profound effect on the rates the client eventually pays.

Conclusion

The future role of the broker is changing and for those who recognise this soon enough the future is good. Those who don't recognise the need for change will disappear.

LIABILITY UPDATE
by Robin de Wilde Q.C.

Introduction

1. In this Seminar I propose to discuss three cases, the first is *Banque Bruxelles Lambert SA v Eagle Star Insurance Company Ltd* which is now going around the Temple in samizdat form and has been partly reported in the Journal, Professional Negligence, Volume 10, No. 2 1994 pps 37-72. The second case is *Bolitho & Others v City and Hackney Health Authority* [1993] 4 Med LR 381 which has been heard in the Court of Appeal and is supposed to be going in the House of Lords. The third case is *White v Jones* [1993] 3 WLR 730 which has been argued in the House of Lords and the speeches from their Lordships are eagerly awaited.

2. I have chosen three different cases namely a surveyor's negligence case, a medical negligence case and a solicitor's negligence case, each of which illustrate the movement and development of what is a discrete area of the law, the law of professional negligence. I believe that you will find the application of the principles of the law of negligence to each of these three different factual situations intriguing.

3. I would also like to make three other points:

   (i) Firstly, the standards of professional are now required to be higher today than they were 30 to 50 years ago.

(ii) Secondly, the Courts are reasonable in the standards they apply, although there has been a long felt suspicion that judges are too kind to doctors.

(iii) Thirdly, it is not a case of lawyers climbing over the barricades to nail professional men or repeating the American experience or what is perceived to be the American experience, especially in relation to doctors. I say that, because in 1989 Harvard University carried out a survey of all medical case records conducted in New York State in 1984. It was found on examination of the papers that for every four cases of negligence, apparent in the case records, only one in four proceed to what the Americans describe as "suit". Now that is not the only evidence to support the idea that in the United States, negligence is under litigated, because in 1991 the Pennsylvania State University College of Medicine, after evaluating 30,000 hospital records, found that only one person in 65 injured by the negligence of a health worked filed for suit for compensation. There have been attempts to work out the appropriate rate in the United Kingdom and in a recent textbook on the subject, Medical Accidents by Vincent, Ennis & Audley, Oxford Medical Publications (1993), it is considered that in the United Kingdom some 300,000 adverse events a year occur with 75,000 due to negligence. However, 70% of these involve, only minor or short term injury. That leaves about 22,500 proper claims. As someone who specialises in this area, I would be surprised if more than 10 to 15% are considered by lawyers.

4. My own experience as a junior was that in respect of medical negligence I stopped more than 50% of the cases I was sent. In many cases that had no chance whatsoever, the papers would not be even sent to me at all. In 1990 the NHS spent about £45 million in malpractice claims. There were about 35 cases in which the damages exceed £300,000 and the total damages in these cases was in the region of £17 million. The remaining £28 million went on about 7,000 cases at an average cost per case of about £6,500: Department of Health, Arbitration for Medical Negligence in the National Health Service (1991)

5. **The Bank Bruxelles Case**

At issue were two questions. First, whether a surveyor responsible for a negligent valuation was liable for all the consequences of a loan, being made on the strength of the valuation, including the loss of value to the property due

to the collapse of the commercial property market in the 1990's. Secondly, whether the damages awarded against a negligent surveyor could be reduced for contributory negligence where the lender also acted carelessly. The implications of this decision are wide, for it limits the scope of the professionals' libability for economic loss. It also accepts that placing total reliance on a professional may amount to contributory negligence. This case is reputed to be the subject of an appeal this autumn, as I understand it, to the Court of Appeal. However, Phillips J's judgement is a masterpiece, exemplifying the English judiciary at their best.

6. **Facts**

In the first half of 1989, Bank Bruxelles Lambert SA (BBL) entered into three transactions under each of which they lent 90% of the valuation of a commercial property to its purchaser. Subsequently BBL syndicated the loans to other banks. The valuations on all three properties, Crusader, Cambridge and Trevelyan, were provided by the fifth defendant John D. Wood, although in the case of one of the properties, Crusader, a first valuation was provided by the Fourth Defendant, Lewis & Tucker Ltd. The valuations were prepared on the instructions of the Second Defendant, Marcovits, who was acting for the purchaser, but was also at times a representative of the Third Defendant, Allied Dunbar, a financial services company. Marcovits was the moving force behind all the transactions and to persuade BBL to make the loans he had procured for them a 100% insurance cover from the first Defendant, Eagle Star. In the case of Trevelyan, the policy covered losses due to overvaluation but in the case of Crusader and Cambridge the cover was limited to losses due to a fall in the market. The borrowers defaulted on the loan and the properties proved to be inadequate security, partly because they were overvalued by as much as 25% and partly because property markets and property prices fell by as much as 50% over the period between the loan and the realisation of the security. BBL dropped its claim against Allied Dunbar and settled its claim against Eagle Star, Markovits and Lewis & Tucker, leaving only the claim against John D. Wood to be resolved. Eagle Star also claimed against John D. Wood in respect of the Trevelyan property.

