

## **SOLICITOR'S NEGLIGENCE: ESTATES AND TRUST CONTEXT**

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### **INTRODUCTION**

Twenty years have passed since the “high-water mark” decision of *White v. Jones*<sup>1</sup> establishing the ability of disappointed beneficiaries to sue drafting solicitors in negligence.

This monograph will review the historical development of the duty of care in Canada, the elements of a claim in solicitor's negligence as well as recent and relevant case law. Guidelines as well

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1. [1995] All E.R. 692 (U.K. H.L.) [*White v. Jones*].

as tips to assist estate and trust practitioners avoid solicitor's negligence claims will also be offered.

### **DUTY OF CARE: HISTORICAL DEVELOPMENT OF THE DISAPPOINTED BENEFICIARY**

In 1924, the Ontario Court of Appeal in *Re Fitzpatrick*<sup>2</sup> denied the recovery of damages to a beneficiary claiming against a solicitor in negligence for failure to properly witness a will. The court made its decision on the basis that there was no privity of contract between the disappointed beneficiary and the solicitor. The state of the law, as it existed in Canada in 1924, limited a drafting solicitor's liability for negligence to the solicitor's client only.

In the United States, since about 1958, when the case of *Biakanja v. Irving*<sup>3</sup> was released by the Supreme Court of California, the courts have recognized that the beneficiary of a will deprived of his inheritance because of the negligence of the lawyer who drew the will had a remedy in law against the lawyer. This liability was established despite the absence of privity of contract.

However, it was not until 1978 that Canadian courts first recognized that a duty of care was owed by a drafting solicitor to intended beneficiaries. It was in the case of *Whittingham v. Crease and Co.*,<sup>4</sup> where the solicitor attended at the testator's home and read the will in the presence of the testator, the testator's son and the son's wife. The son was the intended beneficiary. The solicitor asked the son's wife to witness the will, even after the wife questioned her ability to do so. This rendered the gift to her husband, the testator's son, void by reason of s. 12(1) of the British Columbia *Wills Act*<sup>5</sup> then in force, which nullified bequests made to either witnesses of a will or to their spouses.

The British Columbia Supreme Court allowed recovery on the basis of the principles long enunciated in *Hedley Byrne Co. Ltd. v. Heller & Partners Ltd.*<sup>6</sup> *Hedley Byrne* is the threshold case on liability for pure financial or economic loss, the basic principles for which the courts extended economic loss to will preparation. Particularly, that if a person seeks information from another possessing a special skill and trusts, that person is required to exercise due care and, if that

2. [1924] 1 D.L.R. 981, 54 O.L.R. 3, 1923 CarswellOnt 196 (Ont. C.A.) [*Fitzpatrick*].

3. 49 Cal. 2d 647, 320 P.2d 16 (U.S. Cal. Sup. Ct., 1958) [*Biakanja*].

4. (1978), 88 D.L.R. (3d) 353, 6 C.C.L.T. 1, 3 E.T.R. 97 (B.C. S.C.) [*Whittingham*].

5. R.S.B.C. 1960, 408 s. 12(1).

6. [1964] 2 All E.R. 575 [*Hedley Byrne*].

person knew, or ought to have known, that reliance was being placed on his or her skill or judgment, then the skilled person owes a duty of care and the injured person can recover damages for financial or economic loss caused by the negligent misrepresentation made.

Meanwhile, in England in 1980, the case of *Ross v. Caunters*<sup>7</sup> was tried at the court at Chancery Division, where Sir Robert Megarry V-C was presiding. *Ross* was a similar case to that of *Whittingham*, and is analogous in that regard. The solicitor drafted the testator's will and then upon the request of the testator sent it to him for signing. The husband of the beneficiary under the will was one of the witnesses. The plaintiff's gift made by the testator was void. The solicitor failed to notice the problem when the will was returned to him.

The plaintiff brought an action against the solicitor in negligence for damages for the loss of her benefits under the will. The plaintiff alleged that the defendant failed to check whether the will had been duly executed, failed to observe that one of the witnesses was the plaintiff's husband and failed to draw the testator's attention to that fact. The defendant admitted the allegations of wrongdoing but denied liability on the grounds that he owed a duty of care only to the testator and not to the plaintiff/beneficiary. The court found in favour of the plaintiff stating:

... a solicitor who is instructed by his client to carry out a transaction that will confer a benefit on an identified third party, owes a duty of care towards that 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 own acts or omissions that he can reasonably foresee that the third party is likely to be injured by those acts or omissions.<sup>8</sup>

The court's principle considerations in *Ross* were as follows:

- 1) the close proximity of the plaintiff to the defendant;
- 2) the proximity was a product of the duty of care owed by the defendants to the testator; and
- 3) that to find that the defendant was under a duty of care to the plaintiff would not impose an uncertain and unlimited liability, but a finite one to a finite number of persons, namely, one.

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7. [1979] 3 All E.R. 580, [1980] 1 Ch. 297 (Eng. Ch. Div.) [*Ross*].

8. *Ibid.*

Accordingly, the court held that the defendant owed a duty of care to the plaintiff beneficiary because it was obvious that if the lawyer was careless, the plaintiff would suffer loss.

In the subsequent 1995 decision by the House of Lords of England, *White v. Jones*,<sup>9</sup> the duty of care owed to intended beneficiaries by solicitors drafting wills was affirmed. In this case the testator was estranged from his two children and he asked his solicitor to remove his daughters as beneficiaries in his will. The solicitor re-drafted the will and it was executed by the testator. Three months later he had a change of heart and he reconciled with his daughters. The testator told his daughters that he had taken them out of his will but that he was going to rectify it. He asked his solicitor to prepare a new will with a gift of money to each of his daughters and made an appointment with his solicitor. However, his solicitor failed to keep the appointment and went on holiday. While the solicitor was on holiday, the testator fell, hit his head, suffered a heart attack and died. The two daughters claimed damages for negligence alleging that the solicitor's inexcusable delays were the cause of the failure to receive monies from their father's estate. The claim failed at first instance; however, the court on appeal decided that a duty should be owed by the testator's solicitor to the disappointed beneficiary. Lord Goff of Chieveley stated:

[I]f such a duty is not recognized, the only persons who might have a valid claim (*i.e.* the testator and his estate) have suffered no loss, and the only persons who have suffered a loss (*i.e.* the disappointed beneficiary) have no claim. It can therefore be said that, if the solicitor owes no duty to the intended beneficiaries, there is a lacuna in law, which needs to be filled. This is a point of cardinal importance in the present case.

The injustice of denying such a remedy is reinforced if one considers the importance of legacies in a society, which recognizes the right of citizens to leave their assets to whom they please . . .

There is a sense in which the solicitor's profession cannot complain if such a liability may be imposed upon their members. If one of the has been negligent in such a way as to defeat his client's testamentary intentions, he must regard himself as very lucky indeed if the effect of the law is that he is not liable to pay damages in the ordinary way. It can evolve no injustice to render him subject to such a liability, even if the damages are not payable to his client's estate for distribution to the disappointed beneficiary, but rather directly to the disappointed beneficiary.<sup>10</sup>

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9. *Supra* footnote 1.

10. *Ibid.* at 705.

Courts across Canada adopted the reasoning in *White v. Jones* in subsequent cases over the next decades including in *Smolinski v. Mitchell*,<sup>11</sup> *Couture v. Lamontgane*,<sup>12</sup> *Danchuk v. Calderwood*,<sup>13</sup> *Earl v. Wilhelm*,<sup>14</sup> *Wakeford v. Arnold*,<sup>15</sup> *Rosenberg Estate v. Black*,<sup>16</sup> *Korpiel v. Sanguinetti*,<sup>17</sup> *Re Brown Estate*,<sup>18</sup> *Stern v. Stern*,<sup>19</sup> *Hall v. Bennett*,<sup>20</sup> and *Graham v. Bonnycastle*.<sup>21</sup> These cases show that it is now firmly established in Canadian jurisprudence that a third party beneficiary has standing to bring a claim in solicitor's negligence against a drafting solicitor. The solicitor owes a duty to the third party beneficiary despite the lack of privity of contract.

### STANDARD OF CARE

In *Central Trust Co. v. Rafuse*,<sup>22</sup> the Supreme Court of Canada held that:

A solicitor is required to bring reasonable care, skill and knowledge to the performance of the professional service which he has undertaken . . . The requisite standard of care has been variously referred to as *that of*

11. (1995), 8 E.T.R. (2d) 247, [1995] 10 W.W.R. 68, 10 B.C.L.R. (3d) 366 (B.C. S.C.).
12. (1996), [1997] 5 W.W.R. 23, 151 Sask. R. 283, [1996] S.J. No. 800 (Sask. Q.B.), reversed (1997), [1998] 6 W.W.R. 481, 76 A.C.W.S. (3d) 436, [1997] S.J. No. 735 (Sask. C.A.), leave to appeal refused (1998), 173 W.A.C. 319 (note), 168 Sask. R. 319 (note), 227 N.R. 397 (note) (S.C.C.).
13. (1996), 15 E.T.R. (2d) 193, 67 A.C.W.S. (3d) 418, [1996] B.C.J. No. 2383 (B.C.S.C.), add'l reasons 1997 CarswellBC 1483, [1997] B.C.J. No. 1439.
14. 2000 SKCA 1, 183 D.L.R. (4th) 45, [2000] S.J. No. 45 (Sask. C.A.), leave to appeal refused (2000), 260 W.A.C. 156 (note), 213 Sask. R. 156 (note), [2000] S.C.C.A. No. 124 (S.C.C.).
15. 2001 ABQB 900, 41 E.T.R. (2d) 309, [2001] A.J. No. 1372 (Alta. Q.B.).
16. [2001] O.T.C. 939, 2001 CarswellOnt 4504, [2001] O.J. No. 5051 (Ont. S.C.J.).
17. (1999), 26 E.T.R. (2d) 147, 88 A.C.W.S. (3d) 279, [1999] B.C.J. No. 1048 (B.C. S.C.), additional reasons 1999 CarswellBC 1864, varied (1999), 93 A.C.W.S. (3d) 29, 1999 CarswellBC 2694 (B.C. S.C.).
18. (2001), 39 E.T.R. (2d) 1, 2001 CarswellOnt 1333 (Ont. S.C.J.).
19. (2003), 49 E.T.R. (2d) 129, 119 A.C.W.S. (3d) 867, [2003] O.J. No. 97 (Ont. S.C.J.).
20. (2001), 40 E.T.R. (2d) 65, 111 A.C.W.S. (3d) 614, [2001] O.J. No. 5902 (Ont. S.C.J.), reversed (2003), 227 D.L.R. (4th) 263, 15 C.C.L.T. (3d) 315, [2003] O.J. No. 1827 (Ont. C.A.).
21. 2004 ABCA 270, 243 D.L.R. (4th) 617, [2004] A.J. No. 940 (Alta. C.A.), leave to appeal refused (2005), 360 W.A.C. 396 (note), 376 A.R. 396 (note), [2004] S.C.C.A. No. 489 (S.C.C.).
22. [1986] 2 S.C.R. 147, 31 D.L.R. (4th) 481, [1986] S.C.J. No. 52 (S.C.C.), varied [1988] 1 S.C.R. 1206, 44 C.C.L.T. xxxiv (note), 1988 CarswellNS 601, EYB 1988-68608 (S.C.C.) [*Central Trust*].

