

## REID MORTENSEN\*

*[Since the recognition that, in will-making practice, solicitors owe duties to beneficiaries as well as to clients, the courts have stated solicitors' will-making duties with some precision. However, the law of tort still fails to offer an agreed rationale for them. This article suggests that, tortious principles aside, these duties spring from a clearer articulation of the solicitor's professional role as caretaker of clients' testamentary intentions. This idea explains most adjudication on will-making, while placing reasonably clear limits on solicitors' liabilities. This article's theory of the solicitor's caretaking role is the basis of its criticism of Queensland Art Gallery Board of Trustees v Henderson Trout (a firm) — where duties to one who merely hoped to be a beneficiary were recognised — and its conclusion that the duties stated there are conceptually precarious and practically unsustainable.]*

## CONTENTS

I	Introduction.....	61
II	Duties in Will-Making Practice .....	61
	A Preparing a Will.....	63
	B Giving Legal Effect to the Testator's Instructions.....	65
	C Valid Execution and Attestation .....	68
	D Accidental Revocation .....	70
	E Custodial Duties .....	71
III	Reposing Testamentary Intentions .....	72
IV	The <i>Henderson Trout</i> Cases .....	78
	A Lady Trout, Henderson Trout and the Trout Collection .....	78
	B Precise of Judgments.....	79
	C Causation .....	80
	D Duty of Care .....	81
	E <i>Animus Testandi</i> .....	82
	F Concurrent Duties .....	83
V	Conclusions: Managing Duties to a 'Hopeful' .....	84

PISCATOR: And now I have a bite at another. Oh me! he has broke all; there's half a line and a good hook lost.

VENATOR: Aye, and a good Trout too.

PISCATOR: Nay, the Trout is not lost; for pray take notice, no man can lose what he never had.<sup>1</sup>

\* BCom (Hons), LLB (Hons), PhD (Old); Senior Lecturer, T C Beirne School of Law, University of Queensland; Solicitor of the Supreme Court of Queensland. Thanks are given to the Hon C W Pincus QC and Karen Schultz for critiquing early drafts of this article. The author practised in the Corporate and Commercial Section of Henderson Trout between 1988–90.

<sup>1</sup> Izaak Walton, *The Compleat Angler* (first published 1653, 1921 ed) 108.

## I INTRODUCTION

The solicitor's traditional practice of will-making was the platform for the expansion of lawyers' tortious liability during the 1990s. Lawyers have been as ready as other professionals to preach jeremiads about exposure to civil liability,<sup>2</sup> but since at least 1988, when *Hawkins v Clayton*<sup>3</sup> was decided, they have been right to believe that larger duties have been recognised in this area. The inevitable corollary is that there has been a rise in the number of claims — merited or otherwise — against solicitors over their will-making practices.<sup>4</sup>

For the most part, these will-making duties have been supported by a judicial perception that, without them, the law is incapable of meeting widely recognised demands of justice. Furthermore, although these duties translate into higher insurance premiums for solicitors and higher fees for clients,<sup>5</sup> it is possible to discharge them by inexpensive procedures that were used in law firms before 1988. In this article, I first consider the different duties that courts have articulated for a solicitor's will-making practice. Secondly, I suggest that, despite considerable theoretical incoherence in the genealogy of these duties, they can be reconciled and resolved by developing the idea that they rest on the solicitor's 'custodianship of the testatrix's testamentary intentions'.<sup>6</sup> To that extent, I argue that the large number of cases that have been decided in the field spring from a principled understanding of the solicitor's professional role. Thirdly, this demands discussion of the recent decision of the Queensland Court of Appeal in *Queensland Art Gallery Board of Trustees v Henderson Trout (a firm)*,<sup>7</sup> which is difficult to reconcile with this role. *Henderson Trout II* once more enlarges solicitors' duties of care in will-making practice but in doing so, I suggest, it perforates limits of liability that had developed in the field. In conclusion, I reinforce this argument by showing that, unlike the other will-making cases, *Henderson Trout II* leaves solicitors with unreasonable burdens in practice management if the duties it states are to be properly discharged in similar circumstances.

## II DUTIES IN WILL-MAKING PRACTICE

The recognised duties of a solicitor in will-making practice are owed principally to the client testator. While the question of owing duties to others (usually the client's beneficiaries) has been raised, it received short shrift until the 1950s.

<sup>2</sup> See, eg, Trevor Aldridge, 'Is This Serious?' (1995) 139 *Solicitors Journal* 206; Stephen Warne, 'Legal Professional Liability — Part 1' (2000) 8 *Torts Law Journal* 283, 284–5.

<sup>3</sup> (1988) 164 CLR 539 (Mason CJ, Wilson, Brennan, Deane and Gaudron JJ) (*'Hawkins I'*).

<sup>4</sup> 'Wills Case Effect on Claims "Not Dramatic"' (1995) 139 *Solicitors Journal* 156; Brian Bartley, 'The Widow's Legacy', *APPIL Newsletter* (Brisbane), July 2000, 7, 8.

<sup>5</sup> Christopher Wallworth, 'Will Drafting: A Job for the Specialist?' (1994) 138 *Solicitors Journal* 1040; Des Butler, 'A New Liability for Solicitors, A Fresh Approach for Negligence' (1998) 18 *Queensland Lawyer* 151, 154; Geraldine Gray, 'The Changing Face of Legal Practice and Implications for Professional Indemnity Insurance' (1999) 11 *Insurance Law Journal* 74, 79; *Hawkins v Clayton* (1986) 5 NSWLR 109, 138–9 (*'Hawkins I'*).

<sup>6</sup> *Hawkins II* (1988) 164 CLR 539, 545 (emphasis in original).

<sup>7</sup> [2000] QCA 93 (Unreported, Pincus and Thomas JJA and Byrne J, 24 March 2000) (*'Henderson Trout II'*).

The principle that a disappointed legatee has no action against a lawyer whose negligence caused the loss was stated in *Robertson v Fleming*,<sup>8</sup> a Scottish case that predated the modern law of negligence but controlled the position in the Commonwealth and parts of the United States.<sup>9</sup> Since the California courts first recognised third party liability in a will-making case in 1958,<sup>10</sup> the strong trend has been for common law courts to extend liability to beneficiaries and executors. From that time, *Robertson v Fleming* has only been followed, perhaps reasonably, in Scotland<sup>11</sup> and, more strangely, in Victoria.<sup>12</sup> The New York and Texas courts still maintain a similar rule that attorneys are only liable in negligence to clients,<sup>13</sup> and in Florida third party liability is significantly more limited than in the Commonwealth.<sup>14</sup> These cases aside, adjudication over the last 50 years has seen duties in will-making practice stated in the following five more specific contexts:<sup>15</sup>

- a duty to prepare a will;
- a duty to ensure that the will gives legal effect to the testator's instructions;
- a duty to ensure that a will is validly executed and attested;
- a duty to advise against accidental revocation; and
- custodial duties.

Excepting custodial duties, the duties specified have arisen under the usual retainer to prepare a legally effective will. Although, as will be seen, the specific duties show that there are more profound implications to the usual retainer, it

<sup>8</sup> (1861) 4 Macq 167, 177, 184–5, 199–200.

<sup>9</sup> *Ward v Lewis* (1896) 22 VLR 410, 418; *Buckley v Gray*, 42 P 900, 900–1 (Cal, 1895) ('*Buckley*'); *Re Solicitor; Ex parte Fitzpatrick* [1924] 1 DLR 981, 983, 984–5; *Mickel v Murphy*, 305 P 2d 993 (Cal, 1957) ('*Mickel*'). For discussion of the US position, see Joan Teshima, 'What Constitutes Negligence Sufficient to Render Attorney Liable to Person Other than Immediate Client' (1984) 61 ALR4<sup>th</sup> 464, 483–601.

<sup>10</sup> *Biakanja v Irving*, 320 P 2d 16 (Cal, 1958) ('*Biakanja*').

<sup>11</sup> *Weir v J M Hodge & Son* [1990] SLT 266, 270 ('*Weir*'); *MacDougall v MacDougall's Executors* [1994] SLT 1178, 1184 ('*MacDougall*').

<sup>12</sup> *Seale v Perry* [1982] VR 193, 243–4 ('*Seale*'). See Harold Luntz, 'Solicitors' Liability to Third Parties' (1983) 3 *Oxford Journal of Legal Studies* 284, 285; Gerry Bates, 'Liability of Solicitors for Negligence to Beneficiaries under a Will' (1985) 59 *Australian Law Journal* 327, 333–4.

<sup>13</sup> *Kramer v Belfi*, 482 NYS 2d 898, 899–900 (Sup Ct App Div 2d Dept, 1984) ('*Kramer*'); *Viscardi v Lerner*, 510 NYS 2d 183, 185 (Sup Ct App Div 2d Dept, 1986) ('*Viscardi*'); *Spivey v Pulley*, 526 NYS 2d 145, 146–7 (Sup Ct App Div 2d Dept, 1988) ('*Spivey*'); *Mali v De Forest & Duer*, 553 NYS 2d 391, 392 (Sup Ct App Div 1<sup>st</sup> Dept, 1990) ('*Mali*'); *Deeb v Johnson*, 566 NYS 2d 688 (Sup Ct App Div 3d Dept, 1991) ('*Deeb*'); *Berry v Dodson, Nunley & Taylor*, 717 SW 2d 716, 718 (Tex Ct App, 1986) ('*Berry*'); *Barcelo v Elliott*, 923 SW 2d 575, 578–9 (Tex, 1996) ('*Barcelo*'); *Gamboa v Shaw*, 956 SW 2d 662, 664 (Tex 4<sup>th</sup> Dist Ct App, 1997). Australian commentators have sometimes mistaken the position in New York: Martin Vranken, 'Negligent Solicitors and Compensation for Economic Loss: *Hill v Van Erp*' (1997) 5 *Torts Law Journal* 1, 2; Butler, above n 5, 152.

<sup>14</sup> *De Maris v Asti*, 426 So 2d 1153, 1154 (Fla 3d Dist Ct App, 1983) ('*De Maris*'); *Lorraine v Grover, Ciment, Weinstein & Stauber Co*, 467 So 2d 315, 318 (Fla 3d Dist Ct App, 1985) ('*Lorraine*'); *Rosenstone v Satchell*, 560 So 2d 1229, 1229–30 (Fla 4<sup>th</sup> Dist Ct App, 1990) ('*Rosenstone*'); *Espinosa v Sparber, Shevin, Shapo, Rosen and Heilbronner (a firm)*, 612 So 2d 1378, 1380 (Fla, 1993) ('*Espinosa*'); *Babcock v Malone*, 760 So 2d 1056, 1056 (Fla 4<sup>th</sup> Dist Ct App, 2000) ('*Babcock*').

<sup>15</sup> See Gino Dal Pont, *Lawyers' Professional Responsibility in Australia and New Zealand* (2<sup>nd</sup> ed, 2001) 118–24; Law Book Company, *Laws of Australia*, vol 27 (at 1 April 2002) 27 Professional Liability, '27.3 Solicitors' [47]; Ysaiah Ross, *Ethics in Law: Lawyers' Responsibility and Accountability in Australia* (3<sup>rd</sup> ed, 2001) 283–90.

inevitably requires the proper drawing up and execution of the will. However, on occasion, circumstances can demand a more limited retainer. In *Smolinski v Mitchell*,<sup>16</sup> the solicitor was asked to prepare a will that was to include himself as a beneficiary of the estate. The solicitor, rightly, advised the testator to obtain independent legal advice and recommended another solicitor who could give it. Accordingly, the first solicitor's retainer was only to prepare the first draft of the will. The duty to advise on the content and effect of the will and to arrange execution would, if the testator had lived long enough to seek a second opinion, have belonged to the other solicitor. The defendant solicitor was held not to owe any duty of care to another of the testator's intended beneficiaries, and was not liable for failing to arrange execution before the testator died.<sup>17</sup> Therefore, for wills, as for other aspects of practice, the duties arising under any retainer depend on the circumstances. The custodial duties will arise when the client asks that the solicitors hold the will in their safe-custody facility, and the solicitors agree to do so.