Held:

(1) The valuations had been negligently prepared as the surveyor had ignored the

price at which the property had been purchased by the borrower immediately prior to the loan and had based his valuation of comparable rental values alone.

Per Phillips J.: *"If the comparable suggests a value that differs significantly from sale price agreed, the valuer has to consider all the evidence to decide why the discrepancy esists"*.

(2) There was no liability in relation to the Crusader valuation as:

(a) The valuation had not played *"a real and substantial part"* in inducing BBL to enter the transaction, as BBL had already decided to proceed on the basis of the earlier Lewis & Tucker valuation, *JEB Fasteners v Marks Bloom & Co.* [1983] All ER 583 followed.

(b) Although following *Ministry of Housing v Sharpe* [1970] 2 QB 223, John D. Wood would be liable to BBL if their negligent valuation had indirectly induced BBL to make the loan by persuading Eagle Star to offer the insurance cover, on the facts Eagle Star had been persuaded by pressure from Markovits and not by the valuation.

(3) On the balance of probabilities BBL would not have entered into the loan transactions if John D. Wood had given competent valuations in respect of Trevelyan and Cambridge. Hence damages would be calculated on a *"no transaction basis"*.

Per Phillips J: *"The issue of burden of proof (in relation to whether any loan would have been made on a competent valuation) is not an easy one"*.

(4) BBL was restricted to claiming its own loss stemming from the Trevelyan and Cambridge transaction and could not claim the losses borne by the syndicate banks as:

(a) syndication of the loan did not fall within the rubric of "res inter alios acta" i.e. as being an indemnity to the Plaintiff which should be ignored because it stemmed from an extraneous event. This was because the syndication did not occur after the loss to provide BBL with an indemnity but before the loss with the result that all the syndicated banks suffered the loss.

(b) The doctrine of "transferred loss" did not apply to enable BBL to recover the losses of the syndicated bank. *St Martin's Property Company Ltd v Sir Robert McAlpine Ltd* [1993] 3WLR 48, in which the transferred loss doctrine was applied, was distinguishable on two grounds:

(i) The Defendants' breach in St Martin's was directly causative of the loss to the third party, whereas John D. Wood's breach was not shown to have caused the syndicated banks to join the syndicate and suffer the loss.

(ii) If the banks were induced to enter the syndicate by John D. Wood's valuation then, unlike the third party in St Martin's they would be likely to have an independent cause of action in their own right.

(c) The sharing clause in the syndication agreement applied only to contractual payments made by the borrower. Hence, BBL was not obliged to share its recovery from John D. Wood with the syndicated banks and could not claim that it had to recover in respect of the syndicated losses in order after sharing, to obtain a full indemnity for itself.

(5) The fact that BBL had recovered from Eagle Star under the insurance policies had to be ignored as *"res inter alios acta"*.

(6) BBL could not recover that part of their loss which was attributable to the collapse of the property market as such loss could not fairly and reasonably considered as resulting from John D. Wood's negligence.

Per Phillips J:

"where the negligent advice relates to the existence or amount to some security against risk in the adventure, I do not see why the adviser should be liable for all the consequences of the adventure, whether or not the security in question would have protected them".

Reasoning of Lord Templeman in *Banque Keyser Ullman SA v Skandia* (UK) Insurance Co. Limited [1991] 2 AC 249, 279, and of *Lord Lowry in Swingcastle v Gibson* [1991] 2 AC 223 at 237, considered. Having regard to those decisions *Baxter v Gapp* [1938] 4 All ER 457 can no longer be relied

upon as governing the principles to be applied to the assessment of damages in a case such as this.

(7) Judged by the standards of a reasonably competent merchant bank, BBL were contributorily negligent in entering into a transaction notwithstanding the absence of a satisfactory explanation for the difference between the valuations and the prices of which the property had been sold. As John D. Wood was a professional valuer being paid for valuations which he knew were intended to form the basis of transactions, it must bear the major share of the responsibility for the losses and hence BBL's damages would be reduced by 30%.