*the reasonably competent solicitor, the ordinary competent solicitor and the ordinary prudent solicitor.*<sup>23</sup>

In *Millican v. Tiffin Holdings Ltd.*<sup>24</sup> Riley J. explained:

It is not enough to prove that the lawyer has made an error of judgment or shown ignorance of some particular part of the law; it must be shown that the error or ignorance was such that an ordinarily competent lawyer would not have made or shown it.

It is extremely difficult to define the exact limits by which the skill and diligence which a lawyer undertakes to furnish in the conduct of a case is bounded, or to trace precisely the dividing line between the reasonable skill and diligence which appears to satisfy his undertaking. It is a question of degree, and there is a borderland within which it is difficult to say whether a breach of duty has or has not been committed.<sup>25</sup>

Therefore, the question is not whether the lawyer made a mistake, made an error in judgment, or was ignorant of some part of the law.<sup>26</sup> It must be shown that a reasonably competent lawyer, practicing in the same community at the time in question, would not have made the error or shown the ignorance in question.<sup>27</sup> The standard is reasonableness and not perfection.<sup>28</sup>

Riley J., in *Millican v. Tiffin Holdings*, summarized a lawyer's obligation as follows:

1. to be skillful and careful;
2. to advise his client in all matters relevant to his retainer, so far as may be reasonably necessary;
3. to protect the interests of his client;
4. to carry out his instructions by all proper means;
5. to consult with his client on all questions of doubt which do not fall within the express or implied discretion left to him; and
6. to keep his client informed to such an extent as may be reasonably necessary, according to the same criteria.<sup>29</sup>

23. *Ibid.*, at 208 (emphasis added).

24. (1964), 49 D.L.R. (2d) 216, 50 W.W.R. 673, [1964] A.J. No. 103 (Alta. T.D.), reversed (1965), 53 D.L.R. (2d) 674, 53 W.W.R. 505, 1965 CarswellAlta 52 (Alta. C.A.), reversed [1967] S.C.R. 183, 60 D.L.R. (2d) 469, 59 W.W.R. 31 (S.C.C.) [*Millican*].

25. *Ibid.* at 674.

26. 285614 *Alberta Ltd. v. Burnet, Duckworth & Palmer* (1993), 8 B.L.R. (2d) 280, 139 A.R. 31 at 36, [1993] A.J. No. 157 (Alta. Q.B.).

27. *Startup v. Blake*, 2001 BCSC 8, 101 A.C.W.S. (3d) 1194, [2001] B.C.J. No. 16 (B.C. S.C.) at para. 68.

28. *Carlsen v. Southerland*, 2006 BCCA 214, 40 C.C.L.T. (3d) 1, [2006] B.C.J. No. 973 (B.C. C.A.) at paras. 10-15.

The reasonableness of a lawyer's impugned conduct will be assessed in light of the time available to complete the work, the nature of the client's instructions, and the client's experience and sophistication.<sup>30</sup>

Specifically, a client's lack of sophistication is a significant factor in legal malpractice as the duty to ensure a fully informed client is heightened in those circumstances.<sup>31</sup> Notably, however, in the decision of *Dawe (c.o.b. Dawe and Dawe Fisheries) v. Brown*<sup>32</sup> Schwartz J. stated:

It is incumbent on the client to explain the problem fully, provide all facts pertaining to the matter including anything which might be detrimental to the possibility of a successful claim, and to give the lawyer instructions on proceeding after being fully advised. It is only then that a solicitor can act properly on behalf of the client.<sup>33</sup>

Notably, solicitors can escape liability if a client withholds information that is required for the lawyer to adequately meet the requisite standard of care.<sup>34</sup>

It is not just the lawyer's conduct against which the negligence is measured. The standard of care must be assessed in the light of, and within the confines of, the retainer between the solicitor and his testator client, because it is this retainer that creates the relationship of proximity.<sup>35</sup>

29. *Millican*, *supra* footnote 24 at 675.

30. *Ormindale Holdings Ltd. v. Ray, Wolfe, Connell, Lightbody and Reynolds* (1980), 116 D.L.R. (3d) 346, 36 B.C.L.R. 378, [1980] B.C.J. No. 1969 at paras. 33-34 and 39-40 (B.C. S.C.), affirmed (1982), 135 D.L.R. (3d) 577, 36 B.C.L.R. 378 at 390, 14 A.C.W.S. (2d) 217, 1982 CarswellBC 748, [1982] B.C.J. No. 1899 at paras. 10 and 11 (B.C. C.A.); and *Lenz v. Broadhurst Main* (2004), 129 A.C.W.S. (3d) 206, [2004] O.T.C. 94, [2004] O.J. No. 288 at paras. 47-54 (Ont. S.C.J.), affirmed (2005), 142 A.C.W.S. (3d) 345, 2005 CarswellOnt 4416, [2005] O.J. No. 3903 (Ont. C.A.); see also Lysyk Sossin and Lundy MacKenzie Newbury, *Barristers and Solicitors in Practice* (Markham, Ont.: LexisNexis Canada Inc., 2009).

31. See Grant and Rothstein, *Lawyers' Professional Liability* (Toronto: Butterworths, 1999) and *Lapierre v. Young* (1980), 117 D.L.R. (3d) 643, 30 O.R. (2d) 319, 1980 CarswellOnt 731 (Ont. H.C.).

32. (1995), 405 A.P.R. 281, 130 Nfld. & P.E.I.R. 281, 55 A.C.W.S. (3d) 669 (Nfld. T.D.).

33. *Ibid.*, at para. 44.

34. See Sossin and Newbury, *supra*, footnote 31.

35. *Meier v. Rose*, 2012 ABQB 82, 74 E.T.R. (3d) 249, 531 A.R. 369 (Alta. Q.B.) at para. 26; see also *Spence v. Bell* (1982), 1982 ABCA 282, 22 Alta. L.R. (2d) 193, 39 A.R. 239 at 250 (Alta. C.A.), leave to appeal refused (1982), 31 Alta. L.R. (2d) xl, 41 A.R. 305 (note) (S.C.C.); *Woodglen & Co. v. Owens* (1996), 6 R.P.R. (3d) 259, 19 O.T.C. 81, [1996] O.J. No. 4082 at para. 74 (Ont. Gen. Div.), additional reasons (1997), 6 R.P.R. (3d) 259n, 1997 CarswellOnt 405,

The Supreme Court of Canada, in *Central Trust* stated as follows:

While the solicitor's duty of care has generally been stated in the context of contractual liability as an implied term of the contract or retainer, the same duty arises as a matter of common law from the relationship of proximity created by the retainer. In the absence of special terms in the contract determining the nature and scope of the duty of care in a particular case, the duties of care in contract and in tort are the same.<sup>36</sup>

The Supreme Court of Canada cited with approval *Midland Bank Trust v. Hett, Stubbs & Kemp*,<sup>37</sup> in which Oliver J. stated as follows:

The extent of his duties depends on the terms and limits of the retainer and any duty of care to be implied must be related to what he is instructed to do . . .

. . . the court must beware of imposing on solicitors, or on professional men in other spheres, duties which go beyond the scope of what they are requested and undertake to do.<sup>38</sup>

Like other lawyers, estate practitioners accepting employment to render legal services impliedly agree to use such skill, prudence and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks they undertake.<sup>39</sup>

In the case of *Rosenberg Estate v. Black*,<sup>40</sup> Swinton J. referred to six factors to consider in determining whether a solicitor has acted reasonably in the preparation of draft wills for the review by clients. Mulligan J. also referred to these six factors in *McCullough v. Riffert*,<sup>41</sup> with respect to the preparation of wills in general and not just draft wills:

- 1) the terms of the lawyer's retainer: for example whether a precise timetable is agreed upon;
- 2) whether there was any delay caused by the client;
- 3) the importance of the will to the testator;
- 4) the complexity of the job – for example the more complex the will the more time required;

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additional reasons (1997), 71 A.C.W.S. (3d) 634, 1997 CarswellOnt 1893, affirmed (1999), 27 R.P.R. (3d) 237, 126 O.A.C. 103, [1999] O.J. No. 3989 (Ont. C.A.).

36. *Central Trust*, *supra* footnote 22 at 150-151.

37. (1977), [1978] 3 All E.R. 571 (Eng. Ch. Div.) [*Midland Bank*].

38. *Ibid.* at p. 583.

39. *McCullough v. Riffert*, 2010 ONSC 3891, 76 C.C.L.T. (3d) 71, 59 E.T.R. (3d) 235 at para. 41 (Ont. S.C.J.), additional reasons 2010 ONSC 4769, 76 C.C.L.T. (3d) 88, 59 E.T.R. (3d) 252 [*McCullough*].

40. *Supra*, footnote 16.

41. *Supra*, footnote 39 at para. 39.



- 5) the circumstances indicating the risk of death or onset of incapacity in the testator; and
- 6) whether there has been a reasonable ordering of the lawyer's priorities.<sup>42</sup>

### EVIDENCE

The court must determine whether the lawyer has met the standard of care based on evidence tending to show what an "ordinary competent lawyer" would have done.

When a claim is brought for professional malpractice (either in the form of a breach of contract claim, or for negligence) it is customary, and usually necessary, for there to be expert evidence on the standard of care.<sup>43</sup> Expert evidence that the lawyer's conduct was reasonable does not necessarily establish an authoritative practice.<sup>44</sup> There are decisions where the breach of the standard of care will be apparent without expert evidence.<sup>45</sup>

There is also the possibility of a narrow exception with respect to legal malpractice. There are cases where a judge can take judicial notice of the standard of care expected of lawyers.<sup>46</sup> Nevertheless, as the professions (including the legal profession) become more highly specialized, the circumstances in which a trial judge can properly take judicial notice of the standard of care have narrowed. Judicial notice is properly taken only in cases where the court collectively (and not just individual judges on the court) could make a finding of the standard of care without the assistance of expert evidence.<sup>47</sup>

Judicial notice can be taken only on facts that are notorious and undebatable.<sup>48</sup> Or, if the matter is one of "non-technical matters or those of which an ordinary person may be expected to have

42. *Rosenberg*, *supra* footnote 16 at para. 42.

