Back to Basics – Negligence

This month we look at developments that may be taking place within the courts potentially changing the basis on which negligence is decided when a case involving the possibility of professional negligence is heard.

What constitutes negligence or at least the burden of proof needed to establish negligence as the basis for compensation, maybe on the move once again.

The background to the court’s view of negligence:

A brief overview of the history of negligence is illuminating. In the Scottish case of Robertson v Fleming (1861) 4 Macq 167 the rule of “privity of contract” was first expressed.

In his judgement the Lord Chancellor, Lord Campbell, held that a solicitor’s duties in the preparation of a will could give rise to a cause of action for negligence “only by showing that there was privity of contract between the parties” meaning that only a party to the contract for the provision of a will could sue the solicitor (for negligence). The Lord Chancellor went on to say that a person who was not party to the contract could not sue. The reasoning was that it was unconscionable for a solicitor to be held responsible for the disappointment suffered by a beneficiary that the solicitor had never seen or heard of before.

Note this decision, which laid the foundation of negligence for the next 100 years, was prior to the well-known common law test of capacity found in Banks v Goodfellow (1870) LR 5 QB 549. The third leg of the decision in that case per Cockburn CJ states for the testator to be considered as having “testamentary capacity” the testator “shall be able to comprehend and appreciate the claims to which he ought to give effect”. The decision may have shifted responsibility for negligence further away from the solicitor, in circumstances where the testator’s capacity is not in doubt.

The issue of negligence was not reviewed and did not make further legal headlines until the infamous case of Donoghue v Stevenson [1932] All ER Rep 1. The case involved a bottle of ginger beer and the decomposed remains of a snail found within its contents! Their Lordships held that a case for negligence against the manufacturer of the drink could be upheld, despite the manufacturer not being privy to the contract (for the sale of the drink). The decision in this case rested on the proximity of the manufacturer to the purchaser of the drink, finding that the manufacturer should reasonably have foreseen the consequences of his negligence (allowing the snail to enter the bottle of drink).

Privity of contract is no longer a bar to negligence:

The link to the modern law of negligence, as it affects will writing, took a further 50 years to develop. The modern principle that a party does not need to be privy to a contract before the courts will allow an action for negligence against a solicitor was firmly established in the House of Lords case of Ross v Caunters [1979] 3 All ER 380.

The Vice-Chancellor (Lord Megarry) gave the leading judgement and held that:

i) The principle of privity of contract does not exclude a beneficiary (to the will) from taking action should they have suffered a loss; and

ii) The will-writer/instruction-taker owes a duty of care to the potential beneficiaries to see that the testator’s instructions are implemented in a valid will; and

iii) The beneficiaries could use the law of tort of negligence to provide a remedy for their loss.
Clearly the testator must have demonstrated testamentary capacity and therefore under the common law test of *Banks v Goodfellow*, above, must be able to bring to mind not only the details of his bounty but also all of those persons deserving of it. At this point will writers and instruction takers need to identify and make note of any persons that the testator decides should NOT benefit from his bounty AND any persons who may subsequently make a claim on his bounty using the tort of negligence. The *Inheritance (Provision for Family and Dependents) Act 1975* lays out details of those persons considered by the statute to have a claim, but using the general tort of negligence the court may widen the net further and will writers should take care to consider and discuss the claims of all possible claimants to the testator’s bounty. In this regard the value of full contemporaneous notes and confirmations of discussions that have taken place cannot be overstated.

The boundaries of what may constitute negligence have been extended over the past 35 years since the decision in *Ross v Caunters*. Changes in society, the growth of individual wealth and public expectation are all contributory factors in the growing number of circumstances where the courts have been willing to find negligence is a cause of action for damages.

Whereas individual findings of negligence will fall to be assessed upon the facts of each case the will-writer/instruction-taker should be able to learn from the mistakes of others and develop procedures to protect his client dealings.

The court’s assessment of reasonableness – an ordinary or special skill?

You are likely to be familiar with the idea of the “man on the Clapham omnibus” as the arbiter of the reasonable man test applied by the courts whenever there is a need to instruct a jury as to what may be taken as reasonable when weighing the actions of the defendant. The “man” is the ordinary anonymous individual blessed with rational and reasonable views. This definition may have suggested for the first time in circa 1903 and has therefore been around for over a 100 years.

