



NEGLIGENCE IN PROBATE PROCEEDINGS

Introduction

1. This lecture considers the claims in negligence that most often arise in the probate context including in the context of contentious probate claims.
2. The particular features of these claims are the existence of two or more classes of persons who may wish to bring a claim, namely disappointed beneficiaries and the personal representatives themselves. For those reasons such claims frequently require consideration of the principles established in *White v Jones* [1995] AC 207 and subsequent cases. However, it is hoped that this talk will be more than a discussion of the (no doubt fascinating) issues that arise as a result of that case as well as not purporting to being a thorough discussion of all the different aspects of those cases.
3. The talk covers:
 - Particular issues in establishing negligence
 - The question of who must bring the claim
 - Whether *White v Jones* claims can be made for lifetime transactions
 - The question of when loss arises and when the limitation period expires
 - What alternative claims must be considered and when and how a claimant must mitigate their loss.

Possible Scenarios

4. To illustrate the discussion below the following possible scenarios will be considered:
 - **Scenario 1 - The failed Will**

T, the testator, drafts and executes a Will in 1989 leaving his whole estate on discretionary trusts of which B is the principal beneficiary. In 2000 he gives instructions to draft a new Will. His solicitor, Y, is concerned about his age and the instructions he is giving but decide to continue regardless. T dies. Contentious probate proceedings are issued where it is shown that T lacked capacity for the later Will and may well have been under the influence of C. The costs of the proceedings are substantial.
 - **Scenario 2 - The failed IHT Planning**

In his later years X decides to give his home to his children. He is advised by Y who drafts a trust deed dividing it between his children and his wife, Z, absolutely. On X's death it is appreciated that the gift was a gift with reservation and so has failed. This has no effect on the tax on X's estate because the GWR remains below the threshold. However, it substantially reduces the transferred spouse exemption and means that significant extra tax will be payable on Z's death. Moreover, the children have a bill for CGT from the date of the gift.
 - **Scenario 3 - Negligent (or other) Management of the Deceased's Property**

On A's death it is realised that Y had played a significant part in assisting A with her affairs, holding himself out as a qualified adviser on property affairs. The result is that A's significant property portfolio has dropped significantly in value and A's estate is reduced significantly. A significant part of this is due to leases granted to persons, including companies, to which R is connected.



Is there Negligence?

5. Negligence is a catch all term covering claims for breaches of duty in contract and/or tort leading to loss recoverable under common law principles. Thus whenever negligence is suggested or alleged it is necessary to consider the no doubt familiar requirements necessary to prove that allegation. These are:
 - That a duty of care was owed to the person alleging loss (or, in *White v Jones* cases, to the client).
 - The scope and nature of that duty.
 - That the duty was breached.
 - That the breach of duty has caused the alleged loss.
6. Most frequently the above leads to a detailed consideration of (i) the scope of the retainer (i.e. what did the solicitor or defendant promise to do) and (ii) whether what was done (or not done) was sufficient performance of the retainer.

Will Cases

7. A solicitor owes a general duty to draft a Will with reasonable care and skill. Negligently drafting a Will will normally give rise to a claim provided that the complainant is able to prove what it was intended that the Will would say (see *Walker v Geo H Medicott & Son* [1999] 1 WLR 727).
8. More difficult questions arise in respect of a negligent failure to draft a Will (of which *White v Jones* was one such case). In most cases a solicitor will be under a general duty to act upon instructions to draft a Will within a reasonable time and in particular cases (e.g. "deathbed" cases) an obligation will arise to draw one up within a particular time period (see *X v Woollcombe* [2001] Lloyd's Rep PN 274 and *Hooper v Fynemores* [2002] Lloyd's Rep PN 18). There is not, however, an automatic duty to ensure a Will is drafted or executed promptly or a particular obligation to chase a client. In *Atkins v Dunn & Baker* [2004] EWCA Civ 263 Pill LJ said:

"I am unable to accept that invariably and inevitably there is a duty upon a solicitor, who has carried out instructions to prepare a draft Will and has sent that draft to the client, to follow the matter up. There will often be situations in relation to Wills and other documents where there is a duty to send a reminder or further guidance to the client. An example which arose in argument is the situation where instructions were given to have a Will executed before budget day. It may be negligent for a solicitor, who had sent a draft, to fail to remind the proposed testator that budget day is approaching and that, if action is to be taken, it should be taken promptly.