43. *Krawchuk v. Scherbak*, 2011 ONCA 352, 332 D.L.R. (4th) 310, [2011] O.J. No. 2064 (Ont. C.A.) at para. 130, leave to appeal refused (2011), 297 O.A.C. 395 (note), 430 N.R. 396 (note), [2011] S.C.C.A. No. 319 (S.C.C.); *Kopp v. Halford*, 2013 SKQB 128, [2013] 11 W.W.R. 713, 418 Sask. R. 1 (Sask. Q.B.) at para. 102.

44. 285614 *Alberta Ltd.*, *supra* footnote 26 at 36.

45. *ter Neuzen v. Korn*, [1995] 3 S.C.R. 674, 127 D.L.R. (4th) 577, [1995] S.C.J. No. 79 (S.C.C.) at paras. 44, 51-2.

46. *Tran v. Kerr* (2014), 2014 ABCA 350, [2015] 1 W.W.R. 70, [2014] A.J. No. 1189 (Alta. C.A.) at para. 21 [*Tran*].

47. *Malton v. Attia* (2013), 2013 ABQB 642, 6 C.C.L.T. (4th) 198, [2013] A.J. No. 1186 at para. 214 (Alta. Q.B.), additional reasons 2015 ABQB 135, 17 C.C.L.T. (4th) 25; *MacDonald v. Taubner*, 2010 ABQB 60, 55 E.T.R. (3d) 65, [2010] 9 W.W.R. 121 (Alta. Q.B.) at para. 330.

48. *Tran*, *supra* footnote 46 at para. 23.

knowledge”.<sup>49</sup> There is an underlying reason for this: An expert witness can be cross-examined, but the parties have no means of discrediting a judge’s implicit assertion that he or she knows the proper way to conduct a certain kind of legal business. As Justice Southin observed in *Zink v. Adrian*,<sup>50</sup> “one must not overlook that the reason some judges are judges is that whilst they were practising the profession they were of a standard far above that of the ordinary reasonably competent member of the profession”.<sup>51</sup>

While expert evidence is the usual way of setting the standard of care in a professional malpractice case, a plaintiff can also meet the burden of proof on this issue if there are any admissions by the defendant solicitor that he or she was negligent.<sup>52</sup>

### CAUSATION/DAMAGES

Not only does the plaintiff claiming professional negligence have to show that a solicitor owes him or her a duty of care and that the lawyer failed to meet the requisite standard of care, the plaintiff must also prove a causal connection between the solicitor’s breach of the standard of care and the loss suffered by the claimant. The starting point for this is the “but for” test: on a balance of probabilities would the compensable damage not have occurred *but for* the negligence of the solicitor?<sup>53</sup>

In both *Dhillon v. Jaffers*<sup>54</sup> and *Michiels v. Kinnear*,<sup>55</sup> the court found that, while negligence was found or admitted, there was insufficient evidence to prove that but for the solicitor’s negligence acts the plaintiffs would have suffered the alleged loss.

Furthermore, where there are two or more tortfeasors, the defendant is not excused from liability merely because other “causal factors” for which he or she is not responsible also helped produce the harm. It is sufficient if the defendant’s negligence was a cause of the harm.<sup>56</sup>

49. See *Anderson v. Chasney*, [1949] 4 D.L.R. 71, [1949] 2 W.W.R. 337 at 341, 57 Man. R. 343 (S.C.C.).

50. 2005 BCCA 93, [2005] 4 W.W.R. 420, [2005] B.C.J. No. 295 (B.C.C.A.) [*Zink*].

51. *Ibid.* at paras. 43-44.

52. See *Michiels v. Kinnear*, 2011 ONSC 3826, 7 R.P.R. (5th) 175, [2011] O.J. No. 2803 (Ont. S.C.J.) (discussed below).

53. *Hill v. Hamilton-Wentworth (Regional Municipality) Police Services Board*, 2007 SCC 41, [2007] 3 S.C.R. 129, 285 D.L.R. (4th) 620 (S.C.C.) at para. 93.

54. 2014 BCCA 215, 375 D.L.R. (4th) 288, 57 C.P.C. (7th) 278 (S.C.C.).

55. 2011 ONSC 3826, 7 R.P.R. (5th) 175, [2011] O.J. No. 2803 (Ont. S.C.J.), additional reasons 2011 ONSC 6024, 2011 CarswellOnt 11701, 216 A.C.W.S. (3d) 320 [*Michiels*].

### LIMITATION PERIODS

A claim against a solicitor in the preparation of a testamentary document, will, in most cases, not be discovered until the death of the testator. Under the Ontario *Limitations Act, 2002*<sup>57</sup> a client has two years from the date upon which the claim is *discovered* to commence an action against the solicitor. A claim is discovered on the earlier of:

- a) the day in which the person with the claim first knew,
  - i. that the injury, loss or damage had occurred,
  - ii. that the injury, loss or damage was caused by or contributed by an act or omission,
  - iii. that the act or omission was that of the person against whom the claim is made; and
  - iv. that having regard to the nature of the injury, loss or damage, a preceding would be an appropriate means to seek remedy, and
- b) the day in which a reasonable person with the abilities and the circumstances of the person with the claim first ought to have known of the matters referred to in (a) above.

However, that does not mean that plaintiffs have forever to commence a claim if it is not “discovered”. The *Limitations Act, 2002* provides for an ultimate limitation period of 15 years.<sup>58</sup> It is the plaintiff who bears the evidentiary burden to prove a claim is issued within the limitation period prescribed by the *Limitations Act, 2002*.

In the case of *Ferrara v. Lorenzetti, Wolfe Barristers and Solicitors*,<sup>59</sup> minutes of settlement were entered into concerning a legal dispute in June of 2005. A post-closing dispute arose over terms

56. See generally *Athey v. Leonati*, [1996] 3 S.C.R. 458, 140 D.L.R. (4th) 235, [1996] S.C.J. No. 102 (S.C.C.) at paras. 13-25; *Blackwater v. Plint* (2005), 2005 SCC 58, [2005] 3 S.C.R. 3, 258 D.L.R. (4th) 275 (S.C.C.) at paras. 78-81; *G. (E.D.) v. Hammer*, 2003 SCC 52, [2003] 2 S.C.R. 459, 230 D.L.R. (4th) 554 (S.C.C.) at paras. 31-2; *B. (B.P.) v. B. (M.M.)*, 2009 BCCA 365, [2010] 3 W.W.R. 628, [2009] B.C.J. No. 1650 (B.C. C.A.) at paras. 33-47 (Chiasson J.A.), leave to appeal refused (2010), 504 W.A.C. 320 (note), [2010] S.C.C.A. No. 90 (S.C.C.); *Clements (Litigation Guardian of) v. Clements*, 2012 SCC 32, [2012] 2 S.C.R. 181, 346 D.L.R. (4th) 577 (S.C.C.) at paras. 6-28; and *Hansen v. Sulyma*, 2013 BCCA 349, 3 C.C.L.T. (4th) 169, 48 M.V.R. (6th) 34 (B.C. C.A.) at paras. 21-29, leave to appeal refused (2014), 635 W.A.C. 320 (note), [2013] S.C.C.A. No. 390 (S.C.C.).

57. S.O. 2002, c. 24, Sched. B.

58. Section 15.

59. 2012 ONSC 151, 216 A.C.W.S. (3d) 619, [2012] O.J. No. 135 (Ont. S.C.J.), reversed 2012 ONCA 851, 357 D.L.R. (4th) 480, 113 O.R. (3d) 401 (Ont. C.A.) [*Ferrara*].

of the settlement which was adjudicated by Justice Belobaba in 2009 and Ferrara lost. Ferrara appealed to the Ontario Court of Appeal in 2010 but Justice Belobaba's 2009 decision was upheld. Ferrara then sued his lawyer in 2011 for solicitor's negligence for negligently preparing the minutes of settlement and for failing to ensure that the minutes were properly implemented. While Lauwer J. (as he was then) at first instance in the solicitor's negligence claim, held that the limitation period began to run on September 19, 2006, when the post-closing claim was *commenced*, the majority of the Court of Appeal held that the claim was not discoverable until July 2009 when Justice Belobaba released his decision. Laskin J.A. of the Court of Appeal based this finding on the fact that the lawyer, who was Ferrara's lawyer for over 20 years, repeatedly assured Ferrara that he was right, as well as Ferrara's uncontradicted evidence that no one told him otherwise.

In dissent, Justice Epstein would have dismissed the appeal. While Epstein J.A. disagreed with the motion judge that the cause of action arose when the post-closing claim was commenced, she held that the fact that Ferrara retained three sets of litigation counsel during the dispute was enough to trigger the discoverability rule. Ferrara claims that none of these sets of counsel suggested to him that he had a claim against his lawyer. Epstein J.A. found this hard to believe, stating as follows:

This assertion is difficult to accept. First, it begs the question of why these lawyers and their firms have not been named as defendants in this action. Second, given the issues raised in the [post-closing claim] and the way in which they were described by Belobaba J., the implication being that it should have been relatively easy for [the lawyer] to have identified his error, and the level of experience of these lawyers, it is a difficult assertion to accept without clear and convincing evidence.<sup>60</sup>

The Ontario Court of Appeal also examined the discoverability principle in the solicitor's negligence context in the case of *Lipson v. Cassels Brock*<sup>61</sup> that involved the certification of a class action against a law firm for solicitor's negligence and negligent misrepresentation.

A class of investors relied on a legal opinion from a law firm that opined on the likelihood of the Canadian Customs and Revenue Agency (the "CCRA") successfully denying anticipated tax credits from a donation to a "Timeshare Tax Reduction Program". The

60. *Ibid.* at para. 46.

61. 2013 ONCA 165, 360 D.L.R. (4th) 577, 31 C.P.C. (7th) 128 (Ont. C.A.) [*Lipson*].

legal opinion indicated that it would be “unlikely” that the CCRA could successfully deny the tax credits.

In 2004, the CCRA notified the representative party that it intended to disallow the tax credits. Immediately, Lipson and other donors sought legal and accounting advice. In 2006, two of the donors launched challenge proceedings against the CCRA as a test case against the denial of the tax credits. In 2008, the CCRA settled the test case whereby the donors would receive some but not all of their tax credits. Lipson and other members of the class entered into similar settlements with the CCRA.

In April 2009, Lipson commenced the proposed class action against the law firm for negligence and negligent misrepresentation. In November, 2011, Justice Perrell granted an order dismissing the action, holding that it was statute-barred by the two-year limitation period in the *Limitations Act, 2002*. Perrell J. held that, based on the Supreme Court of Canada decision in *Central Trust* and a review of the facts alleged in the statement of claim, the claims for negligence and negligent misrepresentation should have been discovered in 2004 when the CCRA denied the validity of the tax credits or, at the very latest, in 2006 when Lipson retained legal counsel to sue the CCRA.