### A Preparing a Will

Decisions concerning a client's instructions to prepare a will and the solicitor's failure to do so before the client's death are conceptually and evidentially the most contentious. A will should be prepared if the instructing client has testamentary capacity. That is normally assumed, but a medical opinion should be obtained if there are reasons to doubt that the client has the requisite capacity.<sup>18</sup> Where the medical practitioner believes the client lacks capacity, the client should be advised. The solicitor will still be obliged to prepare a will if an incapacitated, but relatively coherent, client insists it be prepared,<sup>19</sup> although it is likely that the solicitor could not be held liable to beneficiaries of that will if a court later refused to grant it probate on the ground of incapacity.<sup>20</sup>

It has been suggested that the only difference between these 'failure to prepare' cases and those dealing with defective execution is the type of failure, and not the analysis of the duty.<sup>21</sup> There are nevertheless other differences, all relating to the evidence of testamentary intention. The cases raise several questions. First, whether there was a breach of duty in not preparing the will in the unknown time between receiving the instructions and the client's death. Second, whether those instructions reflected the testator's real intention for the property at the time he or she died.<sup>22</sup> That raises a third question, less frequently canvassed, which is the cogency of the evidence used to establish this intention. Testamentary intention in these cases is identified by evidence other than the

<sup>16</sup> [1995] 10 WWR 68 ('*Smolinski*').

<sup>17</sup> *Ibid* 88–91.

<sup>18</sup> *Ryan v Public Trustee* [2000] 1 NZLR 700, 719 ('*Ryan*'); *Public Trustee v Till* [2001] 2 NZLR 508, 515–16 ('*Till*').

<sup>19</sup> *Till* [2001] 2 NZLR 508, 515.

<sup>20</sup> This follows if the solicitor's duties to beneficiaries are held to depend on the testator's intentions, as a person lacking capacity could not be held to have formed an intention which the law is capable of recognising.

<sup>21</sup> *Gartside v Sheffield, Young & Ellis* [1983] NZLR 37, 52 ('*Gartside*').

<sup>22</sup> Cf *Smolinski* [1995] 10 WWR 68, 91.

law's preferred means of proof — that is, through an executed will.<sup>23</sup> *White v Jones*,<sup>24</sup> the leading English decision on solicitors' duties to beneficiaries, is close to the outer perimeter of this third question.<sup>25</sup> There, the 78 year old testator had sent his solicitors a letter instructing them to prepare a will that reinstated his daughters as legatees. The reinstatement had not occurred when the testator died, unexpectedly, just under two months later. An earlier will by which the testator had cut his daughters out of his estate was proved instead. The House of Lords nevertheless held, by a majority,<sup>26</sup> that the solicitors owed the daughters, as the testator's intended legatees, a duty 'to act with due expedition and care' in relation to the preparation of an effective will.<sup>27</sup> Less time was spent discussing the question of negligence, but the majority was satisfied that the solicitors had, by omission, been in breach of their duty.

From other cases it appears that the duty to prepare a will expeditiously arises merely because the testator's intention is made evident to the instructed solicitor. The issue of how expeditiously the will should be prepared is again a situational duty, depending on 'age or health or other circumstances affecting the client'.<sup>28</sup> If it is necessary that a question of testamentary capacity be answered, that an inventory of the estate be taken, or that legal ambiguities in the status of property be resolved, the period within which the will should be prepared should be longer.<sup>29</sup> Short time-lines could be expected where instructions are received from an octogenarian testatrix,<sup>30</sup> from military or naval personnel on active service,<sup>31</sup> from a person whose health is evidently failing,<sup>32</sup> or from a patient in an intensive care unit.<sup>33</sup> Immediate attention is expected on a deathbed visit. In *Summerville v Walsh*,<sup>34</sup> the New South Wales Court of Appeal accepted that there was negligence in a solicitor's failure to complete an effective will after receiving instructions in hospital from a dying client. The negligence in *Summerville* was not undue delay, but the solicitor's ignorance of the law<sup>35</sup> in allowing the

<sup>23</sup> *Garcia v Borelli*, 180 Cal Rptr 768, 771 (1<sup>st</sup> Dist Ct App 3d Div, 1982) ('*Garcia*'); *Barcelo*, 923 SW 2d 575, 581 (Tex, 1996) (Cornyn and Abbott JJ dissenting).

<sup>24</sup> [1995] 2 AC 207 ('*White*').

<sup>25</sup> In Australia, doubts were cast on the authority of *White in Hill v Van Erp* (1997) 188 CLR 159, 208 ('*Van Erp II*'), and at first instance in *Queensland Art Gallery Board of Trustees v Henderson Trout (a firm)* [1998] QSC 250 (Unreported, Chesterman J, 10 November 1998) [126] ('*Henderson Trout I*'). Greg Mann implies that the law in Australia would not extend to the *White* scenario: 'Lady Trout and the *Fine Art* of Testamentary Reluctance' (1999) 19 *Proctor* 14, 15. *White* was accepted by Pincus JA in *Henderson Trout II* [2000] QCA 93 (Unreported, Pincus and Thomas JJA and Byrne J, 24 March 2000) [30].

<sup>26</sup> Lords Goff, Browne-Wilkinson and Nolan; Lords Keith and Mustill dissenting.

<sup>27</sup> *White* [1995] 2 AC 207, 276.

<sup>28</sup> *Gartside* [1983] NZLR 37, 46. See also *Smolinski* [1995] 10 WWR 68, 72, 89; *Carr-Glynn v Frearsons (a firm)* [1999] Ch 326, 331 ('*Carr-Glynn II*').

<sup>29</sup> *Espinosa*, 612 So 2d 1378, 1379 (Fla, 1993); *Ryan* [2000] 1 NZLR 700, 718.

<sup>30</sup> *Gartside* [1983] NZLR 37, reversing *Gartside v Sheffield, Young & Ellis* [1981] 2 NZLR 547; *Carr-Glynn II* [1999] Ch 326, 331, 338.

<sup>31</sup> *Oter v Church, Adams, Tatham & Co* [1953] 1 Ch 280, 286 ('*Oter*').

<sup>32</sup> *Babcock*, 760 So 2d 1056, 1056 (Fla 4<sup>th</sup> Dist Ct App, 2000).

<sup>33</sup> Cf *Berry*, 717 SW 2d 716, 717 (Tex Ct App, 1986).

<sup>34</sup> [1998] NSWSC 52 (Unreported, Mason P, Sheller and Beazley JJA, 26 February 1998) ('*Summerville*').

<sup>35</sup> *Wills, Probate and Administration Act 1898* (NSW) s 7.

client, who had received fatal burns and was unable to write, to direct another person to sign the will on his behalf. The solicitor himself signed a statement, witnessed by the hospital receptionist, as to the client's intention to leave all of his property to a girlfriend. That was refused probate, but the solicitor was still held to be liable to the girlfriend who was denied any interest in the estate.

The cases dealing with a solicitor's failure to prepare a will should be distinguished from those in which a will has been executed, but where the beneficiaries are disappointed because the will is refused probate on the ground that its execution was faulty. The evidential problems in establishing liability are greater in the 'failure to prepare' cases because the testator's intentions may have changed before the will was executed.<sup>36</sup> Furthermore, as in *White* and *Summerville*, evidence must be sufficiently clear for a court to accept that the will on which probate was granted does not reflect the testator's real intentions for the property at the time of death. For this reason, in Florida, while duties to beneficiaries to avoid accidental revocation<sup>37</sup> and presumably to ensure valid execution are recognised,<sup>38</sup> there is no recognised duty to beneficiaries to prepare a will. Liability to a beneficiary will only arise if 'the testamentary intent, as expressed in a will, is frustrated'.<sup>39</sup> The Florida courts have held that

[t]here is no authority ... for the proposition that a disappointed beneficiary may prove, by evidence totally extrinsic to the will, [that] the testator's testamentary intention was other than as expressed in his solemn and properly executed will.<sup>40</sup>

The Florida approach is without parallel elsewhere in the common law world. Those courts in the Commonwealth and in other parts of the United States that do recognise that lawyers owe a duty of care to beneficiaries are cautious about using extrinsic evidence but, regardless, will ultimately give priority to the testator's proven intentions for the property.<sup>41</sup>

### B Giving Legal Effect to the Testator's Instructions

In drawing up a will, a solicitor is under some obligation to ensure that the will gives legal effect to the testator's instructions for the property. The duty requires the solicitor to interview the client carefully and to ascertain fully the client's intentions for the property.<sup>42</sup> It then demands that the solicitor reach a sound

<sup>36</sup> *White* [1995] 2 AC 207, 219; *Smolinski* [1995] 10 WWR 68, 90–1; *Cancer Research Campaign v Ernest Brown & Co (a firm)* (Unreported, High Court of England and Wales, Harman J, 27 October 1997) ('*Cancer Research Campaign*').

<sup>37</sup> *McAbee v Edwards*, 340 So 2d 1167 (Fla 4<sup>th</sup> Dist Ct App, 1976) ('*McAbee*').

<sup>38</sup> *Ibid* 1169, citing *Biakanja*, 320 P 2d 16 (Cal, 1958).

<sup>39</sup> *De Maris*, 426 So 2d 1153, 1154 (Fla 3d Dist Ct App, 1983) (emphasis in original).

<sup>40</sup> *Ibid*. See also *Lorraine*, 467 So 2d 315, 318 (Fla 3d Dist Ct App, 1985); *Espinosa*, 612 So 2d 1378, 1380 (Fla, 1993); *National Union Fire Insurance Co v Salter*, 717 So 2d 141, 142 (Fla 5<sup>th</sup> Dist Ct App, 1998) ('*Salter*'); *Babcock*, 760 So 2d 1056, 1057 (Fla 4<sup>th</sup> Dist Ct App, 2000); *Bates*, above n 12, 336.

<sup>41</sup> Cf *Lorraine*, 467 So 2d 315, 321 (Fla 3d Dist Ct App, 1985); *Barcelo*, 923 SW 2d 575, 581 (Tex, 1996) (Cornyn and Abbott JJ dissenting).

<sup>42</sup> *Gibbons v Nelsons (a firm)* (Unreported, High Court of England and Wales, Blackburne J, 5 April 2000) 6–7 ('*Gibbons*').

legal assessment of the status of the property, that they consider whether the testator is the beneficial owner of the property (and not just a trustee)<sup>43</sup> and, where possible, that they ensure that the property can be dealt with as the client wishes.<sup>44</sup> So, if the property is subject to restraints on alienation, the solicitor must take measures that enable it to be disentailed.<sup>45</sup> An estate plan that requires the division of property to beneficiaries through an inter vivos trust requires a valid trust to be settled first.<sup>46</sup> For example, in *Carr-Glynn II*,<sup>47</sup> the testatrix wanted to leave an interest in land to her niece, but held the land as a joint tenant with her nephew. On the testatrix's death, the land passed by survivorship to the nephew. The Court of Appeal held that, as severance of the joint tenancy was required as part of the will-making process, the solicitors were liable to the niece for failing to arrange it.<sup>48</sup> The will-making retainer might also include a duty to advise the testator and beneficiaries of the tax implications of any gift made in the will, but this would seem not to extend to the giving of tax advice over the whole estate and as to all possible entitlements the testator might have.<sup>49</sup> In Australia, where tax advice is more usually given by accountants, any indication that the estate requires careful tax planning should prompt the solicitor to consult an accountant or an expert tax lawyer.<sup>50</sup> If the property is completely incapable of testamentary disposition, no duty could be owed to a person who hoped to receive it under a will.<sup>51</sup> However, the lawyer might have to advise the testator that the property cannot be given by will, and should not allow the will to imply, by expressly including it as a testamentary gift, that it can be so given.<sup>52</sup>

As in other areas of practice, solicitors are also expected to draft a will in terms that ensure it would realise the client's instructions. In *Ogle v Fuiten*,<sup>53</sup> it was alleged that the attorneys had not followed instructions given by a couple who wanted their mutual wills to provide that, if they died within 30 days of each other, their nephews would be the sole beneficiaries of their estates. The couple died 15 days apart, but, as the wills provided that the nephews were only to receive the estate if the couple died 'in or from a common disaster', the property

<sup>43</sup> *Earl v Wilhelm* [1998] 2 WWR 522, 529 ('*Earl*').

<sup>44</sup> *Carr-Glynn v Frearsons (a firm)* [1997] 2 All ER 614, 621–2 ('*Carr-Glynn I*').

<sup>45</sup> *Otter* [1953] 1 Ch 280, 287.

<sup>46</sup> Cf *Barcelo*, 923 SW 2d 575, 577–8 (Tex, 1996).

<sup>47</sup> [1999] Ch 326.

