

Duty of Care and Negligence in Will Preparation

The law of negligence is constantly evolving and nowhere is the pace faster than in the area of negligent Will preparation. Until recently, lawyers preparing a Will have been exempt from the consequences of their mistakes and could not be sued for issues arising from a negligently drafted Will.

The historical position had been established in the Victorian case of *Robertson v Fleming*ⁱ which was held as good law right up until 1979 and used as an authority in relation to Will preparation with regard to negligence. This case stated:

“Mistakes in the preparation of a Will give no cause of action to the intended beneficiary since the solicitor owes no duty to anyone other than his client, the testator.”

One of the judges sitting on the case panel, Lord Campbell L.C opined that ‘it was not the law of Scotland or of England or of any country where jurisprudence has been cultivated as a science’ to allow a disappointed beneficiary to sue the testator’s solicitorⁱⁱ.

Therefore this position seems to be unfair and unjust, but it was founded on solid legal principles which adhere to the concept of Privity of Contract. In simple terms, the law said the contract for the service of preparing the Will was made between the client (the testator) and the solicitor/Will Writer.

The above principle only allowed the testator the right to sue for any negligent acts which had been committed. Therefore, if a client died and a negligent error came to light they were no longer in a position to pursue a claim. The rule of Privity of Contract as we see only extends to the testator as opposed to his beneficiaries who have suffered the actual loss. As a result any claim of negligence would die with the client leaving the drafter with no potential negligent claims.

While this position may have satisfied the academic law purist, most people regarded it as highly unsatisfactory. Beneficiaries were missing out and the negligent lawyers were getting away ‘scot-free’. However, it was not until the late 1970’s that the court Judges began to acknowledge and consider extending the duty of care to beneficiaries as they are “so closely and directly affected” by the acts of a solicitor preparing a Will.

The breakthrough came in 1979 with the land mark case of *Ross v Caunters* (1980)ⁱⁱⁱ. The facts involved in this case are that the drafting solicitor failed to warn the testator that their spouse (who was also a beneficiary) was not to witness the Will. The act of not informing the testator of this basic rule meant the duty of care which was owed to testator had been breached. The result was the rule of Privity of Contract should not prevent an intended beneficiary from taking legal action to recover losses they have suffered as a result of a Will being negligently prepared.

It is important to note that the above case shows a move away from the right of Privity of Contract to ensure the beneficiaries are also recognised as being owed a duty of care. The effect is the Will drafter needs to ensure that they undertake their role correctly and discharge their duty of care not just to the clients but also to the beneficiaries of a Will.

The idea of duty of care was further developed in *White v Jones*^{iv}, which was a decision about a solicitor’s failure to prepare a Will for an elderly testator. In this instance there had been an excess of 40 days between when the instruction were actually taken to the drafting of the document. In this specific case the solicitor failed to draft amendments to the Will before the testator died. With

the result, although showing no direct loss to the estate, it did result in a loss to intended beneficiaries being the testators daughters as no provision was made for them in the existing Will. The House of Lords held, by a bare majority, that where a client had instructed a solicitor to prepare a will for execution and where, as a result of the solicitor's negligence, an intended legatee was reasonably foreseeably deprived of a legacy, the solicitor was liable to the intended legatee for the loss of the legacy.

The result was achieved by extending the assumption of responsibility principle, i.e. the assumption of responsibility by a solicitor towards his client in circumstances in which there was no confidential or fiduciary relationship; and neither the testator nor the estate had a remedy against the solicitor. In this way common law was fashioning "a remedy to fill a lacuna in the law so as to prevent the injustice which would otherwise occur"^{vi}

The traditional position had regarded this area as separate domains of contract and tort^{vi}. Lord Goff suggested in *White v Jones*, that the imposition of liability was designed to do practical justice in a case where in the absence of a remedy one could be fashioned by the court, neither the testator's estate nor the intended beneficiary would have a claim for the loss caused by the negligence. He thought that there had to be boundaries to the availability of a remedy in such cases, but that these boundaries would "have to be worked out in the future, as practical problems come before the courts"^{vii}.