Where the defendant claims special knowledge and skills – as would a will writer or instruction taker, a further development to the test for reasonableness was put forward by McNair J in *Bolam v Friern Hospital Management Committee [1957] 1 WLR 582 at p171*. If the situation calls for the use of special skill or competence the test as to whether there has been negligence cannot be the test of the man on the Clapham omnibus, because that man does not have any special skill or competence. Instead the test is the standard of the ordinary skilled man exercising and professing to have that special skill claimed. The test for negligence becomes that “a man need not possesses the highest expert skill; (but) it is established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art”, and known as the “Bolam” test.

The “Bolam” test was formulated in a medical negligence case and subsequently widely used in other medical negligence cases. The “Bolam” test has been applied to instances of negligence in will-writing where the will writer and instruction-taker reasonably claim special skills and are judged by the ordinary skill that is expected from a competent will writer and/or instruction taker.

Over time the courts have been sensitive to changes in the general atmosphere exhibited by the public calling for restrictions on the liability of professionals to be swept aside as social attitudes towards professionals change. In April 2005 Lord Justice Jackson LJ delivered the Peter Taylor Memorial Lecture to the Professional Negligence Bar Association – of which he is president. In his address his Lordship said “professional persons are no longer generally seen as a class of individuals superior to other workers, driven by higher ideals and meriting protection …………… but are now characterised (by most sociologists) as special interest groups which exploit their skills in an endeavour to achieve greater income and higher status in society. Many laymen take a similar view.”
If his Lordship’s views are followed then the actions of will-writers/instruction-takers may increasingly expect not to receive the special protection previously afforded by the “Bolam” test. The test amounts to an acceptance by the courts that “each profession sets the standards by which its members are judged”.

Will-writers/instruction-takers may do well to take note of the possible changes coming on the wind. It may be in future that the courts set the standards of negligence by paying regard to relevant evidence of practice and relevant expert opinion. The changes could mean that will-writers and instruction-takers would no longer be able to claim any special skills and special treatment (immunities and restrictions on their liability) but bound to have their actions judged for reasonableness as all others – by the ordinary man on the Clapham omnibus.

What has been adjudged negligent and what is needed to avoid such a charge?

The seminal case of White v Jones [1995] 2 AC 207 in which due to the solicitor’s unreasonable delay, the will was not prepared for execution before the death of the testator, the solicitor was held to be negligent and the beneficiaries were awarded a cause of action to recover damages. The key point was that the estate suffered no loss, it was the beneficiaries who suffered the loss having been deprived of the legacies, which the testator intended they should receive, due to the negligence of the solicitor.

The decision of the court was to fix the “lacuna” (gap) in the law that has arisen due to the retainer to prepare the will being between the will writer and the testator and not between the will writer and the beneficiaries. The intended beneficiaries were deemed to have suffered loss because the will instructions from the now-deceased testator had not been completed, as required by the terms of the retainer accepted by the will writer.

What should the will writer have done differently to avoid the finding of negligence by the court? It must be emphasised that each case will be examined on its own facts. In this case it was a delay of 59 days between the date that the instructions were given and the retainer agreed and the testator’s fatal heart-attack that the court considered as unreasonable in the particular circumstances and therefore the solicitor was negligent. The dividing line between what was acceptable in terms of delay before the will was drafted and what was unreasonable was what the court had to decide. It is fruitless to attempt to judge whether the court was right or wrong in arriving at their decision, as it was based on the particular circumstances.

Lord Denning suggested that whenever he found that questions of the duty to and the remoteness of the parties involved became too difficult to judge, he was in favour of discarding the search for a test, which he could apply, in effect to pigeon-hole the case. Instead he believed that the relationship of the parties should be considered fully to determine whether as a matter of policy, economic loss should be recoverable. The decision as to whether negligence had occurred should be made individually on a thorough assessment of all the facts.