<sup>48</sup> *Ibid* 332, 336. See also *Garcia*, 180 Cal Rptr 768, 770 (1<sup>st</sup> Dist Ct App 3d Div, 1982); *Kecske-meti v Rubins Rabin & Co* [1992] TLR 666 ('*Kecske-meti*'). Cf the decision at first instance in *Carr-Glynn I* [1997] 2 All ER 614, 628–30, where Lloyd J considered that the solicitors' duties were satisfied on advising the testatrix on the implications of different kinds of joint ownership. See Amanda Stickley, 'Consequences if an Intended Beneficiary Is Cut out of a Will: Potential Liability if Unilateral Severance Is Not Fast Enough' (2000) 20 *Queensland Lawyer* 207.

<sup>49</sup> *Cancer Research Campaign* (Unreported, High Court of England and Wales, Harman J, 27 October 1997). Cf *Punford v Gilberts Accountants (a firm)* [1999] ECC 91, 95 ('*Punford*'); *Mali*, 553 NYS 2d 391, 392 (Sup Ct App Div 1<sup>st</sup> Dept, 1990); *Kramer*, 482 NYS 2d 898, 900 (Sup Ct App Div 2d Dept, 1984); *Deeb*, 566 NYS 2d 688, 689 (Sup Ct App Div 3d Dept, 1991); John Murphy, 'Probate Solicitors, Disappointed Beneficiaries and the Tortious Duty to Advise on Tax Avoidance' (1998) 14 *Professional Negligence* 107.

<sup>50</sup> For the situation in Canada, see *Earl* [1998] 2 WWR 522, 539.

<sup>51</sup> *Lorraine*, 467 So 2d 315, 319 (Fla 3d Dist Ct App, 1985).

<sup>52</sup> *Ibid* 317.

<sup>53</sup> 466 NE 2d 224 (Ill, 1984) ('*Ogle*').

was divided amongst other relations under intestacy rules. The Supreme Court of Illinois held that, if these allegations were proved, the nephews had a valid claim against the attorneys.<sup>54</sup>

For the most part however, claims of a solicitor's non-compliance with instructions have failed because the lawyers were simply found to have implemented the client's instructions. There have been cases where claimants had no evidence that the testator intended to leave them property in the will.<sup>55</sup> In one of these, *Ventura County Humane Society*,<sup>56</sup> the California Court of Appeal seemed to accept that the testator intended that a residuary beneficiary be described in ambiguous terms, which were then included in the will. Imprecise drafting by the attorney therefore discharged his duties.<sup>57</sup> In *Walker v Geo H Medlicott & Son (a firm)*,<sup>58</sup> it appeared that the testatrix truly intended to leave her house to her nephew and that that intention remained stable from the time the will was prepared and executed until the time of her death. However, on balance, it appeared that she did not actually instruct the solicitor that the nephew was to have the house and, for that reason, the UK Court of Appeal held that the nephew's claim had to fail. There was a genuine misunderstanding between the testatrix and the solicitor, the latter having the impression that the nephew was to be only a residuary beneficiary. The Court stated: 'It may well be that the testatrix unwittingly gave [the solicitor] the reasonable impression of intending one thing, while in truth intending another.'<sup>59</sup>

There have certainly been cases of failing to give legal effect to the client's instructions in the language of the will. For example, in *Lucas v Hamm*,<sup>60</sup> liability was still denied where a legacy was void because, by the terms of the will, it could possibly have vested after the perpetuity period expired. The Supreme Court of California believed that the errant attorney could not be expected to have known the requirements of the rule against perpetuities.<sup>61</sup> That may be setting the standard too low,<sup>62</sup> but where the drafting error is proved to be negligent, the claim in tort may not be the appropriate means of redress. In *Walker*, the Court held that the disappointed beneficiary should seek rectification of the will before an action in tort could be considered.<sup>63</sup> The traditional equitable claim for rectification is usually unsuitable for this purpose, as it only allows deletion of words incorrectly inserted in the will.<sup>64</sup> There might be cases where a

<sup>54</sup> Ibid 227. See also *Palmros v Barcelona*, 672 NE 2d 1245 (Ill App Ct 2d Dist, 1996) ('*Palmros*').

<sup>55</sup> *Ventura County Humane Society for the Prevention of Cruelty to Children and Animals Inc v Holloway*, 115 Cal Rptr 464, 470 (1<sup>st</sup> Dist Ct App, 1974) ('*Ventura County Humane Society*'); *Sutherland v Public Trustee* [1980] 2 NZLR 536 ('*Sutherland*'); *Weir* [1990] SLT 266; *Gibbons* (Unreported, High Court of England and Wales, Blackburne J, 5 April 2000).

<sup>56</sup> 115 Cal Rptr 464, 470 (1<sup>st</sup> DCA, 1974).

<sup>57</sup> Ibid.

<sup>58</sup> [1999] 1 WLR 727 ('*Walker*').

<sup>59</sup> Ibid 738, 741; cf the allegation of negligent drafting in *Kramer*, 482 NYS 2d 898, 900 (Sup Ct App Div 2d Dept, 1984).

<sup>60</sup> 364 P 2d 685 (Cal, 1961) ('*Lucas I*').

<sup>61</sup> Ibid 690.

<sup>62</sup> Robert Megarry, 'Note' (1965) 81 *Law Quarterly Review* 478, 481.

<sup>63</sup> [1999] 1 WLR 729, 739, 742.

<sup>64</sup> *Re Morris* [1971] P 62, 75.



residuary beneficiary is deprived of an intended benefit because a specific gift is incorrectly included in a will,<sup>65</sup> but more often the problem is a failure to include a disposition that would have given effect to the testator's instructions.<sup>66</sup> Legislative reforms now often allow rectification of a will by inserting words that were incorrectly omitted.<sup>67</sup> Where this remedy is available, *Walker* suggests that the plaintiff's general duty in tort to take steps to mitigate loss requires that the disappointed beneficiary bring proceedings for rectification before suing the solicitor in tort.<sup>68</sup> This is an important practical point, as proceedings for rectification must be brought within six months to two years from the grant of probate, a period much shorter than the normal limitation period in tort of six years from the time of death.<sup>69</sup>

### C Valid Execution and Attestation

The most adjudicated area of will-making practice involves cases of 'defective execution'.<sup>70</sup> Here the solicitor has prepared a will that the testator has accepted and signed. The will nevertheless fails in whole or in part, whether because the execution was incorrect,<sup>71</sup> a witness was absent,<sup>72</sup> or the witnessing by a beneficiary or a beneficiary's spouse means that the beneficiary is not entitled to receive the gift.<sup>73</sup> The will may also fail because the solicitors did not ensure that the testator intended it to take effect at the time it was signed, despite wanting it to be operative at some future point.<sup>74</sup> This situation differs from that of *Smolinski*<sup>75</sup> and the 'duty to prepare' cases, as here testamentary intention is proved in the preferred manner — an executed will. A technical error, casting no doubt on the nature of the testator's intention, nevertheless means that the will cannot be given effect by the law of succession. Instead, the recognition of a solicitor's duty to the disappointed beneficiary means that, so far as that beneficiary is

<sup>65</sup> See, eg, *Viscardi*, 510 NYS 2d 183 (Sup Ct App Div 2d Dept, 1986).

<sup>66</sup> See, eg, *Buckley*, 42 P 900 (Cal, 1895); *Walker* [1999] 1 WLR 727.

<sup>67</sup> *Wills Act 1968* (ACT) s 12A; *Wills, Probate and Administration Act 1898* (NSW) s 29A; *Succession Act 1981* (Qld) s 31; *Wills Act 1936* (SA) s 25AA; *Wills Act 1992* (Tas) s 47; *Wills Act 1997* (Vic) s 31. *Walker* [1999] 1 WLR 727 dealt with the *Administration of Justice Act 1982* (UK) c 53, s 20.

<sup>68</sup> [1999] 1 WLR 729, 739, 742. See, eg, *Garcia*, 180 Cal Rptr 768 (1<sup>st</sup> Dist Ct App 3d Div, 1982). Cf *Pilkington v Wood* [1953] 1 Ch 771, 776–7.

<sup>69</sup> *Wills Act 1968* (ACT) s 12A; *Wills, Probate and Administration Act 1898* (NSW) s 29A; *Succession Act 1981* (Qld) s 31; *Wills Act 1936* (SA) s 25AA; *Wills Act 1992* (Tas) s 47; *Wills Act 1997* (Vic) s 31. See Ken Mackie and Mark Burton, *Outline of Succession* (2<sup>nd</sup> ed, 2000) 59–64.

<sup>70</sup> *Gartside* [1983] NZLR 37, 44.

<sup>71</sup> *Biakanja*, 320 P 2d 16 (Cal, 1958); *Seale* [1982] VR 193.

<sup>72</sup> *Mickel*, 305 P 2d 993 (Cal, 1957); *MacDougall* [1994] SLT 1178.

<sup>73</sup> See, eg, *Buckley*, 42 P 900 (Cal, 1895); *Whittingham v Crease & Co* (1978) 88 DLR (3d) 353 ('Whittingham'); *Ross v Caunters* [1980] 1 Ch 297 ('Ross'); *Watts v Public Trustee for Western Australia* [1980] WAR 97 ('Watts'); *Van Erp v Hill* [1995] Aust Torts Reports ¶81-317 ('Van Erp I'); *Van Erp II* (1997) 188 CLR 159.

<sup>74</sup> *Corbett v Newey* [1999] EWCA 1379 (Unreported, Court of Appeal, Morritt, Auld and Clarke LJ, 30 March 1999) ('Corbett I'); *Corbett v Bond Pearce (a firm)* [2000] Lloyd's Rep 805 ('Corbett II'); *Corbett v Bond Pearce (a firm)* [2001] 3 All ER 769, 772, 773 ('Corbett III').

<sup>75</sup> [1995] 10 WWR 68.

concerned, the testator's intention is given some effect through the law of negligence.

California led this development when its courts held that a notary illegally undertaking attorneys' work was liable to a disappointed beneficiary where the will failed through incorrect witnessing.<sup>76</sup> In the Commonwealth, the duty to a beneficiary to ensure valid execution and attestation was first endorsed in the British Columbia decision of *Whittingham*,<sup>77</sup> which was followed in England in *Ross*.<sup>78</sup> In both *Whittingham* and *Ross*, the gift to the beneficiary failed because the beneficiary's spouse witnessed the execution of the will. Megarry V-C's decision in *Ross* was eventually accepted by the House of Lords in *White*,<sup>79</sup> where damages were awarded despite weaker evidence of testamentary intention.<sup>80</sup>

Similar duties to ensure proper execution were recognised when the question was litigated in Western Australia<sup>81</sup> and Queensland,<sup>82</sup> but not in Victoria.<sup>83</sup> When the Queensland case *Van Erp II* reached the High Court of Australia, a large majority<sup>84</sup> endorsed the duties stated in *Whittingham*, *Ross* and *White*. There was no majority opinion as to *why* the duties should arise. The solicitor had admitted her negligence provided that duties had been owed to the beneficiary, so there was little demand for the judges to give content to them.<sup>85</sup> However, Brennan CJ held in broad terms that '[b]y accepting the testator's retainer, the solicitor enters upon the task of effecting compliance with the formalities necessary to transfer property from a testator on death to an intended beneficiary'.<sup>86</sup>

The dissenting judge, McHugh J, cast the duty in terms more specific to the case, imposing 'a duty to take reasonable care to ensure that the will is not witnessed by a spouse of the beneficiary in jurisdictions where this may result in the beneficiary forfeiting the gift'.<sup>87</sup> *Van Erp II*, dealing as it does with the conceptual problems of holding a solicitor liable to a non-client, sets the Australian paradigm for solicitors' duties in will-making practice generally. It is considered in greater depth below.

<sup>76</sup> *Biakanja*, 320 P 2d 16 (Cal, 1958).

<sup>77</sup> (1978) 88 DLR (3d) 353.

<sup>78</sup> [1980] 1 Ch 297, 314. See also Peter Cane, 'Negligent Solicitors and Disappointed Beneficiaries' (1980) 96 *Law Quarterly Review* 182.

<sup>79</sup> [1995] 2 AC 207, 226, 233, 238, 259–62, 293; cf 282–3. See also *Kecskemeti* [1992] TLR 666.

<sup>80</sup> See above nn 24–7 and accompanying text.

<sup>81</sup> *Watts* [1980] WAR 97.