This decision enforced the rule in *Ross v Caunters* and *White v Jones* further establishing any loss caused by negligence on behalf of a Will drafter, causing loss to a disappointed beneficiary would allow the beneficiary to take legal action on the grounds of breach of duty of care against them, as the Will Writer had not exercised their professional duty to a standard which is required from them.

The terms of duty owed to a disappointed beneficiary depend on the nature of the original instructions given by the testator. If therefore, there is no breach of duty to the testator, the disappointed beneficiary even if they suffer a loss will have no claim. As Chadwick L.J. pointed out in *Carr-Glynn v. Frearsons*^{viii},

"The duty owed by the solicitors to the specific legatee is not a duty to take care to ensure that the specific legatee receives his legacy. It is a duty to take care to ensure that effect is given to the testators intentions"^{ix}

Therefore it is preferable that Will preparation is maintained as a structured process avoiding these potential problems as mentioned above. The best way to alleviate problems and mitigate any issues is by ensuring good client service thus avoiding the pitfalls as listed below:-

- (1) The duty of Care;
- (2) Time taken to prepare a Will;
- (3) Retainers and terms of business; and
- (4) Managing risk.

The first topic considers what is a 'duty of care' and to what standard must this be performed for it to be extinguished. In applying this standard we have two definitions we can use; the first examines what is the standard which should be achieved by ordinarily members of a professional practice in which they trade. The second standard is what the courts use to assess the standard of care a member of a professional practice ought to achieve in performing their role.

The legal definition of reasonable standard for a professional in a duty of care matter arises in the case of Bolam v Friern Hospital Management Committee^x which states:

“Where you get the situation which involves the use of some special skill or competence, then the test as to whether there has been negligence or not is not the test on the top of the Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary man exercising and professing to have that special skill. A man need not possess the highest expert skill; it is established that it is sufficient if he exercises the ordinary skill of an ordinary confident man exercising that particular art”

The second view is derived from the case of Re Parson, Borman v Lel^{xi}, there is judicial disapproval for allowing the unqualified or inexperienced to take instructions, draft or supervise execution in circumstances which demand experience, judgement and knowledge.

“..... whether it is appropriate for someone who is neither a solicitor nor a legal executive qualified in probate matters, but a licensed conveyancer, ever to accept instructions to participate in the drafting of the will and in the supervision of its execution is doubtful at best. But at all events, in my view, where a would be testator is of advanced age or has been seriously ill or is under some other incapacity, it should always be correct practice that (in addition to the need for ensuring the report an attendance of the doctor) the instruction for the will should be taken, and the execution of the will supervised by a qualified solicitor with experience of Wills. Failure to do so can readily lead to problems which could otherwise be prevented.”

The above statements highlight the inherent risk in taking instructions if one is unqualified, but also focuses on the knowledge and experience required in taking instructions, an example being that certain skills are needed to ensure the correct information is obtained from the testator especially from an elderly testator. This underlines the importance of using staff that are appropriately trained and experienced and, where necessary, supervised in all circumstances and this ensures the best service is afforded the testator.

The second topic involves assessing the time needed to prepare the Will and ensuring this meets the client's requirements. Each client has to be assessed individually, for example, a client who is on a hospital ward would need a Will preparing more urgently than a person who is fit and healthy^{xii}.

If a client indicates to a Will drafter that he or she wants to make a Will or wants to make a substantial change to a previous Will, then a Will drafter must evaluate the circumstances of the case and, should the need arise for a Will to be drawn up quickly and made ready for the testator's signature, then he must do so; this Will can then be used as a 'holding Will'. In cases where there is a risk of death from heart attack, stroke or other trauma resulting in a fatality, a holding Will can be used as a stop gap to ensure the testator is protected by having something in place if the worst happens.

Where the client is old or ill, the delay in producing a Will would be unacceptable. This will obviously be less of a risk for younger testators or those with no health issues. These scenarios require the Will Writer's judgement to assess the client's age and state of health when considering the time period within which to prepare the Will. The Society considers prompt Will preparation to be the model in all circumstances, that being within a 14 day time period. If the client has waived their right to the 14 day Cancellation period, work can be completed even sooner.

The suggestion of urgency is thought to be when a client has a likelihood of 50% risk of dying before the Will is prepared. The main factors which need to be evaluated are there a real prospect of the

client not surviving, i.e. age and state of health. These points alone will help determine urgency and whether a holding Will is an appropriate step to take to ensure there is no breach of duty of care.

