's estate and her sister's estate. His wife died in 1988 and the sister died in 1995.

§ After Mrs. Harper's death, The Korpiels (her distant cousins) visited Mr. Harper. Shortly thereafter, Mr. Harper prepared a Will with Ms. Sanguinetti in which Mr. Harper gave his residence to the Korpiels.

§ After hospitalization of Mr. Harper in 1990, the Korpiels sought to visit Mr. Harper but were frustrated in that attempt and blamed the lawyer, Sanguinetti.

§ The Korpiels thereupon instructed a solicitor to make inquiries about Mr. Harper's competence. The solicitor demanded accounts from Sanguinetti regarding Mr. Harper's estate and particulars of his appointment as committee of the estate of his late wife's sister. Mr. Harper viewed these requests with a sense of anger. Korpiels' lawyer then threatened litigation if further details were not provided.

§ In 1991, the lawyer for the Korpiels expressed his clients' view that Mr. Harper was not lucid and would consider applying to be a committee of Mr. Harper's estate. There was suggestion in the lawyer's letter that the Korpiels had been promised Mr. Harper's residence.

§ From 1993 onward, Mr. Harper made a series of changes to his Will. Initially, he left his residence elsewhere and left the Korpiels a gift of bonds as a substitute for the

residence. In subsequent Wills, he reduced the value of bonds given to the Korpiels and in his last Will, the Korpiels received only 10% of the bonds. The changes reflected Mr. Harper's disappointment that the Korpiels had not visited him during the previous six years.

§ Mr. Harper kept a diary which was introduced in evidence and which reflected his thoughts behind the series of changes to his Will.

The Korpiels alleged the lawyer, Sanguinetti, had breached a fiduciary duty of care owed by her to the Korpiels in the advice given to Mr. Harper and in the preparation of his Will. The Korpiels asserted that Sanguinetti had a duty to the Korpiels to persuade Mr. Harper to make a Will different from the one he instructed her to prepare.

The Lower Court held that "the duty owed to a beneficiary must arise from and be the mirror of that owed to the client. It must always follow the duty to the client and not depart from it in a manner contradictory to that owed to the client".

The evidence overwhelmingly supported the court finding that the contents of Mr. Harper's Will were explained to him and understood by him and that the formalities of execution were complied with. In particular, the court asserted that "Ms. Sanguinetti is a solicitor with extensive experience in relation to the preparation and execution of Wills. Her Affidavit in this proceeding recites the fact that she followed her usual practice of ensuring the Testator understood the contents of the Will. Her evidence on examination for discovery was that she recalled Mr. Harper reading the Will with the assistance of a magnifying glass. None of her evidence was contradicted."

Again, we see the importance of "usual practice" by competent solicitors resulting in the Korpiels' claims against the lawyer being dismissed. The foregoing Canadian and English cases

provide the necessary precedent for the disappointed beneficiary to seek redress.

SUGGESTIONS FOR AN ESTATES PRACTICE

As a result of the English and Canadian cases decided on the point, lawyers in Canada are liable to disappointed beneficiaries for negligence. What then are the present standards of practice and have the standards been increased for lawyers of ordinary skill and capacity? It is the author's view that the court decisions have increased the standards for practice. The following are suggestions for practice that may be appropriate as a result of these court decisions:

1. **The Retainer**

In order to obtain the information necessary to discharge our obligations both to the Testator and to the beneficiaries of the Testator, we should view our retainer as being a retainer by the Testator on his or her own behalf and on behalf of his or her beneficiaries. Accordingly, it may now be appropriate to develop a written retainer with our clients which will clearly delineate the expectations of our clients and the legal services we are to provide. In order to meet the client's needs with regard to such things as a quick turnaround time from taking instructions to preparation and execution of the Will, the initial retainer should also reflect the expectations of the client in this regard and the ability of the lawyer to perform. It is necessary to understand more fully the needs of the client from the perspective of completion of the estate planning process having regard to the health of the client (especially if the client is terminally ill) and the expectations of the client such as completion of the estate planning process before an imminent trip. Does the client expect the process to be completed in a few days or in a few weeks or does the

client expect it to be completed in a few months? If there is urgency on the part of the client or if special circumstances exist such as advanced age of the client or ill health, we must decide at the outset whether our busy practice and personal lives will allow us the time to meet the expectations of the client and if they do not, the retainer should reflect the fact that because of other commitments, a turnaround time of, for example, two weeks cannot be met. If the client accepts the longer period of time for production of draft documents, this should be reflected in the retainer and if the client does not accept the longer period, he or she should be referred to another lawyer.