In future to ensure that a charge of negligence is avoided there could be 2 issues of paramount importance: 1) that the will writer provides clear and unequivocal terms of business which are confirmed as presented and explained to the testator(s) and which include ALL statutory requirements and 2) that the will writer carries out his obligations (duty of care) to the testator to the letter of the his retainer and the terms of business. The terms of business should contain the standards of practice as practised by the will writer, relevant to the practice of his skills and supported by a professional code of practice – for example the Code of Practice promoted by the Society of Will Writers for compliance by its members.
Adopting a disciplined procedural approach to the execution of each individual client retainer by the application of robust terms of business compliant with a professional code of practice is a good starting point for a will writer to ensure that a (subsequent) charge of negligence is avoided in all client matters.

What do decided cases tell us about negligence?

Solicitors and will writers are treated alike, see *Esterhuizen v Allied Dunbar Assurance [1998] 2 FLR 668.*

Whereas in *White v Jones* the testator died before the will had been drafted, and as a consequence the testator was held to be negligent, the unexpected loss of capacity could lead to the same result for the will writer. But see the rule in *Parker v Felgate (1883) 8 PD 171* as confirmed to be good law in the recent case of *Clancy v Clancy (2003) EQHC 1885 (Ch).* Scrupulous attention to detail when dealing with such difficult situations is essential to good practice.

What have the courts decided when death occurred unexpectedly? In *X v Woolcombe Yonge [2001] Lloyds Rep PN 274* the testator, who was 55, requested an appointment while he was in hospital. He was suffering from terminal cancer and died 6 days after requesting the appointment. Neuberger J held that the will writer’s delay was not unreasonable in all the circumstances of the case. However had the will writer drawn up and executed a “holding” will by hand at the hospital bed, while the full draft was prepared, incorporating the testator’s intentions the issue would have been avoided.

The death of a 92 year old testatrix 18 days after giving her instructions, before the draft could be executed, was also held not to be an unreasonable delay in *Doidge v Bright Broad & Skinnard* as reported in *The Lawyer 20 April 1993*. This decision may be regarded as generous for the will writer given the age of the testatrix.

In *Carr-Glynn v Frearson [1992] 2 WLR 1046* the 81 year old testatrix wanted to leave her share in a property, owned jointly with her nephew, to her niece. The solicitor was unsure whether the beneficial interests in the property was owned as joint tenants or as tenants in common. The solicitor advised the testatrix to check the deeds and the testatrix agreed to make the check. No further action was taken. When upon her death it was discovered that the property was owned as joint tenants and therefore passed by survivorship to the nephew and not to the niece, the Court of Appeal held that the solicitor’s advice was negligent. The testatrix’s intentions had not been achieved. The solicitor should have advised that a severance notice be served. In this case there was no time-related urgency to the matter and the ownership issue should have been settled before executing the will.

Cancelling appointments to take instructions from a client who is hospitalised is dangerous, without first checking that a) the possibility of death is not imminent and b) whether alternative arrangements can be made to take the instructions at the appointed time. In *Hooper v Fynmores [2001] WTLR 169* the solicitor himself was hospitalised but the testator, who was 83 years old, was gravely ill and died 12 days after the request for an appointment. The court held the solicitor to be negligent.

The moral from these cases must be that particularly when dealing with an elderly client, it is unwise to delay any longer than necessary without good reason. Taking tax advice may be a good reason, but even so the wise instruction-taker will agree the timescales for an appointment; so that any issues that arise from tax considerations can be addressed before proceeding. In all matters comprehensive contemporaneous notes will assist should matters not proceed smoothly and confirmation in writing of actions taken should always be provided.

Negligent dealing with the execution:
Well-constructed terms of business will outline the testator’s responsibility for the execution of the will. In *Atkins v Dunn & Baker [2004] WTLR 477* a draft will was sent to the client seeking his approval prior to preparing the engrossment. There was no response from the client, who died 3 years later. The Court of Appeal stated that “in the circumstances of this case” the solicitor was entitled to consider that it was for the testator to return the will and that the failure to send a reminder did not mean that the actions of the solicitor had fallen below the standard to be expected of a competent solicitor and that he was not negligent. The court did not address the circumstances where the solicitor would have a duty to send a reminder. It would without doubt have been advisable for the solicitor to send a reminder, if not in fact two (an initial and a final).