The Court of Appeal held that the motion judge erred in interpreting and applying *Central Trust* and when interpreted correctly, it was apparent that the record before the motion judge did not disclose whether Lipson’s claim was statute-barred. The facts in *Central Trust* involved a challenge to a mortgage registered against a property. The mortgage was registered in 1969 and a subsequent action in 1977 found that the mortgage was *void ab initio*. In 1980 Central Trust sued the solicitors who acted for it in the mortgage transaction. The issue before the court was when the limitation period began to run. Justice Le Dain in *Central Trust* stated the following:

Since the [lawyers] gave the [Central Trust] a certificate on January 17, 1969 that the mortgage was a first charge on the Stonehouse property, thereby implying that it was a valid mortgage, the earliest that it can be said that [Central Trust] discovered or should have discovered the respondents’ negligence by the exercise of reasonable diligence was in April or May 1977 when the validity of the mortgage was challenged in the action for foreclosure. Accordingly [Central Trust’s] cause of action in tort did not arise before that date and its action for negligence against the [lawyers] is not statute-barred.<sup>62</sup>

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62. *Central Trust, supra*, footnote 22 at para. 77.

Perell J., in *Lipson*, interpreted this passage as follows:

It should be noted that the damage suffered by Central Trust occurred when it accepted a mortgage that could be challenged as illegal. It later transpired that the mortgage was challenged, and Justice Le Dain held that the limitation period for the claim of solicitor's negligence commenced running with the manifest challenge to the mortgage, even though the actual declaration of invalidity of the mortgage would occur still later.<sup>63</sup>

The Court of Appeal held this interpretation to be incorrect and that Justice Le Dain had not concluded that the limitation period commenced running with the manifest challenge to the mortgage but, rather, that Justice Le Dain concluded that the *earliest date* on which the claim for solicitor's negligence could have commenced running was the date on which the validity of the mortgage (and therefore the validity of the solicitor's opinion) was challenged.

The Court of Appeal went on to observe that in *Kenderry-Esprit (Receiver of) v. Burgess, MacDonald, Martin and Younger*<sup>64</sup> Justice Molloy recognized that *Central Trust Co. v. Rafuse* is not binding authority for the proposition that the limitation period in an action for solicitor's negligence begins to run on the date of a manifest challenge to the solicitor's opinion. Instead, Molloy J. held that "the date upon which the plaintiff can be said to be in receipt of sufficient information to cause the limitation period to commence to run will depend on the circumstances of the particular case". The Court of Appeal agreed with this conclusion and held that:

In our view, neither the fact that the CCRA was challenging the claimed tax credits nor the fact that the class members may have been incurring professional fees to challenge the CCRA's denial of the tax credits is determinative of when the class members reasonably ought to have known they had suffered a loss as a result of a breach of the standard of care on the part of Cassels Brock.<sup>65</sup>

Under s. 5(1)(a) of the *Class Proceedings Act* (the reasonable cause of action prong of the certification), no evidence is admissible. The legal opinion stated that it was *unlikely* that the CCRA could *successfully challenge* the tax credits claimed. The court found that the pleadings implied that Lipson and the other class members were not advised until January 2008 of the *likelihood* that the CCRA's disallowance of the tax credits *would not succeed* at least in part.

63. *Lipson*, *supra* footnote 61 at para. 72.

64. (2001), 53 O.R. (3d) 208, 103 A.C.W.S. (3d) 1047, [2001] O.J. No. 776 (Ont. S.C.J.).

65. *Lipson*, *supra* footnote 61 at para. 82.

Therefore, the claim was not statute-barred when it was commenced in 2009.

## SOLICITOR'S NEGLIGENCE – ESTATES CONTEXT

### Notable Case Law: 2010-2015

#### 2010: *McCullough v. Riffert*

In the 2010 case of *McCullough v. Riffert*<sup>66</sup> the testator died 10 days after giving instructions to a lawyer for his will, which was never executed. The testator's niece would have received his entire estate under his new will. Instead the testator's three estranged children became entitled on intestate succession. The niece sued the lawyer in negligence as the "disappointed beneficiary" for not preparing the will and not having it executed before her uncle died. While the testator appeared ill for undiagnosed reasons and was emaciated, no medical evidence was called at trial because the testator refused to seek medical advice.<sup>67</sup>

The lawyer had previously acted for the testator on his divorce and his house purchase. She was not shocked by his appearance and did not feel he was gravely ill. Her notes indicated that the testator said that since he was no longer working as a firefighter, he was not as hungry and did not feel like eating as the explanation for his weight loss.<sup>68</sup> The testator was planning a visit to his niece in a few months and wanted the will prepared before then, otherwise there was no hurry. Three days later the lawyer mailed a draft will for review and further information and instructions were required from the testator. He never provided the missing information. The testator died just 10 days after visiting his lawyer.

The court referred to the factors set out in *Rosenberg Estate v. Black*<sup>69</sup> and concluded that the lawyer met the standard of care and was not negligence based on the following considerations:

- The lawyer acted expediently as an appointment was arranged at the lawyer's office within one week of the niece's telephone call with the lawyer. The lawyer prepared a draft will three days later and sent it to her client for review. The lawyer made notes in her file that the testator wanted the will to be signed by a certain date, about two and a half weeks after the initial interview.

66. *Supra* footnote 39.

67. *Ibid.* at para. 20.

68. *Ibid.* at para. 26.

69. *Supra* footnote 16.

- The testator did not express any urgency, other than his desire to have the will done before his proposed trip to Texas.
- The lawyer did not see the testator in the dishevelled physical state he had been in prior to his visit with the lawyer. The testator came to the lawyer's office by walking in with the assistance of a cane and with some help from his niece. He was dressed in a track suit and a jacket.
- The lawyer asked if he had seen a doctor and the testator said no and she made note of his explanation. There was no diagnosis that he was subject to a terminal illness. This was not a visit to the client's hospital or palliative care bedside.
- The testator did not call back to advise as to the possible alternate executor or to inquire if the will was ready.
- When the testator died ten days later it was a shock to his family including the niece. She was taken aback and not expecting it.<sup>70</sup>

Justice Mulligan concluded also that there is a "continuum" between a client who presents without any particular concerns regarding health or age and a client who is clearly on his or her death bed. To fail to prepare a will quickly may fall below the standard of care for a reasonably competent solicitor depending on all the facts in this continuum.<sup>71</sup>

### **2010: Barbulov v. Huston**

In this case, the plaintiff moved for summary judgment on a claim of solicitor's negligence.<sup>72</sup> The plaintiff was named as attorney in his father's power of attorney ("POA"). When the father was admitted to the hospital after he suffered severe brain damage due to lack of oxygen, he was not able to communicate and there was no medical cure for his loss of cognitive abilities. The physicians asked if there was a power of attorney. The plaintiff says he reviewed the POA and felt it did not reflect his father's wishes so he told the hospital there was not one.

The physicians commenced an application to the Consent and Capacity Board to determine the father's best interests and a plan of treatment. At the outset of the hearing the plaintiff produced the POA and the treatment plan was revised with reduced medical intervention to reflect the father's wishes in the POA. The plaintiff

70. *McCullough*, *supra* footnote 39 at para. 60.

71. *Ibid.* at para. 62.

72. *Barbulov v. Huston*, 2010 ONSC 3088, 319 D.L.R. (4th) 543, [2010] O.J. No. 2251 (Ont. S.C.J.) [*Barbulov*].



appealed to the Ontario Superior Court of Justice and argued that the POA did not reflect his father's wishes: he was at the meeting where his father signed the POA and that the lawyer never discussed the POA with his father, nor did his father read the POA as he could not read English.

Brown J. on appeal found that there was no evidence that the father was aware of the terms in the POA that he signed. Brown J. concluded that as there was no valid POA, he was required to determine under s. 21(2) of the *Health Care Consent Act* what was in the best interests of the father. He directed the plaintiff to give or refuse consent to treatment for his father in accordance with the original treatment plan proposed by the physicians. The plaintiff sued the lawyer who drafted the POA for the legal expenses incurred by him in prosecuting the appeal.

Newbould J., on the summary judgment motion, applied the *Anns v. Merton London Brough Council*<sup>73</sup> adopted in *Kamloops v. Nielson*,<sup>74</sup> and *Cooper v. Hobart*,<sup>75</sup> to determine if there was a duty of care owed to the plaintiff attorney. The court noted that solicitors have been found liable to a "disappointed beneficiary" but that these cases cannot be said to be analogous: "A designated beneficiary is someone with an independent benefit or interest who can reasonably be seen to be harmed if the solicitor is negligent. There is no benefit or interest accorded to an attorney in a power of attorney." Newbould J. also declined to find a new duty of care as there was not sufficient proximity to impose a duty of care.<sup>76</sup>

While the court did not find a duty of care owing, it went on to discuss if there had been a duty of care, no negligence could be found on the evidence as both the recollection and testimony of the plaintiff and the lawyer were given little weight: "I am not satisfied that the plaintiff has established that his father had wishes regarding the terms to be included in the power of attorney, that those terms were provided on his behalf by the plaintiff to [the lawyer] and that [the lawyer] drew a power of attorney conflicting with what he was told the father wanted."<sup>77</sup>

### **2011: Michiels v. Kinnear**

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73. [1978] A.C. 728 (U.K. H.L.).

74. [1984] 2 S.C.R. 2, 10 D.L.R. (4th) 641, 11 Admin. L.R. 1 (S.C.C.).

75. 2001 SCC 79, [2001] 3 S.C.R. 537, 206 D.L.R. (4th) 193 (S.C.C.).

76. *Barbulov*, *supra* footnote 72 at para. 20-22.

77. *Barbulov*, *supra* footnote 72 at para. 42.

This case<sup>78</sup> arose after the plaintiff and her (subsequently deceased) husband transferred their matrimonial home to certain family members subject to a life interest in favour of the plaintiff and her husband. The husband, who had terminal cancer, died three weeks after they executed the transfer. The plaintiff sued the transferee family members as well as the solicitor who drafted the deed, for damages in the amount of approximately \$170,000 to compensate her for the loss of the property. It was the plaintiff's position that she would have inherited the property upon her husband's death had it not been for the conveyance. The plaintiff argued that the solicitor was professionally negligent and breached his fiduciary duty as: he did not advise her to get independent legal advice; failed to act cautiously given the plaintiff's illiteracy and the husband's impending death; failed to properly report with respect to the conveyance; failed to explain the significance of what they were doing including the significance and meaning of a life interest in real estate; failed to explain her rights as a joint tenant; failed to satisfy himself that his clients understood the nature and effect of what they were doing; and failed to advise the plaintiff that the transfer of the real estate would leave her with no financial interest in the property notwithstanding the fact that the property represented the primary asset of the plaintiff and her husband.<sup>79</sup>

The solicitor, in a written submission through his counsel, admitted that he did not meet the standard of care:

Without admitting that he caused the loss complained of by the plaintiff, Mr. Vadala admits that he did not meet the standard of care expected of a reasonably competent real estate lawyer in the circumstances of the transfer.<sup>80</sup>

In light of the admission, the court ruled that it would be unnecessary and, indeed, incorrect for the court to hear expert testimony at trial concerning the relevant standard of care of a solicitor practicing real estate law in Kingston (where the solicitor practiced).

