

THE CANADIAN BAR REVIEW

LA REVUE DU BARREAU CANADIEN

Vol. 62

December 1984 Décembre

No. 4

SOLICITOR'S LIABILITY FOR FAILURE TO SUBSTANTIATE TESTAMENTARY CAPACITY

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It now appears to be the law that a lawyer whose negligence results in a will being invalid is liable in tort to the disappointed beneficiaries. One of the major obligations imposed on a lawyer preparing a will is that of substantiating the testator's capacity. This obligation is particularly onerous in cases involving suspicious circumstances. If a lawyer fails to carry out this obligation a will may be held to be invalid because the lawyer's neglect deprives the proponents of a will of the evidence which might have proved capacity. The will may be declared invalid even though the testator was competent. In such circumstances the negligent lawyer may be liable to the disappointed beneficiaries. Moreover, it may be argued that, given that the lawyer failed in his duty to substantiate capacity, the courts will impose on him the onus of showing that his neglect was not the cause of the beneficiary's loss. This will be a difficult onus for the lawyer to discharge.

Il semble maintenant reconnu en droit qu'un avocat dont la négligence entraîne la nullité d'un testament peut être redevable aux bénéficiaires lésés de dommages et intérêts. L'un des devoirs principaux dont doit s'acquitter l'avocat qui prépare un testament est de s'assurer de la capacité mentale du testateur. Cette responsabilité est particulièrement lourde quand il s'agit de cas aux circonstances suspectes. Si un avocat manque à ce devoir, il peut arriver que le testament soit déclaré nul, même si le testateur était compétent, la négligence de l'avocat privant les intéressés d'éléments nécessaires à prouver la capacité mentale du testateur. C'est dans ce cas-là que l'avocat négligent peut devenir redevable aux bénéficiaires lésés. On peut aller plus loin et plaider que si l'avocat ne s'assure pas de la capacité mentale du testateur le tribunal doit rejeter sur lui la responsabilité de prouver que sa négligence n'a pas été la cause des pertes du bénéficiaire. C'est là une responsabilité dont il serait difficile à l'avocat de s'acquitter.

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Introduction

Recent developments in the law of tort suggest that solicitors will no longer be immune from claims of beneficiaries arising from defective wills which have been negligently prepared or executed. These developments have implications for the solicitor in respect to the manner in which he discharges his duty to substantiate his client's testamentary capacity. In recent years, especially in cases involving suspicious circumstances, solicitors have been criticized repeatedly by judges for failing to discharge this duty properly. It will be suggested in this article that breach of the duty to substantiate capacity can cause a will to be invalidated on the ground of incapacity even though the testator may in fact have been competent. It will also be suggested that where this occurs the solicitor is liable for the loss suffered by the disappointed beneficiary. Moreover, the difficulties which the beneficiary would encounter in relation to traditional principles of proof of causation can be overcome. The solicitor who breaches his duty to substantiate capacity will be presumed to have caused the loss complained of and, it follows, the onus will be on the solicitor to prove that his breach of duty did not cause the will to fail. This onus will be an extremely difficult one for the solicitor to discharge.

In discussing the potential liability of solicitors to beneficiaries for failing to ascertain and document testamentary capacity, this article will explore:

- (1) The arguments for and against extending the solicitor's duty of care to beneficiaries of wills;
- (2) The nature, incidence and significance of the solicitor's failure to discharge properly his duty to substantiate capacity; and
- (3) The ability of a disappointed beneficiary to establish that his loss was caused by the solicitor's breach of duty.

I. The Solicitor's Duty of Care to Beneficiaries

A. The Rise of A Duty of Care

This section of the article discusses whether a solicitor engaged in the preparation of a will owes a duty of care to the intended beneficiaries. At first sight it may be thought that detailed discussion of this issue is unnecessary in light of recent case law, particularly the Canadian case of *Whittingham v. Crease & Co.*¹ and the English case of *Ross v. Caunters*.² in which such a duty of care was held to exist. However, two reasons justify a re-examination of the issue. First, as will be explained below, the decision in *Whittingham* is of little assistance in determining whether, as a general rule, a solicitor owes a duty of care to the intended beneficiary of a

¹ (1978), 88 D.L.R. (3d) 353, [1978] 5 W.W.R. 45 (B.C.S.C.).

² [1980] Ch. 297, [1979] 3 All E.R. 580 (Ch.D.).

will. Secondly, the decision of Megarry V.-C. in *Ross v. Caunters* has not met with uniform approval in other Commonwealth jurisdictions,³ and has been considered in only one Canadian case.⁴ Hence, when this issue next comes before the Canadian courts for determination, a thorough examination of the competing arguments will be necessary.

The plaintiff in *Whittingham* was the major beneficiary under his father's will, the will having been prepared by the defendant solicitor. At the execution of the will, in the presence of the plaintiff, the defendant requested the plaintiff's wife to act as one of the witnesses. She obliged, thereby rendering the bequest to the plaintiff invalid under section 12(1) of the Wills Act.⁵ In the subsequent tort action, Aikins J., of the British Columbia Supreme Court, held that the solicitor owed a duty of care to the plaintiff and that he had breached this duty in his conduct of the execution of the will.

Whittingham has been described as a "milestone decision",⁶ justifiably so in the sense that it was the first Commonwealth decision to impose tort liability in the present context.⁷ However, it is important to understand the legal basis of the decision. Aikins J. held that, since the plaintiff was present during the execution of the will, the defendant's request that the plaintiff's wife act as a witness constituted an implied representation that her doing so would not adversely affect the validity of the will. In the opinion of Aikins J. this implied representation to the plaintiff brought the case within the ambit of *Hedley Byrne v. Heller*,⁸ thereby imposing a duty

³ *Ross v. Caunters* was expressly rejected in *Seale v. Perry*, [1982] V.R. 193 (Full Ct.) and at first instance in *Gartside v. Sheffield, Young & Ellis*, [1981] 2 N.Z.L.R. 547 (H.C.), the latter subsequently being reversed by the Court of Appeal, [1983] N.Z.L.R. 37. It was followed in *Watts v. Public Trustee for Western Australia*, [1980] W.A.R. 97 (W.A.S.C.) and received implied approval in *Sutherland v. Public Trustee*, [1980] 2 N.Z.L.R. 536 (S.C.). See also the Irish case of *Wall v. Hegarty*, unreported, June 1980, referred to in J.W. Salmond and R.F.V. Heuston, *Law of Torts* (18th ed., 1981), p. 10; and for a survey of Australian and English decisions P. Sutherland, *Solicitor's Liability for Negligence in Australia and the United Kingdom* (1984), 33 Int. and Comp. L.Q. 471.

⁴ *Hodgson v. Evans & Rice*, decided in the Alberta Court of Queen's Bench on June 27, 1983, Chrumka J. (unreported); aff'd by the Alberta Court of Appeal February 16, 1984 (unreported). See also *Deyong v. Weeks* (1983), 43 A.R. 342 (Alta. Q.B.).

⁵ R.S.B.C. 1960, c. 408, now R.S.B.C. 1979, c. 434, s. 11(1).

⁶ A.B. Rosenberg, Annotation (1978), 6 C.C.L.T. 2.

⁷ In *Hall v. Meyrick*, [1957] 2 Q.B. 455, [1957] 1 All E.R. 208 (Q.B.D.) liability was imposed by Ashworth J. (although reversed on procedural grounds by the Court of Appeal, [1957] 1 Q.B. 455, [1957] 2 All E.R. 722) on a solicitor who had prepared wills for the plaintiff and her future husband. The solicitor negligently failed to advise them that their subsequent marriage would revoke the wills. On her husband's death the plaintiff received much less on intestacy than she would have under her husband's will. It should be noted, however, that Ashworth J. held that the basis of the plaintiff's claim was breach of contract rather than tort.

⁸ [1964] A.C. 465, [1963] 2 All E.R. 575 (H.L.).

of care on the defendant. Of particular importance is the following caveat by Aikins J.:⁹

I wish to make it clear that my conclusion rests on the particular facts of this case and that I make no pronouncement on the more general issue of the liability of a solicitor to a third party beneficiary on the ground of negligence in the preparation of a will.

It is outside the scope of this article to discuss the correctness of the *Whittingham* decision, in particular its treatment of the "reliance" requirement of *Hedley Byrne*.¹⁰ It is sufficient to note that the decision is of narrow application, applying only to situations (somewhat rare in practice) in which the solicitor can be regarded as having made a representation to the beneficiary. The decision does not purport to address the wider issue of whether, outside the context of *Hedley Byrne*, a solicitor owes a duty of care to the beneficiary.

One year after *Whittingham* the wider issue was dealt with by Megarry V.-C. in *Ross v. Caunters*.¹¹ The facts were similar to those in *Whittingham* except that neither the solicitor nor the beneficiary was present at the execution of the will. In sending the testator instructions on how to execute the will, the solicitor failed to advise him that the spouse of a beneficiary should not act as a witness, nor did he notice, when the will was returned to him, that the plaintiff's husband had in fact acted in this capacity. The bequest to the plaintiff was consequently held to be invalid, although ironically this aspect of the case is somewhat questionable.¹²

⁹ *Supra*, footnote 1, at pp. 374 (D.L.R.), 70 (W.W.R.). It is of interest to note that the *Whittingham* decision was discussed in much broader terms in *Tracy v. Atkins* (1979), 105 D.L.R. (3d) 632, at p. 638 (B.C.C.A.).

¹⁰ For a criticism of this aspect of the *Whittingham* decision see L.N. Klar, A Comment on *Whittingham v. Crease* (1979), 6 C.C.L.T. 311. Aikins J.'s observation (*supra*, footnote 1, at pp. 373 (D.L.R.), 69 (W.W.R.)) that he was unable to find any case in which *Hedley Byrne* had been applied in the absence of reliance by the plaintiff, overlooks cases such as *Ministry of Housing v. Sharp*, [1970] 2 Q.B. 223, [1969] 3 All E.R. 225 (C.A.) and *Dutton v. Bognor Regis U.D.C.*, [1972] 1 Q.B. 373, [1972] 1 All E.R. 462 (C.A.); see also *Midland Bank v. Hett, Stubbs & Kemp*, [1979] Ch. 384, [1979] 3 All E.R. 571 (Ch.D.).

¹¹ *Supra*, footnote 2. For a detailed account of the *Ross* decision see B.L. Rawlins, *Liability of a Lawyer for Negligence in the Drafting and Execution of a Will* (1983), 6 Estates & Trusts Q. 117.

¹² Because the will under which the plaintiff's bequest was disqualified—the 1974 will—revoked a previous will in which the plaintiff was given a fractional share of the residuary estate—the 1972 will—it seems possible to argue that the doctrine of dependant relative revocation could have been utilized to preserve the plaintiff's status as a beneficiary under the 1972 will. If it could be said that the revocation of the gift to the plaintiff under the 1972 will was conditional on the effective substitution of a gift to her in the 1974 will, the doctrine would apply. While no such intention may have been evinced by the 1974 will, courts, with a view to maximizing the true wishes of testators, have been prepared to fictionalize the intention to revoke conditionally. As the doctrine is wholly artificial there is no reason in principle why it could not have been stretched to cover the facts in *Ross v. Caunters*. The fact that the 1974 will may have included a clause expressly revoking the 1972 will would have been no bar to the application of the doctrine. See *Ward v. Van der*

It is of interest to note that, prior to his elevation to the Bench, Megarry V.-C. had occasion to discuss the issue of solicitors' liability to beneficiaries under a will. In a case note in 1965¹³ commenting on the growing trend in the United States towards imposing liability,¹⁴ he observed that the American cases might well find acceptance in England "within a decade or two". His prediction proved to be sound.

In *Ross* Megarry V.-C. held that "[a] solicitor who is instructed by his client to carry out a transaction that will confer a benefit on an identified third party owes a duty of care towards that third party in carrying out that transaction. . .".¹⁵ He based this conclusion on the general principles emanating from the decision in *Donoghue v. Stevenson*,¹⁶ and in particular on the following passage from the speech of Lord Wilberforce in *Anns v. Merton London Borough Council*:¹⁷

. . . [t]he position has now been reached that in order to establish that a duty of care arises in the particular situation, it is not necessary to bring the facts of that situation within those of previous situations in which a duty of care has been held to exist. Rather the question has to be approached in two stages. First one has to ask whether, as between the alleged wrongdoer and the person who has suffered damage there is a sufficient relationship of proximity or neighbourhood such that, in the reasonable contemplation of the former, carelessness on his part may be likely to cause damage to the latter — in which case a prima facie duty of care arises. Secondly, if the first question is answered affirmatively, it is necessary to consider whether there are any considerations which ought to negative, or to reduce or limit the scope of the duty or the class of person to whom it is owed or the damages to which a breach of it may give rise. . . .

Adopting this approach, Megarry V.-C. first concluded that "[p]rima facie a duty of care was owed by the defendants to the plaintiff because it was obvious that carelessness on their part would be likely to cause damage to her".¹⁸ He then proceeded to conclude that there were no reasons of policy which would justify negating this duty of care.

It is our opinion that the decision in *Ross v. Caunters* is correct and that the principles enunciated by Megarry V.-C. ought to be adopted by future Canadian courts. This in fact was done in *Hodgson v. Evans & Rice*,¹⁹ a recent unreported Alberta decision, although the court followed *Ross v. Caunters* without discussion and without reference to any other relevant case law.²⁰ In view of the mixed reception which *Ross* has been

Loeff, [1924] A.C. 653 (H.L.) and in particular the judgments of Lords Phillimore and Blanesburgh.

¹³ (1965), 81 Law. Q. Rev. 478.

¹⁴ See generally the cases discussed in Annotation, 45 A.L.R. 3d 1181 (1972).

¹⁵ *Supra*, footnote 2, at pp. 322-323 (Ch.), 599 (All E.R.).

¹⁶ [1932] A.C. 562 (H.L.).

¹⁷ [1978] A.C. 728, at pp. 751-752, [1977] 2 All E.R. 492, at p. 498 (H.L.).

¹⁸ *Supra*, footnote 2, at pp. 310 (Ch.), 588 (All E.R.).

¹⁹ *Supra*, footnote 4 (Alta. Q.B.).