There is a clear duty for proper care to be taken when advising the testator of the procedure for executing the will in the absence of the will writer, see *Gray v Richards Butler [2000] WTLR 143* at 157D. Clear written instructions in a standard form should be provided. If the testator fails to execute the will validly then under *Ross v Caunters [1979] 3 All ER 580*, where the witnessing of the will by the spouse of a beneficiary invalidated a gift, the will writer may be found liable to disappointed beneficiaries as a result of his negligence, see *Hill v Van Earp (1977) 71 AJLR 457*. Ensuring that the executed will is returned to the will writer; so that the execution may be checked for validity is essential.

A will that is executed but left undated by the testator is liable to be set aside as the court may consider that the testator lacked *animus testandi* (the intention to execute the will) when the will is signed, see *Corbett v Newey [1998] Ch 57*. The will had been subsequently dated by the solicitors but not until after certain lifetime gifts had been made and was set aside. The claim for damages by the beneficiaries was upheld on the basis that as in *White v Jones* above the solicitors were held to have acted negligently as the disappointed beneficiaries did not receive their legacies.

A will writer’s duty to supervise the execution of the will was raised in *Esterhuizen v Allied Dunbar Assurance*, see above. Longmore J held that simply providing written instructions was not enough; the will writer has a duty to assist the testator by either inviting the testator to the will writer’s office or by offering to visit the testator at his home, together with another person to act as witnesses. A testator is entitled to expect reasonable assistance, even though he has not asked for the assistance himself. Certainly arrangements must be made for an assisted execution if there is any reason to believe that the testator will have difficulty understanding the instructions himself. Where the will writer is not present at the signing the will must be returned to the will writer for checking.

Careful attention to process is essential good practice for the will writer, but as has been explained there is no “hard and fast rule” laid down by the courts to judge these issues. The approach of the courts could be to make a policy decision, deciding whether on the particular facts there is a case on economic terms for negligence. The will writer’s defence may be found in a) established procedural protocols and b) whether those protocols were followed in the case under consideration.

Does the will writer have a duty to give advice on execution by the testator?

Establishing whether a testator has the ability to follow printed instructions and validly execute a will without being supervised in its execution by the will writer, is a matter for the competent will writer to judge and decide in each set of circumstances.

The 2 cases of *Esterhuizen v Allied Dunbar Assurance* and *Gray v Richards Butler* present different perspectives on the court’s view regarding the will writer’s duty to supervise the execution of each will. In *Esterhuizen* Longmore J held that the will writer should have personally supervised the execution based upon the court’s assessment of the (now deceased) testator’s apparent lack of
competence to understand instructions. In *Gray* Lloyd J held that the testatrix was capable of understanding instructions and that leaving standard printed instructions was, in that case, sufficient.

The different approaches taken by the court in *Gray* and *Esterhuizen* demonstrate the conundrum for the will writer: should he use his skills and judgement and decide what is the appropriate approach for each testator, here when considering remote execution, per *Gray*? Or conversely, regarding this issue, always assume the worst and follow *Esterhuizen*, per Longmore J proceeding on the basis that testators are not capable of following written instructions and all executions should in fact be supervised?

Following Longmore J the courts could in fact be denying the will writer’s discretion to use a special skill set attributed to the “professional”, as found in the “Bolam” test, by concluding that negligence has taken place because of the absence of supervision. In contrast per *Gray* and Lloyd J the court could decide that the will writer is entitled to use his “special” skill set when deciding whether or not to leave the testator to execute the will unsupervised. Lloyd J may have taken account of Lord Denning’s thinking by deciding the case for economic damages on policy grounds, supporting the solicitor as having a special skill set.

Concluding remarks:

When will writers and instruction takers have to make a tricky decision, which if it turns out wrong could result in a claim of negligence, the actions decided on and taken should rely on providing robust terms of business, which comply with statutory obligations, supported by detailed contemporaneous notes and backed up by confirmatory correspondence.

In a nutshell to provide the best defence against a charge of negligence a will writer should apply the principles of safety first and by his actions leave nothing to chance (following Esterhuizen) or alternatively face the uncertain rigours of the court’s examination (following Gray)! There may be security in applying safety first?

**Important Reminder:**

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