However, the issue remained whether Mr. Vadala's breach of the standard of care caused or contributed to the alleged damages. The court found that the plaintiff failed to meet the burden of showing that "but for" the negligence and breach of fiduciary duty on the part of the solicitor, the alleged loss would not have occurred:

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78. *Michiels*, *supra* footnote 55.

79. *Ibid.* at para. 10.

80. *Michiels*, *supra* footnote 55 at para. 14.

It does not follow automatically that had Viola sought independent legal advice or had Mr. Vadala acted without negligence or in breach of his fiduciary duty, Viola would not have proceeded with the gifts. She might have maintained her original position – *i.e.*, to gift the properties. Gifting of the real estate was clearly what she had planned to do when she consulted with Mr. Vadala and, on the facts as I have found them, she clearly intended to later gift the personal property to Leslie and Les and give up her life interest.<sup>81</sup>

The court was persuaded by all of the evidence that causation was not established and that the lawyer had met the burden of proof on him: even given the breach of fiduciary duty in addition to the negligence, the solicitor's conduct did not *cause* the plaintiff to divest herself of her property by way of gifts. The court also found that the plaintiff's action was statute barred. She knew something was wrong in the spring of 2004 and that she was unhappy about what had happened but she did not commence a claim until September 2007. She could have exercised due diligence by consulting another lawyer at that time. She did not do so. According to her allegation and her testimony, at that time, in the spring of 2004, she knew that she had suffered a loss; she knew that the solicitor had caused or contributed to that loss; she knew that the solicitor was involved; and she knew that she could have sought redress through the courts. All of this information would have been within the grasp of a reasonable person with the abilities and the circumstances of the plaintiff.<sup>82</sup>

### **2012: Meier v. Rose**

In the Alberta Queen's Bench case of *Meier v. Rose*<sup>83</sup> the court found that a drafting solicitor acted negligently in the preparation of a will. The solicitor prepared a will for Gary Meier. The plaintiff, Robert, was the deceased's brother and a beneficiary under the will. The will bequeathed four quarter sections of farmland to the brother; however, the gift failed because the deceased never actually owned the lands at the time of his death, the deceased's corporation owned them.

First, the court confirmed that a duty of care was owed to the disappointed third party beneficiary, Robert Meier:

In this case, Mr. Rose had a duty to his client, Gary Meier, to prepare his will using proper care in carrying out his instructions in order to effectively confer the intended benefit to Robert Meier . . . I am satisfied

81. *Ibid.* at para. 170.

82. *Michiels, supra* footnote 55 at para. 186.

83. 2012 ABQB 82, 74 E.T.R. (3d) 249, 531 A.R. 369 (Alta. Q.B.) [*Meier*].

that the interests of Gary Meier, the testator, and Robert Meier, the disappointed beneficiary, are in harmony and there is no possibility of conflict. Further, Robert Meier has no other available remedy as the intended specific bequest under the will failed.<sup>84</sup>

Second, the court examined whether the solicitor was negligent, specifically, was he negligent in failing to ask who owned the land the deceased wished to gift to his brother and/or conduct a search at land titles of that land to ascertain or confirm ownership. Goss J. stated:

I find that in all of the circumstances, there was ample reason to make further inquiries on the information being received from Mr. Meier regarding ownership of the land to be specifically gifted. At no time did Mr. Gary Meier, from the evidence before me, limit the retainer which he entered into with Mr. Rose regarding the preparation of the will. Mr. Meier was always in a hurry and often did not make appointments. Mr. Meier demanded that Mr. Rose undertook to prepare Mr. Meier's will in one day. There is no evidence supporting the conclusion that the retainer was limited in any way other than by the constraints of time. No avenues of inquiry by Mr. Rose were shut down or dismissed by the testator in their meeting. The testator provided all of the information requested by Mr. Rose. He examined the titles in his possession and provided Mr. Rose's office with the correct legal descriptions of the land to be gifted to Bob Meier. There is no evidence that copies of the titles themselves were requested by Mr. Rose, nor that they were provided by Mr. Meier. Information as to ownership of the lands to be bequeathed to Robert Meier was neither requested of the testator nor provided. *The limited time stipulated for completion of the will did not limit the standard of care required of the solicitor including to be skillful, careful and advise on all relevant matters in that time period* [emphasis added].<sup>85</sup>

Expert evidence was called concerning the practice of solicitors in taking instructions on and preparing a will and Goss J. concluded:

After considering the evidence of the two experts on the standard of care expected of a reasonable competent solicitor, *I am satisfied that a reasonably competent solicitor in 2000, retained to prepare a will for a client for execution the following day, who knew that the testator has used a corporate vehicle to hold title to some of his land and who was familiar with his client's tendency not to distinguish between his personal and corporate ownership of land, would take the step to ascertain ownership in preparing a legal document such as a will by conducting a title search on the legal descriptions provided. A reasonably competent solicitor in those circumstances would, at a minimum have asked who*

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84. *Ibid.* at para. 14.

85. *Meier, supra* footnote 83 at para. 59.

owned [the] land to be gifted in the will or done a search to ascertain in ownership [emphasis added].<sup>86</sup>

The court went on to look at causation and asked: Would the gift have failed if the solicitor had not been negligent in failing to ascertain ownership of the land in question? The court concluded that it was satisfied on the balance of probabilities on the evidence before it that but for the negligence of the defendant the injury or loss to the plaintiff would not have occurred. The deceased would not have signed the will as drafted had he known that the bequest to his brother would fail. He signed the will as drafted, confident that his intentions were properly given effect.<sup>87</sup> Damages were calculated on the value of the property at the date of death.

### **2013: Vincent v. Blake, Cassels & Graydon LLP**

The son of the testator brought a professional negligence claim against the solicitors who drafted his mother's will and completed an estate freeze.<sup>88</sup> The son alleged, among other things, that his sister had unduly influenced his mother so she would benefit to a greater extent than the son, under the will and estate freeze, even though the mother's intention had been for her children to be treated equally. The son based his allegations of undue influence, in part, on the fact that the solicitors had been his sister's professional advisors for a lengthy period of time and that they had ignored the mother's request that the children be treated equally.<sup>89</sup>

The defendant solicitors brought a summary judgment motion seeking to dismiss the action claiming that they owed no duty of care to the son who was a third party beneficiary.<sup>90</sup> Such a claim, they argued, would place a solicitor in direct conflict with the duty owed to his or her client: the testator.

Justice Stevenson, however, held that the question as to whether the solicitor owed a duty of care to the plaintiff beneficiary was a triable issue and refused to dismiss the action.<sup>91</sup> Her Honour agreed with the son's counsel that the case law relied upon by the solicitors could be distinguished as those cases that dealt with beneficiaries under prior wills who wished to challenge subsequent wills. In those

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86. *Ibid.* at para. 60.

87. *Ibid.* at paras. 69-71.

88. *Vincent v. Blake, Cassels & Graydon LLP*, 2013 ONSC 980, 2 C.C.L.T. (4th) 150, 114 O.R. (3d) 100 (Ont. S.C.J.) [*Vincent*].

89. *Ibid.* at paras. 23-24.

90. *Ibid.* at para. 32.

91. *Ibid.* at para. 43.

situations, the interests of the testator were not aligned with those of the beneficiary. Here, where the son argued that the intention of the testator was not fulfilled by the solicitors, it was not clear on the facts whether the testator's interests were in direct conflict with the son's or if they were aligned.<sup>92</sup> Therefore, a trial was required. To date, no trial decision has been reported.

#### **2014: Simpson Wigle Law LLP v. Lawyers' Professional Indemnity Company**

This case examines the insurance coverage lawyers have in place for negligence claims through the Lawyers' Professional Indemnity Company (LawPro).<sup>93</sup>

The defendant law firm in this negligence claim was insured under a policy that had a limit of liability of \$1 million per claim, with an aggregate limit of \$2 million. The suit was brought by former clients, brothers who jointly owned and operated a number of agricultural businesses and properties.

The lawyers argued that the statement of claim gave rise to at least two separate claims: one claim arising from the allegedly improper appointment of the lawyer and CIBC as committees of the brother's person and estate when there was an attorney under a POA (the "POA allegation"), and a second claim arising from the allegedly negligent administration of the one brother's estate (the "Real Property Claim"). The application judge found that the two claims were "related" within the meaning of the insurance policy: the losses were the same, the fiduciary duty was the same, and therefore constituted only one claim.

The Court of Appeal looked to the specific wording of the policy and case law that considered whether two claims in a statement of claim were "related" for the purposes of the policy, and concluded that "the Statement of Claim fundamentally advances two claims" and that "the two claims in the Statement of Claim arise from errors, omissions or negligent acts that are sufficiently different in nature and kind that they are not related within the meaning of the Policy".<sup>94</sup> The allegations underlying the two claims were different in nature and kind: one dealt with the improper appointment of the lawyer and CIBC as committees of the brother's person and estate

92. *Ibid.* at para. 46.

93. *Simpson Wigle Law LLP v. Lawyers' Professional Indemnity Co.*, 2014 ONCA 492, 98 E.T.R. (3d) 180, [2014] I.L.R. 1-5634 (Ont. C.A.), leave to appeal refused 2015 CarswellOnt 1078 (S.C.C.) [*Simpson Wigle*].

94. *Ibid.* at para. 76.

because the lawyer failed to disclose the appropriate information to the court. The second claim arose from allegedly improvident or unnecessary sales of six parcels of land and failing to take the opportunity to increase the value of two of those properties through inclusion in a designated Waterdown urban expansion area. The real property claim was based on allegations of active mismanagement instead of an error or omission or negligence. There was an insufficient association or connection between the two negligence claims from a legal perspective.<sup>95</sup> The court issued an order declaring that the Statement of Claim contained more than one claim within the meaning of the policy. This case will provide guidance for future solicitor's negligence claims and assist in determining the scope of the insurance coverage for solicitors.

#### **2014: Peet v. The Law Society of Saskatchewan**

While this case is a professional misconduct case before the Saskatchewan Law Society Hearing and Discipline Committee,<sup>96</sup> and not a negligence claim, it provides some guidance on the proper standard of care of an estates lawyer.

