



<b>Title</b>	<b>Rectification: Correcting Mistakes in Wills</b>
<b>Author(s)</b>	<b>Sherrin, C</b>
<b>Citation</b>	<b>Hong Kong Law Journal, 2000, v. 30 n. 2, p. 223-244</b>
<b>Issued Date</b>	<b>2000</b>
<b>URL</b>	<b><a href="http://hdl.handle.net/10722/133075">http://hdl.handle.net/10722/133075</a></b>
<b>Rights</b>	<b>Creative Commons: Attribution 3.0 Hong Kong License</b>

# RECTIFICATION: CORRECTING MISTAKES IN WILLS



Christopher Sherrin\*

*This article examines the court's jurisdiction in section 23A of the Wills Ordinance to order that a will be rectified so as to carry out the testator's intentions with contrasting reference to the general equitable remedy of rectification. The types of mistake that can be rectified are analysed in the light of the section's providence and of the relevant case law on the analogous English provision. The important practical impact of the jurisdiction on actions against solicitors for negligence in relation to the drafting of wills is illustrated by showing how an initial application for rectification may be required to mitigate any tortious liability arising out of an alleged mistake in a will.*

## Rectification

Rectification is a time honoured equitable discretionary remedy whereby a written instrument is rectified, in the sense of 'made right', or 'corrected', so that it accords with the true agreement of the party or parties. The equitable remedy in general rests in case-law development but in the singular case of wills rectification has been the subject of statutory formulation and it is the purpose of this article to consider that jurisdiction. A review of the statutory provisions applicable to wills is timely, not only to determine the scope and effect of the power of the court to rectify wills, but also because a recent Court of Appeal decision in England<sup>1</sup> has highlighted the impact of rectification on the question of the liability of solicitors in negligence for mistakes in wills.

The Probate jurisdiction to rectify wills is distinct from the equitable remedy, being wholly derived from and contained in statutory provisions,<sup>2</sup> but the statutory jurisdiction clearly and necessarily owes some contextual reference to the general equitable remedy and can be initially considered as such. The equitable remedy<sup>3</sup> of rectification applies to instruments in writing and has principally been applied to contracts, which have been rectified to enable the

\* Chair of Professional Legal Education, Department of Professional Legal Education, University of Hong Kong.

<sup>1</sup> See *Walker v Geo H Medlicott & Son* [1999] 1 All ER 685, fully discussed below in notes 123-127 and accompanying text.

<sup>2</sup> These provisions in s 23A of the Wills Ordinance (Cap 30) (corresponding to s 20 of the Administration of Justice Act 1982), set out below (see note 54 and accompanying text), do not state 'the equitable remedy of rectification shall forthwith apply to wills'; but create a new and novel jurisdiction, one which clearly owes considerable pedigree to the equitable remedy.

<sup>3</sup> The remedy is discretionary: see *Re Butlin's Settlement Trusts, Butlin v Butlin* [1976] 2 All ER 483, per Brightman J at 489.

written contract to accord with the parties' agreement and intention.<sup>4</sup> A contract is rectified where it contains a mistake not in the understanding of the transaction itself but in the way in which that transaction has been expressed in writing.<sup>5</sup> As stated in a leading case, '[c]ourts of Equity do not rectify contracts; they may and do rectify instruments purporting to have been made in pursuance of the terms of contracts.'<sup>6</sup> This principle has been recently illustrated by the Hong Kong case of *Citilite Properties Ltd v Innovative Development Co Ltd*<sup>7</sup> in relation to a contract for the sale of land. Le Pichon J commented:

... in both *Roberts* and *Bates*, the parties had a common intention that a certain term be included in the lease. Due to a mistake known to only one of the parties, the term was omitted from the lease. In those circumstances, rectification was allowed. In the present case, the mistake was not one of fact; rather, it was one of legal effect of one of the provisions in the agreement.<sup>8</sup>

On that basis rectification was refused. This was upheld by the Court of Appeal. Chan CJHC commented:

It would seem that [the trial judge] accepted the view that the relief of rectification would only be granted where one party to an agreement knew of the mistake of the other and had conducted itself in such a way as would involve a degree of sharp practice. However, the trial judge was of the opinion that the defendant's mistake in the present case was not one of fact but only one of the legal effect of the warranty clause. [The trial judge] held that there was no evidence that the plaintiff actually knew or appreciated that the defendant and their solicitors did not understand the true meaning of saleable area. That, in the learned judge's view, had ruled out rectification.<sup>9</sup>

<sup>4</sup> For an authoritative exposition of the equitable remedy, reference can be made to John McGhee, *Snell's Equity* (London: Sweet & Maxwell, 30th ed 2000), chapter 43 and to Meagher, Gummow and Lehane, *Equity: Doctrines and Remedies* (Sydney: Butterworths, 2nd ed 1984), chapter 26. See also LJ Bromley, 'Rectification in Equity' (1971) 87 *Law Quarterly Review* 532.

<sup>5</sup> See *Frederick E Rose (London) Ltd v William H Pim Jnr & Co* [1953] 2 QB 450.

<sup>6</sup> *Mackenzie v Coulson* (1869) LR 8 Eq 368 at p 375, per James V-C.

<sup>7</sup> [1997] 2 HKC 74, per Le Pichon J; affirmed [1998] 4 HKC 62, CA.

<sup>8</sup> *Ibid*, p 87. *Roberts & Co Ltd v Leicestershire County Council* [1961] Ch 555 concerned rectification of a contract in circumstances where, on the evidence, one party had been aware that the other party had contracted in the mistaken belief that the written contract provided for a 30-month, as opposed to 18-month, completion period. *Thomas Bates & Son Ltd v Wyndham (Lingerie) Ltd* [1981] 1 All ER 1077 concerned rectification of a rent review clause.

<sup>9</sup> See note 7 above (CA), p 65. Stone J, *ibid*, at 74, stated: 'The remedy of rectification arising from mistake attracts a heavy burden, possibly more onerous in instances of so-called unilateral mistake, wherein the conscious "snapping-up" of the recognised error of the other party necessarily attracts overtones of sharp practice.'

In addition to contracts<sup>10</sup> certain unilateral documents such as a deed poll<sup>11</sup> or a settlement<sup>12</sup> have been rectified. But there was no equitable jurisdiction to rectify wills.<sup>13</sup>

The reasons why the Court of Probate historically had no power to rectify wills were not clearly formulated but three factors seemed to prevail. First, a will is a unilateral document and the power of rectification was most often invoked with reference to multilateral documents where the mutuality of evidence that the document did not represent the parties' agreements or intentions could be relied on. But unilateral documents such as deed polls and *inter vivos* settlements had been rectified,<sup>14</sup> presumably on the cogency of the living testimony of the creator.<sup>15</sup> Secondly, wills have to be executed with due formality and all the words of the will have to be on the paper and executed in accordance with s 5 of the Wills Ordinance. If words are added to a will by way of rectification such words would not have the fiat of execution and thus to admit them would, it was thought, be contrary to the formality requirements of the Wills Ordinance. As Templeman J commented in *Re Reynette-James*,<sup>16</sup> 'Any document other than a will could be rectified by inserting the words which the secretary omitted, but in this respect the court is enslaved by the Wills Act 1837.' Thirdly, wills have to be made by the testator. The court has no jurisdiction to create a will for a testator,<sup>17</sup> save in the special case of a statutory will for a mental patient.<sup>18</sup> However this principle would not necessarily preclude a limited rectification of a will otherwise made by the testator.

<sup>10</sup> See *Snell's Equity* (note 4 above), at 700-701, which includes examples of other mercantile documents which have been rectified. As to rectification under s 70(1)(g) of the Land Registration Act 1925, see *DB Ramsden and Co Ltd v Nurdin and Peacock plc* [1998] EGCS 123 (noted [1999] Conv 421).

<sup>11</sup> *Bonhote v Henderson* [1895] 1 Ch 742.