²⁰ On the facts the solicitor was held not to have been negligent. The solicitor did not attend the execution of the will, but wrote to his client advising her to attend a notary public

accorded in other Commonwealth jurisdictions, it is necessary to examine the criticisms which have been advanced against it, particularly in the Australian case of *Seale v. Perry*²¹ and in the New Zealand case of *Gartside v. Sheffield, Young & Ellis*.²² These criticisms will be considered under two general headings, namely, "technical" arguments and "policy" arguments, although the former can fairly be regarded as an embodiment of the latter, given the policy nature of the duty of care question.²³

B. Technical Arguments Against the Imposition of a Duty of Care

(1) *Robertson v. Fleming*

In 1860 the House of Lords in *Robertson v. Fleming*²⁴ affirmed that a solicitor could not be held liable to the beneficiary of a will, in the absence of privity of contract between the parties. In response to the submission that the beneficiary could sue the solicitor in tort, Lord Campbell L.C. stated that he was "clearly of the opinion that this is not the law of Scotland, nor of England, and it can hardly be the law of any country where jurisprudence has been cultivated as a science".²⁵ A decision of the Ontario Court of Appeal in 1923 also lends some support to the principle of solicitors' immunity.²⁶

In *Ross Megarry V.-C.* took the view that the statements in *Robertson* were obiter, a view expressly rejected by a majority of the Supreme Court of Victoria in *Seale v. Perry*,²⁷ but he conceded that "it is arguable that the

to have the will signed before two witnesses. The solicitor's letter made no mention of the requirement that the spouse of a beneficiary should not act as a witness. The client did not follow the solicitor's advice, and executed the will in the presence of two witnesses, one of whom was the husband of the plaintiff, a beneficiary under the will.

²¹ *Supra*, footnote 3.

²² *Ibid.* The criticisms are contained in the judgment of Thorp J. at first instance which was subsequently reversed by the Court of Appeal.

²³ "Whenever the courts draw a line to mark out the bounds of duty, they do it as a matter of policy so as to limit the responsibility of the defendant", per Lord Denning M.R. in *Spartan Steel & Alloys Ltd. v. Martin & Co.*, [1972] 3 W.L.R. 502, at p. 507. [1972] 3 All E.R. 557, at p. 561 (C.A.); see also the judgment of MacDonald J. in *Nova Mink Ltd. v. Trans-Canada Airlines*, [1951] 2 D.L.R. 241 (N.S.S.C.).

²⁴ (1861), 4 Macq. 167 (H.L.).

²⁵ *Ibid.*, at p. 177; see also Lord Cranworth, at pp. 184-185, and Lord Wensleydale, at pp. 199-200.

²⁶ *Re Solicitor, ex parte Fitzpatrick*, [1924] 1 D.L.R. 981 (Ont. C.A.). This case involved an application brought by a disappointed beneficiary, under the court's inherent jurisdiction over its officers, for an order of payment against a solicitor whose negligence had caused the will to fail. The beneficiary succeeded at first instance but the solicitor's appeal was allowed by a five-member Court of Appeal. Although the main basis for the decision related to the nature and extent of the court's jurisdiction in such matters, Middleton J. (at p. 984) and Logie J. (at p. 985) both expressly stated that no duty of care was owed by the solicitor to the beneficiary.

²⁷ *Supra*, footnote 3, per Lush J. at p. 203, and per McGarvie J. at pp. 243-244. The judgment of Murphy J. is unclear on this point.

dicta were of the ratio; and even if they were not, they are plainly of high authority".²⁸ However, he declined to follow *Robertson*, observing that the case had been decided over seventy years before *Donoghue v. Stevenson* and might well have been affected by nineteenth century ideas about the relationship between tort and contract.²⁹ The Vice-Chancellor's phrase "might well have been" is something of an understatement. *Robertson v. Fleming* epitomizes the "tort/contract fallacy" current at that time, whereby the existence of a contract between two parties for the benefit of a third was regarded as preventing any rights based on the law of negligence accruing to the third party with respect to the parties to the contract. Given that *Donoghue v. Stevenson* fundamentally changed this, it is extremely difficult to see how *Robertson v. Fleming* could properly be regarded as of continuing authority. Nevertheless, all three members of the Supreme Court of Victoria in *Seale v. Perry* relied upon *Robertson* in concluding that no duty of care was owed by the solicitor to the beneficiary.

Of particular interest in this regard is the judgment of McGarvie J., who agreed in all other respects with the judgment of Megarry V.-C. in *Ross v. Caunters*. He felt constrained to follow *Robertson*, notwithstanding that it was not "in accord with the general principles of the modern law of negligence",³⁰ on the grounds that it had not been overruled nor was it inconsistent with any subsequent decision or observation of the House of Lords. With respect, *Robertson* is inconsistent with House of Lords' authority, given that it is not in accord with the modern law of negligence as developed in cases such as *Donoghue v. Stevenson*, *Anns v. Merton London Borough Council* and most recently *Junior Books v. Veitchi*.³¹ As Lord Hailsham has recently stated,³² negligence cases decided prior to *Donoghue v. Stevenson*, even though never expressly disapproved or overruled, have to be considered in light of these modern developments. For these reasons it is suggested that *Robertson v. Fleming* is of little relevance in deciding whether a solicitor owes a duty of care to a beneficiary.

A related point is the argument, advanced by counsel for the defendants in *Ross v. Caunters*, that because a solicitor owes his duty to his client in contract and not in tort, the solicitor cannot owe any duty of care to a beneficiary. Megarry V.-C. disposed of this argument by relying on recent English decisions which establish that a professional person owes a duty to

²⁸ *Supra*, footnote 2, at pp. 305 (Ch.), 585 (All E.R.).

²⁹ The same view was expressed by Lord Denning M.R. in *Dutton v. Bognor Regis U.D.C.*, *supra*, footnote 10, at pp. 394 (Q.B.), 472 (All E.R.), referring to *Robertson v. Fleming* as "a long-forgotten case".

³⁰ *Supra*, footnote 3, at p. 244.

³¹ [1983] 1 A.C. 520, [1982] 3 All E.R. 201 (H.L.).

³² *Hurley v. Dyke*, [1979] R.T.R. 265, at p. 303 (H.L.), cited in H. Luntz, *Solicitors' Liability to Third Parties* (1983), 3 Oxford J. Leg. Studies 284, at p. 285.

his client both in contract and in tort.³³ Although the Canadian courts are still divided on this issue,³⁴ the argument can readily be disposed of by other means. Even if it is accepted that a solicitor's duty to his client is based solely in contract, this has no bearing on whether a duty in tort is owed to the beneficiary. To suggest otherwise would be to resurrect the tort/contract fallacy discussed above. In the words of Murphy J. in *Seale v. Perry*,³⁵ "the two matters appear to me to have nothing to do with one another".

The tort/contract fallacy of the pre-*Donoghue v. Stevenson* era also appears in the guise of another argument which has been used by some courts to deny the existence of a duty of care. This argument postulates that the imposition of a duty of care would amount to an "introduction, through the back door, of a *jus quaesitum tertio*".³⁶ Whilst it is true that the common law does not generally recognize the right of a third party to enforce a contract to which he is a stranger,³⁷ this principle is not undermined by imposing a duty of care in the present context. The solicitor's duty of care to the beneficiary is undoubtedly related to the contract with his client, yet it enjoys a separate and independent existence by virtue of the law of tort.³⁸ Even if it were accepted that the creation of a duty of care confers rights on third parties denied them by the law of contract, by means of the "back door" of the law of tort, this in itself is no argument against such a result, nor is it without precedent. Some of the most significant developments in the law of tort have been generated by the inflexibility of the law of contract; *Hedley Byrne v. Heller*³⁹ is a perfect example.⁴⁰ The "*jus quaesitum tertio*" argument is irrelevant to the real issue of whether

³³ *Esso Petroleum v. Mardon*, [1976] Q.B. 801, [1976] 2 All E.R. 5 (C.A.); *Midland Bank v. Hett, Stubbs & Kemp*, *supra*, footnote 10; *Batty v. Metropolitan Property Realisations Ltd.*, [1978] Q.B. 554, [1978] 2 All E.R. 445 (C.A.).

³⁴ For a thorough review of the Canadian cases see *John Maryon International Ltd. v. New Brunswick Telephone Co.* (1982), 141 D.L.R. (3d) 193 (N.B.C.A.); see also N. Rafferty, *The Tortious Liability of Professionals to Their Contractual Clients*, in F.M. Steel and S. Rodgers-Magnet (ed.), *Issues in Tort Law* (1983), p. 242.

³⁵ *Supra*, footnote 3, at p. 212; see also McGarvie J. *ibid.*, at p. 239.

³⁶ *Seale v. Perry*, *ibid.*, per Murphy J., at p. 209; see also *Gartside v. Sheffield, Young & Ellis*, *supra*, footnote 3, at pp. 559 *et seq.*; J.C. Smith and P.T. Burns, *Donoghue v. Stevenson*—The Not so Golden Anniversary (1983), 46 Mod. L. Rev. 147, at pp. 159-160.

³⁷ Dicta to the contrary by Lord Denning M.R. in *Jackson v. Horizon Holidays*, [1975] 1 W.L.R. 1468, [1975] 3 All E.R. 92 (C.A.), have now been rejected by the House of Lords in *Woodar Investment Development v. Wimpey Construction U.K.*, [1980] 1 W.L.R. 277, [1980] 1 All E.R. 571.

³⁸ See P. Cane, *Negligent Solicitors and Doubly Disappointed Beneficiaries* (1983), 99 Law Q. Rev. 346, at p. 347; *Gartside v. Sheffield, Young & Ellis*, *supra*, footnote 3 (C.A.), per Cooke J. at p. 42, per Richardson J. at p. 49, per McMullin J. at p. 54.

³⁹ *Supra*, footnote 8.

⁴⁰ See e.g. G.H.L. Fridman, *The Interaction of Tort and Contract* (1977), 93 Law Q. Rev. 422.

the law of tort ought to impose a duty on the solicitor with respect to the beneficiary.

(2) *Spes Successionis*

It has been argued that the disappointed beneficiary suffers no legally recognizable loss — he loses merely the expectation of a testamentary benefit, a *spes successionis*. Although this submission met with no success in *Ross v. Caunters*, it has found favour elsewhere.⁴¹ The argument, however, is weak, as is demonstrated by one author in the following terms:⁴²

Two answers could be given to this argument: it begs the very question in issue, namely whether the plaintiff's loss *ought* to be recognized as a proper subject for compensation in the law of torts; and also, there is no reason, once the testator has died without changing his will, to ignore the fact that if the will had been properly executed, the intended gift would have been crystallized.⁴³

In *Seale v. Perry*⁴⁴ Murphy J. derived support for the "loss of expectation" argument by drawing an analogy with situations of *inter vivos* gifts, where the negligence of a third party causes damage to the property before it has passed to the donee. It is true that the balance of authority suggests that the donee in such a case would not have a cause of action against the negligent third party.⁴⁵ However, this does not justify a denial of a duty of care in the context of the testamentary beneficiary. Different considerations underlie the two situations. For example, the *inter vivos* donor can perfect the gift by suing the negligent third party and transferring the proceeds to the donee. This is not possible in the context of testamentary gifts, given that the testator's estate will recover no more than nominal damages from the negligent solicitor. Thus, the mere fact that the *inter vivos* donee is denied a cause of action does not necessarily mean that the testamentary beneficiary should suffer the same fate.⁴⁶

⁴¹ *Seale v. Perry*, *supra*, footnote 3, per Lush J. at p. 199, per Murphy J. at pp. 220-221; *contra* McGarvie J. at pp. 240-242; see also *Gartfield v. Sheffield, Young & Ellis*, *supra*, footnote 3 (H.C.), at p. 563.

⁴² Cane, *loc. cit.*, footnote 38, at p. 347.

⁴³ See also *Ross v. Caunters*, *supra*, footnote 2, at pp. 321 (Ch.); 598 (All E.R.).

⁴⁴ *Supra*, footnote 3, at pp. 224-225; see also *Ross v. Caunters*, *supra*, footnote 2, at pp. 321 (Ch.), 598 (All E.R.).

⁴⁵ *Margarine Union GmbH v. Cambay Prince Steamship Co.*, [1969] 1 Q.B. 219, [1967] 3 All E.R. 775 (Q.B.D.); see however *The "Nea Tyhi"*, [1982] 1 Lloyd's Rep. 606 (Q.B.D.); *Schiffahrt v. Chelsea Maritime*, [1982] Q.B. 481, [1982] 1 All E.R. 218 (Q.B.D.); Luntz, *loc. cit.*, footnote 32, at p. 287; G. Robertson, *Defective Premises and Subsequent Purchasers* (1983), 99 Law Q. Rev. 559, at pp. 566-567.

⁴⁶ See *Gartside v. Sheffield, Young & Ellis*, *supra*, footnote 3 (C.A.), per Cooke J. at p. 44. One point which is not considered in any of the cases, and which may be of some relevance, is the effect of the authorities which establish that there is generally no liability for preventing someone from entering into a contract—see J. Fleming, *The Law of Torts* (6th ed., 1983), pp. 658 *et seq.* However, as is the case with the *inter vivos* donee, the mere

(3) *The Testator's Immunity*

In *Seale v. Perry* the majority expressed the view that, since a testator could not be held liable in tort for failing to effect a bequest in favour of a beneficiary, it followed that a solicitor was similarly immune from liability. The reasoning underlying this conclusion was as follows:⁴⁷

All the cases in which an employer engages a workman or contractor to do work for him, and in which the workman or contractor has been held to be under a duty of care to others, "neighbours", in performance of that work, are cases where the employer himself would have been under such a duty if negligently performing the work himself.

As a preliminary point it should be observed that this statement of law is incorrect, as can be demonstrated by the following example. If X consults Y, an expert, for advice which they know is to be relied upon by Z, the requirements of *Hedley Byrne v. Heller* may be satisfied so as to impose on Y a duty of care to Z, notwithstanding that such a duty might not have been imposed on X if he himself had given the advice to Z.⁴⁸ The main criticism of the above dictum is that it overlooks the fact that the policy considerations which underlie the testator's immunity do not apply in the case of the solicitor. It is a *non sequitur* to suggest that since the disappointed beneficiary has no cause of action in tort against the testator, the solicitor should enjoy a similar immunity. Indeed, to confer such "vicarious immunity" on the solicitor would mean that he could not be held liable to the beneficiary for intentionally causing the will to fail, given that the testator's immunity extends to intentional acts of disinheritance.

C. *Policy Arguments Relating to the Imposition of a Duty of Care*

(1) *Economic Loss*

A great deal of discussion, both academic⁴⁹ and judicial,⁵⁰ has focused on the fact that the plaintiff in the present context suffers purely economic loss, without damage to person or property. Notwithstanding the judgment of Lush J. in *Seale v. Perry*⁵¹ to the contrary, this aspect of the plaintiff's claim does not necessarily mean that the claim must fail. It is now well established, in particular by the Supreme Court of Canada in

fact that the potential promisee is denied a remedy in tort does not necessarily justify depriving the beneficiary of a remedy.

