

**PROFESSIONAL NEGLIGENCE IN WILLS & PROBATE**  
**RADCLIFFE CHAMBERS SEMINAR 22 SEPTEMBER 2021**

**Case List**

**Duty of Will Writer**

*Ross v Caunters* [1980] Ch 297 - solicitor owes duty to disappointed beneficiary

*White v Jones* [1995] AC 207 - House of Lords confirms existence of duty

*Esterhuizen v Allied Dunbar* [1998] 2 FLR 668 - duty applies to all professional will writers

*Carr-Glynn v Frearsons* [1999] Ch. 326 - duty to beneficiary complementary to duty to testator

*Trusted v Clifford Chance* [2000] WTLR 1219 - no definitive instructions = no liability

*Bacon v Kennedy* [2001] WTLR 169 - definitive instructions may be inferred if no evidence of change

*South Australia Asset Management v York Montague* [1997] 1 AC 191 - retainer defines the scope of the duty and thus the damage from which the defendant must take care to save the claimant harmless

*Manchester Building Society v Grant Thornton* [2021] UKSC 20 - Supreme Court's six part test to establish liability and quantum in professional negligence

**Delay**

*White v Jones* - 59 day delay for 78 year old = liability

*Smith v Claremont Haynes & Co*, Times, 3 Sept, 1991 - time starts to run from the date testator makes solicitor aware of wish to make will, 33 day delay for testator with leukaemia = liability

*Hooper v Fynmores* [2001] WTLR 169 - 12 day delay for hospitalised 83 year old = liability

*Doidge v Bright Broad & Skinnard*, The Lawyer 20 April 1993 - 18 day delay for healthy 92 year old = no liability

*X v Woolcombe Yonge* [2001] Lloyds Rep PN 274 - 6 day delay for terminally ill 55 year old with no imminent expectation of death = no liability

*Bacon v Howard Kennedy* [2001] WTLR 169 - 9 year delay and no follow up = liability

*Trusted v Clifford Chance* [2000] 1 WTLR 1219 - client's consent to delay = no liability

### **Duty to chase client to execute Will**

*Atkins v Dunn & Baker* [2004] WTLR 477 - client died 3 years after draft will sent out, in circumstances "ball was in his court" = no liability

### **Execution**

*Hill v Van Earp* (1997) 142 ALR 687 - if present solicitor should advise as to execution

*Esterhuizen v Allied Dunbar Assurance* [1998] 2 FLR 668 - will drafter has duty to supervise execution

*Gray v Richards Butler* [2000] WTLR 143 - will drafter only need provide instructions for execution

*Corbett v Newey* [1998] Ch 57 - conditionally signed will dated by solicitors once conditions satisfied held invalid by Court of Appeal with costs payable out of estate, disappointed beneficiaries' subsequent claim against solicitors for lost inheritance undiminished by costs liability paid out by solicitors

*Corbett v Bond Pearce* [1998] Ch 57 - estate held not to be entitled to the same amount of those costs from the solicitors

### **Failure to check whether Will properly executed**

*Gray v Richards Butler* - addresses of witnesses in different parts of London not a circumstance to put solicitor on enquiry as to defect in execution

*Humblestone v Martin Tolhurst Partnership (a firm)* [2004] EWHC 151 - secretary did not notice “executed” will not signed = liability

### **Failure to secure effective disposition of property**

*Carr-Glynn v Frearsons* [1999] Ch 326 - solicitor failed to advise testatrix wishing to leave half of jointly owned property to another to serve notice of severance where there was doubt about joint tenancy/tenancy-in common = liability

*Keckskemeti v Rubens Rabin & Company*, The Times, 31 Dec 1992 - similar claim where the judgment did not deal with the issue of whether any decision to sever would be affected by adverse reaction of co-owner

### **Trust property**

*Earl v Wilhelm* (2000) 183 DLR (4th) 45 - if testator wants to leave trust property by will liability may depend upon possibility of testator making effective arrangements

### **Convincing evidence**

*Walker v Medlicott & Son* [1999] 1 WLR 727 - burden is on disappointed beneficiary to prove the instruction and the negligent failure by convincing evidence. Detailed attendance note = no liability

*Martin v Triggs Turner Bartons* [2010] PNLR 3 - claimant succeeded in establishing a power of advancement had not been drafted in accordance with her husband’s instructions. Poor attendance note = liability.

*Gibbons v Nelson* [1999] Ch 326 - sister claimed solicitor had failed to advise testatrix that she could exercise a power of appointment in favour her sister. Solicitor should have ascertained instructions as to power, but no sufficient evidence of intention to exercise in favour of sister = no liability

*Sutherland v Public Trustee* [1980] 2 NZLR 536 - step children not included as beneficiaries of step-father’s estate in place of pre-deceasing mother sued solicitors.