"As Mr Kempson stated in evidence, clients do change their minds, for good reason or bad, maybe following consultation with other members of the family or after their own reappraisal of the circumstances in which they find themselves, or for other reasons. This was a case where there was a potential conflict of interest between the claimant and Winifred, especially as Winifred's health was such that the need for expensive care could have arisen as well as the need to have a roof over her head. In the circumstances of this case, the recorder was entitled to hold that "the ball was in the client's court", and that the failure to send a reminder did not constitute such a fall below the standard to be expected of a competent solicitor as to amount to negligence."

9. A solicitor who drafts a Will is generally under no obligation to see to its execution. However, it will probably be negligent for a solicitor to send a Will to a client asking them to "execute it" because there are particular (and onerous) requirements for executing a Will that the solicitor will know and the client will probably not (*Esterhuizen v Allied Dunbar* [1998] 2 FLR 668).



Similarly a solicitor who receives a copy of original Will purporting to be executed (e.g. for safekeeping) would be expected to check that it at least appears to have been duly executed, including having not been executed by one or more of the beneficiaries (see e.g. *Ross v Caunters* [1980] Ch 297, *Humblestone v Martin Tolhurst Partnership* [2004] EWHC 151 (ch) and *Gray v Richards Butler* [2000] WTLR 13).

10. Similarly, it will often (but not always) be within the responsibility of a solicitor to advise upon the causes of Wills subsequently becoming invalid (e.g. marriage), see *Hall v Meyrick* [1957] 2 All ER 722.
11. In our first scenario above it is likely to be suggested, by the disappointed beneficiaries, that the solicitor was negligent in advising upon the execution of the Will. However, a careful consideration of the facts should suggest that the solicitor is not in fact negligent, in the sense of having been in breach of his duties to the client as defined by the retainer. That duty was to draft and have executed a Will. The solicitor has done this. When executing a Will a solicitor offers no warranty that extraneous factors do not make the Will valid and cannot be blamed for the testator's lack of capacity. Indeed, to have refused to make a Will might itself have been a breach of the solicitors' retainer.
12. That is not to say that there are not steps that a solicitor can take, indeed should take. It is probably right that the solicitor owes a duty, at least to the intended beneficiaries of the new Will, to ensure that there is as little doubt as possible regarding the new Will. That is akin to the duty to take reasonable steps to ensure that the Will is validly executed (see above). First, the solicitor should, where possible, seek to follow the so called "Golden Rule" . Second instructions for a Will should be taken in the presence of the testator alone and a Will should be executed in the presence only of the necessary witnesses. These steps make a challenge on grounds of lack of capacity, want of knowledge and approval and/or undue influence less likely.

Tax Planning

13. As in any case it needs to be considered carefully whether the matter complained of falls within the retainer. In particular suggestions that the advice to be given included advice or guidance on the tax implications of any transaction must be examined.
14. Claims alleging negligent tax planning also frequently turn on questions of causation - what advice is the claimant saying should have been given, what alternative claim is it suggested that the deceased should have carried into effect and what would the deceased have actually done. Allegations that a deceased would not have carried out a particular transaction at all had he been in possession of the relevant tax advice require particular consideration - a person who is aware of the costs of a particular action may put that action into effect nevertheless.
15. These considerations arise post death as well as in lifetime advice. In *Cancer Research Campaign v Ernest Brown* ((1995) 27/10/1995 Harman J.) the suggestion that a solicitor instructed by the estate should have advised on executing a deed of variation and/or disclaimer in order to reduce the tax paid by that estate was rejected because such advice was outside of the scope of that solicitor's retainer.
16. Scenario 2 is a good example of these problems. Was Y really asked to advise upon the actual tax implications of the gift. Had X known of the GWR problem would he really have made no gift at all? Is it suggested that some other form of tax planning, such as nil rate band wills, would have been better advice and, if so, is it clear that advice regarding estate and tax planning as a whole were within the retainer?



Whose Claim?