⁴⁷ *Supra*, footnote 3, at pp. 198-199; see also Murphy J., *ibid.*, at p. 208; *contra* McGarvie J., *ibid.*, at p. 240.

⁴⁸ The requirement of "reasonable reliance" might lead to a duty of care being imposed on Y but not on X.

⁴⁹ See J.C. Smith, *Economic Loss and the Common Law Marriage of Contracts and Torts* (1984), 18 U.B.C. Law Rev. 95, at pp. 116 *et seq.*; J.A. Smille, *Negligence and Economic Loss* (1982), 32 U. of T. L.J. 231, at pp. 274 *et seq.*; W. Bishop, *Economic Loss in Tort* (1982), 2 Oxford J. Leg. Studies 1.

⁵⁰ *Ross v. Caunters*, *supra*, footnote 2; *Seale v. Perry*, *supra*, footnote 3; *Gartside v. Sheffield, Young & Ellis*, *supra*, footnote 3.

⁵¹ *Ibid.*, at pp. 202-203; *contra* McGarvie J., *ibid.*, at pp. 242.

*Rivtow Marine v. Washington Iron Works*⁵² and most recently by the House of Lords in *Junior Books v. Veitchi*,⁵³ that recovery of purely economic loss in tort is not confined to *Hedley Byrne* situations. Thus the only significance which the economic loss factor has in the present context is whether it provides sufficient policy justification for negating a duty of care.⁵⁴

In this regard it is significant that the primary policy objection which has traditionally been advanced against the recovery of purely economic loss is that such recovery would, in the oft-quoted words of Cardozo C.J., give rise to "liability in an indeterminate amount for an indeterminate time to an indeterminate class".⁵⁵ None of these objections applies in the present context. As Megarry V.-C. observed in *Ross v. Caunters*:⁵⁶

... to hold that the defendants were under a duty of care towards the plaintiff would raise no spectre of imposing on the defendants an uncertain and unlimited liability. The liability would be to one person alone, the plaintiff. The amount would be limited to the value of the share of residue intended for the plaintiff. There would be no question of widespread or repeated liability.

Moreover, one must be careful not to misunderstand Cardozo C.J.'s dictum. For example, in *Seale v. Perry*⁵⁷ it was argued that if the beneficiary is given a share of the estate or the residue, the solicitor will not know at the time of his negligent act what the value of that bequest will be at the testator's death. The same is equally true in many cases of physical damage;⁵⁸ the negligent driver injuring a pedestrian does not know at the time of his negligent act whether the victim will prove to be a millionaire or a pauper. In these cases liability is not "indeterminate", i.e. unlimited, but merely indeterminable by the defendant at the moment of his negligent act. Similarly, since the beneficiary's cause of action will not accrue until the damage is suffered (at the testator's death), the solicitor cannot determine, at the time of the negligent act, the duration of his potential liability. Yet the same is true, for example, of a manufacturer who negligently puts a dangerous product on to the market.

⁵² [1974] S.C.R. 1189, (1973), 40 D.L.R. (3d) 530.

⁵³ *Supra*, footnote 31.

⁵⁴ See, however, Smith, *loc. cit.*, footnote 49, in which it is suggested that the "foreseeability of injury" test enunciated in *Donoghue v. Stevenson*, *supra*, footnote 16, and developed in *Anns v. London Borough of Merton*, *supra*, footnote 18, is not applicable in cases of purely economic loss; *contra Junior Books v. Veitchi*, *supra*, footnote 31.

⁵⁵ *Ultramares Corp. v. Touche Niven & Co.* 255 N.Y. 170, at p. 179, 174 N.E. 441, at p. 444 (N.Y.C.A., 1931).

⁵⁶ *Supra*, footnote 2, at pp. 309 (Ch.), 588 (All E.R.); see also *Gartside v. Sheffield, Young & Ellis*, *supra*, footnote 3 (C.A.), per Richardson J. at p. 51; Smille, *loc. cit.*, footnote 49, at p. 277.

⁵⁷ *Supra*, footnote 3, at p. 237.

⁵⁸ See R. Solomon and B. Feldthusen, Recovery for Pure Economic Loss: The Exclusionary Rule, in L.N. Klar (ed.), *Studies in Canadian Tort Law* (1977), 167, at pp. 183-184.

It is the last of Cardozo C.J.'s three elements—the "indeterminate class"—that really underlies the judicial concern in relation to economic loss.⁵⁹ This will seldom be a problem in the solicitor/beneficiary context. Admittedly the bequest may be a class gift, with the size of the class unascertained at the date of the will. However, various rules controlling the creation of future interests,⁶⁰ in particular the class closing rules,⁶¹ will almost certainly preclude a class from growing large enough to justify the description "indeterminate". In any event the possibility of a gift to an unascertained class of beneficiaries cannot in itself justify a general rule conferring immunity on solicitors regardless of the circumstances.

(2) *Conflict of Interest*

In *Seale v. Perry*⁶² Lush J. expressed the opinion that:

There are serious difficulties involved in the concept that a solicitor may owe a duty of care to any person other than his client in the discharge of his client's instructions. The result might well be the existence of conflicting duties.

This view was echoed by the New Zealand High Court in *Gartside*.⁶³ Despite the examples given in these cases in support of this view, it remains unconvincing. It is certainly possible to cite situations in which a conflict of interest *might* arise, particularly in relation to confidentiality.⁶⁴ This, however, is far from being of such a compelling nature as to justify absolving the solicitor from liability to the beneficiary. Moreover, the solicitor's duty to third parties does not require that he take all possible steps to ensure that a benefit is conferred on them. He is simply required to exercise reasonable care in carrying out the testator's instructions.⁶⁵ Thus in most, if not all, cases the duty to the client and the duty to the beneficiary will be in harmony rather than in conflict. In the words of Megarry V.-C.:⁶⁶

⁵⁹ *Ibid.*, at p. 184.

⁶⁰ In particular the rule against perpetuities, aided by the modern class splitting rules (see e.g. The Perpetuities Act, R.S.A. 1980, c. P-4, s. 7); and the rule in *Purefoy v. Rogers* (1671), 2 Wms. Saund, 380. 85 E.R. 1181 (K.B.), aided by *Festing v. Allen* (1843), 12 M. & W. 279, 152 E.R. 1204 (Exch.).

⁶¹ Otherwise known as the rules in *Andrews v. Partington* (1791), 2 Cox 223, 30 E.R. 103 (L.C.); see J.H.C. Morris and W.B. Leach, *The Rule Against Perpetuities* (2nd ed., 1962), pp. 109-133.

⁶² *Supra*, footnote 3, at p. 199.

⁶³ *Supra*, footnote 3, at p. 561; see however the comments of the Court of Appeal, *ibid.*, per Cooke J. at p. 44.

⁶⁴ For example, in defending a claim by a disappointed beneficiary, the solicitor might have to reveal details of confidential instructions given to him by his client; see the discussion in *Gartside v. Sheffield, Young & Ellis*, *ibid.*, per Thorp J. at p. 561 (H.C.), per Richardson J. at p. 50, and per McMullin J. at p. 55 (C.A.).

⁶⁵ See e.g. *Sutherland v. Public Trustee*, *supra*, footnote 3, in which it was held that the solicitor owed no duty of care to persons whom the testator failed to nominate as beneficiaries.

⁶⁶ *Ross v. Caunters*, *supra*, footnote 2, at pp. 322 (Ch.), 599 (All E.R.); see also *Seale*

The duty . . . [to the beneficiary], far from diluting the solicitor's duty to his client, marches with it, and, if anything, strengthens it.

(3) *Insurance and Loss Distribution*

One of the most cogent policy reasons for imposing a duty of care in the present context relates to insurance. Since the beneficiary will often be unaware of the existence of the invalid bequest until after the testator's death, by which time the damage has already been suffered, it is impracticable to expect him to take out insurance to cover such a loss. In contrast, not only is the solicitor "in a better position to take out insurance",⁶⁷ he is required by statute to do so in order to practise law.⁶⁸ Although in *Seale v. Perry*⁶⁹ Murphy J. regarded it as inappropriate for a court to take the existence of insurance into consideration, there is leading Canadian and English authority to the contrary.⁷⁰ The imposition of a duty of care on the solicitor, when taken in conjunction with the fact of insurance, thus serves to effect more efficient loss distribution.

D. *Conclusion*

The arguments which have been advanced against the imposition of a duty of care in the present context do not withstand scrutiny. They lack substance and are far from being sufficiently compelling to justify solicitors' immunity. In the words of Professor Luntz, they amount to "little more than the old 'floodgates' notion much more elegantly expressed in Lord Buckmaster's dissent in *Donoghue v. Stevenson*".⁷¹ For this reason it is likely that future Canadian courts will be persuaded by the reasoning of Megarry V.-C. in *Ross v. Caunters* and will impose a duty of care on solicitors in relation to beneficiaries.

II. *Testamentary Capacity: The Solicitor's Duty*

The remainder of this article will proceed on the assumption that solicitors owe a duty of care to beneficiaries. In *Ross v. Caunters*⁷² Megarry V.-C.

v. *Perry*, *supra*, footnote 3, per McGarvie J. at p. 236; *Gartside v. Sheffield, Young & Ellis*, *supra*, footnote 3 (C.A.), per Richardson J. at p. 51.

⁶⁷ Cane, *loc. cit.*, footnote 38, at p. 348; see also *Seale v. Perry*, *supra*, footnote 3, per McGarvie J. at p. 238; *Gartside v. Sheffield, Young & Ellis*, *supra*, footnote 3 (C.A.), per Richardson J. at p. 51.

⁶⁸ See e.g. Legal Profession Act, R.S.A. 1980, c. L-9, and Benchers' Rules (Law Society of Alberta) 129-139A. It is the writers' understanding that this requirement applies in every province, with the possible exception of P.E.I. (conversation with Mr. David Turner, Deputy Secretary of the Law Society of Alberta).

⁶⁹ *Supra*, footnote 3, at p. 225.

⁷⁰ See e.g. *Rivtow Marine v. Washington Iron Works*, *supra*, footnote 52, per Laskin J., at pp. 1221 (S.C.R.), 551-552 (D.L.R.); *Lamb v. London Borough Camden Council*, [1981] Q.B. 625, at pp. 637-638, [1981] 2 All E.R. 408, at pp. 414-415 (C.A.) (Lord Denning M.R.).

⁷¹ *Supra*, *loc. cit.*, footnote 32, at p. 287.

⁷² *Supra*, footnote 2, at pp. 322 (Ch.), 599 (All E.R.) (emphasis added).

stated that the solicitor's duty is to take "*proper care* in carrying out the client's instructions for conferring the benefit on the third party". Though the standard of care which must be achieved in order to discharge this duty is somewhat debatable,⁷³ it is clear that proper care, at its most fundamental level, entails executing the basic tasks necessary to effect a valid will. Proper attestation by competent witnesses is one such task. Another is to adduce and document evidence of testamentary capacity.⁷⁴ The latter is part of the solicitor's general duty to support his client's will. In *Maw v. Dickey*⁷⁵ Shapiro J. described the solicitor's duty to substantiate capacity as follows:

. . . might not a careful and experienced solicitor consider that he might at some later time be called upon in Court or otherwise, to relate the circumstances surrounding the drawing and execution of the will. What better way to refresh his memory than from notes he could make at the time of interview. The duty he owed his client was to properly support, at a later date if necessary, the will—once he was sure it expressed the sane and intended wishes of his client. I therefore find a specific duty on the part of the solicitor to ask questions in order to satisfy himself that his client had testamentary capacity and . . . a duty to reduce to some permanent form [his] impressions.

A. *The Solicitor's Duty In the Face of Suspicious Circumstances*

The solicitor's duty to substantiate capacity is particularly important in cases of suspicious circumstances. By suspicious circumstances is meant any circumstances surrounding the execution or preparation of a will which individually or cumulatively cast doubt upon the testator's capacity to make a will or his knowledge and approval of the will's contents. Suspicious circumstances are innumerable in form and cannot be listed comprehensively.⁷⁶ While the onus of proving capacity is on the propoun-

⁷³ For example, it is unclear precisely how much substantive law (tax, corporate, future interests, etc.) the competent solicitor will be expected to know. In *Lucas v. Hamm* 364 P. 2d 685 (1962), the Supreme Court of California concluded that a solicitor did not fall below the standard skill and capacity when a provision in a will drafted by him was struck down by the rule against perpetuities. In supporting its conclusion the court cited the complexity of the rule and the high incidence of error committed by eminent solicitors with respect to it. Sir Robert Megarry, *loc. cit.*, footnote 13, at p. 481, trenchantly criticized the decision and concluded as follows:

[I]t is to be hoped that on the standard of professional competence [*Lucas v. Hamm*] . . . will prove to be a slur on the profession which, like the mule, will display neither pride of ancestry nor hope of posterity.

⁷⁴ *Murphy v. Lampier* (1914), 31 O.L.R. 287, at pp. 320-321 (Ont. H.C.), *aff'd* (1914), 20 D.L.R. 906, 32 O.L.R. 19 (C.A.).

⁷⁵ (1974), 52 D.L.R. (3d) 178, at pp. 190-191, 6 O.R. (2d) 146, at pp. 158-159 (Ont. Surr. Ct.).

⁷⁶ For an extensive list of suspicious circumstances see Margaret Ramsay's paper entitled "Testamentary Capacity and Undue Influence: A Solicitor's Standard of Conduct in Preparing Wills", published in Proceedings, Alberta Branch, Canadian Bar Association, mid-winter meeting, January 1984, p. 396. In this article the author lists sixty-four different circumstances which courts have found to be suspicious.