<sup>82</sup> *Van Erp I* [1995] Aust Torts Reports ¶81-317; see also *Finlay v Rowlands, Anderson and Hine* [1987] Tas R 60, 63–4.

<sup>83</sup> *Seale* [1982] VR 193; Peter Cane, 'Negligent Solicitors and Doubly Disappointed Beneficiaries' (1983) 99 *Law Quarterly Review* 346.

<sup>84</sup> (1997) 188 CLR 159 (Brennan CJ, Dawson, Toohey, Gaudron and Gummow JJ; McHugh J dissenting).

<sup>85</sup> *Ibid* 172, 191–2 (Gaudron J), 200–1 (McHugh J), 219 (Gummow J).

<sup>86</sup> *Ibid* 170. See also at 187 (Dawson J).

<sup>87</sup> *Ibid* 200. See also at 199.

D *Accidental Revocation*

Somewhat analogous to the duties relating to execution and attestation is a possible duty to advise against the accidental revocation of a will. If it exists, this duty arises only where statute provides that a will is revoked, in whole or part, on the marriage of the testator unless the will is expressly made in contemplation of that particular marriage. In the specific circumstances of *Hall v Meyrick*,<sup>88</sup> Ashworth J held that a solicitor was bound by this duty after the solicitor learned from Hall (the client testator) in an interview that he was planning to marry his housekeeper Sheela James. The duty was to advise that, if the marriage took place, the will the solicitor was instructed to prepare would be revoked.<sup>89</sup> The couple had consulted the solicitor together in 1949, instructing him to prepare mutual wills. That led to differing interpretations as to whether there was a joint retainer, and as to whether James was advised as both testatrix and beneficiary of Hall's estate.<sup>90</sup> The couple married 10 months later but, although James consulted the solicitor again about a new will for herself in June 1952, Hall made no new will before his death in September 1952. James received part of Hall's estate under intestacy rules, but less than she would have received under the 1949 will. Her claim failed because the Court of Appeal regarded her retention of the solicitor as independent of Hall's, and her claim in contract was time-barred. However, Ashworth J held that the duty to advise about the effects of marriage on a will only arose because, during the interview in 1949, the possibility of marriage had been mentioned. On appeal, Hodson and Ormerod LJ also supported the solicitor's duty to advise about the effects of marriage once the solicitor learned that the couple was considering marriage. Their Lordships did not believe that, in other will-making cases, the solicitor would necessarily have that same obligation.<sup>91</sup> *Hall* therefore suggests that it is a precondition to the duty to advise about automatic revocation that the solicitor is told that there is a possibility of marriage. However, with the recognition of tortious liability to beneficiaries, the need for this precondition must be in doubt.

In the later California case of *Heyer v Flaig*,<sup>92</sup> and the almost identical Florida case of *McAbee*,<sup>93</sup> the accidental revocation of part of a will by the subsequent marriage of a testatrix was held to make the attorney liable to the residuary beneficiaries. The beneficiaries were deprived of the portion of the estate that was allocated to the husband under intestacy rules because the marriage revoked the will as against the spouse.<sup>94</sup> So far as the duty to the beneficiary is concerned, the circumstances of *Hall*, *Heyer* and *McAbee* are difficult to distinguish from *Van Erp II*. The testator's intention to benefit the disappointed beneficiary

<sup>88</sup> [1957] 2 QB 455 ('*Hall*').

<sup>89</sup> *Ibid* 467. No doubt the duty would also be discharged if the solicitor advised the client to make the will in contemplation of the marriage.

<sup>90</sup> *Ibid* 467, 481. Cf *Rosenstone*, 560 So 2d 1229, 1230 (Fla 4<sup>th</sup> Dist Ct App, 1990).

<sup>91</sup> *Hall* [1957] 2 QB 455, 455, 475–6, 482.

<sup>92</sup> 74 Cal Rptr 225 (Cal, 1969) ('*Heyer*').

<sup>93</sup> 340 So 2d 1167 (Fla 4<sup>th</sup> Dist Ct App, 1976).

<sup>94</sup> The spouse therefore took the portion allocated to spouses by intestacy rules, and the balance of the estate only was distributed in accordance with the will: *Heyer*, 74 Cal Rptr 225, 226 (Cal, 1969); *McAbee*, 340 So 2d 1167, 1168 (Fla 4<sup>th</sup> Dist Ct App, 1976).

is also established by a will, not by some extrinsic evidence that would displace the intention expressed in an earlier will. The will is also only invalid because it is unwittingly revoked, but as in *Van Erp II* the law of succession does nothing to undermine the strong evidence of the particular intention presented by the will.

### E Custodial Duties

There are a number of duties that arise only when the solicitor has been retained to hold the client's will in safe custody, and which arise on the client's death. The High Court of Australia articulated these duties in *Hawkins II*.<sup>95</sup> There, the testatrix's will had been made in 1971 but, despite her asking that it be returned to her, the solicitors kept it in safe custody. When the testatrix died in 1975, the solicitors dealt with her nephew and with another relative, arranged for the bank to pay her funeral expenses, and inspected a safe-custody packet. However, it was not until 1981 that the solicitors contacted Hawkins, the executor and primary beneficiary of the estate. Until then, he was unaware of his appointment as executor and his beneficial interest. This delay led to financial loss: a house had fallen into disrepair; and penalties were imposed for the late lodgement of a death duty return. Hawkins sought to recover the loss by an action against the solicitors in 1982. His claim as executor was brought in contract and tort, and, as beneficiary, in tort alone.<sup>96</sup> The High Court, by a majority,<sup>97</sup> held that the duties were owed to Hawkins as executor. The Court therefore recognised a duty of care to a person who was not strictly a client.<sup>98</sup> However, as was later held in *Van Erp II*, this duty sprang from the terms of the retainer between the solicitors and the testatrix.<sup>99</sup> Under a retainer by which the solicitors expressly assumed custodial responsibilities, the majority inferred duties that could be reasonably expected of the solicitors when the client died. For Brennan J, the duty that the solicitors owed to this executor was to disclose to him that they held the will.<sup>100</sup> Deane J outlined the purposes of the duty:

In accepting responsibility for custody of the testatrix's will after her death, the firm effectively assumed the custodianship of the testatrix's testamentary intentions. If the firm simply retained custody of the will without disclosing its existence to anyone at all, those testamentary intentions would obviously be likely to be frustrated — by grant of probate of an earlier will, by grant of letters of administration on the basis that the testatrix had died intestate or by the estate remaining unadministered and the assets being neglected, misused or misappropriated.<sup>101</sup>

<sup>95</sup> (1988) 164 CLR 539.

<sup>96</sup> *Ibid* 566.

<sup>97</sup> Brennan, Deane and Gaudron JJ; Mason CJ and Wilson J dissenting.

<sup>98</sup> Cf *Dunn v Fairs, Blissard, Barnes & Stowe* (1961) 105 SJ 932, 932, 933, where Barry J held that no duty was owed to an executor. This did not prevent a personal representative bringing, under the survival of actions legislation, an action that the deceased might have had: eg *Otter* [1953] 1 Ch 280.

<sup>99</sup> *Hawkins II* (1988) 164 CLR 539, 544 (Mason CJ and Wilson J), 577 (Deane J).

<sup>100</sup> *Ibid* 553–4. See also *Hawkins I* (1986) 5 NSWLR 109, 137–8.

<sup>101</sup> *Hawkins II* (1988) 164 CLR 539, 580.

While not defining the particular duties imposed on solicitors to ensure that the testator's intentions were promoted, Deane J did hold that the solicitors were negligent in failing 'to take any positive steps at all to locate ... Hawkins during the period of more than six years after ... the death of the testatrix'.<sup>102</sup> Gaudron J also considered that the solicitors should have taken 'reasonable steps to inform [the executor] that they were in possession of the will'.<sup>103</sup> There was no decision as to whether the duty to advise the executor was conditional on the solicitors' actual knowledge of the testatrix's death. In the Court of Appeal below, McHugh JA had refused to decide this point, but by suggesting that there were circumstances where solicitors 'ought to know of the death of the testator',<sup>104</sup> he intimated that there would still be a duty to advise the executor in that case.<sup>105</sup> This would necessarily mean a finding of negligence — advice can only be given to discharge the duty to advise if the solicitor knows of the death. *Hawkins II* therefore also hints at a duty *to take steps to learn* if a person for whom a will is held has died.

### III REPOSING TESTAMENTARY INTENTIONS

Even though will-making has been a constant of legal practice since the 13<sup>th</sup> century, adjudication on solicitors' duties in the area was scarce until the latter part of the 20<sup>th</sup> century. Fewer opportunities for courts to address will-making practices could arise when the duties were limited to the testator client. The ambulatory character of a will means that, if a solicitor's mistakes are discovered before death, the mistakes will have caused no loss and can be inexpensively corrected by the preparation (for no fee) of a new will.<sup>106</sup> After death, personal representatives might succeed to the testator's rights to enforce the retainer. However, representatives are bound to administer the estate as it devolved to them without the will and, again, no loss can be ascribed to the estate if property is not to pass as the testator intended.<sup>107</sup> It is the rise of liability to third parties that has given both motive and means to litigating solicitors' will-making practices, and reasons for courts to clarify the duties which those practices entail.

The content of these duties has now been stated with some precision, but the law of negligence still fails to give coherent reasons for why they are owed to beneficiaries and executors. The dissentient in *Van Erp II*, McHugh J, agreed with the majority that the beneficiary's loss was reasonably foreseeable.<sup>108</sup> However, his Honour lamented that, although each of the other five Justices referred to any one or more of eight other reasons for finding a duty of care to a

<sup>102</sup> Ibid 580.

<sup>103</sup> Ibid 598.

<sup>104</sup> *Hawkins I* (1986) 5 NSWLR 109, 139.

<sup>105</sup> Ibid 139–40.

<sup>106</sup> *Buckley*, 42 P 900, 902 (Cal, 1895); *Otter* [1953] 1 Ch 280, 287; *Heyer*, 74 Cal Rptr 225, 230 (Cal, 1969); *White* [1995] 2 AC 207, 224; *Van Erp II* (1997) 188 CLR 159, 173.

<sup>107</sup> *Spivey*, 526 NYS 2d 145, 147 (Sup Ct App Div 2d Dept, 1988); *Barcelo*, 923 SW 2d 575, 579, 580 (Tex, 1996); *Bates*, above n 12, 327.

<sup>108</sup> (1997) 188 CLR 159, 174 (Dawson J), 188 (Toohey J), 201 (McHugh J), 234 (Gummow J).

beneficiary, together they could not agree on any one reason for that duty to arise.<sup>109</sup> Later decisions on tortious liability have not disciplined the Court's rationale for recognising a duty to third parties.<sup>110</sup> However, by far the most compelling consideration that has attracted judges to finding third party liability in will-making cases is the intuition that there must be some remedy for the solicitor's mistake. In the early stages of *Lucas*, Shoemaker J said that '[r]ejection of the privity doctrine in this type of case is particularly justified because no other person can recover for the loss caused by the attorney's negligence.'<sup>111</sup> In similar terms, in *Ross*, Megarry V-C noted that without third party liability, '[t]he only person who has a valid claim has suffered no loss, and the only person who has suffered a loss has no valid claim.'<sup>112</sup>

This powerful rhetoric underscores a sense of injustice that has been voiced repeatedly.<sup>113</sup> Injustice there is — if, indeed, the beneficiary has suffered a loss at the solicitor's hands but cannot demand that someone give reparation. However, the question is whether the beneficiary has suffered a 'loss'. Judicial critics have emphasised that the beneficiary loses nothing. The beneficiary had no legal interest in the property. There was some expectation that the beneficiary would receive something, but the legal quality of this expectation is weaker than even a *spes successionis* that might pass to an heir-at-law or next of kin under intestacy rules. This expectation is not even a defective right that equitable remedies might perfect.<sup>114</sup>

Two answers have been given to the criticism that the beneficiary loses nothing. First, in *Van Erp II*, Brennan CJ was aware that, in one sense, no loss was suffered.<sup>115</sup> His Honour and Gaudron J then suggested that these cases were not really concerned about the loss of, at best, a *spes*.<sup>116</sup> As Brennan CJ put it, 'compensation is sought for the loss of the property which, but for the negligence of the defendant, the plaintiff would have taken.'<sup>117</sup> But this argument risks circularity, as it suggests that the ground for recognising a claim under the law of

<sup>109</sup> Ibid 215.