Per Phillips J:

"Neither past experience nor market information justified BBL in treating as normal features of the property market the disparities between the purchase price and valuations. A prudent bank would have required specific and convincing explanation of disparity before relying on property as sole source of repayment".

There would be no reduction of damages for contributory negligence in relation to the following conduct:

(i) Taking the risk that the property market would fall. That was irrelevant as the losses due to the market fall were not recoverable anyway.

(ii) Lending with only a 10% margin as, once the risk of a fall in market values was discounted, it was not shown that this was an unreasonably slender margin to protect against losses due to delay in selling the properties.

(8) John D. Wood were liable to Eagle Star in relation to the Trevelyan transaction as it was aware that the insurance cover granted by Eagle Star to BBL extended to loss due to overvaluation and knew that Eagle Star would be relying on its valuation as a guide to the value of the property. *Smith v Eric S. Bush* [1991] 1 AC 831; and *Caparo v Dickman* [1991] 2 AC 605 followed.

Per Phillips J:
"The suggested restriction (that because the valuation report was stated to be for "bank for the specific purpose to which it refers", Eagle Star's use of it

should be restricted to participating in the loan and not extend to provide insurance cover) is nonsensical and I reject it. I have no doubt that (the valuer) was well aware that Eagle Star would wish to consider the valuation in order to decide whether to provide cover in respect of the loan and I find that he expressly agreed that Eagle Star could do so".

(9) Eagle Star were not entitled to recover that part of their loss which was attributable to the effect on the value on the security of a fall in the property market. Damages would also have to be adjusted to take account of the overlap with damages awarded to BBL.

Points arising

[1] This decision concerns what is believed to be the largest ever case against a valuer for negligence. Almost half the judgment is taken up with considering whether the valuer acted negligently, but in the end there was no doubt on that matter. The real interest in the case lies in the remainder of the judgment, in which Phillips J. considers various limitations on the valuers liability, limitation which can reduce its potential liability from close to £100 million to a figure nearer £10 million.

[2] Probably the most significant aspect of the case is the Judge's decision that BBL could *not* recover that part of their loss which was attributable to the collapse of the property market, as such loss could not be fairly and reasonably considered as resulting naturally from John D. Wood's negligence. Phillips J. commented that:

> *"where the negligent advice relates to the existence or amount of some security against risks in the adventure, I do not see why the adviser should be liable for all the consequences of the venture, whether or not the security in question would have protected them. This meant that the loss attributable to the fall in property market, i.e. £7.5 million in the case of Trevelyan and £34.75 million in the case of Cambridge, had to be deducted proportionately from BBL's losses on its own stake, reducing its claim in respect of Cambridge by slightly over 50% and by slightly less than 50% in respect of Trevelyan."*

[3] In reaching this conclusion, the Judge declined to follow the principle thought

to have been established by the leading 1930's Court of Appeal decision on valuers liability *Baxter v Gapp*, namely that the lender could recover its full loss. In two recent valuers liability cases, *HIT Finance v Lewis & Tucker* (1992) 9 PN 33 and *United Bank of Kuwait v Prudential Property Services* (unreported decision of Gage J.), it had been accepted that this principle entitled the lender to recover losses attributable to market depreciation. But Phillips J. considers that the reasoning in Baxter had been undermined by the House of Lords decision in *Swingcastle v Gibson and Skandia.* In Swingcastle the law tells us that Baxter was wrong in suggesting that the lender could recover from the valuer the contractual rate of interest due from the loan because it was not part of the valuer's responsibility to see that the borrower met his obligations.

[4] The combination of Swingcastle and Skandia was sufficient to satisfy Phillips J. that *"Baxter can no longer be relied upon as governing the principles to be applied in a case such as this"*. The point of precedence is a nice one. Phillips J. took the broad view that the precedent value of Baxter had been totally undermined by the decisions of the House of Lords. His colleague, Gage J., in United Bank of Kuwait, took the narrow, technical point that the ratio of Baxter in relation to recovery of capital loss had not been overrruled by any of the later decisions and was still binding at first instance. Very large sums depend upon which of these views is correct. An authoritative ruling is required from a higher court. Unfortunately, the litigation in Bank Bruxelles was settled in the light of the first instance judgment, thus preventing the appellate Courts from considering the issue. With so much at stake, it is not surprising that lenders, valuers and their insurers may be reluctant to take the matter to a final resolution at a higher level. But valuers should take heart. The most recent appellate decision on casual responsibility, *Galoo Limited v Bright Grahame Murray* (The Times 14 January 1994) clearly supports the trend in Swingcastle and Skandia of restricting the scope of the professionals' causal responsibility.