Examples of suspicious circumstances include physical or mental debility or deterioration of the testator, clandestine preparation of a will, "unnaturalness" of dispositions, will

der of a will, in the absence of suspicious circumstances this onus is discharged by proving that the will was duly executed by a testator who read and apparently understood it.⁷⁷ In these circumstances testamentary capacity is presumed to exist. However, where suspicious circumstances are present affirmative evidence of capacity is required. Canadian courts have repeatedly stated that in these circumstances there is a "heavy burden" on the propounder of a will to prove that the will was executed by a testator who knew and approved of its contents and who, at the time, had testamentary capacity.⁷⁸ It is also well established that the propounder's evidentiary burden varies with and is proportionate to the gravity and degree of suspicion.⁷⁹ Since the solicitor's obligation is to support the will, one would expect that the solicitor's burden to substantiate capacity grows commensurately with that of the propounder. Indeed, this seems to be the thrust of Chancellor Boyd's classic judgment in *Murphy v. Lampier*⁸⁰ where he notes that the solicitor's duties "vary with the situation and condition of the testator"⁸¹ and, further, that the solicitor who is faced with suspicious circumstances must make "searching"⁸² inquiries as to his client's capacity. These same points are made with considerably more emphasis in the case of *Eady v. Waring*,⁸³ where the Ontario Court of Appeal quoted approvingly the following extract from Dunlap J.'s judgment at trial:

The Law imposes a heavy burden on a solicitor confronted with circumstances such as existed here [suspicious circumstances] and *the conduct of his inquiries and responses thereto must be minutely surveyed to divine from the vantage point of hindsight how free and unfettered was the mind of the Testator.*

preparation or execution in which a beneficiary is instrumental, lack of control of personal affairs by the testator, drastic changes in the personal affairs of the testator, isolation from friends and family, drastic change in the testamentary plan and physical, psychological or even financial dependency by the testator on beneficiaries. In respect to financial dependency see *Re Carvell* (1977), 37 A.P.R. 642, at p. 646, 21 N.B.R. (2d) 643, at p. 646, (N.B. Prob. Ct.) where the testator had executed a power of attorney in favour of a nursing home operator who was the sole beneficiary under his will. The power of attorney was apparently executed to overcome difficulties the nursing home was having in securing payment from the testator for his room and board. Montgomery J. in this case, at pp. 664 (A.P.R.), 664 (N.B.R.), stated that the testator's "dependence" on the nursing home operator "created by his physical condition was completed by the complete vesting of control under the power of attorney".

⁷⁷ *Re Martin; MacGregor v. Ryan*, [1965] S.C.R. 757, at p. 760, (1965), 53 D.L.R. (2d) 126, at pp. 133-134. See also *Re Lavers* (1972), 3 Nfld. & P.E.I. R. 177, at p. 220 (P.E.I.S.C.).

⁷⁸ *Re Martin*, *ibid.*

⁷⁹ *Ibid.*, at pp. 765 (S.C.R.), 138 (D.L.R.).

⁸⁰ *Supra*, footnote 74.

⁸¹ *Ibid.*, at p. 318 (Ont. H.C.).

⁸² *Ibid.*, at p. 320, quoting with approval from Blake V.-C.'s judgment in *Wilson v. Wilson* (1875-6), 22 Gr. 39, at p. 74, *aff'd* (1876), 24 Gr. 377.

⁸³ (1974), 43 D.L.R. (3d) 667, at p. 675, 2 O.R. (2d) 627, at p. 635 (Ont. C.A.) (emphasis added).

B. *The Importance of the Solicitor's Testimony*

Where solicitors have properly grounded their opinion as to their client's testamentary capacity courts have accorded their views a very high degree of influence. There are strong theoretical reasons to justify the judiciary's readiness to adopt the evidence of solicitors.⁸⁴ Solicitors differ from other witnesses in that they have a specific appreciation of the legal notion of testamentary capacity. Unlike other witnesses, solicitors are under a legal duty to consider carefully whether capacity exists in a particular testator, and are duty bound to document their opinions. The unique position of the solicitor was recognized by Chancellor Boyd in *Murphy v. Lampier*⁸⁵ where he stated:

The solicitor is a skilled professional man . . . [He] is brought in for the very purpose of ascertaining the mind and will of the testator touching his worldly substance and his comprehension of its extent and character and of those who may be considered proper and natural objects of his bounty. . . . [T]he business of the solicitor is to see that a will represents the intelligent act of a free and competent person.

The judicial reliance on the solicitor's evidence is reflected by the following extract taken from Shapiro J.'s judgment in *Maw v. Dickey*,⁸⁶ where it was alleged that the testator's will was procured by undue influence:

I do not consider this to be a case where the Court should interfere with a testator's express wish, *particularly where that also has been given consideration by an experienced and careful solicitor.*

If a solicitor does his job conscientiously and properly it seems natural and correct that there should be extremely heavy reliance placed on his opinion.

Where suspicious circumstances attend the preparation and execution of a will, particularly where a testator is seriously ill or debilitated by terminal illness which is capable of affecting his state of mind, the solicitor's evidence is especially crucial. Typically in this situation the testator's mental presence is either highly variable over time or rapidly deteriorating.⁸⁷ Naturally, where this is the case, the courts are interested in the testator's state of mind at the precise moment when instructions are

⁸⁴ It is interesting that these reasons have not as yet prompted the courts into making a statement as to the relative worth of a solicitor's evidence of his client's capacity, as compared to the evidence offered by other categories of witnesses. Conceivably solicitors could be considered "lay" witnesses in the context of the many judicial statements to the effect that in principle lay witnesses have as much to offer on questions of capacity as do medical experts. See for example *Re Price*, [1946] 2 D.L.R. 592, (Ont. C.A.) and *Re Carvell*, *supra*, footnote 76.

⁸⁵ *Supra*, footnote 74, at p. 319 (Ont. H.C.).

⁸⁶ *Supra*, footnote 75, at pp. 186 (D.L.R.), 154 (O.R.) (emphasis added). See also *Re Lavers*, *supra*, footnote 77, at p. 205 where Nicholson J. refers to the solicitor's evidence as being "most important evidence".

⁸⁷ For example, in *Re Mann* (1981), 33 A.R. 144, at p. 151 (Alta. Q.B.) Stratton J. noted that the testator "was more confused some days than others and that this state could show considerable variation day to day whilst at the same time showing a general declining trend".

given and/or the will is executed. In this situation the history of the testator's mental competence prior to his illness is irrelevant and therefore the observations and insights of persons who have interacted with the testator in his daily life become immaterial. The ill testator in his last days frequently has visitors who have an opportunity to observe his mental state but their impressions are usually general in the sense of not specifically being related to the various elements of testamentary capacity. Moreover, these persons tend to be interested parties whose evidence is not infrequently in conflict. Physicians and nurses will have observed the ill testator but too often their impressions are also general. Medical evidence tends to emphasize the deficiencies and weaknesses rather than the strengths and abilities of the testator.⁸⁸ The legal concept of testamentary capacity is, of course, concerned with the latter.⁸⁹ Moreover, the observations of physicians are often not linked temporally with the precise moment of execution and the issuance of instructions. Too frequently the medical perspective is based upon casual observation⁹⁰ incidental to the main task of providing

⁸⁸ See Nancy J. Marlett's (Faculty of Educational Psychology, University of Calgary) unpublished paper "Competency In Making Decisions A Psychological Perspective" where at page 2 she comments on the medical and psychological concepts of competence as follows:

The medical interpretation of competence, however, tends to be much more broadly based and treats competence as a diagnostic classification. Used within this framework competence is seen as the lack of incompetence because the medical model concentrates on finding deficits and weaknesses rather than establishing strengths and abilities. Thus, if a person's past behaviour or present thought processes are found to be irrational or lacking in a designated ingredient, then the person is said to be—in toto—incompetent. The move away from competence based on diagnostic classification such as mental retardation, senile dementia and psychosis has been dramatic in the last five to ten years as society has realized the classification in itself is not sufficient to prejudge a person's functional capabilities within a specific area of decision making.

The psychological perspective of competence has traditionally fallen into the same traps as the medical model in that the psychologist has been trained to look for cognitive deficits and deviant thought processes rather than being charged to seek out competence and strengths in decision making. When psychologists have tried to apply the generalized medical view of 'incompetence' to legal issues serious problems arise. Perhaps our reliance on diagnostic categories has resulted, in part, from our inability to operationally define competence in a way which would allow the empirical study of the parameters of situation specific decision making.

⁸⁹ We are not suggesting that medical evidence is unhelpful. From deficiencies and weaknesses legitimate inferences may be made about competence. However, such evidence is not as direct as the evidence of a solicitor which focuses on the affirmative requirements of capacity.

⁹⁰ In *Eady v. Waring*, *supra*, footnote 83, at pp. 677 (D.L.R.), 637 (O.R.), Arnup J.A. quoted with approval the following extract from Dunlap J.'s judgment at trial:

... [m]y conclusions fly in the face of the testimony of the doctor . . . but in my view [his] . . . observations and conclusions were limited . . . [,] capacity not being an immediate concern of Dr. B. . . .

Similarly in *Re Lavers*, *supra*, footnote 77, at p. 218 Nicholson J. noted that the physician's opinions were based on "casual" and not "clinical" observations. Moreover, in a surpris-

medical care for a large number of patients.⁹¹ In these circumstances casual observation is simply not good enough. What is required is a systematic assessment of the testator's capacity. Such an assessment should be conducted by the solicitor, and if there are any doubts whatever, by a physician or psychologist⁹² at the solicitor's request. Moreover, the solicitor should, prior to assessment, convey to the physician or psychologist the content of the legal concept of testamentary capacity. This is all part of the solicitor's burden to ensure that "all available means"⁹³ are utilized to ascertain that testamentary capacity exists. In the context of testamentary capacity cases, serious illness in a testator, especially where the testator is elderly and his illness is capable of affecting his mental state, is one of the most extreme of suspicious circumstances.⁹⁴ Few other circumstances demand of the solicitor greater care and caution.

C. *Evaluating the Performance of Solicitors in Recent Cases*

With a view to evaluating solicitors' performance of their duty to adduce and document evidence of testamentary capacity, we analysed thirty-two recently reported Canadian cases in which the issue of testamentary capacity was litigated.⁹⁵ The results of this analysis are shown in

ing number of cases medical opinions are based upon a review of charts and nurses' and physicians' notes rather than personal observation. Generally, little weight is given to this form of "academic" assessment of capacity. In *Re Mann*, *supra*, footnote 87, at p. 157 Stratton J. in rejecting medical evidence made the following observation:

I also have in mind that Dr. Van Est never met or examined the testator and the validity of his opinion was admittedly based on the presumption of accuracy of the testimony of Dr. Lee and the nurses' notes.

⁹¹ See also *Re Mann*, *ibid.*, at p. 157 where Stratton J. stated:

. . . I was not impressed with the complete reliability of Dr. Lee's memory of the circumstances having in mind particularly that . . . [the testator] was merely one of many patients with whom Dr. Lee was involved. . . .

⁹² It could be argued that the most appropriate expert is the psychologist. The psychologist's approach to the general question of capacity seems more empirically based than the traditional intuitive approach of the physician. Psychologists are heavily involved in making "objective" assessments of competence. Their expertise on matters of competence has been statutorily recognized—see e.g. the Dependents Adults Act, R.S.A. 1980, c. D-32, s. 2(1) and (2). It would be extremely useful if psychologists developed an instrument capable of measuring testamentary capacity which could be administered to the seriously ill patient, in respect of whom the issue of capacity arises most often. For a general discussion of the psychological approach to assessing capacity see Nancy H. Marlett's paper, *Competence in Making Decisions A Psychological Perspective*, *supra*, footnote 88.

⁹³ *Murphy v. Lampier*, *supra*, footnote 74, at p. 319 (Ont. H.C.) where Boyd C. stated ". . . the solicitor does not discharge his duty by simply taking down and giving legal expression to the words of his client, without being satisfied by *all available* means that testable capacity exists. . . ." (emphasis added).

⁹⁴ See *Re Mann*, *supra*, footnote 87, at p. 157 where Stratton J. states: "The medical evidence presented, coupled with the age and sickness of the testator, comprises the major source of suspicion".

⁹⁵ See Appendix I.

Appendices II and III. In twenty-six of these cases solicitors were involved in the preparation and/or execution of the wills in question.⁹⁶ In approximately 90 percent of these twenty-six cases solicitors were faced with suspicious circumstances, particularly that of a seriously ill client who was either hospitalized or about to be hospitalized.⁹⁷

The analysis confirms that courts, particularly where suspicious circumstances exist, are extremely receptive of the evidence of the careful solicitor. In sixteen of the twenty-six cases the solicitor's opinion that capacity was present was adopted by the court.⁹⁸ In many of these sixteen cases the courts commented on the fullness and detail of the solicitors' evidence.⁹⁹ In two such cases, *Re Eastland Estate*¹⁰⁰ and *Re Wright Estate*,¹⁰¹ solicitors tape-recorded interviews with their clients. The recordings were played in court and, in both cases, clearly assisted the judges in arriving at their conclusions that capacity was present. In *Re Wright Estate*,¹⁰² McIntyre J. commended counsel for his foresight in recording the interview.

However, the analysis also indicates that in a large percentage of cases solicitors did not discharge their duty properly and that in most of these cases the wills failed.¹⁰³ In ten of the twenty-six cases the courts rejected the solicitors' opinions that capacity was present.¹⁰⁴ In six of these cases the courts expressly criticized the manner in which solicitors had performed their duties.¹⁰⁵ In a seventh case this criticism was implicit.¹⁰⁶ In all seven, suspicious circumstances were present, and the testator was serious-

⁹⁶ See Appendix II.

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*

⁹⁹ See for example *Re Babcock Estate* (1982), 53 N.S.R. (2d) 716, at p. 718 (N.S. Prob. Ct.) where the court characterized the solicitor's evidence as "impressive" and "very convincing" and *Re Darichuk's Estate* (1981), 8 Sask. R. 131, at p. 133 (Sask. Surr. Ct.) where Dielschneider J. said of the solicitor that he recognized the testator's eccentricities and "took more than the usual time, effort and patience to assure himself that this testator was of sound mind, memory and understanding".

¹⁰⁰ (1977), 9 A.R. 504 (Alta. Surr. Ct.).

¹⁰¹ (1981), 13 Sask. R. 297 (Sask. Surr. Ct.).

¹⁰² *Ibid.*, at p. 304.

¹⁰³ On the other hand, in two cases, *Re Bishop's Estate* (1979), 21 A.R. 361 (Alta. Surr. Ct.) and *Re Gregory* (1979), 37 N.S.R. (2d) 640 (N.S. Prob. Ct.), judges were critical of the way in which solicitors discharged their duties, but nevertheless, found in favour of the will. These cases will be discussed in the text below.

¹⁰⁴ See Appendix III.

¹⁰⁵ *Re Carbone*, unreported, October 21, 1983 (Ont. Surr. Ct.); *Re Carvell*, *supra*, footnote 76; *Eady v. Waring*, *supra*, footnote 83; *Re Ferguson's Will* (1980), 73 A.P.R. 223 (N.S.P.C.); *aff'd* (1981), 43 N.S.R. (2d) 89 (N.S.C.A.); *Re Seabrook* (1978), 4 E.T.R. 135 (Ont. Surr. Ct.); *Turner and De Felice v. Rochon* (1980), 22 B.C.L.R. 319 (B.C.S.C.).