The case involved two complaints. Within the first complaint, a client hired the lawyer to assist with a filing for probate, the selling of the client's father's house and distributing her father's estate to herself and a brother who lived in Ontario. At the beginning all went well and virtually all of the assets in the estate had been liquidated and letters probate were issued. The lawyer wrote to the client and recommended steps to wind up the estate and asked for a complete list of expenses the client had paid from the estate funds. The client complied with the request but then did not hear from the lawyer for almost a year. After repeated follow-up calls, long response times, or no responses, and various correspondence and mistakes with the accounting, the client completed the estate work herself and then complained to the law society.

The second complaint involved a holograph will. The clients (adult children of the deceased) asked the lawyer to determine if the document was a valid will and to proceed to probate it as soon as possible if it was. The lawyer said this would be done within a couple of months.<sup>97</sup> One of the adult children was elderly and lived outside of the province. She called the lawyer multiple times in the months

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95. *Ibid.* at para. 80.

96. *Peet v. Law Society of Saskatchewan* (2014), 2014 SKCA 109, 80 Admin. L.R. (5th) 260, [2015] 2 W.W.R. 466 (Sask. C.A.) [*Peet*].

97. *Ibid.* at para. 19.

and year following the meeting. She concluded that the lawyer had not actually done any work on their file. When her sister called a year after the meeting the lawyer did not return any of her calls but the lawyer eventually left a message saying that her matter had fallen “through the cracks”. When she finally spoke with the lawyer he said he thought the family was supposed to be looking for another will, despite the instructions provided to the lawyer to try and probate the holograph will. Eventually more than a year after the initial meeting the lawyer attempted to probate the holograph will but was unsuccessful as a court held that it was not a valid testamentary instrument and could not be probated. The clients filed a complaint with the Law Society in 2008.

The Hearing Committee found with respect to the first estate:

In summary, though [the lawyer] appeared to be quite diligent with respect to the O.N. estate at the outset, there was an unexplained period over one year whereby there was poor, if any, communication with the client and no appreciable work advanced on finalizing the estate. Again with the lack of any explanation from [the lawyer] at the hearing on this failure to communicate and the delay . . . the Committee comes to the conclusion that [the lawyer] is guilty of conduct unbecoming.<sup>98</sup>

With respect to the second estate:

The failure to return phone calls, the failure to complete the application for probate and failure to complete the additional documents in a timely manner are indicators of service that is below that required for competent lawyers in this situation.<sup>99</sup>

The lawyer’s licence was suspended for a period of 30 days and he was ordered to pay costs of the proceedings. He appealed, arguing among other things, that he had performed all the services required of him and that any delays on his part were the result of not having received information from the client. The Court of Appeal was not persuaded by this argument. There “was a delay of over 13 months” during which the client “left about ten telephone message for [the lawyer] which were not returned”.<sup>100</sup> The Committee had concluded that the service was below that which was required and expected for competent lawyers in this situation. The Court of Appeal concluded that this was an entirely reasonable conclusion for the Committee to reach.

The lawyer also argued that the Committee should have heard from an expert lawyer with deep experience in estate work before it

98. *Ibid.* at para. 30.

99. *Ibid.* at para. 31.

100. *Ibid.* at para. 65.



made its decision. The Court of Appeal dismissed this argument as well:

I see no reason why, on the facts of this complaint, the evidence of an expert was necessary. The root reality is that effectively nothing was done to advance the file concerning E.B.'s estate from July of 2007 (the initial meeting with M.B. and her siblings) to July of 2008 (when the will was sent for probate). During this time, Mr. Peet left many calls unreturned and acknowledged in a message for M.B. that things had fallen "through the cracks". *No expert was required to allow the Hearing Committee to determine that all of this amounted to a failure to provide legal services to M.B. and the Estate of E.B. in a conscientious, diligent and efficient manner* [emphasis added].<sup>101</sup>

His appeal was dismissed, although he was allowed to have the Registrar assess the award with respect to costs that was made against him.<sup>102</sup>

#### **2014: Dhillon v. Jaffer**

This was an appeal from an assessment of damages in a solicitor's negligence case.<sup>103</sup> The question of liability of the solicitor was decided by the British Columbia Court of Appeal in 2012.<sup>104</sup> The court found that his conduct in releasing to his client, Mrs. Dhillon, the entire net proceeds of sale of her and her husband's former matrimonial home, pursuant to a forged "Special Power of Attorney" had fallen "well below" the standard of care expected of a reasonably competent lawyer.<sup>105</sup> The home had been registered in the name of Mr. Dhillon alone and he was living in India at the time of the sale. The Court of Appeal held that even though Mr. Dhillon had not been the solicitor's client, the lawyer should have been "mindful" of his interests in dealing with the proceeds he had received in trust. As Donald J.A. observed in the 2012 solicitor's negligence Court of Appeal decision:

It would be difficult to find a case with a closer proximity than this. While the respondent's mandate for Mrs. Dhillon was to undo the deal to sell the house, when he failed in that endeavour, he was left with the responsibility of handling the appellant's property. The sale proceeds came into his hands. They derived from the exercise of a Special Power

101. *Ibid.* at para. 69.

102. *Ibid.* at para. 95.

103. *Dhillon v. Jaffer*, 2014 BCCA 215, 375 D.L.R. (4th) 288, 57 C.P.C. (7th) 278 (S.C.C.) [*Dhillon*].

104. *Dhillon v. Jaffer*, 2012 BCCA 156, 348 D.L.R. (4th) 712, 542 W.A.C. 218 (B.C. C.A.).

105. *Ibid.* at para. 48.

of Attorney which he believed to be genuine. The sale was effected by Mrs. Dhillon on the appellant's behalf as sole registered owner. As far as the respondent knew, the appellant wanted all the proceeds for himself and was not prepared to share them with Mrs. Dhillon; after all, that was her principal motive in trying to collapse the sale. The respondent had to know that paying the proceeds to Mrs. Dhillon was contrary to the appellant's wishes.<sup>106</sup>

The assessment of damages against the lawyer was remitted to the British Columbia Supreme Court. Melnick J. made his analysis of damages on the basis of negligence, and not breach of fiduciary duty on the part of the lawyer.<sup>107</sup> The onus of proof rested on the plaintiff to demonstrate that but for the negligence of the solicitor, he would not have suffered any given loss for which he claims.<sup>108</sup> Melnick J. concluded that the plaintiff was entitled to judgment for the entire (net) proceeds of sale of the house of \$187,201.18. Melnick J. also awarded \$40,000 in general damages, concluding that as long as the injury was reasonably foreseeable, the claim for general damages was a proper one.<sup>109</sup> Melnick J. also ordered damages for loss of opportunity in the amount of \$5,000. The lawyer appealed.

The Court of Appeal allowed the appeal and set aside the award of all damages made against the lawyer, with the exception of the \$5,000 award for loss of opportunity which was not the subject of appeal.<sup>110</sup> Fundamental rules of tort law dictate that the plaintiff cannot recover more than was caused by the defendant's wrong and a tortfeasor is responsible only for losses occasioned by foreseeable harm. In this case the plaintiff had already been awarded title to the house into which \$101,000 of the sale money had been traced. To allow the plaintiff to then recover the full \$187,000 from the defendant solicitor would have violated the rule against double recovery. Also, at the time of the sale of the house the spouse was presumptively entitled to 50% of the matrimonial home, so the foreseeable losses at the time of the tort were only \$93,500. The plaintiff therefore had his losses fully satisfied. The court also held that damages for mental distress were not available in this case.<sup>111</sup> Leave to appeal to the Supreme Court of Canada was denied.<sup>112</sup>

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106. *Ibid.* at para. 34.

107. *Dhillon*, *supra* footnote 103 at para. 15.

108. *Ibid.* at para. 15 citing trial decision 2013 BCSC 1595 at para. 32.

109. *Ibid.* at para. 21 (para. 72 B.C.S.C.).

110. *Ibid.* at para. 60.

111. *Ibid.* at para. 58.

112. *Dhillon v. Jaffer*, 2015 CarswellBC 73 (S.C.C.).

**2015: Walman v. Walman Estate**

While this case is not a solicitor's negligence case it provides a helpful overview for drafting solicitors for "best practices" when interviewing clients. *Walman v. Walman*<sup>113</sup> involved a will challenge with allegations that the testator lacked testamentary capacity and that his will and certain *inter vivos* transfers were a result of undue influence.

The testator was a "quiet gentle man" who had a long career in the financial services industry and who was close with his three sons. When his first wife died, he remarried. Unfortunately, his second wife did not have a good relationship with his sons from his first marriage. In 1999 he was diagnosed with Parkinson's disease and in 2003 he was diagnosed with Lewy Body Dementia. Between 2003 and his death in 2009 at the age of 88, the testator's cognitive function decreased and he would become confused (getting lost in his bedroom, making mistakes writing cheques, etc.), he began to suffer from hallucinations, he had trouble following conversations, and he suffered from delirium, among other ailments.

Between 2003 and 2007 the testator executed three wills, each one superseding the prior. He also made capital asset transfers to his wife, as his wife had convinced him that she was running out of money due to costs of his attendant care.

The effect of the third will and the capital transfers resulted in the wife inheriting all of the testator's assets, with a very small amount of between \$5,000 and \$10,000 to be split between his three sons (in his previous wills the sons were substantial beneficiaries of his estate). The sons challenged the will and *inter vivos* transfers alleging that their father lacked testamentary capacity and that the will and transfers were a result of undue influence by the wife.

In 2006 the wife set up an appointment with the solicitor who had drafted her husband's will in 2005 so that he could draft a codicil to the will that stipulated that if anyone challenged the will that person would be disinherited. However, when the solicitor met with the husband alone, he refused to sign the codicil, stating that the will was "alright the way it [was]".<sup>114</sup> In 2007, the wife called the same solicitor again advising that her husband wanted to cut one of his sons out of the will. The solicitor stated that he would prefer to have a doctor's assessment confirming that the husband was competent

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113. 2015 ONSC 185, 4 E.T.R. (4th) 82, 248 A.C.W.S. (3d) 489 (Ont. S.C.J.), additional reasons 2015 ONSC 653, 4 E.T.R. (4th) 119 [*Walman*].

114. *Walman*, *supra* at para. 46.

before preparing a will excluding one of his children. This solicitor never heard from the wife or husband again.

The wife sought out a second solicitor who determined that the husband had testamentary capacity and drafted a new will for him. While the husband chose not to disinherit any of his sons in this new will their inheritance was significantly less than under previous wills. The wife did not tell this new solicitor that the previous solicitor suggested the husband get a capacity assessment. He was also not advised that the husband suffered from Lewy Body Dementia.