Identifying the Loss

17. It is, of course, always necessary to consider who has suffered the loss and so who should bring the claim. Put another way it is essential to decide whether the loss that is sought to be recovered has actually been suffered by the person making the claim. Once that is done it can then be decided whether that person is able to bring a claim, i.e. was that person owed a duty of care that can be said to have been breached.
18. Scenario 2 illustrates these difficulties well. Consider the following:
 - The principal loss is in respect of the lost opportunity to carry out IHT planning. However, the deceased's estate has suffered no loss (there is no tax to pay) and the person who may have suffered loss (the wife, Z) has not yet died and so not yet suffered loss.
 - The children have suffered increased CGT but only on the assumption that they will eventually receive the property free of such liability. As matters stand they are actually better off as a result of the advice because they have their share of the property less the CGT whereas without it they would not currently have any interest in the property whatsoever. Neither can there be any guarantee that Z will actually leave the property to them.
19. Outside of the facts in scenario 2, an issue arises as to precisely whose loss an increased amount of IHT is. It may appear obvious that increased IHT is a loss caused to the personal representatives, who must normally pay it (see *Macauley and Farley v Premium Life Assurance Co* 29/4/99). In *Daniels v Thompson* [2004] EWCA Civ 307 the Court of Appeal held that this was indeed the case but that the cause of action, for negligently advising on the tax scheme, could not be brought because the deceased (as opposed to her estate) could never have paid the tax. That decision is probably wrong but so long as it exists means that there may be a lacuna which justifies a claim being brought by the beneficiaries whose bounty has been reduced by the amount of the tax (see *Rind v Goddard* [2008] EWHC 459 (ch)). It should also be remembered that other individuals, including trustees and the recipients of property have secondary liability to pay IHT (see IHTA 1984 ss 199, 200 and 205).

White v Jones

20. The decision in *White v Jones* was made because of the perceived lacuna that existed in Will cases where the person to whom the duty of care was owed (the deceased) had suffered no loss yet the persons who had suffered loss, the disappointed beneficiaries, were owed no duty. It was for this reason (and apparently for this reason alone) that the House of Lords extended the duties owed by the solicitor to the client to the disappointed beneficiaries.
21. That suggests two things. First, in cases where the estate has itself suffered loss for which it can recover a claim by the beneficiary should fail. It was for this reason that in *Chappell v Somers & Blake* [2004] Ch 19 it was said that a claim against a solicitor for negligently administering an estate would normally be brought by the estate rather than a residuary beneficiary. However, less easy to explain is *Carr- Glynn v Frearsons* [1999] Ch 326 where a beneficiary was permitted to bring a claim for the failure to sever a joint tenancy, notwithstanding that the loss (i.e. the lost property following its passing by survivorship) was also suffered by the estate.
22. The second aspect of *White v Jones* is that in any case where there is a distinction between the person suffering the loss and the person owed a duty it ought to be possible for the duty of care to be correspondingly extended. Hence, the duties have (in some cases anyway) been extended to lifetime transactions (see below) and to matters ancillary to the preparation of a Will (*Carr- Glynn v Frearsons*).



23. In all cases it is important to show that the alleged duty is the same as the duty owed to the testator or at least that the duty owed to the person bringing the claim is not in conflict with the duty owed to the testator. This is well illustrated by Scenario 1, the Will that failed due to the lack of capacity of the testator. In that scenario it is (presumably) suggested that the solicitor should not have drafted or had executed the second Will since that action has caused the significant costs of the probate proceedings brought to show that it was invalid. However, when instructed by the testator the solicitor's duty was to draft a Will and he owed those duties directly to the testator. Moreover, the suggested extension of the duties from the testator to the beneficiaries of the first Will involves an extension to person with whom the solicitor's duties conflicted - after all the solicitor had been instructed to draft a Will cutting them out. It was for these reasons that the claim in *Worby v Rosser* CA 28/5/99 were rejected.

Lifetime Transactions

24. In considering the scope of the decision in *White v Jones* it is lifetime transactions that have caused the courts most trouble.
25. In *White v Jones* itself Lord Goff had expressed the view that a claim for a failed gift could not be brought:

"Let me take the example of an inter vivos gift where, as a result of the solicitors' negligence, the instrument in question is for some reason not effective for its purpose. The mistake comes to light some time later during the lifetime of the donor, after the gift to the intended donee should have taken effect. The donor, having by then changed his mind, declines to perfect the imperfect gift in favour of the intended donee. The latter may then be unable to obtain rectification of the instrument, because equity will not perfect an imperfect gift, though there is some authority which suggests that exceptionally it may do so if the donor has died or become incapacitated: see *Lister v Hodgson* (1867) L.R. 4 Eq. 34-35, per Romilly M.R. I for my part do not think that the intended donee could in these circumstances have any claim against the solicitor. It is enough, as I see it, that the donor is able to do what he wishes to put matters right. From this it would appear to follow that the real reason for concern in cases such as the present lies in the extraordinary fact that, if a duty owed by the testator's solicitor to the disappointed beneficiary is not recognised, the only person who may have a valid claim has suffered no loss, and the only person who has suffered a loss has no claim."