¹⁰⁶ *Re Drath* (1982), 38 A.R. 518 (Alta. Q.B.).

ly, if not terminally, ill at the date of execution. In at least three of these cases¹⁰⁷ the wills were executed in hospitals, and in one case in a nursing home only two and one-half months prior to the testatrix's death.¹⁰⁸

(1) *Nature of Solicitor's Breach of Duty*

(a) *Failure to Obtain Mental Status Examination*

In three of the seven cases mentioned above the courts expressly criticized the solicitors for failing to obtain mental status examinations.¹⁰⁹ In a fourth case, *Re Ferguson's Will*,¹¹⁰ it was suggested that steps should have been taken to ensure that the will was executed upon "proper medical information".

(b) *Failure to Interview Client in Sufficient Depth*

In two of the seven cases the courts criticized solicitors for not making sufficient inquiries of their clients so as to enable them to establish the essential elements of testamentary capacity. In *Re Carbone*¹¹¹ the terminally ill testator executed, approximately three weeks before his death, a will in which he left his entire estate to his parents and brothers. No provision was made for the testator's wife, with whom the testator was on good terms; indeed, the will made no mention of her. Sprague J. criticized the solicitor, *inter alia*, for failing to test the testator's knowledge of relationships. In *Re Carvell*¹¹² the testator, despite being survived by his wife and daughter, left his entire estate to the operator of a nursing home in which he resided. Montgomery J. criticized the solicitor in the case for making "very limited inquiries" with respect to the natural objects of the testator's bounty.¹¹³ He pointed out that no inquiries were made about the possibility of specific assets being given to specific relatives, friends or other familiar or natural objects of the testator's bounty such as churches or community institutions.¹¹⁴ A grandson of the testator, whom the testator was particularly fond of, was apparently not mentioned in the discussions between the solicitor and the testator.¹¹⁵ The solicitor was also criticized for being too general in his inquiries regarding the nature and extent of the testator's property.¹¹⁶ The solicitor had failed to ascertain the value of the

¹⁰⁷ *Re Ferguson's Will*, *supra*, footnote 105; *Re Seabrook*, *ibid.*; *Turner and De Felice v. Rochon*, *ibid.*

¹⁰⁸ *Re Carvell Estate*, *supra*, footnote 76.

¹⁰⁹ *Re Carbone*, *supra*, footnote 105; *Re Seabrook*, *ibid.*; *Turner and De Felice v. Rochon*, *ibid.*

¹¹⁰ *Supra*, footnote 105, at p. 253 (A.P.R.).

¹¹¹ *Supra*, footnote 105.

¹¹² *Supra*, footnote 76.

¹¹³ *Ibid.*, at pp. 658-659.

¹¹⁴ *Ibid.*, at p. 659.

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.*, at p. 658.

testator's main asset, his farm, and had also failed to learn that the farm was encumbered by a lease.¹¹⁷ Finally, in discussing whether the testator had understood the nature and effect of his will, Montgomery J. criticized the solicitor for not discussing with the testator the "effect of the purported Will and the legislation which might have an effect on the proposed disposition. . .".¹¹⁸

(c) Failure Properly to Record or Maintain Notes

In four of the seven cases courts criticized solicitors for failing to perform their essential duties of recording and maintaining proper notes.¹¹⁹ In *Re Carbone*¹²⁰ the notes were too sketchy. In *Re Drath*¹²¹ it appears that no notes were taken, as the court stated that under close cross-examination the solicitor could disclose "no details" of his conversations with his client.¹²² The court went on to conclude that because the solicitor's "memory" of these conversations was "weak in the extreme" it could not be relied on.¹²³ In *Re Seabrook*¹²⁴ Killeen J. of the Ontario Surrogate Court rejected the solicitor's "emphatic" evidence that the testatrix had capacity, partly because of the absence of solicitor's notes. The solicitor's "sketchy notes" of pre-execution instructions were, in accordance with his ordinary practice, destroyed and he failed to prepare notes documenting the testatrix's state of mind at the date of execution.¹²⁵ In *Re Gregory*,¹²⁶ where the testatrix's will was upheld, the solicitor was implicitly criticized for failing to document his notes properly. His failure, which was referred

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.*, at p. 659. (emphasis added). Montgomery J. does not elaborate on this rather tantalizing statement. It may be that he is simply stating that solicitors, in appropriate cases, have a duty to inform their clients of the operation and effect of Dependant's Relief legislation. However, in light of the context of his statement, he may be suggesting that appreciating the nature and effect of the act of making a will could in relevant cases involve the capacity to understand the effect that Dependant's Relief legislation may have on the testator's dispositive scheme. If, indeed, this is what he is saying it seems to go well beyond established notions of testamentary capacity. At first sight there seems to be no functional reason why testators should have to be capable of appreciating the operation of law in the form of a statutory regime—though the inability to appreciate the rather simple elements of Dependant's Relief legislation could be evidence of incapacity.

¹¹⁹ *Re Carvell*, *supra*, footnote 76, at p. 665; *Re Carbone*, *supra*, footnote 105; *Re Drath*, *supra*, footnote 106; *Re Seabrook*, *supra*, footnote 105.

¹²⁰ *Supra*, footnote 105.

¹²¹ *Supra*, footnote 106, at p. 527.

¹²² *Ibid.*

¹²³ *Ibid.*

¹²⁴ *Supra*, footnote 105, at p. 160 where Killeen J. concluded: "It is nothing but obvious to say that the lack of a mental status examination or solicitor's notes does not, per se dictate my result. However, their absence are evidentiary factors which must be weighed in the scales of proof assessment in this case".

¹²⁵ *Ibid.*, at p. 158.

¹²⁶ *Supra*, footnote 103, at pp. 647-648.

to as "unfortunate", was a failure to date his notes. This omission was significant because the testatrix's condition while in hospital, where she gave instructions, fluctuated quite considerably. The solicitor's "guesstimate" of the date of receiving instructions happened to coincide with what the nurses' notes indicated was one of the testatrix's better days; however, O'Hearn J. concluded that he could not rely on the solicitor's guess.¹²⁷

(d) *Failure to Ascertain Existence of Suspicious Circumstances*

In *Re Carvell*¹²⁸ the solicitor was criticized for failing to take reasonable steps to ascertain the existence of suspicious circumstances. The duty to ascertain suspicious circumstances is an intrinsic part of the duty to substantiate capacity. This is because the depth and direction of the solicitor's inquiry into his client's capacity is directly proportionate to the gravity, degree and type of suspicion aroused by the client's circumstances. In *Murphy v. Lampier*¹²⁹ Chancellor Boyd stated that the solicitor "may in some perfunctory way" satisfy himself as to the existence of capacity. This is true only when the client's circumstances are wholly devoid of suspicion. Where suspicious circumstances exist an in-depth inquiry about testamentary capacity must be made. It is suggested that the solicitor must *always* be extremely careful and thorough in ascertaining the circumstances of his client. Only then can he properly gauge the depth and nature of inquiry necessary to effectuate his duty to substantiate capacity. The proper discharge of the duty to ascertain the existence of suspicious circumstances requires systematic questioning of the client, preferably with the aid of a checklist specifically aimed at distilling the existence of such circumstances. In *Re Carvell*¹³⁰ counsel was criticized for failing to detect that his client's will departed substantially from "previously expressed testamentary intentions". These intentions had been communicated orally to the relatives of the testator and were manifested in writing in a lease granted by the testator. The lease included a provision to the effect that rental payments were to be paid to the testator's daughter upon his death. The court's criticism of the solicitor took the following form:¹³¹

What reasons are given to explain why . . . [the testator] would completely change this intention which was expressed repeatedly and was embodied in a document affecting his property? Why would . . . [the testator] make such a drastic change in his intentions and leave all of his estate to an individual he had known for such a short time? The answers to these questions, if they had been asked of . . . [the testator], would have thrown considerable light on the question of testamentary capacity. However, [the solicitor] never inquired if . . . [the testator] had any previous intentions or apparently if he had any previous wills. [The solicitor] testified that he was

¹²⁷ *Ibid.*

¹²⁸ *Supra*, footnote 76, at p. 660.

¹²⁹ *Supra*, footnote 74, at p. 321 (Ont. H.C.).

¹³⁰ *Supra*, footnote 76, at pp. 659 (A.P.R.), 659 (N.B.R.).

¹³¹ *Ibid.*, at pp. 660 (A.P.R.), 669 (N.B.R.).

interested only in then present intentions and therefore asked no questions regarding prior intentions.

The expressed reasons of the testator for such changes provide the evidence on which testamentary capacity can be assessed by the Court. Since the reasons for this change have not been ascertained I am left in doubt as to testamentary capacity.

(e) *Failure to React Properly to the Existence of Suspicious Circumstances*

Not only do solicitors occasionally fail to unearth suspicious circumstances, but the cases reviewed in this article suggest that too often solicitors are insensitive to the additional burdens brought on by the existence of these circumstances. This criticism was specifically directed at counsel by Laskin J.A., as he then was, in his dissenting judgment in *Re Schwartz*.¹³² In that case at the time of making his will the seventy-eight year old testator was seriously ill and exhibiting signs of mental dysfunction. There were other suspicious circumstances, including the fact that the testator had altered his pre-existing will by disinheriting one of his three sons. Laskin J.A., commenting on the manner in which the solicitor had conducted himself, stated the following:¹³³

... the solicitor appeared to treat the matter as if he was acting for a man in good health and in full command of all faculties, although he knew or became aware of the sensitive situation into which he had been introduced.

Unfortunately, as the cases reviewed in this article demonstrate, this criticism may be made of many a solicitor involved in the preparation of wills in suspicious circumstances.

(f) *Failure to Provide Proper Interview Conditions: The Presence of an Interested Party*

In two of the seven cases, *Eady v. Waring*¹³⁴ and *Re Ferguson's Will*,¹³⁵ solicitors were criticized for failing to obtain reliable information upon which an objective assessment of capacity could be made. In *Eady* the failure was due to the circumstances in which the solicitor took instructions from and interviewed his client. In that case the testator, aged 78 years, executed a will which left the major portion of his estate to a married brother with whom he was living. This will revoked an earlier will which contained a markedly different disposition scheme. At the time of giving instructions for his second will the testator was in ailing health, suffering through episodes of confusion and distress and exhibiting a faulty memory. The solicitor interviewed the testator in the presence of an interested party,

¹³² (1970), 10 D.L.R. (3d) 15, [1970] 2 O.R. 61 (Ont. C.A.).

¹³³ *Ibid.*, at pp. 38 (D.L.R.), 84 (O.R.).

¹³⁴ *Supra*, footnote 83. See also *Re Drath*, *supra*, footnote 106, at p. 527 where the solicitor interviewed the extremely ill testator in the presence of his parents, the major beneficiaries under the will. The will was challenged by the testator's widow. See also *Karstonas v. Karstonas* (1979), 12 B.C.L.R. 45 (B.C.S.C.).

the testator's nephew, who was the son of the major beneficiary under the second will. The trial judge, whose reasons for judgment were quoted extensively by the Ontario Court of Appeal, concluded that the testator did not divulge to the solicitor the extent of his assets and that this failure occurred either because the testator lacked testamentary capacity or because, in the inhibiting presence of his nephew, the testator simply refrained from describing his assets in detail.^{135a} For the propounder of the will, the uncertainty of the cause of the testator's "silence" was problematic in itself. As Dunlap J., the trial judge, stated:¹³⁶

It is not the duty of this Court to speculate [as to why the testator failed to describe the extent of his assets] and another cloud encumbers a scene that must be distinguished by brightness and clarity to satisfy the onus confronting the proponents.

Moreover, Dunlap J. suggested that had the solicitor been aware of the extent of the testator's estate he would have undertaken a "more exhaustive inquiry", which presumably would have given him and the court more information about the presence or absence of capacity in the testator.¹³⁷ Dunlap J. concluded as follows:¹³⁸

I am loath to be critical of a solicitor who rightfully enjoys the respect and regard Mr. C is accorded in the Ottawa Valley, but it is difficult for the Court to accept that such an investigation can be pursued other than in complete privacy. In my considered view his presence materially weakens the effect to be given to this portion of the Plaintiff's testimony and poses a further obstacle in the path of those seeking to propound the Will.

And further, after finding the testator lacked capacity, he stated:¹³⁹

. . . my conclusions fly in the face of the testimony of the . . . solicitor, but in my view . . . [his] observations and conclusions were limited and inhibited. . . . [T]he seemingly reliable conclusions emanating from Mr. C's sole interview now are challenged in one material respect and of questionable validity in the light cast by hindsight.

(g) *Improper Relationship Between the Solicitor and his Client:
Preparing a Will for a Relative*

In *Re Ferguson's Will*¹⁴⁰ the failure to obtain reliable information upon which an objective assessment of capacity could be made resulted in part from the relationship between the solicitor and the testator. In this case the testator was terminally ill with cancer. Prior to being hospitalized the testator had given his brother instructions for the execution of a will. These

¹³⁵ *Supra*, footnote 105, at p. 254 (A.P.R.). The solicitor who conducted the interview was himself a beneficiary under the estate.

^{135a} *Supra*, footnote 83, at pp. 676 (D.L.R.), 636-637 (O.R.).

¹³⁶ *Ibid.*, at p. 677 (D.L.R.), 637 (O.R.).

¹³⁷ *Ibid.*

¹³⁸ *Ibid.*

¹³⁹ *Ibid.*

¹⁴⁰ *Supra*, footnote 105, at p. 94 (N.S.R.).

instructions were confirmed by the testator shortly after hospitalization but the testator apparently indicated the desire that his nephew, a solicitor, review them for "legal propriety".¹⁴¹ After reviewing a draft will prepared in accordance with the instructions and recommending a change in the draft, the solicitor visited the testator in hospital and reviewed the provisions of the will. The will provided, *inter alia*, for the residue to be held on trust for the testator's wife for life and on her death to be divided among nine of the testator's nieces and nephews. The will did not contain a provision which entitled the testator's wife to encroach on capital. In interviewing the testator the solicitor asked him whether he intended to restrict his wife to income. Upon receiving an affirmative reply the solicitor did not pursue the point by inquiring into the testator's reasons for being restrictive. Nor did he attempt to be comprehensive in ascertaining the testator's assets.¹⁴² At trial the solicitor explained his failure to be thorough by stating that his impression was that the testator "was not so much asking for advice as telling him what he wanted in his will".¹⁴³ After interviewing the testator the solicitor arranged for the draft will to be retyped. The retyped will was never executed by the testator. Noticing that the testator was deteriorating rapidly, the testator's brother arranged for another will to be executed. O'Hearn J. at trial noted that the executed will differed in "several respects" from the draft will.¹⁴⁴ Some of these differences were purely technical but others were not.¹⁴⁵ In commenting on the impropriety of the solicitor preparing a will for his uncle, O'Hearn J. implied that the solicitor did not properly discharge his duty to substantiate capacity and explained why such a breach of duty flowed naturally from the relationship between the parties. He stated:¹⁴⁶

The propriety of acting as legal advisor to close relatives is questionable. . . . The advocate . . . may have difficulty and encounter embarrassment in attempting to discuss, with the objectivity and detachment required of counsel in court, evidence given by his father, brother, sister, cousin, wife or other close relatives, but every legal advisor owes his client disinterested advice. The client should not have to discount that advice by allowing for his advisor's personal interest in the matter. In a great many cases, however, the problem is more theoretical than practical. . . . [I]n this instance it is easy to understand that . . . [the testator's] reluctance to discuss his affairs with 'an outside lawyer' would be appreciated by . . . [his nephew] and may account not only for his failure to discuss his estate with his uncle, but also for his not taking firmer steps with his other uncle . . . to insure that the will was properly executed upon sufficient medical information.

