

A LAWYER'S DUTY TO THIRD PARTIES

In Bermuda a claim by a client against a lawyer¹ will arise in contract rather than in negligence. That is because in Bermuda there is at present no concurrent liability in contract and in negligence. But a lawyer may owe a duty in negligence to someone other than a client (a "third party") in exceptional circumstances.² That duty may extend to a person for whom the lawyer undertakes to act professionally without reward and to another specifically in the lawyer's contemplation, such as the beneficiaries under a will.

The general rule is that a lawyer owes no duty to a third party, whether to take care in one's work or to disclose information. The leading authority in England and Wales is White v. Jones,³ which case has been consistently followed in Bermuda.⁴ That was a case where lawyers were instructed to draw a will (or codicil) for a client in order to leave a sum of money for the client's daughters. The lawyer negligently failed to have the new will reviewed or executed until after the death of the client. The client's daughters, who would have benefitted under the intended will, sued the lawyers for negligence in failing to draw the will within a reasonable time, thus depriving them of the intended gifts.

Lord Goff of Chieveley, giving the leading speech in the House of Lords, summarised the conceptual difficulties of a lawyer (solicitor) owing duties to third parties (as well as the client) in the following way:⁵

'First, the general rule is well established that a solicitor acting on behalf of a client owes a duty of care only to his client. The relationship between a solicitor and his client is nearly always contractual, and the scope of the solicitor's duties will be set by the terms of his retainer. ... But, when a solicitor is performing his duties to his client, he will generally owe no duty of care to third

¹ For the purposes of this article there is no distinction to be drawn between the use of the words "lawyer", "solicitor" and "attorney". In Bermuda all lawyers are known as attorneys.

² A lawyer's duty is primarily owed to the client, subject to certain narrowly defined exceptions.

³ [1995] 2 AC 207.

⁴ See, e.g. Moulder v. Cox Hallett Wilkinson (a firm) et al [2010] Bda LR 78 (Supreme Court); Benjamin v. KPMG Bermuda (a firm) and KPMG Barbados (a firm) [2007] Bda LR 22.

⁵ *Ibid.* at 698j-699f.

parties. Accordingly, as Sir Donald Nicholls V-C pointed out in the present case, a solicitor acting for a seller of land does not generally owe a duty of care to the buyer: see *Gran Gelato Ltd v. Richcliff (Group) Ltd* [1992] Ch 560. Nor, as a general rule, does a solicitor acting for a party in adversarial litigation owe a duty of care to that party's opponent: see *Al-Kandari v. J.R. Brown & Co* [1988] QB 665, 672, per Lord Donaldson of Lymington M.R. Further it has been held that a solicitor advising a client about a proposed dealing with his property in his lifetime owes no duty of care to a prospective beneficiary under the client's then will who may be prejudicially affected: see *Clarke v. Bruce Lance & Co* [1988] 1 WLR 881.'

It is true to say that the House of Lords did (by a bare majority) go on to find that a duty of care existed to the appellant in White v. Jones, but that duty was owed to the plaintiffs *as the intended beneficiaries* under the will of the lawyer's client, not a stranger to the transaction in question. As Lord Goff observed:⁶

'Even so it seems to me that it is open to your Lordships' House ... to fashion a remedy to fill a lacuna in the law and so prevent the injustice which would otherwise occur on the facts of cases such as the present ... The present case is, if anything, *a fortiori*, since the nature of the transaction was such that, if the solicitors were negligent and their negligence did not come to light until after the death of the testator, there would be no remedy for the ensuing loss unless the intended beneficiary could claim. In my opinion, therefore, your Lordships' House should in cases such as these extend to the intended beneficiary a remedy under the *Hedley Byrne* principle by holding that the assumption of responsibility by the solicitor towards his client should be held in law to extend to the intended beneficiary who (as the solicitor can reasonably foresee) may, as a result of the solicitor's negligence, be deprived of his intended legacy in circumstances in which neither the testator nor his estate will have a remedy against the solicitor. Such liability will not of course arise in cases in which the defect in the will comes to light before the death of the testator, and the