<sup>12</sup> See *Re Butlin's Settlement Trusts* (note 3 above); *Lackersteen v Lackersteen* (1860) 30 LJ Ch 5; *Jervis v Howle* [1936] 3 All ER 193; *Whiteside v Whiteside* [1949] 2 All ER 913 and *Joscelyne v Nissen* [1970] 1 All ER 1213. See Meagher, Gummow and Lehane (note 4 above), paras 2611-2614 where the case law is set out and discussed. In *Re Butlin's Settlement Trusts* (above), Brightman J stated, 'Furthermore, rectification is available not only in a case where particular words have been added, omitted or wrongly written as the result of careless copying or the like. It is also available where the words of the document were purposely used but it was mistakenly considered that they bore a different meaning from their correct meaning as a matter of true construction. In such a case, which is the present case, the court will rectify the wording of the document so that it expresses the true intention.' This formulation should be approached cautiously for, as Meagher, Gummow and Lehane (note 4 above) comment, 'it prefaces a far wider doctrine of rectification than any one else has ever managed.'

<sup>13</sup> *Harter v Harter* (1873) LR 3 P&D 11; *Collins v Elstone* [1893] P 1; see also the additional citations in Meagher, Gummow and Lehane (note 4 above), para 2601.

<sup>14</sup> See notes 11 and 12 above.

<sup>15</sup> See *Van der Linde v Van der Linde* [1947] Ch 306.

<sup>16</sup> [1975] 3 All ER 1037, 1041, citing Greene MR in *Re Horrocks* [1939] 1 All ER 579 at 584, to the same effect.

<sup>17</sup> As Stirling J commented in *Re Phelan (decd)* [1971] 3 All ER 1256, at 1258: 'The court cannot, of course, remake a will for a testator, but it can omit words which have come in by inadvertence or by misunderstanding if their omission gives effect to the true intention of the testator as found by the court.'

<sup>18</sup> See Mummery LJ in *Walker v Geo H Medicott & Son* (note 1 above), at 699. Under the mental health legislation the court has power in certain circumstances to make a will for a mentally incapable person; hence 'statutory' will.

## Knowledge and approval

A further factor mitigating against rectification is the principle that a testator should have knowledge and approval of the contents of his will.<sup>19</sup> As Latey J expressed it in *Re Morris*, 'The law is that, for a testamentary instrument to be valid, its contents must be known to and approved by the testator who executes it.'<sup>20</sup> Likewise Templeman J in *Re Reynette-James*: '...the court should not admit to probate anything which was not known and approved by the testator....'<sup>21</sup> To rectify the will subsequently would defeat this principle. Indeed in *Walker v Geo H Medicott & Son* Mummery LJ expressed the power of rectification as 'a limited exception to the doctrine of knowledge and approval in the case of a valid will...'<sup>22</sup>

The proof of knowledge and approval was historically determined by reference to a principle that where the will had been read over by, or to, the testator and executed as such this gave rise to a strong presumption that the testator knew and approved of the contents as executed. This presumption was formulated in the nineteenth century<sup>23</sup> and was enunciated as a rule of universal application by Lord Penzance in *Guardhouse v Blackburn*.<sup>24</sup> However as Latey J pointed out in *Re Morris*<sup>25</sup> there had subsequently been a progressive erosion of the rigidity of the rule, notably by the House of Lords in *Fulton v Andrew*.<sup>26</sup> Latey J preferred to adopt the approach: 'The fact that the testatrix read the document, and the fact that she executed it, must be given the full weight apposite in the circumstances, but in law those facts are not conclusive, nor do they raise a presumption of law.'<sup>27</sup>

Similarly in the most recent judicial pronouncement on the status of the presumption, Sir Christopher Slade commented, 'As the decision of Latey J in *Re Morris* shows, these facts are no longer regarded by the court as conclusive or as giving rise to a presumption of law. Nevertheless, for obvious reasons of public policy, the court will still attach considerable importance to them in weighing the evidence as to knowledge and approval.'<sup>28</sup> Thus the presumption

<sup>19</sup> See *Wintle v Nye* [1959] 1 All ER 552, for an application of the rule in a different context.

<sup>20</sup> *Re Morris, Lloyds Bank Ltd v Peake and others* [1970] 1 All ER 1057, 1061.

<sup>21</sup> See note 16 above.

<sup>22</sup> See note 1 above, at 699.

<sup>23</sup> See Sir Christopher Slade in *Walker v Geo H Medicott & Son* (note 1 above), at 689, who described it as such a rule.