2. **Knowledge of the Client**

A general knowledge of the client is no longer sufficient. In the past, a general knowledge of the personal and financial position of the client was all that most lawyers required. The standards established by the cases clearly illustrate that it is now necessary to spend enough time with our clients to obtain sufficient information about our clients and their assets to recognize unusual circumstances which will obligate the solicitor to set upon a course of additional inquiry. Accordingly, we must develop methods of questioning our clients and of note-taking which are consistent and which reflect the estate planning process as an integrated process from incapacity to death and eventual administration of the estate of the deceased individual. Careful attention must be paid therefore to taxation planning and probate planning, estate liquidity, ownership of assets, dependent's relief legislation, ownership and beneficiary designations for insurance, benefit plans, RRSP's and RRIF's, foreign property holdings, family business issues, marital issues, intervivos and testamentary trust issues and charitable giving to name a few.

3. **Establishing a Critical Path**

The more complex the client's personal situation, the greater the need for time for research, consultation with the client's other advisors and time to prepare drafts of the estate planning documents. Perhaps it is time to consider establishing, in writing, a critical path with each client at the initial interview which will delineate the time periods for delivery of draft documents and the date of the meeting with the client to sign the Will and Powers of Attorney. This will ensure that the client agrees with the process and the ultimate date for completion of the work no matter how far in the future that date may be. By establishing appropriate dates in a critical path, if the client has not communicated a sense of urgency to you, he or she no doubt will if the dates are too far in the future.

4. **Turnaround Time**

White v. Jones has established the principle that the relevant turnaround time period runs from the date all instructions have been received. This suggests that if instructions are given for preparation of the Will and the drafting of the Will is to be delayed until further instructions are provided, then that should be carefully noted in the instructions and responsibility for, and a method of, follow-up instituted. Alternatively, a draft document could be prepared with blanks for additional instructions. This highlights the integrated nature of estate planning as it exists today which usually includes incapacity planning concurrent with testamentary planning. A potential problem is created if instructions are lacking in respect of, for example, incapacity Powers of Attorney. Should this delay completion of the Will if full instructions have been given for preparation of the Will?

Again, this is a matter which should be clarified at the time of the initial retainer and when the instructions are taken, decisions made in this regard should be included in the notes of the meeting. This may result in more than one meeting with the client to sign documents if the client wishes, for example, to complete and sign the Will leaving completion of incapacity Powers of Attorney for a later date when additional decisions are made.

5. **Failure by Clients to Respond**

The courts' increasing expectations of us to manage the estate planning process with our clients, so as to avoid unnecessary delay, demand that we address failure of clients to respond to draft documents and whether this places on us an obligation to follow up with clients if there is no response. Our suggestion is that the letter forwarded to clients with draft documents address this issue and the result may be different depending upon how we address the issue. For example, if we state in the letter that we expect to hear from the client regarding the drafts within two weeks, there is now probably an obligation on us to follow up a failure to respond. Alternatively, if our letter states that we look forward to hearing from the client regarding the drafts at the client's convenience and if we place a positive expectation on our clients to contact us, perhaps our follow up obligation is reduced. It is good practice or at least good defensive practice to have a follow up system even if we place the obligation to respond on our clients.

6. **The Search for Information and Legal Alternatives**

It also appears that the developing standards we must meet include making an independent determination as to whether there is information available to us of which we should be aware. For example, if a referral to another lawyer is made by a lawyer in the same law firm who has completed work for the client in the past, it is incumbent on us to understand the nature and the extent of that work so that we will have knowledge of prior transactions and other work currently in progress which may affect the manner in which we draw our client's Will or give advice to the client. Query the disclosure obligations of a lawyer who refers a client to a lawyer in another law firm? Another example is the verification of ownership of property. If it is uncertain whether property is held in joint

tenancy or as tenants in common the cases illustrate that if we are not able to obtain instructions to confirm title, we must present alternatives and risk to the client such as the client personally verifying title or service of a notice severing the joint tenancy if there is not enough time for the client to verify title independently.

7. **Checklists, Consistent Practice, Notes**

The foregoing highlight the importance of checklists and a thoughtful, consistent practice in establishing the initial retainer and keeping notes of discussions and instructions. If a consistent practice is appropriate, then the notes prepared at the initial meeting with clients should reflect that consistency, i.e. it should be a habit that the notes reflect the location of the meeting, all those in attendance, the date of the meeting, the critical path (including the date for drafts and the date to meet to sign the documents) and all of the usual notes regarding instructions, document preparation, changes to written notes or instructions prepared by the client and so on. In addition, the lawyers' expectations of the client in terms of responding to drafts should be noted as well as any unusual circumstances which become apparent during the initial interview.