Solicitor had advised of possibility of pre-decease, testator had declined to do anything  
= no liability

*Littlewood v Wilkinson Woodward* [2009] PNLR 29 - possibly inebriated testator gave instructions including gift to granddaughter, solicitor took reasonable care to take further comprehensive instructions which did not include gift to granddaughter at further meetings, granddaughter sued = no liability

### **Tax Advice**

*Cancer Research Campaign v Ernest Brown & Co* [1997] STC 1425 - will drafter's duty to advise as to tax implications of will in question, unless expressly excluded

*Cotterell v Leeds Day* [2001] WTLR 435 - liability for failure to register deed of variation (as was then required)

### **Duty to advise beneficiaries of entitlement**

*Cancer Research v Ernest Brown* - no duty to advise beneficiaries of entitlement

*Martin v Triggs Turner Bartons* - liability for volunteering incorrect advice about entitlement

### **Delay in obtaining grant**

*Chappel v Somers & Blake* [2003] WTLR 1085 - no liability to non-beneficiary executor for delay in obtaining grant

*Sifri v Clough & Willis* [2007] WTLR 1453 - no liability for delay occasioned by probate dispute resulting from negligently drafted will

### **Failure to notify personal representatives**

*Hawkins v Clayton* (1988) 164 CLR 539 - failure to notify executor of will stored with firm = liability

### **Duty not to act**

*Hines v Willans* [2002] WTLR 299 - liability for acting in drafting new will for husband disinheriting wife while there was a continuing contractual relationship with both

### **Measure of Damage**

*Trusted v Clifford Chance* - no liability but discussion of entitlement to damages of disappointed discretionary beneficiaries, for the court to assess the value of the lost expectation

*Gray v Richards Butler* - discussion of entitlement of class of disappointed objects of discretionary power appointment, trustees to bring the claim for the benefit of the class

### **Discounts for claims against estate**

*Gartside v Sheffield, Young & Ellis* [1983] NZLR 37 - loss may be less than the anticipated testamentary provision, a value must be placed upon the benefit that has been lost taking account of other claims

### **Limitation**

Section 2 of the Limitation Act 1980 - primary claim in tort barred six years after cause of action arises;

Section 14B gives 15 year longstop from the date of the actual drafting or execution In

Section 14A may give 3 year period from date of knowledge of the problem

*Bacon v Howard Kennedy* [1999] PNLR 1 - loss is suffered at death of the testator

*Osborne v Follett Stock* [2017] EWHC 1811 - contingent loss was suffered by the beneficiary at the date a flawed compromise was entered into, not at the later date that the other party sought to resile

### **Marley v Rawlings**

*Marley v Rawlings* [2015] AC 129 - solicitor's failure led to husband and wife signing the wrong mirror will, Supreme Court allowed rectification claim and short-circuited

any *White v Jones* claim by ordering solicitors' insurers to pay the majority of the parties' costs

### **Costs of Probate/Construction/Rectification Claims**

*Corbett v Bond Pearce* - scope of duty question

### **Mitigation by rectification**

*Walker v Medlicott* - if rectification claim is straightforward intended beneficiary should mitigate by that route

*Horsfall v Haywards* [1999] 1 FLR 1182 - if rectification claim would be difficult or pointless no need to do so

### **Capacity**

*Re Simpson* (1977) NLJ 487 - golden rule get capacity assessed

*Worby v Rosser* [2000] PNLR 140 - later will set aside for lack of capacity. Earlier will beneficiaries' claim for irrecoverable costs of the probate action dismissed on the basis estate should have brought the claim (rather than that they were owed no duty because either no retainer or no intention to benefit)

*Feltham v Freer Bouskell* [2013] EWHC 1952 - solicitor failed to pursue capacity report promptly, so intended beneficiary made a homemade will which was challenged by beneficiaries under earlier will solicitor liable to the intended beneficiary for costs of settling the claim and her costs.

### **Want of Knowledge and Approval**

*Sifri v Clough & Willis* [2007] WTLR 1453 - two wills set aside for want of knowledge and approval, beneficiary of a previous will recovered damages equal to her irrecoverable costs of successful pleas against solicitor

### **Double Recovery**

*Corbett* - cases are an example of courts not permitting double recovery

*Chappel v Somers & Blake* - residuary beneficiaries ordered to be joined to avoid any possible double recovery

### **Other Claims by personal representatives**

*Otter v Church Adams Tatham & Co* [1953] 1 Ch 280 - personal representatives entitled to sue for loss to estate for negligent advice to testator in his lifetime

*Clarke v Bruce Lance & Co* [1988] 1 All ER 364 - beneficiaries' claim for loss to estate caused by negligent advice in lifetime, consistent with personal representatives being proper claimants for such loss

### **Post-Death Claims For Negligent Inheritance Tax Planning**

*Daniels v Thompson* [2004] All ER(D) 357 - solicitor failed to advise the testatrix to move out of gifted house or pay rent to avoid reservation of benefit leading to increased IHT bill. Executor sued the solicitor. Claim failed on limitation grounds. Claim by son personally on basis of reliance on solicitor was never made.

*Rind v Theodore Goddard (a firm)* [2008] EWHC 459 - beneficiary's claim for tax not saved not stuck out

*Vinton v Fladgate Fielder* [2010] EWHC 904 - ineffective tax planning in anticipation of death, strike out of executors' and beneficiaries' claims refused

*Steven v Hewats* [2013] CSOH 61 - solicitor failed to give full advice to avoid reservation of benefit

### **Procedure**

S. 48 Administration of Justice Act 1985 - allows the court to make an order permitting executors or trustees to proceed in reliance on the Opinion of counsel of 10 years' call on a question of construction unless a dispute appears to exist

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24 September, 2021