¹⁴¹ *Ibid.*, at p. 247 (A.P.R.).

¹⁴² *Ibid.*

¹⁴³ *Ibid.*

¹⁴⁴ *Ibid.*, at pp. 247-248.

¹⁴⁵ *Ibid.*, at p. 248.

¹⁴⁶ *Ibid.*, at p. 253. O'Hearn J.'s comments are particularly poignant on the facts of the case as the solicitor was also a beneficiary under the will.

(h) *Failing to Take Steps to Test for Capacity*

In the final three of the ten cases where courts rejected solicitors' opinions that capacity was present, *Re Griffin's Estate*,¹⁴⁷ *Karstonas v. Karstonas*¹⁴⁸ and *Re Wilcinsky*¹⁴⁹, no express or implied criticism was forthcoming from the courts. However, with respect to the first two of these cases it seems clear that criticism would have been justified and its absence may simply have been a function of judicial restraint. In the *Griffin's* case the solicitor prepared a will pursuant to instructions given by the testator's agent, the testator's wife, but was not involved in the execution. The bulk of the estate was left to the testator's wife to whom the testator had been married seven months. It was during the testator's final illness, while hospitalized, that he apparently gave instructions on the preparation of his will. The will was executed while he was dying in hospital. There was considerable fluctuation in his condition but at the time of execution his capacity was doubtful. Neither the trial judge nor the Court of Appeal commented adversely on the solicitor's absence from the execution. The trial judge did state that utmost precautions should have been taken at the will's execution to ensure the existence of capacity and further "[t]he fact that a solicitor is not present should not make any difference in taking proper precautions. . . ."¹⁵⁰ While this point may be correct¹⁵¹ it obscures the solicitor's breach of duty. The testator, after all, was his client. The solicitor's duty of care to his client included a duty to substantiate capacity. This duty was not negated by the involvement of the testator's agent. Indeed, her involvement should have prompted the solicitor to be more vigilant than usual in effecting his duty. The proper discharge of the duty to substantiate capacity, with few exceptions, requires a personal meeting between solicitor and client.¹⁵² Where suspicious circumstances are present the failure to meet personally with a client must seriously jeopardize the chances of a will being probated. It is not surprising that the will in *Re Griffin* failed. The solicitor made no effort whatever to discharge his duty to substantiate his client's capacity.

¹⁴⁷ (1979), 21 Nfld. & P.E.I.R. 39 (P.E.I. S.C.); aff'd 21 Nfld. & P.E.I.R. 21 (P.E.I. C.A.).

¹⁴⁸ *Supra*, footnote 134.

¹⁴⁹ (1977), 6 A.R. 585 (Alta. Surr. Ct.).

¹⁵⁰ *Supra*, footnote 147, at p. 70 (P.E.I.S.C.).

¹⁵¹ Surely it is impractical to impose a duty on the layman, who is not versed in the legal concept of testamentary capacity, to ensure its presence.

¹⁵² See *Re Worrell* (1969), 8 D.L.R. (3d) 36, at pp. 42-43, [1970] 1 O.R. 184, at pp. 190-191 (Ont. Surr. Ct.), where Clare J. stated: "I would suggest that in this day of speedy methods of transportation there should be no occasion when a solicitor should prepare a will without receiving his instructions from the testator. It is certainly improper for a solicitor to draft a will without taking direct instructions from the testator and then not to attend personally when the will is executed".

In *Re Bishop Estate*,¹⁵³ on very similar facts, the testatrix's will was upheld. As was the case in *Griffin* the solicitor in *Bishop* received instructions from an agent and did not meet personally with the testatrix. The circumstances surrounding the instructions, the execution, and even the contents of the will, were suspicious. Though not specifically criticizing the solicitor, Patterson J. did say that the "circumstances surrounding the preparation and execution of the will are unfortunate and certainly unusual".¹⁵⁴ Nevertheless, based primarily on the evidence of the testatrix's best friend, and despite contrary medical evidence, it was concluded that the testatrix was competent at the date of execution.¹⁵⁵

The criticism of failing to make any effort to substantiate the testamentary capacity of a client can also be levied at the notary public who prepared and supervised the execution of the testator's will in the case of *Karstonas v. Karstonas*.¹⁵⁶ In that case the testator executed his will in hospital while dying of respiratory problems. These problems caused him to be extremely drowsy. Moreover, with the exception of being able to move his head, eyes, and, in a vertical fashion, one of his hands, the testator was completely paralyzed. The will was prepared at the request of the testator's wife and one of his brothers. At the execution stage, when the will was read to the testator, he moved his hand up and down. The notary treated this as a sign of assent to the contents of the will. At one point the testator attempted to communicate orally with the notary but the notary was unable to understand him as the testator apparently spoke in Greek. At trial the notary testified that "he had no way of knowing if the deceased was competent but relied on the fact that 'the two beneficiaries were present,' [i.e., the widow and the brother[. . .]".¹⁵⁷ The judge did not comment on the complete failure of the notary to pursue the question of capacity. Again, it is not surprising that the will was declared invalid.¹⁵⁸

¹⁵³ *Supra*, footnote 103.

¹⁵⁴ *Ibid.*, at p. 362.

¹⁵⁵ See also *Slater v. Chitrenky*, [1981] 4 W.W.R. 421, at pp. 426-427 (Alta. Surr. Ct.), aff'd [1982] 3 W.W.R. 575 (Alta. C.A.), for another case where the solicitor prepared the will but did not meet personally with the testator for its execution. The testator was ill and hospitalized when he signed the will. The will failed because the propounders did not prove that it expressed the true intentions of the testator, but not on the ground of lack of capacity. See also *Re Wright Estate*, *supra*, footnote 101, where a solicitor prepared a codicil to a will and did not meet personally with the testatrix to have it executed. The testatrix was in her late nineties at the date of execution of the codicil and living in a nursing home. The codicil was upheld in that case as there was substantial affirmative evidence that the testatrix had capacity.

¹⁵⁶ *Supra*, footnote 148.

¹⁵⁷ *Ibid.*, at p. 46.

¹⁵⁸ No doubt the notary was in a difficult position. However, some systematic effort should have been made to test for capacity. At the very least the notary should have arranged for a mental status examination to be conducted by a physician or psychologist. Psychologists have substantial experience in assessing "uncommunicative" persons and, therefore, might have been the most appropriate professionals to assess this particular testator.

(2) *Failure of a Will where Solicitor Properly Discharges his Duty*

In *Re Wilcinsky*¹⁵⁹ Medhurst J. of the Alberta Surrogate Court invalidated a will on the ground that the psychotic delusions of an 86-year old testator in respect to his sister and her son precluded him from having testamentary capacity. There is nothing in Medhurst J.'s judgment that suggests that the testator's solicitor fell short of his obligations to substantiate capacity, though he did note that the solicitor was aware of his client's suspicions of his sister. However, in light of the fact that the will in question did not differ markedly from a previous will, prepared while the testator clearly had capacity, and, further, that the testator "appeared normal and capable",¹⁶⁰ it is probably correct to assume that the solicitor discharged his duties properly.

D. *Conclusions*

It is striking that in nine of ten cases where courts invalidated wills due to the testator's lack of capacity, solicitors were either criticized or open to criticism for failing properly to discharge their duties. This statistic in itself suggests that there may be, at least in some cases, a causal link between the solicitor's breach of duty and the failure of the will. This theory is reinforced by the paucity of cases in which courts have confirmed the existence of testamentary capacity, notwithstanding the solicitors' breach of duty. In only two of sixteen cases where courts upheld the existence of capacity could it be said that solicitors were in breach of their duty of care.¹⁶¹

The theoretical basis of the link between the solicitor's breach and the will's failure was discussed earlier in this paper. In cases involving suspicious circumstances there exists a particularly heavy evidentiary burden on the propounder of a will to satisfy the court that capacity was present. The solicitor is in the best position effectively to generate, gather and credibly present the evidence necessary to discharge this burden. Logic suggests that the solicitor's failure to present such evidence materially increases the risk of the will being invalidated.

III. *Establishing Causation*

A solicitor's breach of duty to adduce and document evidence of testamentary capacity will not necessarily result in the will being invalidated.

¹⁵⁹ *Supra*, footnote 149. A contract entered into by the testator was also held to be invalid on the ground of incapacity; see *Schulze v. Ruzas* (1982), 40 A.R. 60 (Alta. Q.B.).

¹⁶⁰ *Supra*, footnote 149, at p. 598.

¹⁶¹ See *supra*, footnote 103. Perhaps the number of these cases is three or four if the solicitors in *Slater v. Chitrenky*, *supra*, footnote 155 and *Re Wright Estate*, *supra*, footnote 101 can be viewed as having been in breach of their duty of care. Actually in *Slater* the solicitor's breach of duty could be viewed as contributing to the failure of the will, i.e., the solicitor failed in his duty to substantiate that the will expressed the testator's true intentions. In *Wright* the codicil did not fail but the testatrix, not long before executing the

As in cases such as *Re Bishop's Estate*¹⁶² and *Re Gregory*,¹⁶³ there may be evidence, independent of the solicitor's testimony, from which a court can discern the existence of capacity. However, as the preceding section has shown, the much more likely result of the solicitor's breach of duty is that the will will fail. The question to be addressed in this section is whether, in such a case, the disappointed beneficiary can successfully recover damages from the negligent solicitor.

For the beneficiary to succeed it must be established that the solicitor's negligence caused the will to be invalidated. At first sight it may be thought that this would be an impossible task; the beneficiary's loss seems attributable to the testator's incapacity rather than the solicitor's breach of duty. However, this is not necessarily the case. The will may have failed either because of the court's affirmative finding of incapacity, or because of the court's conclusion that the propounder of the will failed to establish capacity. It is of interest to note that in most of the cases analyzed by the writers, in which the will was invalidated on the ground of incapacity, the court worded its conclusion in terms of failure to establish capacity.¹⁶⁴ Even where a court makes an affirmative finding of incapacity, this does not necessarily mean that, if the solicitor had provided better evidence of capacity, the court's decision would still have been the same.

Thus, in order to establish causation, the beneficiary must prove, on a balance of probabilities, that had the solicitor discharged his duty properly the court would have concluded that the testator had capacity. In practice, however, it will be impossible for the beneficiary to discharge this onus of proof. The evidence which he requires is unavailable because of the solicitor's negligence. He will be unable to prove what, if any, evidence of capacity the solicitor would have been able to adduce had he discharged his duty properly. Consequently, because this evidence remains unknown, the beneficiary will be unable to prove whether the testator did in fact have capacity. Since the onus of proof of causation, according to traditional principles, rests with the plaintiff, the beneficiary's action seems doomed to failure.

The result would be different, of course, if the onus of proof lay with the defendant. In that case the solicitor would suffer from the same problem of unavailable evidence and would therefore be unable to establish that the will failed because of incapacity and not because of his breach of duty. Indeed, it would be extremely embarrassing for the solicitor to have to argue that the testator lacked capacity, given that the solicitor will have testified to the contrary at the trial concerning the validity of the will.

codicil, had been interviewed by another solicitor who had carefully documented her capacity. It will be recalled that he tape-recorded his interview with her.

¹⁶² *Supra*, footnote 103.

¹⁶³ *Ibid.*

¹⁶⁴ See Appendix III.

There are two grounds for believing that the onus of proof does indeed lie with the solicitor and not with the beneficiary. One stems from the decision of the Supreme Court of Canada in *Cook v. Lewis*,¹⁶⁵ and the other from the House of Lords' decision in *McGhee v. National Coal Board*.¹⁶⁶

A. *Cook v. Lewis*

In this well-known case the plaintiff succeeded in establishing that the two defendants had each been negligent in firing shotguns in his vicinity and that he had been injured by one of them; however, he could not establish which defendant had caused his injuries. The Supreme Court of Canada held that the onus shifted to the defendants to disprove causation. In the present context it is the judgment of Rand J. which is important. His justification for shifting the onus of proof was that, by their negligence, the defendants had made it difficult if not impossible for the plaintiff to establish causation. Their negligence had "destroyed the victim's power of proof".¹⁶⁷

This reasoning applies equally to the present context. The solicitor's negligent failure to adduce and document evidence of testamentary capacity makes it difficult if not impossible for the beneficiary to establish a causal link between that negligence and the failure of the will. Moreover, in the case of the disappointed beneficiary, there are strong reasons for applying the principle enunciated by Rand J. If the onus of proof remains with the beneficiary, the solicitor will be able to breach his duty with impunity in almost every case.¹⁶⁸ It would be absurd for the law to impose a duty to adduce evidence, and yet permit the person in breach of that duty to take the benefit of the evidential difficulties created by his breach.

The scope of Rand J.'s reasoning was discussed by the Supreme Court of Canada in *Joseph Brant Memorial Hospital v. Koziol*.¹⁶⁹ This case involved the death of the plaintiff's husband in the defendant-hospital. The trial judge held that death was due to aspiration resulting from regurgitation of gastric juices, which in turn was caused by the negligent failure of hospital staff to provide proper care and attention to the deceased. Jessup J.A., delivering the judgment of the Ontario Court of Appeal, reversed the trial judge's finding as to the cause of death, concluding that the cause was unknown. However, he went on to hold that the mystery surrounding the cause of death was due to the negligence of a nurse in failing to record the deceased's vital signs during the night of his death. Applying the reasoning

¹⁶⁵ [1951] S.C.R. 830, [1952] 1 D.L.R. 1.

¹⁶⁶ [1973] 1 W.L.R. 1, [1972] 3 All E.R. 1008 (H.L.).

¹⁶⁷ *Supra*, footnote 165, at pp. 832 (S.C.R.), 4 (D.L.R.).