8. **Periodic Review of Documents**

If we are moving to a stricter standard, do we have an obligation to periodically review client's estate planning documents and to call client's attention to changes in law or a client's situation that might frustrate the testamentary intentions of the client or the client's incapacity planning? Events which transpire between the date of making a Will and the death of the Testator may have serious consequences for the Testator's testamentary intentions and if the lawyer is aware of those events either personally or is deemed to have knowledge of such events as a result of another lawyer in the same law

firm working with the client, there may be a duty to inform the Testator of such events. Does this mean we must institute a procedure for communication of information respecting work completed by other lawyers in the law firm to the lawyer responsible for the client's estate planning, the results of which may affect that planning? Alternatively, do we now need to institute a system for periodic review of estate planning documents? Perhaps that is a logical extension of the standards being established by the courts. Does good practice now require a retainer agreement or reporting letter which contains an appropriate disclaimer?

9. **Practice In Isolation**

In view of our potential liability to the Testator and to third party beneficiaries for negligence, are we not self-insuring our client's estate planning expectations and preferences? Can one solicitor continue to perform all of the work required in the estate planning process without an independent review by another solicitor? A practice which has been instituted by some law firms is that the estate planning documents are read by a second lawyer before they are finalized, not for content, but for drafting errors.

It is the author's belief that the day of the "simple Will" and the "simple Power of Attorney" are over and that we must establish fees for Powers of Attorney and Wills and Trusts which are not modest, but which reflect the time and care the lawyer must take in the process and the skill which the lawyer must bring to the process. The fees for this process must also reflect the fact that we can no longer treat estate planning as a loss leader assuming we will be compensated for our losses at the time we administer the estate. With the growing tendency to "strip" estates prior to death to avoid probate fees and capital gains taxes and with the pressure

on solicitors to charge fees for representing executors based on time spent rather than a percentage of value, lawyers can no longer afford to treat the preparation of a Will or Powers of Attorney as relatively simple, unimportant documents. It is now time to educate the public as to the importance of these documents and the complexities associated with them. Reasonable fee estimates cannot be established until we have had an opportunity to meet with our clients so that we will be aware of the time and effort that will be required in completing the legal work. We should no longer quote a fee on the basis that the estate planning process will be inexpensive; nor should we quote a minimal fixed fee on the telephone to a client. In the author's experience, once a client realizes the importance and complexity of the process and its ultimate effect, the client is more likely to appreciate the opportunity to properly plan his or her affairs and to expect to pay an appropriate fee for the planning process and the legal documents produced.

We are all aware of the fact that more and more estate planning services are being performed by non-lawyers such as banks, trust companies, accountants, life underwriters, financial planners and paralegals. Forms of estate planning documents are available in kit form or on the internet. It is now time to educate the public about the ever-increasing standards established by the courts and the serious ramifications of failing to properly plan and of failing to ensure that all estate planning documents reflect the integrated nature of the estate planning process. In the author's view, we can no longer practice in isolation as a profession; rather, we must reach out to other professions which provide estate planning advice to clients and reinforce the importance of multi disciplinary practice or at least interdisciplinary practice.

CONCLUSION

The problems we encounter in practising law today only

increase the pressure on all of us to meet the increasing demands and expectations of our clients, our law firms and Canadian society. It is the author's belief that the foregoing suggestions for an estates practice should be embraced by practitioners and adopted as personal standards before jurisprudence overtakes us. By focusing on what can go wrong, we will be able to develop new approaches to practice which will help us handle the pressure we experience on a daily basis. It is clear that we need to have time to think and plan, free of the clatter of telephones, computers and faxes before we put pen to paper. Additionally, the more a solicitor knows and understands the nuances of legislation and relevant case law, the better he or she is prepared to advise clients, draft appropriate documentation and avoid worst-case problems. If we try always to anticipate the worst-case scenario, we can better advise our clients and assist them not only to plan away from the worst-case but to be prepared if it does happen. This will not make the constant pressure on us go away; rather, we can, if we know and understand the law, be more motivated to do our best. We have an ideal opportunity before us to redefine in a confident manner what we do in the estate planning process and how we can be more effective.