<sup>24</sup> (1866) LR 1 P&D 109, 116. See also *Atter v Atkinson* (1869) LR 1 P&D 665 and *Harter v Harter* (1873) LR 3 P&D 11.

<sup>25</sup> See note 20 above, at 1063.

<sup>26</sup> (1875) LR 7 HL 448. The decision was followed in *Gregson v Taylor* [1917] P 256 and *Crerar v Crerar* (1956) unreported (referred to by Latey J in *Re Morris* (note 20 above) at 1064.

<sup>27</sup> In *Re Morris* (note 20 above), at 1065, citing Sachs J in *Crerar v Crerar* (note 26 above). The English Law Reform Committee, Nineteenth Report, *Interpretation of Wills* (1973) cmd 5301, para 31, agreed: '... our view is that reading over [the will] is one of the many factors to which the court should pay attention but it should have no conclusive effect.'

<sup>28</sup> In *Walker v Geo H Medicott & Sons* (note 1 above), at 689. *Re Morris* is cited in note 20 above.

no longer stood as an obstacle to rectification but is but one important factor in determining whether the power should be invoked.

### The background to the statutory provisions

'I revoke Clauses 3 and 7 of my said Will'—what could be clearer than that? Nothing, except that the testatrix meant her codicil to say, 'I revoke Clauses 3 and 7(iv) of my said Will.'<sup>29</sup> The testatrix had instructed her solicitor that she wished to alter two bequests in her will to her housekeeper, in particular that she wanted to substitute a legacy of £300 for the original legacy of £2,000 which was in clause 7(iv) of the original will and that in other respects there were to be no changes to her will. The solicitor understood those instructions but by a mistake which he admitted was his alone, he drafted the codicil with the '7' unqualified by the omitted vital '(iv)'; the mistake was not noticed by the testatrix. The result was that the codicil as drafted and executed revoked all the legacies in clause 7 rather than just the legacy in clause 7(iv), which was what the testatrix intended. The draftsman had made a mistake which was freely admitted. What could be done? The obvious solution would have been to have added the missing '(iv)' after '7' but at the date of *Re Morris*<sup>30</sup> in 1970, the Court of Probate had no power to add words to a will in order to correct or rectify a will. The only power the Court then had was to omit words from a will in certain restricted circumstances where it was clear that the offending words had been included by fraud or inadvertence and thus without the testator's knowledge and approval.<sup>31</sup> It was this power to omit words which was prayed in aid in *Re Morris*<sup>32</sup> to provide a solution to the dilemma caused by the mistake. The number '7' in the codicil was omitted thus leaving it to the court of construction to construe the meaning of, 'and [blank]' in the clause, as a question of interpretation.

Similarly in *Re Boehm*<sup>33</sup> the intention was to give legacies in two separate clauses to 'Georgina' and to 'Florence' but by mistake 'Georgina' was inserted in both clauses. The court omitted the name 'Georgina' in the second clause leaving a blank to be construed by the court of construction.

<sup>29</sup> The facts of *Re Morris* (note 20 above).

<sup>30</sup> *Ibid.*

<sup>31</sup> *Rhodes v Rhodes* (1882) 7 App Cas 192; *Re Bohrmann* (1937) 158 LT 180 and *Re Phelan (decd)* [1971] 3 All ER 1256. See *Wordingham v Royal Exchange Trust Co Ltd* [1992] 3 All ER 204, at 205, where Edward Evans-Lombe QC (sitting as a Deputy Judge of the High Court) explained the position in those terms. Other reported cases on mistake include: *In the Goods of Swords* [1952] P 368; *In the Goods of Moore* [1892] P 378; *Re Horrocks* [1939] P 198 and *Rhodes v Rhodes* (1882) 7 App Cas 198. For a full review see Sherrin, Barlow and Wallington, *Williams on Wills* (London: Butterworths, 7th ed 1995), pp 51-53.

<sup>32</sup> See note 20 above.

<sup>33</sup> [1891] P 247.