[5] The exclusion of recovery for losses caused by the property market more than halved BBL's claim, but a further 30% reduction of that figure was achieved by the application of the contributory negligence principles. Phillips J. held that, judged by the standards of a reasonably competent merchant bank, BBL were contributorily negligent in entering into the transactions in the absence of a satisfactory explanation for the difference between the valuations and the prices at which the property had been sold.

[6] It should be noted that he also held that there could be no contributory negligence reduction for lending on a speculative market in the knowledge that values might depreciate. The reason was simple: as the lender could not recover losses due to market depreciation, any negligence in lending on such a market did not contribute to the losses claimable. The point is important in relation to claims that lenders had been at fault in failing to check the creditworthiness of borrowers.

The next case I wish to consider is *Bolitho v City Hackney Health Authority* [1993] 4 Med LR 381

Facts:

In December 1983 the first Plaintiff, Patrick Bolitho, then aged 2, underwent an operation to correct a condition of Patent Ductus Arteriosis. On January 11, 1984 he was admitted to St Bartholomews Hospital suffering from acute croup. The following morning his condition had deteriorated and he was having difficulty in breathing. On January 13 he appeared to be cyanosed although he recovered quickly and was discharged on 15 January.

That night Patrick was restless. He was readmitted to hospital the next day. His respiration rate was high and there was a recession in his breathing. This increased during the evening. The following morning Patrick was much better although he still had reduced air entry on one side. The Consultant examined him but apparently Patrick's condition did not attract attention.

At 12.40 pm a Sister Sallabank, concerned about Patrick's condition, asked the Senior Paediatric Registrar, Dr Horn, to see Patrick straight away. The Doctor said she would attend as soon as possible. When the Sister returned to Patrick he was walking about again with a pink colour. She left a nurse to stay with him.

At about 2 pm the nurse called her back to Patrick. Sister Sallabank saw that he was in the same difficulty as at 12.40 pm and telephoned Dr Horn who had not yet arrived. Dr Horn said she was on afternoon clinic and had asked the Senior Houseman, Dr Rodgers, to come in her place. Whilst talking to Dr Horn the nurse told the Sister that Patrick was now pink again, and so she told Dr Horn about the two episodes. Dr Rodgers did not attend Patrick because her "bleeper" was not working because of flat batteries.

At about 2.30 pm there was a change in Patrick's condition. Although he retained his colour he became agitated and began to cry, the nurse left a colleague with Patrick and reported to Sister Sallabank who told her to "bleep" the doctors again. While on the telephone the emergency buzzer was set off by the nurse left with Patrick, a call was sent out for the cardiac arrest team.

Patrick had collapsed because he was unable to breathe. He suffered a cardiac arrest, sustaining severe brain damage as a result. The explanation of the two attacks accepted by the trial Judge as probably was that, on each occasion, a gobbet of mucus obstructed his bronchial air passages and it impaired his ability to breathe until removed by coughing.

The Plaintiffs claimed against the Defendant Health Authority alleging medical negligence in that Dr Horn or another doctor on her behalf failed to attend Patrick on either of the occasions that Sister Sallabank telephoned asking her to come, that is to say after the two episodes at 12.40 pm and at 2 pm respectively.

It was agreed by both parties that it was negligence on the part of Dr Horn not to have attended Patrick when summoned in the terms used by the Sister.

The Plaintiff's case supported by the opinion of five doctors called on their behalf, was that after the first episode suffered by Patrick and certainly the second he should have been intubated which would have provided a supply of oxygen to him in the event of his respiratory tubes being entirely blocked.

The Defendant's experts rejected that suggestion testifying that intubation of a child of Patrick's age which would involve anaesthizing him and on the evidence of his condition in the case such a course was not necessary or desirable.

In approaching this issue the Defendants conceded that if Patrick had been intubated at any time prior to the cardiac arrest at 2.35 pm that would, as a matter of probability, have averted his collapse and/or any serious consequence arising from it.

Accordingly, the issue between the parties was what Dr Horn would have done had she attended in response to either of the sister's calls. If Dr Horn would have intubated, then the Plaintfiff succeeded, whether or not that was a course which all reasonably competent practitioners would have followed. If however Dr Horn

would not have intubated, then the Plaintfiff could only succeed if such failure was contrary to accepted medical practise.

Faced with a division of expert opinion, the learned Judge held that it had not been proved that any competent doctor, in the position of Dr Horn, would have intubated Patrick before his collapse.