<sup>110</sup> *Perre v Apand* (1999) 198 CLR 180; *Tepko Pty Ltd v Water Board* (2001) 178 ALR 634; *Sullivan v Moody* [2001] HCA 59 (Unreported, Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ, 11 October 2001); Warne, above n 2, 295–300.

<sup>111</sup> *Lucas v Hamm*, 11 Cal Rptr 727, 731 (1<sup>st</sup> Dist Ct App, 1961).

<sup>112</sup> [1980] 1 Ch 297, 303.

<sup>113</sup> *Heyer*, 74 Cal Rptr 225, 229 (Cal, 1969); *Lorraine*, 467 So 2d 315, 320 (Fla 3d Dist Ct App, 1985) (Pearson J dissenting); *White* [1995] 2 AC 207, 220, 233, 259, 262; *Cancer Research Campaign* (Unreported, High Court of England and Wales, Harman J, 27 October 1997); *Van Erp II* (1997) 188 CLR 159, 165, 187, 195, 202; *Smolinski* [1995] 10 WWR 68, 85–6; *Barcelo*, 923 SW 2d 575, 580 (Tex, 1996) (Cornyn and Abbott JJ dissenting); *Carr-Glynn I* [1997] 2 All ER 614, 623–4; *Carr-Glynn II* [1999] Ch 326, 335, 337–8, 339; *Earl* [1998] 2 WWR 522, 529. Cf *Seale* [1982] VR 193, 210–11; Bates, above n 12, 334; K M Stanton, 'The Impulse to Do Practical Justice: The Legacy of *White v Jones*' (1998) 14 *Professional Negligence* 188; John Fleming, 'The Solicitor and the Disappointed Beneficiary' (1993) 109 *Law Quarterly Review* 344, 345.

<sup>114</sup> *Buckley*, 42 P 900, 902 (Cal, 1895); *White* [1995] 2 AC 207, 251; *Van Erp II* (1997) 188 CLR 159, 211–12; *Seale* [1982] VR 193, 220. Cf *Ventura County Humane Society*, 115 Cal Rptr 464, 470 (1<sup>st</sup> Dist Ct App, 1974); *Hawkins I* (1986) 5 NSWLR 109, 142; *Earl* [1998] 2 WWR 522, 535.

<sup>115</sup> (1997) 188 CLR 159, 168.

<sup>116</sup> Ibid 170, 197.

<sup>117</sup> Ibid 170. See also *Ross* [1980] 1 Ch 297.

negligence is that the right to the property would be established if duties imposed by the law of negligence were discharged.

The second, more compelling, answer is provided by the law of succession. In *White*, Steyn LJ's response to the argument that the beneficiary loses nothing if a will fails through a solicitor's carelessness was to conceptualise the beneficiary's claim over the property by reference to testamentary intention:

The negligent solicitor assumes a responsibility to give effect to his client's testamentary wishes. ... The solicitor further knows that upon the death of the testator the beneficiary's interest crystallises and that the mere expectation ought then to become an entitlement to the legacy. Due to the solicitor's negligence the beneficiary's interest never becomes an entitlement. That seems a principled basis on which to impose liability in tort.<sup>118</sup>

Here, liability is explained by the common law's longstanding program to place intention at the centre of property distribution on death. This has occurred largely by the progressive dismantling of restraints on the alienation of property. The process by which intention became central in testamentary succession similarly enhanced the testator's freedom to dispose of his or her estate how and to whom the testator thought fit, and was checked only by family provision laws.<sup>119</sup> It also reinforced the need to be satisfied that the will that ultimately governed the distribution of the estate should properly and completely reflect the testator's last intentions for the property. This need was one reason for maintaining the rigorous formalities surrounding the creation of a valid will. On the other hand, the defective execution cases show that the failure to comply strictly with the formalities of signing and witnessing can also defeat the testator's last intentions for the property.<sup>120</sup> In an effort to have the order for probate give effect to the substance of the testator's intentions, statute gives some concession to less scrupulous execution. This is more completely realised where the pattern of the *Wills Act 1936* (SA) is followed, as a defectively executed will can be proved if the court is satisfied that it expresses the intentions of the testator.<sup>121</sup> It is only partially realised in Queensland, where the *Van Erp I* case arose, because substantial (though not complete) compliance with formalities is required for a will to be proved.<sup>122</sup>

Accordingly, it is possible to understand the law presented in *White* and *Van Erp II* as correcting the inability of statute to ensure that the proven substantive intentions of the testator are realised. In other words, the powerful emphasis that the modern law places on the realisation of testamentary intention is advanced by both the law of succession and, where that fails, the law of negligence.<sup>123</sup> Indeed, the curative purpose of the law of negligence was reinforced by the Court of

<sup>118</sup> [1995] 2 AC 207, 237.

<sup>119</sup> Mackie and Burton, above n 69, 41–2; Charles Harpum, Malcolm Grant and Stuart Bridge, *The Law of Real Property* (6<sup>th</sup> ed, 2000) 585–90; *Van Erp II* (1997) 188 CLR 159, 224.

<sup>120</sup> *White* [1995] 2 AC 207, 278.

<sup>121</sup> *Wills Act 1968* (ACT) s 11A; *Wills Act 1936* (SA) s 12(2); *Wills Act 1992* (Tas) s 26; *Wills Act 1997* (Vic) s 9; *Wills Act 1970* (WA) s 34. See also Bates, above n 12, 339.

<sup>122</sup> *Succession Act 1981* (Qld) s 9(a).

<sup>123</sup> For comments to this effect, see *Van Erp II* (1997) 188 CLR 159, 232; *Carr-Glynn II* [1999] Ch 326, 339; Fleming, above n 113, 348.

Appeal's decision in *Walker* that a beneficiary who could obtain rectification of a will must do so *before* the claim in tort can be brought.<sup>124</sup> The reason therefore that an intended, though disappointed, beneficiary is entitled to damages is not because an existing right to property has been lost. It is because the disappointed beneficiary, like a beneficiary under a valid will, is the object of the testator's intention, and the law does its utmost to give effect to that intention.

As the law now stands, effect can be given to both the testator's formal intentions (as found in the proved will or deemed by intestacy rules) and the testator's substantive intentions (as might be established by other evidence). True, the different means that might be used to realise formal and merely substantive intentions can also enlarge the pool of assets available to 'formal' and 'substantive' beneficiaries.<sup>125</sup> To take the *Van Erp* case as an example, under the terms of the will for which probate was granted, the residuary beneficiary gained a windfall half-share in a house that comprised part of the estate. The plaintiff, who was denied this share only because her husband had witnessed the signing of the will, gained the equivalent of this half-share in damages as she was the object of the testatrix's substantive intentions for that share. The testatrix's formal and substantive intentions were realised, and her formal and substantive beneficiaries provided for, from her estate and her solicitor's (or her solicitor's insurer's) pocket.

An appreciation of the central role of *animus testandi* in will-making cases sharpens the definition of the solicitor's responsibility and its limits. The solicitor is caretaker of the client's testamentary intentions.<sup>126</sup> The Florida approach, in only recognising intentions as expressed in a will, cannot be reconciled with this role. It demands that the lawyer produce a valid will, even one significantly unresponsive to the client's wishes.<sup>127</sup> Elsewhere, there is ample support for this understanding of will-making practice. The duty upheld in *Carr-Glynn II*, ensuring that the land (as part of the estate) was capable of devise, was held to arise from the general obligation 'to take care to ensure that effect is given to the testator's testamentary intentions.'<sup>128</sup> In addressing attestation duties in *Van Erp II*, Davies JA referred to the role of the solicitor as 'the

<sup>124</sup> [1999] 1 WLR 727, 739, 742.

<sup>125</sup> *White* [1995] 2 AC 207, 224–5, 257–8, 293; *Van Erp II* (1997) 188 CLR 159, 213; *Carr-Glynn I* [1997] 2 All ER 614, 628; *Corbett I* [1999] EWCA 1379 (Unreported, Court of Appeal, Morritt, Auld and Clarke LJJ, 30 March 1999) [16]–[17]; *Corbett II* (Unreported, Queen's Bench Division, Eady J, 25 May 2000) 5, 6. Cf *Walker* [1999] 1 All ER 685, 742. This was extended in *Carr-Glynn II* [1999] Ch 326, 337–8, where Chadwick LJ recognised that, in some cases, the estate and the beneficiary could have separate claims against the solicitor.

<sup>126</sup> *Sutherland* [1980] 2 NZLR 536, 546–7. Cf *Whittingham* (1978) 88 DLR (3d) 353; *Trusted v Clifford Chance (a firm)* (Unreported, High Court of England and Wales, Parker J, 17 May 1996) 61–2 ('*Clifford Chance*'). The term 'caretaker' is used on purpose, emphasising the moral sense of custodianship and trusteeship without being limited by the implications each of those terms has when understood as a legal concept. This parallels Clive Boxer's comment on *White*, which he claims reassessed '[t]he traditional role of the solicitor as quasi trustee for family property': 'The Lords' View of a Solicitor' (1995) 139 *Solicitors Journal* 372, 373.

<sup>127</sup> *Ogle*, 466 NE 2d 224, 226 (Ill, 1984); *De Maris*, 426 So 2d 1153, 1154 (Fla 3d Dist Ct App, 1983); *Lorraine*, 467 So 2d 315, 318–19 (Fla 3d Dist Ct App, 1985) cf at 319–32.

<sup>128</sup> [1999] Ch 326, 337, 339. See also *Ventura County Humane Society*, 115 Cal Rptr 464, 469 (1st Dist Ct App, 1974); *Barcelo*, 923 SW 2d 575, 581 (Tex, 1996) (Cornyn and Abbott JJ dissenting).



assumption ... of responsibility for giving legal effect to the testamentary intentions of the testator'.<sup>129</sup> And, on appeal, Gummow J reconciled attestation duties with the custodial duties of *Hawkins II* under the solicitors' 'position of control over the realisation of the testamentary intentions of the testatrix.'<sup>130</sup>

The duty to advise or provide against accidental revocation by marriage was deduced in *Heyer* from the attorney's duty 'to fulfil the testamentary instructions of his client'.<sup>131</sup> As has been seen, in *Hawkins II* Deane J thought the solicitors' custodial duties stemmed not so much from the firm's agreement to hold the will as from the fact that 'the firm effectively assumed the custodianship of the testatrix's testamentary intentions.'<sup>132</sup> Although this language is conditioned by principles of tortious liability for financial loss, it also illuminates the special, distinctive position of the solicitor in will-making practice and the general responsibility that position creates to ensure that the testamentary intention is realised.<sup>133</sup> This position depends on the client having testamentary capacity, and could not arise if the solicitor rightly believed that the client lacked capacity but, against the solicitor's advice, the solicitor was still instructed to prepare a will.<sup>134</sup> Peculiar terms in the retainer might also relieve a solicitor from the general responsibility associated with the role of caretaker of the client's testamentary intention,<sup>135</sup> but the usual instructions in will-making practice would oblige the solicitor to ensure that the substantive intentions of the testator are given proper formal expression. To the extent that the client's intentions are not realised in a legally effective will or by rectification then, as caretaker of the *animus testandi*, the solicitor will carry the financial burden of approximating the testator's substantive intentions in damages.

The gravity of the solicitor's task becomes more evident once his or her role is understood in these terms. The solicitor becomes intimately entwined in the legal arrangements for securing the disposal of the testator's property on death and, in a sense, pledges the solicitor's own property (and indemnity insurance) as a guarantee for fulfilling the testator's intentions. Equally, both the peculiarity and enhanced significance of that role demand that it be carefully confined to the limits of the testator's instructed intention.<sup>136</sup> This has two consequences. Firstly, the solicitor's duty to the beneficiary cannot arise until that intention has formed, and instructions to that effect are given. As Parker J stated plainly in *Clifford Chance*:

[N]o tortious duty of care will arise in favour of an intended beneficiary unless and until the client has (a) decided to confer on the intended beneficiary a particular intended testamentary benefit (being the benefit for the loss of which the

<sup>129</sup> [1995] Aust Torts Reports ¶81-317, 62 066.

<sup>130</sup> *Van Erp II* (1997) 188 CLR 159, 232. See also at 195. Stickley, above n 48, 209, probably overstates the differences between *Van Erp II* and *Carr-Glynn II*.

<sup>131</sup> 74 Cal Rptr 225, 228 (Cal, 1969). See also *McAbee*, 340 So 2d 1167, 1169 (Fla 4<sup>th</sup> Dist Ct App, 1976); *Lorraine*, 467 So 2d 315, 320 (Fla 3d Dist Ct App, 1985).