Justice Corbett noted that the second solicitor did several things “right” in his meeting with the husband to determine testamentary capacity:

- he interviewed the testator alone,
- he kept good notes, and
- he “asked questions that, facially, comport with the requirement of determining whether the testator understood the extent of his assets”.<sup>115</sup>

On the second solicitor’s evidence, the husband also understood who the persons were with a moral claim against his estate, and he had reasons for reducing his bequests to his sons.<sup>116</sup>

However, Justice Corbett was of the view that the drafting solicitor should have taken his inquiries one step further and that where there is a filial estrangement the solicitor needed to conduct a “more probing inquiry”.<sup>117</sup> According to Justice Corbett, the solicitor should have explored whether the testator understood not only what his assets were but also if he understood what his *wife’s assets were* as he was proposing to cut his children out of an inheritance in favour of his wife.<sup>118</sup> The testator also needed to understand the dispositions he had made to his wife already. The husband’s explanations to the second solicitor were based only on his understanding of his own assets at the time the third will was made and did not reflect an understanding of the wife’s financial position or the extent to which she had or would receive money that had been the husband’s (through joint accounts, etc.).<sup>119</sup> Justice Corbett did not accept that the husband had a “true appreciation of his overall financial position, or of the state of his relations with his sons, both as

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115. *Ibid.* at para. 55.

116. *Ibid.* at para. 97.

117. *Ibid.* at para. 56.

118. *Ibid.* at para. 55.

119. *Ibid.* at para. 106.

a result of the burden of his severe affliction with Lewy Body Dementia and the wife's undue influence".<sup>120</sup>

Ultimately, the court found that the husband lacked testamentary capacity and that the wife had unduly influenced the husband to make the will and the *inter vivos* transfers. This case seems to suggest that the testator must not only understand the extent of his own assets but also of those who may be inheriting under the will. Or in other words the testator must understand the "big picture" and not just a simple understanding of his assets.

### **2015: McLaughlin (Estate of) v. McLaughlin**

The facts of *McLaughlin* are unique but the case imparts important lessons to wills solicitors in ensuring their clients have read the will or that the solicitor at least reviews the material aspects of the will with the client.<sup>121</sup> It should go without saying that a solicitor should ensure they read the will if they have had a clerk draft it.

In *McLaughlin*, the testator, Elizabeth Anne McLaughlin, executed two wills to avoid paying probate tax on the asset of the secondary will which dealt solely with her house. The secondary will had to be rectified in a prior hearing as the secondary will, when drafted, omitted a residue clause that included only the house, and duplicated the bequests as set out in Mrs. McLaughlin's primary will.<sup>122</sup> In addition, the secondary will repeated the revocation clause in the primary will which stated:

I hereby revoke all wills made before this will, but not the Will made the 16th day of June 2010 to dispose of real property located at 78 Wellington Street East, Brampton, Ontario.<sup>123</sup>

The effect of the secondary will unrectified would have meant that the beneficiaries under the primary will could claim an entitlement to two separate bequests, one under the primary estate and another from the secondary estate. Further, the residue of the secondary estate would go by way of intestacy and be equally distributed amongst all five children of Mrs. McLaughlin.<sup>124</sup> This would have

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120. *Ibid.* at para. 99.

121. *McLaughlin Estate v. McLaughlin*, 2015 ONSC 4230, 10 E.T.R. (4th) 10, 256 A.C.W.S. (3d) 247 (Ont. S.C.J.) [*McLaughlin*].

122. *McLaughlin Estate v. McLaughlin*, 2014 ONSC 3162, 99 E.T.R. (3d) 71, 242 A.C.W.S. (3d) 1003 (Ont. S.C.J.) at paras. 2, 20, additional reasons 2014 ONSC 5046, 99 E.T.R. (3d) 87, 244 A.C.W.S. (3d) 26.

123. *Ibid.* at para. 23.

124. *Ibid.* at para. 22.

meant that the house would be distributed by way of intestacy. The testator in her prior wills had disinherited two of her five children.

Justice Lemon ordered the secondary will rectified but in doing so he found that the testator had not read nor knew what she was signing.<sup>125</sup> In addition Lemon J. found that the drafting solicitor, Mr. Walsh, did not read the document before it was signed and that “Mr. Walsh left it to his secretary to prepare the wills. His secretary no doubt left it to him to review them (and it would be his obligation to do so)”.<sup>126</sup>

After the secondary will had been rectified a motion was brought before Justice Price to have the notice of objection removed so that a certificate of appointment could be issued for the primary will. Justice Price invoked the court’s inquisitorial approach when dealing with probate matters and ordered a subsequent hearing to deal with the will’s validity in light of Lemon J.’s finding that the testator did not read nor know what was in the will she executed.<sup>127</sup>

At the subsequent hearing counsel agreed with the court that Justice Price could hear the matter of the will’s validity despite the will having already been rectified.<sup>128</sup> The court focused on the issue of whether the testator could have had knowledge and approval of the contents of the will where the Testator had been found not to have read the will or known what was in it. The court provided practical advice for drafting solicitors, saying:

It is clear from the jurisprudence that a testator should read or have the will read over to him/her. At the very least, the contents of the will should be brought to the testator’s attention at some point before the execution of the will. The testator must know what is in the document that he or she is signing. The understanding does not have to be that of a lawyer, but it must be sufficient.<sup>129</sup>

The court held it was bound by Lemon J.’s findings of fact and the uncontroverted evidence before Lemon J. where the drafting solicitor under cross examination concluded “that it was highly unlikely that we reviewed and went through the real estate will”.<sup>130</sup> As Mrs. McLaughlin did not read the will and did not have the knowledge of or approve its contents, the secondary will was found to be invalid.<sup>131</sup> The court then ordered the primary will to be proven

125. *Ibid.* at para. 79.

126. *Ibid.* at paras. 75 and 78.

127. *McLaughlin v. McLaughlin*, 2015 ONSC 3491, 254 A.C.W.S. (3d) 449, 2015 CarswellOnt 7998 (Ont. S.C.J.).

128. *Supra* footnote 121 at paras. 35 and 42.

129. *Ibid.* at para. 73.

130. *Ibid.* at paras. 56-67.

in solemn form.<sup>132</sup> The ruling is currently under appeal at the Court of Appeal.

Solicitors who draft wills need to ensure they review the will with their client before execution to protect the will's validity. This practice should be documented in the drafting solicitor's notes.

### **SOLICITOR'S NEGLIGENCE – UNDUE INFLUENCE CASES**

The question of whether or not a solicitor may be successfully sued for professional negligence if his or her client was unduly influenced in the drafting, preparation or arrangement for execution of testamentary documents or other estate planning documents such as a power of attorney, is not clear, and is likely dependent on the evidence and findings in the particular surrounding circumstances of each case.

The doctrine of undue influence is an equitable principle used by courts to set aside certain transactions or estate documents where an individual exerts such influence on the testator, grantor or donor that it cannot be said that his or her decisions are wholly independent. Undue influence may be found where one person has the ability to dominate the will of another, whether through manipulation, coercion, or the outright but subtle abuse of power.<sup>133</sup> In making such determinations, courts will look at whether "the potential for domination inheres in the nature of the relationship between the parties". Specifically the courts will examine whether an imbalance of power existed in the relationship.

The drafting solicitor must be diligent to be live to the indicia and potential for undue influence to be in a position to advise the client on the lawfulness of the transaction, and perhaps assist in avoiding the undue influence or at the very least to document any concerns.

The majority of decisions involving undue influence issues focus on whether or not undue influence exists, and if so, its effects on the rights of the parties directly involved and any transaction conducted, such as the validity of wills and powers of attorney or transfers of property involving older adults. Among these decisions, there are very few reported cases where negligence claims were brought against the drafting solicitor.

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131. *Ibid.* at para. 85.

132. *Ibid.* at para. 86.

133. *Dmyterko Estate v. Kulikowsky* (1992), 47 E.T.R. 66, 35 A.C.W.S. (3d) 755, [1992] O.J. No. 1912 (Ont. Gen. Div.).

In the complex and lengthy decision of *Hussey v. Parsons*,<sup>134</sup> an elderly widow sued her former solicitor for professional negligence alleging that he breached his duty by drafting an agreement transferring the sale proceeds of her house (her major asset) to her nephew and drafted a will under which the nephew was a major beneficiary. The widow alleged that the solicitor knew or ought to have known that she was being unduly influenced by her nephew and that he had failed to ensure her wishes were represented.

The court concluded that the transaction as it concerned the drafting of a written agreement was not “unconscionable”, nor was there actual undue influence exerted. The court concluded that with regard to any presumption of undue influence which might arise in the circumstances, the surrounding facts were such as to rebut that presumption.

After reviewing the evidence and the relevant case law, Justice Puddestar found that there was “indicia of undue influence” present which “suggest[ed] that the situation as a whole was one which called for an extra degree of care and inquiry by the defendant in terms of exactly what were the interests, intentions and understandings of the plaintiff”.<sup>135</sup> The court emphasized the presence of indicia of undue influence, and although the court concluded that any presumptions could be rebutted, a lawyer in those circumstances would have to exercise extra caution in his/her dealings. The court specifically stated that the situation was one that “called for an extra degree of care and inquiry by the [solicitor] in terms of exactly what were the intentions and understandings of the plaintiff”.<sup>136</sup> Finally, and importantly, the court concluded that case law establishes that there is an onus on the solicitor, in properly representing his/her own client, so as to ensure as clearly as can be established that the client “was fully aware of the circumstances and the consequences of his act and that there was no undue influence”.<sup>137</sup> The duty of the independent advisor is not merely to satisfy him or herself that the donor understands the effect of and wishes to make the gift, but to protect the donor from himself as well as from the influence of the donee. A solicitor who is called upon to advise the donor must satisfy himself that the gift is one that is right and proper in all of the circumstances of the case.<sup>138</sup>

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134. 1997 CarswellNfld 349, 152 Nfld. & P.E.I.R. 1, 474 A.P.R. 1 (Nfld. T.D.).

135. *Ibid.* at para. 633.

136. *Ibid.*

137. *Ibid.* at para. 634.

138. *Ibid.* at para. 635.