Held by Farquharson and Dillon LJJ (Simon Brown LJ dissenting) that the appeal would be dismissed because

(1) The Judge was dealing with a breach of duty which consisted of an omission, and it was necessary for him to decide what the course of events would have followed had the duty been discharged;

(2) Accordingly even though he was dealing with causation the learned Judge was in those circumstances bound to rely on the evidence of the experts available to him;

(3) Whether Dr Horn's failure to appear would have made any different in the event depended upon what she would have done had she been present; it was for the Plaintiff's to prove that she would probably have intubated, and further that if she did not do so her failure was contrary to accepted medical practice;

(4) The learned Judge was not equipped to resolve those issues without the assistance of expert evidence;

Held, by Simon Brown LJ dissenting that the Appeal should be allowed because

(1) The test in *Maynard v West Midland Regional Health Authority* [1984] 1 WLR 634 which was forged specifically in the context of liability for negligence, not of causation;

(2) Quite different considerations came into play when the issue was one of causation, arising in the particular way that issue arose in the present case;

(3) The plain fact was that no doctor ever arrived at Patrick's bedside. It was that want of attention that constituted the undoubted negligence in the case;

(4) The issue of causation could have been formulated: had Dr Horn or a suitable substitute attended when called, would Patrick on the balance of probability have been intubated? That clearly was not a question which in the event the Judge addressed;

(5) (a) having considered Dr Horn's evidence as to what she would have done had she attended, the Judge found that she would probably not have intubated;

(b) that involved a wrong approach in that

(i) It was far from clear that it was Dr Horn, the Senior Paediatric Registrar, who would have attended. On the evidence, it might well have been Dr Rodgers, the Senior House Officer;

(ii) It would seem unsatisfactory to place much reliance upon any doctor's evidence in those circumstances as to what he or she would have done had they complied with their duty to attend (or arranged for someone else to attend) a patient;

(c) The question was what would an attending doctor probably have done? And given that the doctor would probably do that which she or he should do, the question became: what should a doctor do in such circumstances;

(d) The answer to that question was clearly that a doctor should have intubated:

(6) The very purpose of the system calling for the Senior Paediatric Registrar was to ensure that whatever needed to be done for Patrick was done; the initial assumption must surely be that the doctor's attendance would have been of some use;

(7) It was the indisputable fact that intubation alone would have benefitted the child;

(8) On the entire history of the case as it would present itself to an attending doctor, it could be inferred that whichever doctor had attended would have acted in the one way which would have been effective.

Comment

[1] The majority applied the Maynard Test – if there is a respectable body of opinion in favour of the Defendant, even if there is another such body of expert opinion to the contrary, that exonerates the Defendant: The Court is not entitled to prefer one opinion before the other, and in consequence the Plaintiff inevitably fails to establish his case. But does this rule apply to the finding of causation as well as negligence?

[2] Simon Brown LJ, in a dissenting judgment, was not prepared to accept this wholesale application of the Bolam principle where the issue, as here, was one of causation rather than negligence; in his view, when probability of the risk to patient being avoided by the alternative cause of action contended for by the Plaintfiff. To put it another way, Bolam is too simplistic an approach when it comes to causation: the decision of the Court cannot be allowed to depend on the resolution of the conflicting views of doctors in a way which is heavily weighted against the Plaintfiff in every case, as would be the result of that approach; medical paternalism must give way to judgment of the Court, whose function is very largely to draw inferences from primary facts.

[3] The pertussis cases, *Loveday v Renton* [1991] 1 Med LR 117 here, and *Rothwell v Raes* (1988) 54 DLR 4th 193 (Ont HC) in Ontario, required the Court to assess a mass of conflicting scientific evidence, which the Court had to take into account and apply to the primary facts; in each case the Court decided the issue of causation on "possibility" as opposed to "probability". This approach recognises that causation may well have to be proved without resolving the conflicting expert evidence, but rather by adopting a *"robust and pragmatic approach to the primary facts of the case"*. (Lord Bridge in *Wilsher v Essex Area Health Authority* [1987] QB 1090D.

[4] As early as 1968 Sachs J put a gloss on the Bolam test in *Hucks v Cole* [1993] 4 Med LR 393 by placing a duty on the Court to be "vigilant" in accepting medical evidence to ensure that it was valid by modern standards. On a different aspect of negligence, the giving of information, Bolam was rejected by the New South Wales Supreme Court in *Rodgers v Whittaker* [1992] 3 Med LR on a different aspect of negligence, (where the Court treated the principle as one of law rather than evidence).