<sup>132</sup> *Hawkins II* (1988) 164 CLR 539, 580. Cf 545.

<sup>133</sup> *White* [1995] 2 AC 207, 224. Cf 291.

<sup>134</sup> Cf *Ryan* [2000] 1 NZLR 700, 718.

<sup>135</sup> See, eg, *Smolinski* [1995] 10 WWR 68.

<sup>136</sup> *Walker* [1999] 1 WLR 727, 737, 740-1.

intended beneficiary seeks to hold the solicitor liable), and (b) retained the solicitor for that purpose.<sup>137</sup>

Secondly, the duty is limited to those beneficiaries that the solicitor knows are intended by the testator to benefit from the estate.<sup>138</sup> The case law is replete with references to the duty of care owed to an 'intended beneficiary'.<sup>139</sup> In *Van Erp II*, all of the judges in the High Court framed the object of the duty as the 'intended beneficiary'.<sup>140</sup> However, it was Pincus JA in the court below who defined most accurately the object as it has developed in the cases: 'the plaintiff must be a person who is precisely identified in the solicitor's instructions'.<sup>141</sup>

If there is a duty to the plaintiff, it must be compatible with the client's instructions. So, provided the client has testamentary capacity, a solicitor receiving instructions to cut a person out of the estate could not owe any duties to that person.<sup>142</sup> Pincus JA's formulation also excludes a duty to 'incidental beneficiaries', that is, beneficiaries of the estate of a beneficiary of the client's estate.<sup>143</sup> Furthermore, it should also preclude any duties to a 'potential beneficiary', that is, a member of a class defining permissible recipients of a gift in the will (such as the objects of a power of appointment) but not specifically named as a beneficiary by the testator. For example, in *Ventura County Humane Society*,<sup>144</sup> a quarter of the residue of the estate was, as the testator instructed, left to a 'Society for the Prevention of Cruelty to Animals (Local or National)', a term

<sup>137</sup> *Clifford Chance* (Unreported, High Court of England and Wales, Parker J, 17 May 1996) 63. See Luntz, above n 12, 287. Again, this implies that the client's testamentary capacity is a prerequisite to the duty to a beneficiary arising: *Ryan* [2000] 1 NZLR 700, 718–19.

<sup>138</sup> Cf Helen Roberts, 'Liability of Solicitors to Disappointed Beneficiaries' (1997) 71 *Australian Law Journal* 674, 676, 677.

<sup>139</sup> *Lucas I*, 364 P 2d 685, 689 (Cal, 1961); *Hever*, 74 Cal Rptr 225, 229, 231 (Cal, 1969); *Ventura County Humane Society*, 115 Cal Rptr 464, 468, 469 (1<sup>st</sup> Dist Ct App, 1974); *McAbee*, 340 So 2d 1167, 1169–70 (Fla 4<sup>th</sup> Dist Ct App, 1976); *Ross* [1980] 1 Ch 297, 309; *Sutherland* [1980] 2 NZLR 536, 546, 547; *Gartside* [1983] NZLR 37, 47; *De Maris*, 426 So 2d 1153, 1154 (Fla 3d Dist Ct App, 1983); *Ogle*, 466 NE 2d 224, 226, 227 (Ill, 1984); *Lorraine*, 467 So 2d 315, 317, 318 (Fla 3d Dist Ct App, 1985); *Rosenstone*, 560 So 2d 1229, 1230 (Fla 4<sup>th</sup> Dist Ct App, 1990); *Berry*, 717 SW 2d 716, 718, 719 (Tex Ct App, 1986); *Weir* [1990] SLT 266, 270; *White* [1995] 2 AC 207, 222, 239, 262, 275, 276, 277, 278, 280–1; *Cancer Research Campaign* (Unreported, High Court of England and Wales, Harman J, 27 October 1997); *Palmros*, 672 NE 2d 1245, 1246 (Ill App Ct 2d Dist, 1996); *Clifford Chance* (Unreported, High Court of England and Wales, Parker J, 17 May 1996) 62; *Van Erp I* [1995] Aust Torts Reports ¶81-317, 62 065, 62 066, 62 067; *Barcelo*, 923 SW 2d 575 (Tex, 1996); *Salter*, 717 So 2d 141, 142 (Fla 5<sup>th</sup> Dist Ct App, 1998); *Summerville* [1998] NSWSC 52 (Unreported, Mason P, Sheller and Beazley JJA, 26 February 1998) 7; *Carr-Glynn I* [1997] 2 All ER 614, 621, 623, 625, 626; *Carr-Glynn II* [1999] Ch 326, 334, 335; *Earl* [1998] 2 WWR 522, 530, 538; *Walker* [1999] 1 WLR 727, 732; *Punford* [1998] EWCA 2008, [12]–[14]; *Gibbons* (Unreported, High Court of England and Wales, Blackburne J, 5 April 2000); *Corbett II* (Unreported, Queen's Bench Division, Eady J, 25 May 2000) 2, 5, 6; *Corbett III* [2001] 3 All ER 769, 775; *Babcock*, 760 So 2d 1056, 1056–7 (Fla 4<sup>th</sup> Dist Ct App, 2000); *Ryan* [2000] 1 NZLR 700, 718.

<sup>140</sup> (1997) 188 CLR 159, 167–8, 170 (Brennan CJ), 181–3 (Dawson J), 193–7 (Gaudron J), 200 (McHugh J), 233 (Gummow J).

<sup>141</sup> [1995] Aust Torts Reports ¶81-317, 62 067.

<sup>142</sup> Cf *Worby v Rosser* [1998] EWCA 3545 (Unreported, Court of Appeal, Nourse and Ward LJ, 17 September 1998) [2], [7]; *Ryan* [2000] 1 NZLR 700, 718–19; *Corbett III* [2001] 3 All ER 769, 780, 781–2.

<sup>143</sup> *Keckemeti* [1992] TLR 666, 667; *MacDougall* [1994] SLT 1178, 1184; *Barcelo*, 923 SW 2d 575, 579 (Tex, 1996); *Salter*, 717 So 2d 141, 142 (Fla 5<sup>th</sup> Dist Ct App, 1998).

<sup>144</sup> 115 Cal Rptr 464, 470 (1<sup>st</sup> Dist Ct App, 1974).

that included the plaintiff and numerous other organisations. The attorneys were held not to owe a duty (to give legal effect to the client's instructions) to the plaintiff as one 'potential beneficiary' among many.<sup>145</sup>

No judge has held that the duty could extend beyond that precisely identified by the instructing testator. If there were duties to incidental or potential beneficiaries or, as we will see, even those merely hoping to be beneficiaries, those duties would certainly have to be developed on some ground other than the working-out of the law's program of giving effect to the testator's intentions.<sup>146</sup>

#### IV THE *HENDERSON TROUT* CASES

##### *A Lady Trout, Henderson Trout and the Trout Collection*

Sir Leon Trout and Lady Trout were Queensland's most significant private art collectors. Paintings, sculpture, antiques and other objets d'art were displayed at the Trouts' home, Everton House, in Brisbane. They had also been generous benefactors; large donations of paintings had been made to the Queensland Art Gallery ('the Gallery'). Sir Leon, a solicitor, died in 1978 and the whole collection passed to his widow. The testatrix, Lady Trout, died on 24 May 1988. In accordance with her will of 1986, the art works were sold and the proceeds distributed between five charities.<sup>147</sup>

However, the Gallery contended that there should have been a later will in 1988 and blamed the testatrix's solicitors for its failure to materialise. According to the Gallery, this will would have included a bequest to it of all paintings in the Trout collection. The solicitors were Henderson Trout, descendants of Sir Leon's original firm, which had supported his widow with free legal and business services and which had (from January 1988) been instructed to prepare her new will. The Gallery alleged that Henderson Trout's delay in preparing this will meant that the testatrix died before it was produced in an executable form but, had the solicitors not been so negligent, the will would have been executed before her death. So, the Gallery claimed that the solicitors were liable to pay it damages for the loss of the paintings.<sup>148</sup>

The evidence presented in *Henderson Trout I* was ambiguous and contradictory. At trial, Chesterman J's interpretation of events often relied on his findings about the testatrix's and the solicitors' credibility. However, the judge's conclusions about the testatrix's intentions towards the Gallery are central to any sensible appraisal of the judgments. The Court of Appeal effectively accepted the facts as presented by Chesterman J, despite the major argument on appeal being a reinterpretation of the facts and despite a lengthy factual analysis by the appellate judges.<sup>149</sup> The testatrix's role as benefactress to the Gallery ended in 1982 when, feeling slighted by people there, she excluded it from her estate. She

<sup>145</sup> Ibid 466, 469. See also Bates, above n 12, 330–1.

<sup>146</sup> Ross [1980] 1 Ch 297, 322.

<sup>147</sup> *Henderson Trout I* [1998] QSC 250 (Unreported, Chesterman J, 10 November 1998) [1]–[7].

<sup>148</sup> Ibid [123].

<sup>149</sup> *Henderson Trout II* [2000] QCA 93 (Unreported, Pincus and Thomas JJA and Byrne J, 24 March 2000) [5], [10], [33]–[34], [35], [44].

made six wills after that, none leaving anything to the Gallery.<sup>150</sup> Her abiding purpose was to have the collection maintained in a way that ensured that she and Sir Leon would receive perpetual recognition as art collectors, and different ways of achieving that objective were explored. In late 1987, her resentment towards the Gallery had cooled and the solicitors were told that she would proceed in January 1988 with the preparation of a new will leaving paintings to the Gallery.<sup>151</sup> The four drafts prepared provided for the Gallery to receive all of the paintings. The fourth draft was produced in April, but the partner responsible believed detail about a gift of jewellery was to come from the testatrix before he could finalise the will. On 5 May 1988, Lady Trout said that she never intended to make this gift and, believing the partner was rude to her, terminated the retainer. On 12 May 1988, she instructed another firm, Flower & Hart, to settle the will.<sup>152</sup> The testatrix died before this was done.

Chesterman J accepted that neither Henderson Trout nor Flower & Hart understood that the preparation of the will was urgent. The testatrix happily agreed to the latter's timetable of 'a week or so', even though at that stage the will could have been settled in less than a day.<sup>153</sup> Even more significantly, the judge felt that the testatrix would not have signed the will even if it were ready.<sup>154</sup> While the will was being prepared, she told her local alderman that she was resolved not to leave the paintings to the Gallery. They discussed the possibility of the city council maintaining the whole Trout collection in Everton House for the benefit of the people of Brisbane. As late as 19 May 1988, the alderman wrote to the testatrix to that end, advising that the Lord Mayor would visit on 26 May to view the collection. Lady Trout was awaiting the outcome of the planned discussions with the Lord Mayor before committing herself to signing the will.<sup>155</sup> Chesterman J concluded 'that Lady Trout had not, by the time she died, unequivocally decided that [the Gallery] should be the beneficiary of her art collection'.<sup>156</sup>

### B *Precis of Judgments*

Even though all judges ruled against the Gallery, there are significant differences between the judgments as to whether the solicitors owed it a duty of care and, if they did, whether they were negligent. Chesterman J held, firstly, that there was no duty of care.<sup>157</sup> Secondly, he concluded that, even on the assumption that there was this duty, there was no negligence.<sup>158</sup> Thirdly, he found that,

<sup>150</sup> *Henderson Trout I* [1998] QSC 250 (Unreported, Chesterman J, 10 November 1998) [82]–[83].

<sup>151</sup> *Ibid* [24]–[28], [36]–[40].

<sup>152</sup> *Ibid* [38]–[72].

<sup>153</sup> *Ibid* [72], [89]–[90].

<sup>154</sup> *Ibid* [70]–[71], [118].

<sup>155</sup> *Ibid* [73]–[77], [103].

<sup>156</sup> *Ibid* [80]. See also at [122].

<sup>157</sup> *Ibid* [137]–[140].