26. It has subsequently been questioned whether this obiter statement is correct. Whilst a donor may subsequently be able to correct the mistake this may not always be the case and the donor may anyway be unwilling to do so. In a case where the donor is unable or unwilling to correct the mistake and where he himself has suffered no loss why should the donee not be able to bring a claim in the same way as the disappointed beneficiary of a Will?
27. Prior to the House of Lords' decision (but after the Court of Appeal's in the same case) Judge Moseley Q.C had decided that it would not be fair, just and reasonable to extend a remedy in negligence to an intended recipient of a gift where it was subsequently, and within the lifetime of the donor, discovered that the gift was unenforceable and where the donor refused to rectify the problem, see *Hemmens v Wilson Browne* [1995] Ch 223. However, the Judge had stated that duties could be owed in some life time transactions and that the duty was excluded in that case principally because of a statement that the donee should seek her own advice.
28. In *Gorham v British Telecommunications* [2000] 1 WLR 2129 the deceased's wife sued for negligent pensions advice given to the deceased and which had reduced the rights that she had received on the deceased' death. The insurers, who had given the negligent advice, were held to be liable:

"The advice in this case was given in a context in which the interests of the dependants were fundamental to the transaction, to the knowledge of the insurance company representative giving advice as well as to his customer, and a duty of care was owed additionally to the intended beneficiaries"



29. In *Hughes v Richards* [2004] EWCA Civ 226 the parents had intended to make gifts to their children. They had been advised to set up offshore trusts and to place £30,000 in them. The trusts, which were wholly unsuitable, led to the whole sum being used up in administration and other costs and their children saw no money from it. A claim was brought by both the parents and the children. An application was made to strike out the children's claim and this reached the Court of Appeal. The application was dismissed and the claim was allowed to progress. The Court of Appeal made no categorical statement that the claim would succeed or that claims did exist in respect of lifetime transactions but it is clear from the judgment that there is a move away from the passage of Lord Goff set out above.
30. A more difficult, and indeed highly puzzling decision is that of *Daniels v Thompson*. That involved a gift that failed for tax purposes as being a Potentially Exempt Transaction (for another tax case see *Macauley and Farley v Premium Life Assurance Co* 29/4/99). The claim was brought by the executor but was held to fail because the deceased (as opposed to her estate) could never have paid the tax. That decision is probably wrong but so long as it exists means that there may be a lacuna which justifies a claim being brought by the beneficiaries whose bounty has been reduced by the amount of the tax, see *Rind v Goddard* [2008] EWHC 459 (ch).

When Does Loss Arise and Limitation Issues

Will Claims

31. If a Will is negligently drafted then the testator suffers immediate loss. He/she has an inadequate document that needs to be corrected and the costs of this can be recovered against the solicitor. Therefore, on one view loss is caused immediately and the limitation period (which depends upon the cause of action accruing) begins to run. However, the loss is usually only discovered on the testator's death and prior to that the beneficiary has only a conditional and uncertain right. It follows that the person to whom the duty is owed (the beneficiary) probably only suffers measurable loss on the death of the deceased.
32. It was these latter factors that influenced the decision in *Bacon v Kennedy* 22/5/1998, to the effect that the limitation period only began to run on the date of the deceased's death. Similar factors have influenced the decisions on Inheritance Tax (see below).
33. Nevertheless, it is fair to say that there has been no clear appellate decision to the effect that the cause of action accrues only when the deceased dies and for that reason in any case where it is possible a claim should be issued within six years of the negligent Will (or the date on which the Will ought reasonably to have been drafted).

Has There Been Loss?

34. For a claim to arise it is necessary to show that the claimant has suffered loss. Two issues arise.
35. First, the claimant must have shown that he or she would have received something from the estate of the deceased had the duty of care not been breached. If it is suggested that the deceased ought to have (or would have had) executed a Will with a discretionary trust of which the claimant would have been one (scenario 1) then it remains necessary to prove that the claimant would indeed have received something from that trust. Where the terms of that trust would, as normal, give the trustees a wide discretion that will be very difficult indeed (and see the failed claim in *Trusted v Clifford Chance* 17/5/1996 at page 75).
36. Second, it is necessary to show that the alleged loss has already arisen. Where the loss is said to be that of IHT where that increased IHT has not yet been incurred (scenario 2) it is likely that the loss has not yet been incurred (what if the Government changed the law?). This is probably so irrespective of the House of Lords' analysis of losses of a chance in *Law Society v Sephton* [2006] 2 AC 543.