¹⁶⁸ See also *McGhee v. N.C.B.*, *supra*, footnote 166, per Lord Simon at pp. 9 (W.L.R.), 1015 (All E.R.), and per Lord Salmon at pp. 12 (W.L.R.), 1018 (All E.R.).

¹⁶⁹ (1977), 77 D.L.R. (3d) 161, *sub. nom. Kolesar Estate v. Joseph Brant Memorial Hospital* (1977), 5 N.R. 302 (S.C.C.).

of Rand J. in *Cook v. Lewis*, Jessup J.A. held that the onus of proof shifted to the defendants. The Supreme Court of Canada, however, expressly rejected this application of Rand J.'s judgment. Spence J. noted that Rand J.'s judgment was not that of the majority in *Cook v. Lewis*,¹⁷⁰ and observed that:¹⁷¹

Even if that had been the judgment of the Court, it is surely inapplicable in the present circumstances on the basis of Jessup, J.A.'s finding because by that finding guilt has not been "brought down" to one or the other of the two persons. Upon Jessup, J.A.'s finding, the cause of death was a mystery and therefore it is impossible to say that there was guilt or negligence, that is, guilt or negligence which caused the death. *There must be not only negligence but negligence causing the injury before there can be recovery.* We are not here faced with two persons who were negligent and with an inability to find whether the negligence of one or the other caused the death.

It should be noted that Spence J. did not criticize or reject Rand J.'s reasoning, but merely sought to restrict its scope. The above dictum is rather ambiguous, particularly in its suggestion that "[t]here must be not only negligence but negligence causing the injury". This statement cannot mean that the plaintiff is required to prove that the defendant's negligence caused his injury, since this was exactly what the plaintiff in *Cook v. Lewis* was unable to prove. He was, however, able to establish that the negligence of one of the defendants caused his injury, and in that sense there was "negligence causing the injury". Thus, read as a whole, the dictum appears to restrict the principle enunciated by Rand J. to the context of *Cook v. Lewis*, that is, to cases involving multiple defendants all of whom have been negligent but only one of whom has caused the injury. Yet there is no reason in principle why Rand J.'s judgment should be restricted in this way. The policy justification underlying that judgment is that it would be unfair to permit a defendant to take advantage of evidential difficulties created by his own negligence. Indeed Rand J.'s judgment can be seen as an extension of the principle that the intentional destruction of evidence results in a presumption that the evidence would have been unfavourable to the party who destroyed it.¹⁷² The policy of fairness underlying Rand J.'s judgment applies with equal force in the present context, and thus the scope of this judgment ought not to be restricted arbitrarily to cases of multiple defendants. As Professor Fleming has observed:¹⁷³

... a reversal in the burden of proof is justified whenever a defendant's negligence has destroyed the plaintiff's ability to prove that it caused his injury. This rationale which is not limited to multiple defendants has been repeatedly applied in modern American decisions.

Finally, it should be noted that Spence J. concluded elsewhere in his judgment that the Court of Appeal had erred in rejecting the trial judge's

¹⁷⁰ The majority in *Cook v. Lewis* arrived at the same result as Rand J. but for different reasons.

¹⁷¹ *Supra*, footnote 169, at pp. 168 (D.L.R.), 311 (N.R.). (emphasis added).

¹⁷² See e.g. *Lamb v. Kincaird* (1907), 38 S.C.R. 516.

¹⁷³ Fleming, *op. cit.*, footnote 46, p. 288.

finding as to the cause of death.¹⁷⁴ Consequently, the above dictum is technically obiter and thus only of persuasive authority. Therefore, the possibility of applying the reasoning of *Rand J.* outside the context of *Cook v. Lewis* has not been foreclosed.

B. *McGhee v. National Coal Board*

The second ground on which it can be argued that the onus of proof with regard to causation shifts to the solicitor stems from the case of *McGhee v. National Coal Board*.¹⁷⁵ In *McGhee* an employee contracted dermatitis attributable to his conditions at work, and sued his employers for damages. He succeeded in proving that his employers had been negligent in failing to provide adequate washing facilities. However, because of uncertainty as to the causes of dermatitis, the medical evidence could not establish, on a balance of probabilities, that the employee would not have contracted the disease had adequate washing facilities been provided. Nevertheless, the House of Lords imposed liability, on the basis that the employers' negligence had "materially increased the risk" of the employee's contracting the disease. A leading Canadian torts scholar has summarized the *McGhee* principle as follows:¹⁷⁶

There is a dramatic new decision of the House of Lords, *McGhee v. National Coal Board*, which shifts the onus of proof of causation from the plaintiff to the defendant where the defendant is negligent, and where this negligence materially increases the risk of injury.

The main policy reason underlying the decision is evident in the speech of Lord Wilberforce. Referring to what he termed the "inherent evidential difficulty" facing the plaintiff, he observed that:¹⁷⁷

... if one asks which of the parties, the workman or the employers should suffer from this inherent evidential difficulty, the answer as a matter in policy or justice should be that it is the creator of the risk who ex hypothesi, must be taken to have foreseen the possibility of damage, who should bear its consequences.

This policy reason applies with even greater force in the present context. In *McGhee*, the "inherent evidential difficulty" was not caused by the defendants' negligence; it was due to the limits of medical knowledge. In contrast, the evidential difficulty facing the disappointed beneficiary is due entirely to the solicitor's negligent failure to adduce evidence of testamentary capacity. Thus, there is even greater justification than in *McGhee* for shifting the onus of proof.

¹⁷⁴ *Supra*, footnote 169, at pp. 169 (D.L.R.), 311-312 (N.R.).

¹⁷⁵ For a detailed discussion of the decision in *McGhee* see E.J. Weinrib, *A Step Forward in Factual Causation* (1975), 38 Mod. L. Rev. 518; G.B. Robertson, *Overcoming the Causation Hurdle in Informed Consent Cases: The Principle in McGhee v. N.C.B.* (1984), 22 (1) Univ. West. Ont. L. Rev. (at press).

¹⁷⁶ A.M. Linden, *Canadian Tort Law* (3rd ed., 1982), pp. 96-97.

¹⁷⁷ *Supra*, footnote 166, at pp. 6 (W.L.R.), 1012 (All E.R.).

In *McGhee* Lord Simon offered an additional policy justification for the decision, namely, that "to hold otherwise would mean that the [employers] were under a legal duty which they could, in the present state of medical knowledge, with impunity ignore".¹⁷⁸ As was explained above, the same is true in the present context.

The preceding section has discussed why the solicitor's evidence performs a crucial role in the propounder's task of establishing that the testator had capacity. If the solicitor fails to take proper steps to adduce and document evidence of testamentary capacity, the propounder's task will be made much more difficult. Indeed the analysis of recent cases suggests that the propounder of the will is unlikely to succeed in establishing testamentary capacity if the solicitor is in breach of his duty. It follows from this that the solicitor's breach of duty materially increases the risk of the beneficiary suffering loss. In these circumstances the *McGhee* principle will apply so as to shift the onus to the solicitor to prove that the will failed by reason of testamentary incapacity and not because of his breach of duty.

One final point should be noted in relation to the *McGhee* principle. Although it has been applied in several recent Canadian decisions,¹⁷⁹ in one case an attempt was made to restrict its scope. The Saskatchewan Court of Appeal in *Nowasco Well Service Ltd. v. Canadian Propane Gas & Oil Ltd.*¹⁸⁰ stated in obiter that the principle enunciated in *McGhee* applies only where the risk of injury created by the defendant's negligence is more likely to occur than not. If this restriction is sound, it means that the beneficiary would be able to rely on *McGhee* only if he could establish that the solicitor's breach of duty made it more likely than not that the will would fail. However, as has been discussed in detail elsewhere,¹⁸¹ the restriction imposed in *Nowasco Well Service Ltd.* is probably unsound and accordingly the beneficiary will not be prevented from relying on *McGhee* in every case where the solicitor has breached his duty and the will has failed.

¹⁷⁸ *Ibid.*, at pp. 9 (W.L.R.), 1015 (All E.R.); *ibid.*, at pp. 12 (W.L.R.), 1018 (All E.R.).

¹⁷⁹ *Delaney v. Cascade River Holidays* (1983), 24 C.C.L.T. 6 (B.C.C.A.) (leave to appeal to the Supreme Court of Canada granted 25 February 1983); *Townsend v. Lai*, [1979] B.C.D. Civ. 2632-03 (B.C.S.C.); *Meyer v. Gordon* (1981), 17 C.C.L.T. 1 (B.C.S.C.); *Wipfli v. Britten* (1982), 22 C.C.L.T. 122 (B.C.S.C.); *Nowasco Well Service Ltd. v. Canadian Propane Gas & Oil Ltd.* (1981), 122 D.L.R. (3d) 228, (Sask. C.A.); *Powell v. Guttman* (1978), 89 D.L.R. (3d) 180, [1978] 5 W.W.R. 228 (Man. C.A.); *Schierz v. Dodds*, [1981] C.S. 589 (Que. S.C.); *Re Workers' Compensation Appeal Board and Penny* (1980), 112 D.L.R. (3d) 95 (N.S.C.A.); see however *Wilson v. Vancouver Hockey Club* (1983), 5 D.L.R. (4th) 282 (B.C.S.C.); *Moore v. Shaughnessy Hospital* (1982), 15 A.C.W.S. (2d) 389 (B.C.S.C.).

¹⁸⁰ *Ibid.*, at p. 246.

¹⁸¹ See Robertson, *loc. cit.*, footnote 175; see however *Wilson v. Vancouver Hockey Club*, *supra*, footnote 179.

C. Conclusions

Under traditional principles, the onus would lie with the beneficiary to prove that, had the solicitor discharged his duty properly, the will would not have failed. However, the solicitor's negligence deprives the beneficiary of the evidence which he would need to discharge this onus of proof. It is suggested, however, that by virtue of the judgment of Rand J. in *Cook v. Lewis* and of the House of Lord's decision in *McGhee v. National Coal Board*, the onus of proof shifts to the solicitor to establish that the failure of the will was due to testamentary incapacity and not to his own breach of duty. For reasons outlined above, this onus will be an extremely difficult, if not impossible, one to discharge.

Conclusion

On balance we view *Ross v. Caunters* as a welcome development in the law. Its effect is to bring solicitors into the ambit of twentieth century developments in the law of torts. Short of substantial changes in the law of wills and succession, which would indeed be desirable,¹⁸² tort law provides the sole mechanism for protecting the interest of beneficiaries. Testamentary gifts tend to be rather substantial in their pecuniary worth. Disinheritance, irrespective of its cause, can be a major blow in a person's life. When a loss of an inheritance is caused by a solicitor's carelessness it is only right and proper, for reasons discussed above, that the solicitor should compensate the disinherited heir. The solicitor's incentive to act carefully in the preparation of a will is presently limited. Professional pride and the desire to protect one's reputation can and do promote conscientiousness and the acquisition and exercise of skill. However, the incentive to act carefully would undoubtedly be enhanced if carelessness carried with it serious financial implications¹⁸³ "instead of a theoretical action for nominal damages on behalf of the client's estate".¹⁸⁴

Much of the resistance to the imposition of liability on the solicitor stems from the recognition that his negligence does not destroy the property of his client.¹⁸⁵ Rather, it deflects the property from the intended beneficiary to another person, the latter receiving a windfall. The propriety of the unintended beneficiary retaining this windfall has been questioned. In the

¹⁸² See text accompanying footnotes 191-194.

¹⁸³ Despite the universality of errors and omissions insurance, liability can still be costly. According to Mr. David Turner, Deputy Secretary of The Law Society of Alberta, the various plans which presently provide coverage for Canadian solicitors have an element of deductibility—ranging from two to five thousand dollars. Even in the absence of deductibility it is suggested that the mere threat of a law suit, involving substantial liability, creates an incentive to exercise care.

¹⁸⁴ *Seale v. Perry*, *supra*, footnote 3, per McGarvie J., at p. 236; see also *Gartside v. Sheffield, Young & Ellis*, *supra*, footnote 3 (C.A.), per Richardson J. at p. 51.

¹⁸⁵ See Bishop, *loc. cit.*, footnote 49, at pp. 28-29, where he notes that the solicitor's negligence does not destroy any of society's resources.

context of cases in which wills have been defectively executed Professor Luntz has asked:¹⁸⁶

If the court is satisfied that the testator's intention was to benefit the plaintiff, notwithstanding non-compliance with the Wills Act, why — apart from rights he may have under the testator's family maintenance legislation — should the person who actually takes be entitled to retain what he was *not* intended to receive?

Particularly where a will is only technically or formally defective it is tempting to suggest that the appropriate solution is to "give the disappointed beneficiary a right of action against the unintended beneficiaries to force a re-transfer of the benefit".¹⁸⁷ Implicit in this solution is the notion that the windfall has unjustly enriched the unintended beneficiary. Correction of the unjust enrichment would enure to the benefit of the negligent solicitor, but this is only incidental. The purpose of the correction should be to give effect to testamentary intention and not to extricate the solicitor from his potential liability.

The problem with the unjust enrichment approach is that the enrichment of the unintended beneficiary is not, in a juridical sense, unjust. In *Pettkus v. Becker*¹⁸⁸ Dickson J., in his landmark judgment, established that "there are three requirements to be satisfied before an unjust enrichment can be said to exist: an enrichment, a corresponding deprivation and an absence of any juristic reason for the enrichment". In the defective will cases there is a juristic reason to sustain the enrichment. The enrichment of the unintended beneficiary is a product of the operation of law. Where a will is defective it is the law of wills and succession which transfers to him the benefit intended for another person. The juridical justification for the retention of the windfall, therefore, is the law of wills. Allowing the intended beneficiary to succeed in an action for unjust enrichment would undermine this law. Moreover, as Cane has noted, while this approach "achieves through the back door major changes in the law of wills and succession. . .",¹⁸⁹ it "does not give the solicitor any incentive to be more careful in the future".¹⁹⁰

Some writers have maintained that, at least in some circumstances, where a solicitor's negligence gives rise to a defective will the real culprit is the law of wills itself.¹⁹¹ These writers view the disappointed beneficiary or

¹⁸⁶ *Loc. cit.*, footnote 32, at p. 288.

¹⁸⁷ Cane, *loc. cit.*, footnote 38, at pp. 348-349.

¹⁸⁸ [1980] 2 S.C.R. 834, at p. 848, (1980), 117 D.L.R. (3d) 257, at pp. 273-274. It could be argued that the unjust enrichment principle cannot be utilized by the intended beneficiary to rectify the deprivation of his expectancy. The basis of this argument is that it is the testator and not the intended beneficiary who is being unjustly deprived. In any event as noted in the text the deprivation or enrichment is not unjust.