<sup>158</sup> *Ibid* [141]–[169].

even if there was negligence, it did not cause the loss claimed by the Gallery.<sup>159</sup> Fourthly, for good measure, he considered that if negligence causing loss had been established, damages would amount to just under A\$9 million.<sup>160</sup>

The majority in the Court of Appeal disagreed with this analysis. Pincus JA held that the solicitors did owe the Gallery a duty of care<sup>161</sup> and that they were negligent.<sup>162</sup> Byrne J said he agreed ‘substantially with Pincus JA’s analysis of the evidence as well as with his factual conclusions’.<sup>163</sup> This seems to endorse Pincus JA’s conclusions that a duty of care was owed to the Gallery and that there was negligence, although it does not address those issues explicitly. Thomas JA held that no duty of care arose on the part of the solicitors to the Gallery,<sup>164</sup> and that there was no negligence.<sup>165</sup> The three judges in the Court of Appeal nevertheless agreed that, even if there were negligence, it could not have caused the loss claimed by the Gallery.<sup>166</sup> They therefore dismissed the appeal.

### C Causation

The one point on which all trial and appellate judges agreed that the solicitors should escape liability was causation. The Gallery’s argument that the solicitors negligently caused it to lose the paintings was twofold. Firstly, it alleged that the solicitors should have had the will ready for execution by the end of April 1988. Secondly, the Gallery argued that had they done so the testatrix would have signed the will so that, when she died in May, the paintings would have passed to the Gallery.<sup>167</sup> The reasons for rejecting this argument were summarised by Chesterman J: ‘The fact that Lady Trout did not instruct (and did not then want) to sign a will shows that there is no causal connection between the defendant’s inactivity or inattention in preparing such a document and the plaintiff’s loss’.<sup>168</sup> This reveals two related considerations that supersede the possibility that the solicitors caused any loss, though each could independently do so without the other.

The first is that, on 5 May 1988, the testatrix denied Henderson Trout any opportunity to arrange the execution of the will by terminating the retainer and instructing Flower & Hart to prepare a will instead. Chesterman J<sup>169</sup> and, in the Court of Appeal, Thomas JA and Byrne J<sup>170</sup> thought this an important fact

<sup>159</sup> Ibid [170]–[190].

<sup>160</sup> Ibid [191]–[203].

<sup>161</sup> *Henderson Trout II* [2000] QCA 93 (Unreported, Pincus and Thomas JJA and Byrne J, 24 March 2000) [29]–[31].

<sup>162</sup> Ibid [31]–[32].

<sup>163</sup> Ibid [48].

<sup>164</sup> Ibid [38]–[41].

<sup>165</sup> Ibid [41].

<sup>166</sup> Ibid [33], [42], [45]–[47].

<sup>167</sup> *Henderson Trout I* [1998] QSC 250 (Unreported, Chesterman J, 10 November 1998) [170].

<sup>168</sup> Ibid [181].

<sup>169</sup> Ibid [174].

<sup>170</sup> *Henderson Trout II* [2000] QCA 93 (Unreported, Pincus and Thomas JJA and Byrne J, 24 March 2000) [42], [45], [46].

disproving causation. The second consideration, raised by all the judges, is that the testatrix's tentative plan to leave the paintings to the Gallery had not metamorphosed into a testamentary intention to that effect. At the time of her death, Lady Trout was considering two alternative programs for preserving the Trout collection: a gift of the collection to the city council and a gift of the paintings to the Gallery. The will-making process was furthering the latter of those options, while arrangements like the Lord Mayor's visit were being made to further the former. Not unusually, the testatrix was pursuing arrangements for two incompatible projects while deferring the final decision about which to implement. The prospects of a gift to the council could not be assessed until after the Lord Mayor's visit, so — even in the testatrix's dying days — she had no fixed intention that the paintings would be left to the Gallery. The fact that instructions were given to prepare a new will does not, in itself, mean that the testatrix intended to leave the paintings to the Gallery.<sup>171</sup>

The significance of *Henderson Trout II* is certainly open to different interpretations. If it is merely considered in terms of its result, *Henderson Trout II* is an uncontroversial case. The Queensland Court of Appeal held that 'a hopeful' — a person who hoped (but was not intended) to be a beneficiary of a testator's largesse — could not recover damages when it transpired that the hopeful was not named as a beneficiary in the testator's last valid will. In this sense, it is of little importance whether that result is attributed to the lack of a causal nexus between the solicitor's conduct and the hopeful's disappointment or to the premise that the solicitor owed no duty of care to the hopeful. Alternatively, the reasoning in the judgments in *Henderson Trout II* could be taken more seriously. Indeed, the decision could be understood as the most significant attempt of an Australian court to explore the implications of the High Court's decision in *Van Erp II*. That is the assertion made in this article and it gives rise to some concern about the reasoning behind the Court of Appeal's decision.

#### D Duty of Care

Even if the outcome in *Henderson Trout II* is correct, the decision that the solicitors owed a duty of care to the Gallery is conceptually precarious. Pincus JA referred to the Gallery as 'a disappointed beneficiary',<sup>172</sup> but effectively accepted that the Gallery's true position could be regarded as nothing more than 'a hopeful'. His Honour upheld Chesterman J's factual conclusions, including his finding that the testatrix had no settled intention to leave the paintings to the Gallery, stating that Lady Trout 'had not quite made up her mind about the matter'.<sup>173</sup> So, the finding that the solicitors owed a duty of care to the Gallery can be construed as a finding that they owed duties to a person who was contem-

<sup>171</sup> *Henderson Trout I* [1998] QSC 250 (Unreported, Chesterman J, 10 November 1998) [176], [179]; *Henderson Trout II* [2000] QCA 93 (Unreported, Pincus and Thomas JJA and Byrne J, 24 March 2000) [32]–[33], [42], [46].

<sup>172</sup> *Henderson Trout II* [2000] QCA 93 (Unreported, Pincus and Thomas JJA and Byrne J, 24 March 2000) [31].

<sup>173</sup> *Ibid* [34].

plated as a possible beneficiary of the testatrix's estate, but who at the testatrix's death was not intended to be a beneficiary.

This duty was found by analogy with *Van Erp II*. To an extent, this was influenced by the incoherence of the majority's reasoning in *Van Erp II* and the High Court's inability in that case to state any coordinating principle of a solicitor's liability to third parties.<sup>174</sup> That being so, Pincus JA said:

If a mistake in arranging for the execution of a Will as in *Hill v Van Erp* and in *Somerville v Walsh* ... suffices to create a duty of care, then I can see no reason why it should be held that a disappointed beneficiary, whose hope of benefit is evident to the solicitor engaged, should not have a right to sue if that hope fails of realisation because of the solicitor's culpable delay in preparing a Will.<sup>175</sup>

Despite being conscious of the dangers of analogical reasoning or 'incrementalism',<sup>176</sup> the comparison with *Van Erp* and *Summerville* led Pincus JA to conclude that (causation aside) there was a duty that vested rights in a hopeful.<sup>177</sup>

In determining rights and liabilities in novel cases, incrementalism is certainly an accepted approach for judges to adopt. It has a respectable pedigree in the general area of tort that determines solicitors' professional duties<sup>178</sup> and has become more significant since *Van Erp II*, where a majority of the High Court rejected the use of the concept of proximity as the means of identifying a duty of care.<sup>179</sup> It is still questionable whether the incremental extension of tortious liabilities to third parties is within a State appellate court's (in contrast to the High Court's) law-making role and it is a role that the Queensland Court of Appeal has eschewed in other financial loss cases.<sup>180</sup> Furthermore, in *Van Erp II*, Dawson J hinted that the decision in that case was so dependent on the position of an intended beneficiary that *Van Erp II* itself may not be a safe point from which to extend solicitors' duties.<sup>181</sup> However, the problem that analogising created in *Henderson Trout II* can arguably be addressed in more doctrinal terms.

#### E Animus Testandi

On concluding in *Henderson Trout II* that, before withdrawing instructions from the solicitors, the testatrix had not finally decided to leave the paintings to the Gallery, the Court of Appeal implicitly accepted that the case came outside the decision in *Van Erp II*. *Henderson Trout II* could not be a defective execution case like *Van Erp II* until there was an attempt to have the will signed and witnessed, but the former case did not even meet the more general principles of

<sup>174</sup> Ibid [30]–[31].

<sup>175</sup> Ibid [31] (citation omitted).

<sup>176</sup> Ibid. See also *Van Erp I* [1995] Aust Torts Reports ¶81-317, 62 067.

<sup>177</sup> *Henderson Trout II* [2000] QCA 93 (Unreported, Pincus and Thomas JJA and Byrne J, 24 March 2000) [31], [33].

<sup>178</sup> *Sutherland Shire Council v Heyman* (1985) 157 CLR 424, 481 (Brennan J); *Hawkins II* (1988) 164 CLR 539, 556 (Brennan J).

<sup>179</sup> (1997) 188 CLR 159.

<sup>180</sup> *Fangrove Pty Ltd v Tod Group Holdings Pty Ltd* [1999] 2 Qd R 236, 241, 242.

<sup>181</sup> (1997) 188 CLR 159, 187; Bruce Feldthusen, 'Pure Economic Loss in the High Court of Australia: Reinventing the Square Wheel?' (2000) 8 *Torts Law Journal* 33, 50.

liability in *Van Erp II* that rested on the duty owed to an intended beneficiary. Pincus JA's analogising between 'defective execution cases' and 'failure to prepare cases' was certainly appropriate.<sup>182</sup> However, it is the evidence of a settled, instructed intention in 'defective execution' cases like *Van Erp II*, and 'failure to prepare' cases like *White* and *Summerville*, that makes the analogy between them uncontroversial. It also distinguishes both types of cases from *Henderson Trout II*.

Without the testatrix's proved intention to benefit the Gallery, *Henderson Trout II* lacks the motivations for liability that give the other will-making cases juridical coherence: the justice of realising the testator's intentions; the solicitor's role as caretaker of the testamentary intention; and the duties associated with that role. As a result, it is suggested that the appropriate analogy for *Henderson Trout II* is not a defective execution case, but rather *Smolinski*,<sup>183</sup> where there was a limited retainer. In both *Henderson Trout II* and *Smolinski*, the instructions did not repose the testamentary intention in the solicitors as that intention could not crystallise until a contingency was satisfied. In *Smolinski*, the contingency was at least the testator's receipt of independent advice that the solicitor was an appropriate beneficiary. In *Henderson Trout II*, the contingency was most likely the abandonment of plans for an endowment to the city council and the instruction that the will be engrossed. Exceptionally, for will-making practice, the instructions in *Henderson Trout II* were only to prepare a draft will and no larger role could be inferred from them. The draft will might have eventually become the *animus testandi*. Larger duties might then have arisen but, applying the test set by Parker J in *Clifford Chance*, this would not occur until the testatrix had truly decided to leave the paintings to the Gallery and had instructed the solicitors for that purpose.<sup>184</sup> At the testatrix's death, the terms of the will had not reached that point.

#### F Concurrent Duties

The expansion of lawyers' liabilities after *Hawkins II* was accentuated by Deane J's belief in that case that tortious duties to a client could be over and above those arising in contract.<sup>185</sup> That is no longer true. The High Court has since held that tortious and contractual duties are concurrent,<sup>186</sup> leading other courts to rein in some of lawyers' duties in tort.<sup>187</sup> Strictly, the new doctrine cannot control tortious duties to third parties as there is necessarily no parallel contractual relationship. However, before *Henderson Trout II*, the content of the duties owed to beneficiaries was concurrent with the content of the duties owed

<sup>182</sup> *Summerville* was classified as a defective execution case: *Henderson Trout II* [2000] QCA 93 (Unreported, Pincus and Thomas JJA and Byrne J, 24 March 2000) [31]. Chesterman J had noted similarities with *Gartside* [1983] NZLR 37: *Henderson Trout I* [1998] QSC 250 (Unreported, Chesterman J, 10 November 1998) [138].

<sup>183</sup> [1995] 10 WWR 68.

<sup>184</sup> *Clifford Chance* (Unreported, High Court of England and Wales, Parker J, 17 May 1996) 62.

<sup>185</sup> *Hawkins II* (1988) 164 CLR 539, 583–5.

<sup>186</sup> *Astley v Austrust Ltd* (1999) 197 CLR 1, 20–3.