[5] On the long view, Simon Brown LJ, although not giving any view on the status of Bolam, was facing the right way. But his approach was not new: it was consistent with that expressed by Lord Bridge in *Sidaway v Board of Governors of Bethlem Royal Hospital and the Maudsley Hospital* [1985] 1 All ER at page 662-63. And followed thereafter.

[6] All these cases represent applications, even explanations, of Bolam; there is no question of wholesale rejection of the principle by English Law nor is it necessary to do so in order to rectify some imagined imbalance in the Court's treatment of medical and other expert evidence. If there be any undue deferrence for medical evidence, it must be due to judicial tendencies, for it is certainly not encouraged by the leading cases, especially Sidaway and by the words of Lord Edmund Davies in 1980 when considering Bolam: *"Doctors and surgeons fall into no special category"* going on to approve the words of the original Bolam judgment.

[7] There is also an interesting aspect in the judgment of Dillon LJ where he said as follows:

"In my judgment, the Court could only adopt the approach of Sachs LJ and reject medical opinion on the ground that the reasons of one group of doctors do not really stand up to analysis, if the Court, fully conscious of its own lack of medical knowledge and clinical experience was nonetheless satisfied that the views of that group of doctors were Wednesbury unreasonable, i.e. views such as no reasonable body of doctors could have held. But in my judgment that would be an impossibly strong thing to say of the honest views of experts of the distinction of Dr Dinwiddie and Dr Robertson, in the present case."

"The matter is one of clincial judgment. I am unable to regard the view of Dr Dinwiddie, and for that matter Dr Robertson, as Wednesbury unreasonable. Therefore, I cannot disregard their views or prefer the views of the witnesses who would have intubated Patrick. Therefore it must follow, in accordance with the authorities cited above, that causation of damage has not been proved, and Patrick's claim for damages must fail."

[8] The application by Dillon LJ of the public law test of "Wednesbury unreasonableness" is a new and interesting test to be applied to the views of medical experts. The answer to this is probably as follows:

(a) The Judge is sitting as a lay jury and is exercising a judgment on the facts, not on the law. There is no law which says without more ado that a Judge cannot substitute is own views for those of the medical experts.

(b) It has to be recognised that given experts whose reputations are high, it is no easy matter for a Judge to ride rough shod over opinions expressed. Hence the "control" that a Judge should not feel justified in so ruling unless he can demonstrate "Wednesbury unreasonableness".

(c) However in his dissenting judgment, Simon Brown LJ was able to demonstrate why the expert evidence for the defence should be rejected on a "Wednesbury" basis.

(d) The Judicial Committee of the Privy Council had no difficulty in deciding that the general practice of solicitors in Hong Kong in respect of mortgage transactions was a negligent practice cf. *Edward Wong Finance Co Ltd v Johnson Stokes & Master* [1984] 1 AC 296, Lord Brightman agreed with the dissenting judgment in Hong Kong of Li J.A., who said:

"The fact that practically all her fellow solicitors adopted this practice is not conclusive evidence that it is prudent ... acting in accordance with the general practice she took a foreseeable risk for her client while there was not necessity to do so. The fact that other solicitors did the same did not make the risk less apparent or unreal."

The third case which we will consider is *White v Jones, C.A.* [1993] 3 WLR 730.

Facts:

In March 1986 in consequence of a family quarrel, a testator executed a Will disinheriting the Plaintiffs, his two daughters. After a reconciliation he resolved to make a new Will which was to include legacies of £9,000 to each daughter and on 17 July 1986 the Second Defendants his solicitors, received a letter signed by him instructing them to prepare a Will to that effect. The First Defendant, a legal executive employed by the Second Defendants, did nothing to implement those instructions until 16 August, when he dictated an internal office memorandum on the matter. Thereafter, little progress was made with preparation of the Will and on 14 September the testator died without the new Will having been executed, the

March 1986 Will thus remaining unrevoked. The judge dismissed a claim in negligence by the Plaintiffs, holding that, although the Defendants were in breach of their professional duty to the testator, they owed no duty of care to the Plaintiff, and that the damage was in any event too speculative and uncertain in extent to be recoverable.