In *Tulick Estate v. Ostapowich*<sup>139</sup> children of a widower sought damages against their father's solicitor in negligence, alleging that the lawyer drafted a transfer of property from the widower to his nephew and that the nephew had unduly influenced their father to do so. The lawyer had also acted on behalf of the nephew in the past. However, while the court concluded that the lawyer had not provided independent legal advice to the widower, no undue influence existed. As no undue influence existed, "the claim for damages against [the solicitor] cannot succeed and it must be dismissed".<sup>140</sup>

Similarly in *Doyle v. Valente*,<sup>141</sup> the court dismissed a negligence claim against a solicitor when it held that a testator had freely changed his mind and no undue influence was found. Justice Spencer concluded that "[i]t follows that [the] action against the solicitors must also be dismissed because [the testator] knew what he was doing. There is no obligation at law, nor was any suggested, for a solicitor to protect the interest of a former beneficiary from a testator's properly formed intention to change his mind".<sup>142</sup>

In *Brown Estate, Re*,<sup>143</sup> the deceased's wife brought a claim in negligence against the solicitor who drafted her husband's will claiming that he had been unduly influenced by two caregivers to leave 2/3 of his estate to them. She argued that her husband's true intentions were that she should receive his entire estate. The drafting solicitor brought a summary judgment motion seeking to stay or dismiss the claim which had been brought concurrently with a will challenge claim. The solicitor argued that the negligence claim was "entirely contingent" upon the will challenge and that it should be stayed or dismissed pending the outcome of that case to "avoid undue prejudice to [the solicitor]".<sup>144</sup>

The court dismissed the motion finding that the negligence claim was "not necessarily predicated upon the outcome of [the Will] challenge based on undue influence".<sup>145</sup> The court observed that "even if the plaintiff's allegation of undue influence was not established she could, presumably, still pursue her claim of negligence against [the solicitor] on the basis of his failure to discern the testator's true intention".<sup>146</sup> Unfortunately, there is no

139. (1988), 62 Alta. L.R. (2d) 384, 91 A.R. 381, 12 A.C.W.S. (3d) 190 (Alta. Q.B.) [*Tulick*].

140. *Ibid.* at para. 41.

141. (1993), 40 A.C.W.S. (3d) 1024, 1993 CarswellBC 2971, [1993] B.C.J. No. 1270 (B.C. S.C.) [*Doyle*].

142. *Ibid.* at para. 36.

143. (2001), 39 E.T.R. (2d) 1, 2001 CarswellOnt 1333 (Ont. S.C.J.).

144. *Ibid.* at para. 11.

145. *Ibid.* at para. 20.

known reported decision of the outcome of the negligence claim against the solicitor.

### **Red Flags and Indicators of Undue Influence**

In order to detect undue influence, drafting solicitors should have a solid understanding of the doctrine, and of the facts that often indicate that undue influence is present. In developing their own protocol for detecting such indicators, lawyers may wish to address the following questions:

1. Is there an individual who tends to come with your client to his/her appointments; or is in some way significantly involved in his/her legal matter? If so, what is the nature of the relationship between this individual and your client?
2. What are the familial circumstances of your client? Is he or she well supported? Does that support come from one family member? If so, is there a relationship of dependency between the client and this person?
3. If the client does not have familial support, does he or she benefit from some other support network, or is the client isolated?
4. Is the client independent with respect to personal care and finances, or does he or she rely on one particular individual, or a number of other individuals? Is there any connection between such individual(s) and the legal matter for which your client is seeking your assistance?
5. Is there conflict within your client's family?
6. Based on conversations with your client, his or her family members or friends, what are his or her character traits?
7. Has the client made any gifts? If so, in what amount, to whom, and what was the timing of any such gifts?
8. Have there been any recent changes in the planning document(s) in question? What was the timing of such changes and what was the reason for the change? For instance, did any changes coincide with a shift in life circumstances, situations of conflict, or medical illnesses?
9. If there have been recent changes in planning documents, was independent legal advice sought? Was the client alone with his or her lawyer while providing instructions? Who were the witnesses to the document, and why were those particular witnesses chosen?

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146. *Ibid.*

10. Have different lawyers been involved in drafting planning documents? If so, why has the client gone back and forth between different counsel?
11. Are there any communication issues that need to be addressed? Particularly, are there any language barriers that could limit the client's ability to understand and appreciate the planning document at hand and its implications?
12. Overall, do the client's opinions tend to vary? Have the client's intentions been clear from the beginning and instructions remained the same?
13. Have any medical opinions been provided in respect of whether a client has any cognitive impairment, vulnerability, dependency? Is the client in some way susceptible to external influence?
14. Are there professionals involved in the client's life in a way that appears to surpass reasonable expectations of their professional involvement?
15. Does the substance of the planning itself seem rational? For example, does the client's choice of beneficiaries of a testamentary interest, or of attorneys named in a power of attorney, seem rational in the circumstances?
16. Is the client making a marked change in the planning documents as compared to prior documents?
17. Is the client making any substantive changes in the document similar to changes made contemporaneously in any other planning document?
18. Does the client have a physical impairment of sight, hearing, mobility, or other?

### **Recommended Guidelines to Avoid Undue Influence**

When taking instructions from a client in respect of a planning document, the following are some recommended guidelines to assist in minimizing the risk of undue influence:

1. Interview the client alone;
2. Obtain comprehensive information from the client, which may include:
  - (i) Intent regarding testamentary disposition/reason for appointing a particular attorney/to write or re-write any planning documents;
  - (ii) Any previous planning documents and their contents, copies of them.

3. Determine relationships between client and family members, friends, acquaintances (drawing a family tree of both sides of a married couples family can help place information in context);
4. Determine recent changes in relationships or living circumstances, marital status, conjugal relationships, children, adopted, step, other and dependants;
5. Consider indicators of undue influence as outlined above, including relationships of dependency, abuse or vulnerability;
6. Make a list of any indicators of undue influence, including a consideration of the inquiries suggested above, as well as corroborating information from third parties with appropriate client directions and instructions;
7. Be mindful and take note of any indicators of capacity issues, although being mindful of the distinction that exists between capacity and undue influence;
8. Consider evidence of intention and indirect evidence of intention; and
9. Consider declining the retainer where there remains significant reason to believe that undue influence may be at play and you cannot obtain instructions.<sup>147</sup>

### **COMMON ERRORS AND RECOMMENDED BEST PRACTICES IN AN ESTATES AND ELDER LAW PRACTICE**

According to the article, “Biggest Malpractice Claim Risks” by Dan Pinnington of PracticePro<sup>148</sup> the top causes of solicitor’s negligence claims are:

1. Communications-related errors;
2. Deadline and time management concerns;
3. Inadequate investigation or discovery of facts;
4. Conflicts of interest;
5. Clerical and delegation errors;
6. Fraud claims; and

147. For a helpful review of tips for solicitors to prevent undue influence, see “Recommended Practices for Wills Practitioners Relating to Potential Undue Influence: A Guide”, BCLI Report no. 61, Appendix, in particular “Checklist” and “Red Flags”, [www.lawsociety.bc.ca/docs/practice/resources/guide-wills.pdf](http://www.lawsociety.bc.ca/docs/practice/resources/guide-wills.pdf). For other related resources, see [www.whaleyestatelitigation.com](http://www.whaleyestatelitigation.com).

148. Dan Pinnington, “Biggest Malpractice Claim Risks”: see PracticePro online: [www.practicepro.ca/LawPROmag/Pinnington\\_Biggest\\_Malpractice.pdf](http://www.practicepro.ca/LawPROmag/Pinnington_Biggest_Malpractice.pdf).

7. Failure to know the law.<sup>149</sup>

Gleaned from the case law discussed above, and from “A Review of Ethics and Defensive Practice Tools in an Estate Planning Context”<sup>150</sup> by Margaret O’Sullivan, in order to avoid the common errors made by estate solicitors which may lead to negligence claims, consider the following recommended best practices:

- do not miss time limits or cause inordinate delay in carrying out client instructions;
- manage your client’s expectations;
- be clear in your communications with clients, solicitors, or third party beneficiaries;
- be careful with delegation and supervision of work;
- stay organized and diligent with your own self-management;
- have a clearly drafted and defined retainer;
- know your client’s legal issues;
- be cognizant of, and review for, omissions and drafting errors;
- do not “dabble” in a practice area that you are not familiar with;
- understand who your client is and his or her needs;
- understand the rules of conflict of interest and when a conflict might arise or be present;
- assess the urgency from a client who might be severely ill, *i.e.* time is of the essence, the exercise of common sense, perception and judgment. Come to an agreement regarding the time frame for completing the Will at the outset with the client;
- ascertain testamentary capacity and whether dementia, Alzheimer’s disease, cognitive dysfunction, delusions, mental illness, drug addiction, or alcoholism are present;
- ascertain undue influence or suspicious circumstances;
- be aware of the pitfalls of varying one will where mutual wills are involved;
- when preparing a new will or codicil, examine the terms of the previous will and codicil;
- ask probative, open-ended and comprehensive questions which may help to elicit important information involving the psychology of the client executing the planning document.
- keep written notes of instructions taken and given, and docketed recorded;

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149. *Ibid.*

150. Presented at the 14th Annual Estates and Trusts Summit (Law Society of Upper Canada, November 10, 2011).

- in executing the will, make a checklist of all necessary items attendant on validity: signatures, dates witnesses and their contact info, initialled etc.;
- be aware of, or wary of, terminally-ill clients and the need to get full disclosure of the client's medical situation;
- be aware of high-risk matters where the proposed Will or estate plan, if not completed, will result in a "disappointed beneficiary";
- be vigilant during "death-bed" planning or pre-nuptials Wills on the way to the altar;
- be vigilant when unreasonable time limits are imposed by the client: consider documenting timeframe for completion of the service after discussion with the client. Decline to act where timelines are unreasonable and prevent you from consulting fully with the client and other third parties or giving a matter appropriate time and attention.
- complete follow-ups with the client, confirming need for a response in writing, closing the file etc.
- be aware of high-risk situations:
  - estate planning for spouses which impact matrimonial and family property rights;
  - estate planning involving multiple parties including shareholder and buy/sell arrangements and cottage succession planning;
  - lending arrangements between family and other non-arm's length parties;
  - property transfers among family and other non-arm's length parties, in particular "improvident" transfers and those involving valuations;
  - estate freezes by parents, including where only one child may benefit from the freeze and receive the benefit of future equity growth;
  - where there is unequal treatment of children in an estate plan or Will and where the law firm has acted for multiple generations of the family in prior separate retainers, include those members who are to receive preferred treatment;
  - estate planning involving the lawyer's family members;
- act on a timely basis in assisting in the administration of an estate or trust;
- file tax returns and elections and attend to other tax compliance on a timely basis; and
- finally, always be mindful of the *Rules of Professional Conduct*<sup>151</sup> which are applicable in the lawyer's jurisdiction.

### CONCLUDING COMMENTS

Certainly the case law concerning solicitor's negligence is vast, and expanding, and consequently illustrative of a need for heightened awareness and diligence. There is a clearly defined duty of care owed by the estate planning solicitor. Liability in negligence will be sustained by the solicitor in relationships that are proximate and reasonably foreseeable. The solicitor must exercise diligence and avoid acts and omission which may be detrimental to the testator/client and the intended beneficiaries.

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151. *Rules of Professional Conduct*, Law Society of Upper Canada, online: [www.lsuc.on.ca/with.aspx?id=671](http://www.lsuc.on.ca/with.aspx?id=671).