A more graphic illustration was provided by *Re Reynette-James (decd)*, *Wightman v Reynette-James*<sup>34</sup> where, in typing the engrossment of the will, the clerk's secretary accidentally omitted several crucial words from a clause, resulting in an unintended meaning of the clause. The only recourse of the court was to omit the clause since the court would not admit to probate anything which was not known and approved by the testatrix. Templeman J commented:

The result is not satisfactory but will perhaps encourage a further study of the recommendations which have been made from time to time that rectification of a will should be allowed on the same terms as rectification of other instruments, with perhaps the added safeguard of written contemporaneous evidence supporting the claim to rectification. There is ample evidence in the present case, but it does not enable the will to be rectified.<sup>35</sup>

But the solution in these three cases is not merely inelegant—it is unsatisfactory. In both *Re Morris*<sup>36</sup> and *Re Boehm*<sup>37</sup> the fate of the will as admitted to probate with a blank, depended on the determination of the court of construction, which might or might not result in an interpretation giving effect to the testator's intentions. It was doubly unsatisfactory in *Re Reynette-James* because the omission of the words in that case was unlikely, in contrast to *Re Morris*<sup>38</sup> and *Re Boehm*,<sup>39</sup> to provide any opportunity for the court of construction to correct the mistake as a matter of interpretation. Such cases can be contrasted with more straightforward cases of omission where the effect of the omission is to clarify the will so that no further interpretation is called for. The best illustration of such a situation is *Re Phelan (decd)*,<sup>40</sup> where revocation clauses were omitted from wills thus achieving the testator's intention that the previous wills were not to be revoked and thereby requiring no further interpretation.

### The English Law Reform Committee's recommendations

The cases noted above underlined the need for the Court of Probate to have a power to rectify wills, at least in cases of patent mistakes, and reform was already in hand in England 1970. The Report of the English Law Reform Committee

<sup>34</sup> See note 16 above.

<sup>35</sup> *Ibid.*, at 1043.

<sup>36</sup> See note 20 above.

<sup>37</sup> See note 33 above.

<sup>38</sup> See note 20 above.

<sup>39</sup> See note 33 above.

<sup>40</sup> See note 17 above. There were four wills, each with a revocation clause, but the wills were not inconsistent since each dealt with only one block of shares. The omission of the revocation clauses in the wills enabled probate to be granted of the four wills as the composite will of the testator.

on the '*Interpretation of Wills*' was published in May 1973.<sup>41</sup> The reasons and principles noted above against rectification of wills were considered by the Law Reform Committee but were not thought to be conclusive. The Committee stated, 'In the end we have been unable to discover any satisfactory reason for holding that the doctrine of rectification should not apply to wills.'<sup>42</sup>

But as the Committee pointed out, although there was agreement that some power of rectification should be introduced, there were different views as to what should be the extent and scope of that power. The final recommendations were that only a limited power of rectification should be introduced, restricted to two categories of mistake. The Committee also considered, as a related topic the unsatisfactory state of the law with reference to the admission of extrinsic evidence both to facilitate rectification and generally as an aid to the construction of wills.

It will be apparent that rectification, whether by omission or inclusion, depends on the court being satisfied that the will 'fails to carry out the testator's intentions'. This carries the implicit requirements, first, that the testator's intentions can be ascertained and, secondly, that the failure to carry these out can be demonstrated.<sup>43</sup> In other words, evidence is required of the testator's true intentions both to identify the mistake and to clarify what was in fact intended. In cases of latent mistakes,<sup>44</sup> as opposed to obvious patent mistakes or omissions,<sup>45</sup> both the intentions and the failure to carry them out must be determined by reference to extrinsic evidence, ie evidence outside the wording of the will. This was recognised by Chadwick J in *Re Segelman*: 'In order to answer the first of those questions [*what were the testator's intentions*] the court must admit extrinsic evidence of the testator's intentions with regard to the relevant dispositions.'<sup>46</sup>

However the admission of such evidence was subject to principles which at the time of the Law Reform Committee's deliberations<sup>47</sup> were far from clear. The starting point was a negative rule of exclusion that extrinsic evidence was not admissible to add to, vary or contradict the written words of a will, but then admitting various exceptions by way of inclusion. These exceptions were usually stated under three heads: to establish the surrounding circumstances;<sup>48</sup>

<sup>41</sup> See note 27 above.

<sup>42</sup> *Ibid*, para 10.