On appeal by the Plaintiffs:–

Held: Allowing the appeal that it was reasonably foreseeable that the failure of a solicitor to prepare a Will as instructed by a client would cause the intended beneficiaries financial loss which could not be recompensed by the payment of damages to the clients' estate; that although a solicitors paramount duty of care was to his client and normally excluded any duty to third parties, acceptance of instructions to prepare a Will created a special relationship between the solicitor and the intended beneficiaries in respect of which it was fair, just and reasonable that the solicitor should be under a duty of care to the intended beneficiaries because there would otherwise be no sanction for the solicitors breach of duty, imposed on him by law, to exercise due professional skill and care in carrying out those instructions:

That the judge was entitled on the evidence to find that the Defendants were in breach of their professional duty; that, since the testators clear intention to benefit the Plaintiffs could be inferred from the evidence, the damage claimed was not too speculative or uncertain in extent to be recoverable; and that, accordingly, the judge's order would be set aside and judgment would be entered for each Plaintiff in the sum of £9,000. *Ross v Caunters* [1980] Ch. 297 approved. *Caparo Industries plc v Dickman* [1990] 2 AC 605 (H.L.) applied.

At page 733 Sir Donald Nicholls B.-C. said as follows:–

> *"A solicitor accepts instructions to prepare a Will for a client. In breach of his professional duty to his client he is dilatory, and the client dies before the Will has been prepared or signed. Can the solicitor be liable in damages to the disappointed prospective beneficiary?*
> *In Ross v Caunters [1980] Ch. 297 Sir Robert Megarry V.-C. decided that he can. The issue on this appeal is whether that case is still good law since the House of Lords' decision in Murphy v Brentwood District Council [1991] 1 AC 398. The point is not easy. Even before Murphy v Brentwood District Council,*

Courts in other jurisdictions had reached opposite conclusions. In Garthside v Sheffield, Young & Ellis [1983] NZLR 37 the New Zealand Court of Appeal, presided over by Cooke J., applied Ross v Caunters. The contrary course was taken by the Supreme Court of Victoria in Seale v Perry [1982] VR 193 and in Scotland by Lord Weir in Weir v J.M. Hodge & Son, 1990 SLT 266. In this country the subject is being considered by the Law Commission as part of the wider topic of the law relating to contracts for the benefit of third parties: see the Law Commission Consulting Paper No. 121, Privity of Contract: Contracts for the benefit of Third Parties (1991), paragraphs 3.12-3.17 and 5.40-5.44."

Under the heading *"Foreseeability"* Sir Donald Nicholls said at page 737 as follows:

The House of Lord's decision in Caparo Industries plc v Dickman [1990] 2 AC 605 established that, for there to be a duty to take reasonable care to avoid causing damage of a particular type to a particular person or class of persons, three factors must coalesce: foreseeability of damage, a close and direct relationship characterised by the law as "proximity" or "neighbourhood," and the situation must be one where it is fair, just and reasonable that the law should impose the duty of the given scope upon the one party for the benefit of the other. In the present case there is no difficulty over the first of the three headings. A solicitor must foresee that if he fails to prepare a will as instructed by his client, and arrange for it to be duty executed, the disappointed beneficiaries will suffer financial loss. After the client's death nothing can be done to remedy the solicitor's negligence. The estate will pass to those entitled under any valid unrevoked will and, subject thereto, to those entitled on an intestacy. In the nature of things it will then be too late for the solicitor to prepare a will. Furthermore the solicitor must foresee that the payment of damages to his deceased client's estate would achieve nothing. This would not provide a means of recompensing the client for the solicitor's professional negligence. Any money paid to the estate would simply pass under the very testamentary dispositions which fail to carry out the testators instructions. Money paid to the estate would not go to the disappointed beneficiaries.

Special relationship

I turn to consider whether there is between a solicitor and intended beneficiary a relationship of proximity and whether it is fair, just and reasonable that there

should be a liability to compensate the intended beneficiary. I shall consider these two headings together, because there is a real demarcation line between them. They shade into each other. Both involve value judgments. Under the third heading the Court makes its assessment of the requirements of fairness, justice and reasonableness. Likewise, although less obviously, built into the concept of proximity or neighbourhood is an assessment by the Court that in a given relationship there "ought" to be liability for negligence. These two headings are not more than two labels under which the Court examines the pros and cons of imposing liability in negligence in a particular type of case. That is well illustrated in the instant case where some of the points which fall for consideration could happily be considered under either heading."...

"So one asks oneself: Is the position different regarding instructions for the preparation and execution of a Will? If so why? After all, such instructions are no more than one particular type of instruction given by clients to a solicitor. Why should a solicitor be liable to a third party in such case but not in others? These are pertinent questions. Before attempting to answer them I must mention another point also urged by Mr Matheson. He submitted that it would not be fair or reasonable to impose liability on the solicitor in favour of the intended beneficiary, because that would be to give the beneficiary the benefit of a claim for professional negligence for services under a contract not made by him and in respect of which he has made no payment.