¹⁸⁹ *Loc. cit.*, footnote 38, at p. 349.

¹⁹⁰ *Ibid.*

¹⁹¹ See Klar, *loc. cit.*, footnote 10, at p. 102, and by implication, Luntz's comments, *loc. cit.*, footnote 32, at pp. 288-289.

the solicitor, if he is liable to the beneficiary, as the victim of the inflexibility of the law of wills. Accordingly, it has been proposed that legislation be enacted empowering courts to probate wills which have been executed without compliance with all requisite formalities if it can be proved that the deceased intended the document to constitute his will or that there was substantial formal compliance with the Wills Act.¹⁹² Moreover, in respect to cases such as *Whittingham v. Crease* and *Ross v. Caunters*, it has been suggested that the law of wills be reformed so as to substitute the irrebuttable presumption against validity of bequests to witnesses or their spouses with a rebuttable presumption against validity.¹⁹³ Both of these suggestions have a great deal of merit, but not because they solve the problem of the negligent solicitor. These proposals for reform have independent merit,¹⁹⁴ though if undertaken would incidentally benefit the errant professional. However, until these changes become law the solicitor will continue to be at risk.

Moreover, given the wide range of errors which solicitors can commit in supervising the preparation and execution of a will, legislating greater flexibility into the law of wills is a solution which, though promising, has its limits. Many of the errors solicitors can commit are unlikely to be cured by changes in the law which have the effect of giving or restoring to the beneficiary that which was intended for him or that which, in the absence of the error, would have gone to him. This is true, for example, of the solicitor who advises his client incorrectly as to the effect of intestacy rules,¹⁹⁵ the solicitor who drafts a will in contravention of substantive rules of law¹⁹⁶ and, perhaps, the solicitor who fails to take into account basic tax considerations in the preparation of a will. This is also true of the solicitor who breaches his duty to substantiate capacity.

¹⁹² Luntz, *ibid.*, at pp. 288-289. As Luntz points out legislation of this type has already been passed in South Australia and Queensland. In Canada, Law Reform Commissions have been considering this form of legislation. See, for example, Manitoba Law Reform Commission, *The Wills Act and the Doctrine of Substantial Compliance*, Report No. 43 (1980).

¹⁹³ Klar, *loc. cit.*, footnote 10, at p. 102.

¹⁹⁴ In both cases the advantages of the proposed reforms outweigh the disadvantages. Substantial compliance legislation is desirable because it allows courts to give effect to testamentary intention without unduly sacrificing the cautionary, evidentiary and channelling functions presently provided by the Wills Act. Furthermore, substituting a rebuttable presumption against validity for the presently existing irrebuttable presumption is desirable because such a reform continues to provide the protective function of the present legislation while allowing courts to give effect to testamentary intention in cases where there has been an innocent transgression of the rule prohibiting a beneficiary from witnessing a will.

¹⁹⁵ If the client relies on the solicitor's advice and does not prepare a will, the client's estate will be distributed under the rules of intestacy to unintended beneficiaries. The only "reform" capable of curing this problem is the reinstatement of the oral will, a very unlikely development.

¹⁹⁶ Such as rules regulating the creation of future interests, rules requiring certainty of conditions or rules of public policy.

The cases reviewed in this paper have demonstrated that too often the manner in which solicitors effectuate their duty to substantiate capacity is seriously deficient. These deficiencies include:

- (1) The complete failure to take steps to test for capacity,
- (2) The failure to take reasonable steps to ascertain the existence of suspicious circumstances,
- (3) The failure to obtain mental status examinations,
- (4) The failure to interview testators in sufficient depth,
- (5) The failure properly to record or maintain the records of interviews with testators, and
- (6) The failure to ensure that interview conditions are conducive to the extraction of reliable information upon which an assessment of capacity may be made. In respect to this deficiency solicitors have allowed interested parties to be present at interviews, and in one case a solicitor also prepared a will for a close relative despite being named a beneficiary thereunder.

It is astonishing that in the recent cases discussed in this article all these failures took place in the context of suspicious circumstances. Precisely why solicitors in these cases were not more guarded in their actions is a matter of conjecture. In almost all the cases solicitors testified, in some cases emphatically, as to their belief in their client's capacity. Unfortunately, too often the solicitors were unable to substantiate their personal views with hard evidence. In *Murphy v. Lampier*¹⁹⁷ Chancellor Boyd made repeated references to the solicitor's duty to "satisfy himself" that capacity exists. If the recent cases are a barometer of current practice it would seem that some solicitors have interpreted Chancellor Boyd too literally. In *Re Seabrook*¹⁹⁸ counsel for the propounder of the will submitted that "... [i]f the evidence of the solicitor is reliable and trustworthy" it must be held that the testatrix had capacity. Killeen J. rejected this submission by stating that "... [t]he undoubted integrity, experience and reputation of the solicitor are not ... the true issue here; rather, I must decide on testamentary capacity. ...".¹⁹⁹ While it is true that a solicitor should not prepare a will unless he believes there are reasonable prospects of it being probated, his ultimate duty is to satisfy a court, and not himself, that capacity exists.²⁰⁰

¹⁹⁷ *Supra*, footnote 74, at pp. 319-320 (Ont. H.C.).

¹⁹⁸ *Supra*, footnote 105, at p. 158.

¹⁹⁹ *Ibid.*

²⁰⁰ In *Murphy v. Lampier*, *supra*, footnote 74, at p. 321 (Ont. H.C.) Chancellor Boyd adds a caveat to his statement that the solicitor must "satisfy himself as to capacity. . .". He cautions: "but it is to be remembered that his duty is to go far enough to satisfy the Court that the steps he took were sufficient to warrant his satisfaction". Though an awkward way of putting it, he is clearly suggesting that the solicitor's duty goes beyond being personally satisfied as to the existence of capacity.

The solicitor plays an instrumental role in proving his client's capacity. In suspicious circumstances his evidence becomes all the more important. Where suspicious circumstances exist, especially in cases where the testator is seriously ill at the date of execution, the absence of credible evidence from the solicitor as to his client's capacity can make it very difficult for the propounder to discharge his burden of proving capacity. It follows from this that the solicitor's breach of duty materially increases the risk of the will failing. Accordingly, in his action against the solicitor, the disappointed beneficiary will be able to take advantage of the principle enunciated by the House of Lords' in *McGhee v. National Coal Board*, thus shifting the onus to the solicitor to establish that the will failed by reason of testamentary incapacity and not because of his own breach of duty. Moreover, the shift of onus can be justified by reference to the judgment of Rand J. in *Cook v. Lewis*, given that the beneficiary's evidential difficulties are created by the solicitor's negligence.

In view of the catalogue of errors committed by solicitors in recent cases, and of the potential liability arising therefrom, solicitors would be well advised to review the way in which they presently discharge their duty to substantiate testamentary capacity.

Appendix I

Citation to Cases in Appendix II

1. *Re Babcock Estate* (1982), 53 N.S.R. (2d) 716 (Prob. Ct.).
2. *Re Bishop's Estate* (1979), 21 A.R. 361 (Surr. Ct.).
3. *Re Carbone* (October 21, 1983, Ontario Surrogate Court, Sprague Surrogate Court J.)—as yet unreported, see All Canada Weekly Sheets.
4. *Re Carvell Estate* (1977), 21 N.B.R. (2d) 643 (Prob. Ct.).
5. *Re Cranford's Will* (1975), 8 Nfld. & P.E.I.R. 318 (Nfld. Surr. Ct.).
6. *Re Darichuk's Estate* (1981), 8 Sask. R. 131 (Surr. Ct.).
7. *Re Davis* (1977), 4 A.R. 339 (Surr. Ct.).
8. *Re Dorion* (1980), 27 Nfld. & P.E.I.R. 211 (P.E.I.S.C. [Estate Division]).
9. *Re Drath* (1982), 38 A.R. 518 (Q.B.).
10. *Dyanna v. Grant* (1980), 6 E.T.R. 175 (Sask. C.A.).
11. *Eady v. Waring* (1974), 43 D.L.R. (3d) 667 (Ont. C.A.).
12. *Earle v. Dawe* (1982), 36 Nfld. & P.E.I.R. 455 (Nfld. C.A.).
13. *Re Eastland Estate* (1977), 9 A.R. 504 (Surr. Ct.).
14. *Re Ferguson's Will* (1980), 73 A.P.R. 223, aff'd (1981), 43 N.S.R. (2d) 89 (C.A.).
15. *Re Gillanders' Estate* (1980), 5 Man. R. (2d) 342 (Surr. Ct.).
16. *Re Gregory* (1979), 37 N.S.R. (2d) 640 (Prob. Ct.).
17. *Re Griffin's Estate* (1979), 21 Nfld. & P.E.I.R. 39 (P.E.I. Est. Div.), aff'd 21 Nfld. & P.E.I.R. 21 (C.A.).
18. *Karstonas v. Karstonas* (1979), 12 B.C.L.R. 45 (S.C.).
19. *Re Lavers* (1972), 3 Nfld. & P.E.I.R. 177 (P.E.I.S.C. [Estates Division]).
20. *Re Mann Estate* (1981), 33 A.R. 144 (Q.B.).
21. *Re Morrison Estate* (1982), 52 N.S.R. (2d) 64 (C.A.).
22. *Re Pommerehnke* (1979), 4 E.T.R. 169 (Alta. Surr. Ct.).
23. *Re Schwartz* (1970), 10 D.L.R. (3d) 15 (Ont. C.A.).
24. *Re Seabrook* (1978), 4 E.T.R. 135 (Ont. Surr. Ct.).
25. *Slater v. Chitrenky and Benny*, [1981] 4 W.W.R. 421 (Alta. Surr. Ct.); aff'd [1982] 3 W.W.R. 575 (C.A.).
26. *Re Spearman Estate* (1981), 14 Man. R. (2d) 17 (Surr. Ct.); aff'd 14 Man. R. (2d) 14 (C.A.).
27. *Re Topp Estate* (1983), 27 Sask. R. 54 (Surr. Ct.).
28. *Turner and De Felice v. Rochon* (1980), 22 B.C.L.R. 319 (S.C.).
29. *Re Valco* (1982), 18 Sask. R. 211 (Surr. Ct.).
30. *Re Wernicke* (1983), 25 Sask. R. 124 (Surr. Ct.).
31. *Re Wilcinsky* (1977), 6 A.R. 585 (Surr. Ct.).
32. *Re Wright Estate* (1981), 13 Sask. R. 297 (Surr. Ct.).

Appendix II

Analysis of Recent Wills Cases

Cases	Solicitor involved in preparation and/or execution of will	Suspicious circumstances present	Testator seriously ill when instructions given and/or will executed	Will failed on ground of incapacity
<i>Re Babcock Estate</i>	Yes	No	Unclear	No
<i>Re Bishop's Estate</i>	Yes	Yes	Unclear	No
<i>Re Carbone</i>	Yes	Yes	Yes	Yes
<i>Re Carvell Estate</i>	Yes	Yes	Yes	Yes
<i>Re Cranford's Will</i>	No	Yes	Yes	No
<i>Re Darichuk's Estate</i>	Yes	Yes	No	No
<i>Re Davis</i>	Yes	No	No	No
<i>Re Dorion</i>	Yes	Yes	No	No
<i>Re Drath</i>	Yes	Yes	Yes	Yes
<i>Dyanna v. Grant</i>	Yes	Yes	No	No
<i>Eady v. Waring</i>	Yes	Yes	Yes	Yes
<i>Earle v. Dawe</i>	Yes	Yes	Yes	No
<i>Re Eastland Estate</i>	Yes	No	Yes	No
<i>Re Ferguson's Will</i>	Yes	Yes	Yes	Yes
<i>Re Gillanders' Estate</i>	No	No	No	No
<i>Re Gregory</i>	Yes	Yes	Yes	No
<i>Re Griffin's Estate</i>	Yes	Yes	Yes	Yes
<i>Karstonas v. Karstonas</i>	Yes (notary public)	Yes	Yes	Yes
<i>Re Lavers</i>	Yes	Yes	No	No
<i>Re Mann Estate</i>	Yes	Yes	Yes	No
<i>Re Morrison Estate</i>	Yes	Yes	Yes	No
<i>Re Pommerehnke</i>	No	Yes	No	No
<i>Re Schwartz</i>	Yes	Yes	Yes	No
<i>Re Seabrook</i>	Yes	Yes	Yes	Yes
<i>Slater v. Chitrenky and Benny</i>	Yes	Yes	Yes	No
<i>Re Spearman</i>	No	No	No	No
<i>Re Topp Estate</i>	Yes	Yes	Yes	No
<i>Turner and De Felice v. Rochon</i>	Yes	Yes	Yes	Yes
<i>Re Valco</i>	No	Yes	Yes	Yes
<i>Re Wernicke</i>	No	Yes	Yes	No
<i>Re Wilcinsky</i>	Yes	Yes	Yes	Yes
<i>Re Wright Estate</i>	Yes	Yes	No	No

Appendix III

Analysis of Cases in which Wills Failed on Ground of Incapacity
Nature of the Solicitor's Breach of Duty

Cases	1	2	3	4	5	6	7	8	9A	9B
<i>Re Carbone</i>	Yes	No	Yes	Yes	Yes	No	No	No	B	
<i>Re Carvell Estate</i>	Yes	No	No	Yes	Yes	Yes	No	No	B	
<i>Re Drath</i>	Yes	No	No	No	Yes	No	Yes	No	B	
<i>Eady v. Waring</i>	Yes	No	No	Yes	No	No	Yes	No	B	
<i>Re Ferguson's Will</i>	Yes	No	Yes	Yes	No	No	Yes	Yes	B	
<i>Re Griffin's Estate</i>	No	Yes	No	No	No	No	No	No	B	
<i>Karstonas v. Karstonas</i>	No	Yes	No	No	No	No	Yes	No	B	
<i>Re Seabrook</i>	Yes	No	Yes	No	Yes	No	No	No	A	
<i>Turner and De Felice v. Rochon</i>	Yes	No	Yes	No	No	No	No	No	B	
<i>Re Wilcinsky</i>	No	No	No	No	No	No	No	No	A	

1. Solicitors criticized
2. Failure to take steps to test for capacity
3. Failure to obtain mental status examination
4. Failure to make sufficient inquiries re essential elements of testamentary capacity
5. Failure to properly record interview with client/or maintain record of interview
6. Failure to take reasonable steps to discover existence of suspicious circumstances
7. Interested party present at interview
8. Improper relationship between solicitor and client
- 9A. Will failed because of alternate finding of incapacity
- 9B. Will failed because of failure to discharge burden of proof