⁶ *Ibid.* at 709 j.

testator either leaves the will as it is or otherwise continues to exclude the previously intended beneficiary from the relevant'

It seems clear from the speech of Lord Goff, with whom Lord Browne-Wilkinson and Lord Nolan agreed, that the decision was intended to address a lacuna in the law whereby neither the estate of the client nor the intended beneficiaries of the client's will would have a cause of action against a person (the solicitor) who was clearly negligent. The decision was in favour of the intended beneficiaries of the client's instructions, *identifiable individuals who were in the actual contemplation* of the negligent solicitor; not in favour of a stranger to the transaction.

Lord Nolan was careful to urge caution. He put the matter this way:⁷

'Here, as in *Merrett*, it would be highly artificial to treat the appellants' responsibility to Mr. Barratt in contract as excluding their responsibility to the respondents under the law of tort. The appellants were acting in the role of family solicitors. As is commonly the case the contract was with the head of the family, but it would be astonishing if, as a result, they owed a duty of care to him alone, to the exclusion of the other members of the family. In the particular circumstances of the case, the degree of proximity to the plaintiffs could hardly have been closer. Carol White, the first plaintiff, had spoken to Mr. Jones about the revised wishes of Mr. Barratt and the letter setting out those wishes was written for Mr. Barratt by Mr. Heath, the husband of the second plaintiff. It would be absurd to suggest that they placed no reliance upon the appellants to carry out the instructions given to them. I do not say that other potential legatees, less intimately concerned with the carrying out of the testator's wishes, would necessarily be deprived of a remedy: I simply point to the facts as being relevant to the pragmatic, case-by-case approach which the law now adopts towards negligence claims.'

The general law, as it has been developed in relation to whom a duty of care is

⁷ *Ibid.* at 720.

owed, has been set out authoritatively in Caparo v. Dickman.⁸ The general law may be summarised as follows:

- 1 If an advisor giving advice or information is fully aware of the nature of the transaction which another has in mind; and
- 2 He knows that his advice or information will be communicated to a specific person or group of persons directly or indirectly; and
- 3 He knows that it is very likely that that other person or those other people will rely on that advice or information in deciding whether or not to engage in a transaction in contemplation

then the advisor can be expected that other or those others to rely on his advice or information for the purpose for which it was proffered and he will be liable to that other or those others if his advice or information is negligently prepared.

Examples of where lawyers have been held liable to third parties include in relation to the purchase of land⁹ and drawing of a will,¹⁰ but it should not be assumed that that list is exhaustive or that new areas, not previously judicially considered, are closed. The law is ever evolving in relation to negligence.

This principle of law does not impose liability on a lawyer to all and sundry for things done or said in the course of his work, but it does mean that an advisor should be careful not only in relation to his client but also to those who he knows are intended to benefit from a specific transaction.

If the law protected people outside the advisor's specific contemplation, an advisor could find that he is exposed to '*liability in an indeterminate amount for an indeterminate time to an indeterminate class*',¹¹ But that is not the law in England and Wales,¹² and it is not the law in Bermuda.¹³

⁸ [1990] 2 A.C. 605.

⁹ Doran v. Delaney [1998] 2 IR 61; Doran v. Delaney (No 2) [1999] 1 IR 303.

¹⁰ Finlay v. Murtagh [1979] IR 249; Wall v. Hegarty [1980] ILRM 124; White v. Jones [1995] 2 AC 207.

¹¹ Ultramares Corporation v. Touche 74 A.L.R. 1139, *per* Cardozo J.

¹² See, *e.g.*, Caparo Industries plc v. Dickman [1990] 1 All ER 568.

This article addresses general principles only and is not intended to be a comprehensive exposition of the subject. Specific legal advice should be obtained in respect of any particular issue in Bermuda.

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¹³ See, e.g. Benjamin v. KPMG Bermuda (a firm) and KPMG Barbados (a firm) [2007] Bda LR 22.