<sup>187</sup> Cf *Heydon v NRMA Ltd* (2000) 36 ACSR 462, 531–4, 567–8, 687–90 and *Waimond v Byrne* (1989) 18 NSWLR 642, 652.



to clients under the retainer, even though the personal objects of those duties were different. So, consistent with concurrent liability, courts have insisted that a duty was owed to the beneficiary because the beneficiary's and testator's interests were identical.<sup>188</sup> Megarry V-C stated in *Ross* that the duty to the intended beneficiary, 'far from diluting the solicitor's duty to his client, marches with it, and, if anything, strengthens it.'<sup>189</sup> This identity is created, and dissolved, by the client's testamentary intention. However, the *Henderson Trout II* obligation does not necessarily concur with the obligations to the client under the retainer. The duty to the hopeful, being independent and often prior to the testator's intention, cannot originate in the retainer. This is precisely why Thomas JA dissented on the question of a duty of care in *Henderson Trout II*, his concern being that the duty to the hopeful should not override the duty to the client.<sup>190</sup> A duty to a hopeful may not necessarily march against the duty to the client, but there is a significant risk that the duty to the hopeful will jostle that duty. And, the fact that the duties to the testator and the hopeful are not bound together by testamentary intention also creates problems in the performance and management of both.

#### V CONCLUSIONS: MANAGING DUTIES TO A 'HOPEFUL'

The will-making cases have general implications for legal practice, and cautious lawyers are best to disregard suggestions that any particular decision is limited to its facts.<sup>191</sup> Despite the theory that a finding of negligence is a factual conclusion that is not authoritative for later cases,<sup>192</sup> the post-*Van Erp II* importance of incrementalism means a finding of liability in one case will be significant when adjudging factually similar disputes. The theory advanced in this article — that the will-making duties rest on the solicitor's role as caretaker of the testamentary intention — implies a general application of the duties stated in the will-making cases.

For the most part, these duties can be managed by wise use of basic legal knowledge and standard, but inexpensive, file and office procedures.<sup>193</sup> It is certainly true that ignorance of the law relating to will-creation is now inexcusable. There is no real complexity in the rules concerning the minimum content of a will; the age, qualifications and disqualifications of the testator and wit

<sup>188</sup> *Ross* [1980] 1 Ch 297, 322; *Gartside* [1983] NZLR 37, 43, 49; *Hawkins II* (1988) 164 CLR 539, 554, 577, 591; *White* [1995] 2 AC 207, 233, 239, 268, 276; *Van Erp II* (1997) 188 CLR 159, 167, 171, 185, 187, 196–7, 236; *Carr-Glynn II* [1999] Ch 326, 337; *Corbett III* [2001] 3 All ER 769, 772, 773; cf *Heyer*, 74 Cal Rptr 225, 231–2 (Cal, 1969); Bates, above n 12, 332.

<sup>189</sup> [1980] 1 Ch 297, 322.

<sup>190</sup> *Henderson Trout II* [2000] QCA 93 (Unreported, Pincus and Thomas JJA and Byrne J, 24 March 2000) [40].

<sup>191</sup> Stanton, above n 113, 192. Cf *Whittingham* (1978) 88 DLR (3d) 353, 374; 'Solicitors' Duties' [1997] *New Zealand Law Journal* 240.

<sup>192</sup> *Qualcast (Wolverhampton) Ltd v Haynes* [1959] AC 743, 755, 759; *Teubner v Humble* (1963) 108 CLR 491, 503.

<sup>193</sup> Cf Fleming, above n 113, 347.

nesses;<sup>194</sup> and alternative methods of signing.<sup>195</sup> Ignorance of the effect of marriage (and divorce) on a will could also not now be defended.<sup>196</sup> However, taking notes of instructions, having them confirmed by the client,<sup>197</sup> and prompt preparation of a will<sup>198</sup> (with special urgency attached to a will for a client who belongs to a class that presents a greater risk of early death) should minimise the risk of the solicitor negligently failing to comply with instructions or failing to finish the will on time. Precedent letters, either outlining the retainer or finalising the work, can easily discharge duties like that of advising when automatic revocation can occur.

Indeed, even duties that have puzzled commentators worried about risk management<sup>199</sup> can be reconfigured by well-written letters of retention, a practice allowed in *Hawkins II* itself.<sup>200</sup> For example, it seems that a court could hold both a testator and beneficiaries to an oral agreement over the time that is to be allowed to a solicitor to prepare a will,<sup>201</sup> and this is something that could usefully be confirmed in a letter of retention. The possible custodial duty to take steps to learn of a client testator's death could be met by written advice that the will is held on condition that the client makes arrangements for another person to tell the solicitor of the client's death, and that the solicitor is authorised immediately to advise the executor of his or her appointment. A letter to the executor could likewise request that the solicitor be informed of the executor's address.<sup>202</sup> This helps to show that reasonable steps to learn of the testator's death and to advise the executor have been taken.<sup>203</sup>

Some duties are more difficult to manage. It is hazardous for a solicitor to predict what standard of knowledge of the underlying stratum of property law is

<sup>194</sup> *Whittingham* (1978) 88 DLR (3d) 353, 336.

<sup>195</sup> *Summerville* [1998] NSWSC 52 (Unreported, Mason P, Sheller and Beazley JJA, 26 February 1998) 7.

<sup>196</sup> *Hall* [1957] 2 QB 455, 464 suggests otherwise about legal practice in the 1940s. However, since standard practice manuals and checklists on will-making now include advising a client on the effect of marriage, this must now be assumed to be basic knowledge for competent solicitors: John de Groot, Steven Karas and Julie Pastellas, *Solicitors' Checklists* (2<sup>nd</sup> ed, 1993) 6. See also the expert evidence in *Sutherland* [1980] 2 NZLR 536, 542.

<sup>197</sup> *Sutherland* [1980] 2 NZLR 536, 539–40; *Walker* [1999] 1 WLR 727, 732, 735.

<sup>198</sup> Christopher Wallworth, 'Wills Case Reaches Lords' (1994) 138 *Solicitors Journal* 223; 'Wills Case Effect on Claims "Not Dramatic"', above n 4, 156. Although the testator was a septuagenarian, the decision in *White* shows that a period of two months to prepare a will for a healthy client is too long. It would probably be unwise, where the instructions for disposition are clear and no other legalities need be settled before execution, to allow will-making to take more than a month.

<sup>199</sup> Noela L'Estrange, "'All for the Want of a Phone Call' — *Hawkins v Clayton and Others*' (1988) 18 *Queensland Law Society Journal* 95, 98; Frank Riley, 'Holding a Client's Will? Consider the Duty of Care' (1988) 26(5) *Law Society Journal* 47, 51.

<sup>200</sup> (1988) 164 CLR 539, 582.

<sup>201</sup> *Henderson Trout I* [1998] QSC 250 (Unreported, Chesterman J, 10 November 1998) [72], [89]–[90].

<sup>202</sup> Solicitors Liability Committee, 'Safe Custody of Wills' (1988) 62 *Law Institute Journal* 664.

<sup>203</sup> Where the solicitor herself or himself discovers the testator's death and the executor cannot be found at the last advised address, 'rudimentary source[s] of locator information' like telephone directories and electoral rolls should be consulted before the duty to the executor can be said to have been discharged: *Hawkins I* (1986) 5 NSWLR 109, 113 (Kirby P), 141 (McHugh JA).

expected to meet the standard of care,<sup>204</sup> and much will depend on how uncommon or technical the issue is.<sup>205</sup> However, this is a general problem of legal practice and cannot be attributed to the development of will-making duties. Further precautionary measures are also often taken to meet custodial duties. Some law firms undertake daily reviews of death notices and obituaries in local newspapers and check names against the safe-custody register, a procedure that will obviously raise administrative costs.

However, the *Henderson Trout II* duty to a hopeful to prepare a will ready for execution brings risk management to the sensitive area of client relations, requiring the solicitor to give some direction to, and perhaps to exert some pressure on, the testator to make up his or her mind about the disposition of the property. To an extent, guiding a client's wishes was already a duty. For even in will-making, the solicitor is no mere scrivener rephrasing the testator's wishes in appropriate legalese.<sup>206</sup> If the property is incapable of testamentary gift, the solicitor should advise the testator of alternative means, if any, of dealing with it.<sup>207</sup> If the property is completely inalienable, the solicitor should advise that it is not possible to give effect to the testator's wishes.<sup>208</sup> The testator may not like it but, where the testator wants to exclude dependants from the estate, the solicitor should advise that family provision laws impose 'a moral duty' on the testator to make adequate provision for their dependants.<sup>209</sup> All of this serves clients' interests, enabling them to use the law as best they can.

The *Henderson Trout II* duty raises another complication: the promotion of the hopeful's interests even where they do not coincide with the testator's. The Queensland Court of Appeal's judgment in *Henderson Trout II* does not make clear what is required of a solicitor when the duty to prepare a will expeditiously is owed to a hopeful, as compared to *White* where it was owed to an intended beneficiary. A weak interpretation is that the duty to the hopeful is a duty to urge the testator to make a faster decision on the terms of a will and sign it, even if the effect of that decision is to exclude the hopeful from the estate. A strong inter-

<sup>204</sup> For example, even knowing whether and how to sever a joint tenancy is debatable. In *Carr-Glynn II* [1999] Ch 326, 339, Thorpe LJ considered that the means of severance was 'one of the simplest procedures in an area of law where the procedures are not always simple'. At trial, *Carr-Glynn I* [1997] 2 All ER 614, 623, Lloyd J had thought there might be cases where severance was not straightforward.

<sup>205</sup> So while, in England in the 1940s, knowing how to identify an entailed estate and how to disentail it might be 'known and understood by every solicitor' (*Otter* [1953] 1 Ch 280, 285–6) the same might not be so in modern Australian practice. On the other hand, the decision in *Lucas I*, 364 P 2d 685, 690 (Cal 1961), was that an attorney need not know that a legacy is void if it might possibly vest outside the perpetuity period. Later rationalisations in the rule against perpetuities suggest that a competent solicitor could be expected to know more about it. In any case, new 'wait and see' rules would probably mean that a gift like that in *Lucas I* would now be considered valid.

<sup>206</sup> *Earl* [1998] 2 WWR 522, 540.

<sup>207</sup> Wallworth, above n 5, 1040.

<sup>208</sup> *Lorraine*, 467 So 2d 315, 319 (Fla 3d Dist Ct App, 1985).

<sup>209</sup> That means that if the will does not provide enough for dependants, the testator should be aware that the court could defeat his or her intentions by allowing a family provision claim. Further, the size of the estate and its ability to provide for those the testator *does* want to benefit could be depleted, as the estate is likely to bear a significant portion of the court costs: John de Groot and Bruce Nickel, *Family Provision in Australia and New Zealand* (1993) 12, 166–7; Anthony Dickey, *Family Provision after Death* (1992) 77–9, 184–5.

pretation is that it is a duty to have the testator decide to sign a will that makes the hopeful an intended beneficiary. Either is compatible with *Henderson Trout II*, although the strong interpretation conflicts with other case law that recognises that no duty is owed to a person who is consciously excluded from an estate.<sup>210</sup> Indeed, where the testator's goodwill towards the hopeful is ebbing, the strong interpretation puts the solicitor in a position that carries a significant risk of conflicting duties — and *that*, of course, is itself a breach of duty. But even under the weak interpretation, the solicitor must assume 'busybody functions',<sup>211</sup> leaning on a client to make up their mind about the disposition of the estate merely to discharge a duty the solicitor owes to someone else. *Henderson Trout II* therefore suggests that the solicitor is supposed to be caretaking for two masters. In practice, the solicitor is more likely to serve the client and disregard the hopeful. For, if the duty to the latter were taken seriously, the solicitor would probably end up despised by both — like the partners in *Henderson Trout II*.

It would probably improve practice if the *Henderson Trout II* obligation were reconsidered. For a will to have some longevity, there is often good reason to allow the testator to deliberate carefully, consult widely and remain undecided throughout that time.<sup>212</sup> So long as the client is fully advised on the present division of the estate if a new will is not executed,<sup>213</sup> no damage is caused if the testamentary intention remains unformed and the will unprepared. The client has a right of indecision, and the solicitor a right to expect that undivided loyalty will be rewarded in the courts.

<sup>210</sup> *Sutherland* [1980] 2 NZLR 536; *Clarke v Bruce Lance & Co (a firm)* [1988] 1 All ER 364, 369–70. Cf *Worby v Rosser* [1998] EWCA 3545 (Unreported, Court of Appeal, Nourse and Ward LJJ, 17 September 1998).

<sup>211</sup> *Henderson Trout II* [2000] QCA 93 (Unreported, Pincus and Thomas JJA and Byrne J, 24 March 2000) [40].

<sup>212</sup> *Barcelo*, 923 SW 2d 575, 581 (Tex, 1996) (Cornyn and Abott JJ, dissenting).

<sup>213</sup> *Carr-Glynn I* [1997] 2 All ER 614, 629.