Inheritance Tax

37. There are particular difficulties in analysing when loss arising as a result of increased Inheritance Tax has actually arisen. On one view a failed attempt to avoid IHT causes immediate loss, particularly if the property is put beyond recovery. On another the tax itself does not usually arise until the death of the deceased. In *Macauley and Farley v Premium Life Assurance* 28/4/99 Park J. held that the loss did not arise until death because it was not until then that the tax became payable. Similar logic underpinned the decision in *Daniels v Thompson* although the Court there seems to have been attracted to the notion that a failed PET causes immediate loss. This logic was then followed in *Rind v Goddard* [2008] EWHC 459.
38. As matters stand, therefore, a failed PET (scenario 2) will not cause loss unless and until the deceased dies and the increased IHT becomes payable. What is interesting is whether this will remain the case if (and when) the decision in *Daniels v Thompson* is overturned. When that is done it will again become clear that the loss is that of the deceased and conceivably that loss is incurred at the moment that the flawed tax planning is put into place.

Alternative Claims and Mitigation of Loss

39. A claimant in a negligence claim must show that they have taken reasonable steps to mitigate their loss. That will present a number of different issues.
40. Suspicions often arise where the disappointed and "successful" beneficiary are in the same family and apparently on good terms. In such circumstances it may be questioned why the successful beneficiary would not be willing to execute a deed of variation to correct the mistake and the answer is usually that all are happy for the solicitor to have to pay. Unfortunately, it would probably be very difficult for the solicitor to prove that a deed of variation correcting the mistake would be possible.
41. Where the facts of the case suggest that a mistake in drafting a Will was caused by a clerical error or a failure to understand the testator's instructions it will normally be possible for a claim to be brought to rectify the Will. In such cases the claimant will normally be expected to bring such a claim although this will not be the case where the claim has little prospects of success or where it will not lead to actual recovery of the monies, see *Walker v Medicott* [1999] 1 WLR 727 and *Horsfall v Haywards* [1999] Lloyd's PN 332. Even if successful the costs of such claims would normally be paid by the negligent solicitor and it is often worthwhile asking the negligent solicitor to agree to underwrite the costs, particularly if the insurers are insisting that without such a claim they will not pay.
42. A disappointed beneficiary may also have a claim for reasonable financial provision under the Inheritance (Provision for Family and Dependents) Act 1975. This raises particularly acute problems for the claimant, particularly in deciding which claim must be brought first. The relief under the Act is discretionary and depends upon an assessment of the beneficiary's means. What if the Judge decides to take into account the value of the perceived negligence claim? Or is this impermissible prior to making the claim? Unfortunately, there is no clear answer to this conundrum.



Further Reading/Key Sources

Solicitors' Negligence and Liability; 2nd ed William Flenley and Tom Leech, especially chap 11
Professional Liability to the parties for inter vivos transactions [2005] 21 Prof Neg 142

Cases Cited

Hall v Meyrick [1957] 2 All ER 722
Ross v Caunters [1980] Ch 297
White v Jones [1995] AC 207
Hemmens v Wilson Browne [1995] Ch 223
Cancer Research Campaign v Ernest Brown (1995) 27/10/1995 Harman J.
Trusted v Clifford Chance 17/5/1996
Esterhuizen v Allied Dunbar [1998] 2 FLR 668
Bacon v Kennedy 22/5/1998
Walker v Geo H Medicott & Son [1999] 1 WLR 727
Glynn v Frearsons [1999] Ch 326
Worby v Rosser CA 28/5/99
Macauley and Farley v Premium Life Assurance Co 29/4/99
Walker v Medicott [1999] 1 WLR 727
Horsfall v Haywards [1999] Lloyd's PN 332
Gorham v British Telecommunications [2000] 1 WLR 2129
Gray v Richards Butler [2000] WTLR 13
X v Woolcombe [2001] Lloyd's Rep PN 274
Hooper v Fynemores [2002] Lloyd's Rep PN 18
Atkins v Dunn & Baker [2004] EWCA Civ 263
Humblestone v Martin Tolhurst Partnership [2004] EWHC 151 (ch)
Chappell v Somers & Blake [2004] Ch 19
Daniels v Thompson [2004] EWCA Civ 307
Law Society v Sephton [2006] 2 AC 543
Hughes v Richards [2004] EWCA Civ 226
Rind v Goddard [2008] EWHC 459 (ch).
Rind v Goddard [2008] EWHC 459 (ch)