The third and the fourth topics we will look at together and need to be clearly identified. That being 'terms of business' and 'risk management' which come under the same heading. As we have seen the duty owed to the testator will transfer to the disappointed beneficiaries if a loss occurs. The main consideration a Will drafter must remember is they cannot limit their liability by imposing unreasonable contractual terms on their client. This act of imposing such terms will only be viewed by the court as breaching the Unfair Contract Terms Act 1977 or the Unfair Terms in Consumer Contract Regulations 1999. Furthermore, if the Wills are challenged in the courts; the court will recognise the imbalance of power which exists in the contract between the parties and the limitations laid out will be set aside due to the fact of uneven/ unfair terms.

The last topic is an important factor which every business needs to address to be able to meet the duty of care. Undertaking effective risk management ties in with what was examined under section 2 of this paper, which simply means ensuring the client's needs are addressed. This could involve Will Writing Companies training their consultants to be able to recognise and cope with various situations and assess whether their client may have a particular need. Not using professionally trained consultants or adequately skilled professionals for this task would simply be litigation waiting to happen.

"If a claim comes in from a disappointed beneficiary, ask yourself, 'Could the client have complained of the way I handled the retainer?' If the will draftsman can answer that question with a negative then he or she has nothing to fear."^{xiii}

Once these steps are in place the risk management strategy only needs to be updated to mirror the current legislation and to ensure that the policy in force is carried out by the consultants. The obvious effect of such an activity will ensure that the duty owed to the client is fulfilled.

The steps for ensuring risk management is carried out are simple, by identifying potential risks, understanding these risks, creating policies which will reduce or eradicate the risk, implanting change and the continual monitoring of compliance and updating any these policies^{xiv}. Although this process is the application of common sense it requires considerable discipline to make sure the effectiveness of this strategy.

Whilst this can appear a little bureaucratic, written guidelines will often provide great assistance for the consultant who may be confronted by an issue previously not encountered and will guarantee any problems are dealt within and comply with company policy. For example where the company has a policy on death-bed wills this will undoubtedly give guidance to the consultant in order for him to deal with the situation, if encountered for the first time.

Summary

In conclusion, what we can see when it comes to preparing a Will for a client, is that the drafter will need to make sure he meets the duty owed. The duty of care owed is not just to his client but extends to potential beneficiaries named in the client's Will. It is also important that the Will drafter evaluates each of his clients to make certain he meets his obligations within a reasonable time frame.

A Will drafter can extinguish his or her duty by ensuring effective operations are in place to minimise any issues when dealing with the question of duty of care.

In the process of taking instructions from a client any contract between the Will Writer and the client cannot impose unreasonable terms of business. If the contract imposes unreasonable terms on a client it will simply invalidate those terms and the balance between the parties, in the eyes of the law, will be seen as unequal and not therefore enforceable.

ⁱ Robertson v Fleming (1861) 4 Macq 167

ⁱⁱ The Law of Succession, 12th Edition, Parry and Kerridge, Sweet & Maxwell, Ch 15, pp351

ⁱⁱⁱ Ross v Caunters [1979] 3 All ER 580

^{iv} White v Jones [1995] 2 A.C.

^v White v Jones [1995] 2 A.C. Lord Goff at 268B

^{vi} Per Steyn L.J in the Court of Appeal in White v Jones [1995] 2 A.C 207,235

^{vii} White v Jones [1995] 2 A.C. 207 269

^{viii} Carr-Glynn v. Frearsons [1999] Ch.326

^{ix} Carr-Glynn v Frearsons [1999] Ch.326 337 E

^x Bolam v Friern Hospital Management Committee [1957] 1WLR

^{xi} Re Parson, Borman v Le [2002] WTLR 237

^{xii} These are observations taken from Neuberger J in examining X v Woollcombe Young [2001] WTLR 301

^{xiii} Alastair Norris QC (as he was then) in New Law Journal pg934, Wills and Probate Supplement, 22 June 2001.

^{xiv} Planning the 6 Step theory to *Risk Management*, as suggested by The Society of Trust and Estate Planning.