I think it must be frankly recognised that if the Court holds a solicitor liable to an intended beneficiary, what the Court is doing is fashioning an effective remedy for solicitors breach of his professional duty to his client. I do not shrink from this. If this sounds heretical to some, the observation of Deane J. in the High Court of Australia in Hawkins v Clayton (1988) 62 ALJR 240, 259, in a case concerned with a solicitor's liability to make reasonable efforts to locate the executor named in a will held by him in safe custody when he learnt of the testator's death.

> *"The law of contract and the law of tort are, in a modern context, properly to be seen as but two of a number of imprecise divisions, for the purposeof classification, of a general body of rules constituting one coherent system of law."*

Here, a coherent system of law demands that there should be an effective

remedy against the solicitor. The law of contract is unable to provide the remedy. In some cases where, the purpose of a contract is to confer a benefit on a third party, the purpose can be achieved in the event of a breach, by the Court, making an order compelling the party in breach specifically to perform his obligation to make a payment or confer some other benefit on the third party: see the Beswick v Beswick [1968] AC 50H. That route is not available here. The solicitor did not agree to confer a benefit on the intended beneficiary. He agreed to take steps to enable the client to do so. Specific performance of that agreement is no longer possible once the client has died. I have, indeed, considered whether a remedy for breach of contract could be shaped whereby, the client having lost the opportunity to make a gift to the intended beneficiary, (1) his estate should be regarded as having lost a sum equal to the amount of the intended gift, and (2) the executors should hold that sum, when recovered from the solicitor, upon trust for the intended beneficiary."

"In the end I can see no need for the law to grapple with the difficulties raised by this and other possibilities when there is to hand a simple remedy in negligence. Instructions to prepare a will are different from other instructions to a solicitor, the failure to carry them out properly results in the clients purpose being thwarted, but leaves the clients estate with no effective remedy. There is good reason why the solicitor should be liable to a third party in this very special situation. If the mistake, such as faulty witnessing is discovered in the clients lifetime, the third party will suffer no loss. The cost of preparing and signing a new will would be recoverable by the client from the solicitor. But it is different if the client dies at a time when, because of a breach of solicitors duty the will for whose preparation the solicitor was responsible has not been duly prepared and signed. Then it is eminently fair, just and reasonable that the solicitor should be liable in damages to the intended beneficiary. Otherwise there is no sanction in respect of the solicitor's breach of his professional duty. Thus there is a special relationship between the solicitor and intended beneficiary which should attract a liability if the solicitor is negligent."

Later on at page 742 Sir Donald Nicholls says as follows:

"In my view Ross & Caunters [1980] Ch 297 is still good law. I venture to echo Sir Robert Megarry V.-C.'s prophecy p. 321, that wherever the bounds of negligence become finally drawn, they will be wide enough to give an affirmative answer to the liability question."

Steyn LJ said at p. 754 at

"But I come back to the critical point that a coherent law of obligations ought not to render a solicitor's undoubted responsibility to his client wholly ineffectual. And there is a broader consideration which has been well expressed by Cooke J. in Gartside v Sheffield, Young & Ellis [1983] NZLR 37, 43:

> *"To deny an effective remedy in a plain case would seem simply to imply a refusal to acknowledge the solicitors professional role in the community. In practice the public relies on solicitors (or statutory officers with similar functions) to prepare effective Wills. It would be a failure of the legal system not to insist on some practical responsibility."*

Cumulatively, these factors suggest that prima facie the case for the recognition of a duty care is made out.

Then again at p. 755 c

"While I recognise that there may be difficult problems to be considered in future, it does not seem to me that Ross v Caunters [1980] Ch. 297 created an uncontrollable principle. In my view the requirements of foreseeability, proximity and justice, which are needed to establish a duty, together with the concepts of breach, causation, loss and remoteness, are adequate to contain liability of the Ross v Caunters type within acceptable limits. And in my judgment the recognition of a duty in care in such a case, which involves very special considerations, will not assist arguments on the recoverability of other heads of economic loss, I would rule that Ross v Caunters was correctly decided."

On 19 July 1993 the Appeal Committee of the House of Lords allowed a petition by the Defendants for leave to appeal on condition that the Defendants did not seek their costs in the House; that they paid the Plaintiffs' costs in the House in any event; and that they did not seek to disturb the order for costs made in the Court of Appeal. What this space;