<sup>43</sup> Chadwick J in *Re Segelman (decd)* [1995] 3 All ER, at 681; see [1996] Conv 379.

<sup>44</sup> See for example, the facts of *Re Morris* (note 20 above).

<sup>45</sup> The initial reference will be to examine the will as 'expressed' which may, in the case of patent mistakes reveal the error, but may not in the case of latent errors. See as an example of patent mistake the facts in *Re Reynette-James (decd)* (note 16 above).

<sup>46</sup> See note 43 above, at 681.

<sup>47</sup> See note 27 above.

<sup>48</sup> *Boyes v Cook* (1880) 14 Ch D 53. It is beyond the scope of this article to consider the rules relating to the admission of extrinsic evidence in detail. Reference will be made in this and the two succeeding footnotes to one leading illustrative case on each point only.



to resolve latent ambiguities<sup>49</sup> and to rebut equitable presumptions.<sup>50</sup> Some clarification and extension of these rules was needed and the English Law Reform Committee recommended that new rules of admission should be introduced by statutory formulation both generally in the construction of wills and as a necessary step to facilitate the exercise of the power of rectification. These recommendations were linked to the main proposals that the power to rectify should be limited to two categories of mistake but that in such cases there should be no rigid restriction on the nature of the evidence admissible, with the important caveat that the standard of proof required to justify a rectification of the written will should be high.<sup>51</sup>

### The statutory reform

It was the recommendations of the English Law Reform Committee which led, somewhat belatedly, to the creation of a limited jurisdiction to rectify wills in s 20 of the (English) Administration of Justice Act 1982 and to a statutory formulation of an extended power to admit extrinsic evidence in the construction of wills, in s 21 of the same Act. The Hong Kong legislation followed suit in 1995 by adding identical provisions as ss 23A and 23B to the Wills Ordinance,<sup>52</sup> with effect from 3 November 1995 by the Wills (Amendment) Ordinance.<sup>53</sup> Section 23A (1) provides as follows.

### S 23A rectification

- (1) If a court is satisfied that a will is so expressed that it fails to carry out the testator's intentions, in consequence—
  - (a) of a clerical error; or
  - (b) of a failure to understand his instructions,it may order that the will shall be rectified so as to carry out his intentions.<sup>54</sup>

<sup>49</sup> *Re Jackson* [1933] Ch 237.

<sup>50</sup> *Re Tussaud's Estate* (1878) 9 Ch D 363.

<sup>51</sup> See note 27 above, para 65.

<sup>52</sup> *Ie Wills Ordinance* (Cap 30). Section 23C (corresponding to s 22 of the 1982 Act pursuant to the recommendations) was also added; see note 79 below.

<sup>53</sup> (No 56 of 1995). The wording, the layout and the punctuation of this provision are identical to s 20 of the (English) Administration of Justice Act 1982. For a full consideration of the English section, see Sherrin, Barlow and Wallington, *Williams on Wills* (note 31 above), Chapter 6. There are similar statutory powers of rectification of wills in other common law jurisdictions, eg in the Australian States of New South Wales, Wills, Probate and Administration Act 1898 s 29A; Victoria, Wills Act 1997, s 37 and Queensland, Succession Act 1981. It is beyond the scope of this article to consider any legislation beyond the English and Hong Kong provisions.

<sup>54</sup> Subsections (2) (3) and (4) are summarised below, see notes 72, 74 and 73 and accompanying text.

It will be noted that the legislation creates a new jurisdiction exercisable in accordance with the principles stated.<sup>55</sup> Whether this should be regarded as a 'power' or a 'remedy' is a moot point, since there has been considerable inconsistency in the labelling of the jurisdiction. Edward Evans-Lombe QC in *Wordingham v Royal Exchange Trust Co Ltd*<sup>56</sup> referred to it as 'the power', as did Chadwick J in *Re Segelman (decd)*,<sup>57</sup> 'gives power to the court to order rectification'; but that judge also referred to it as, 'the jurisdiction'.<sup>58</sup> The jurisdiction was regarded as a 'remedy' by the Court of Appeal in *Walker v Geo H Medlicott & Son*<sup>59</sup> and referred to as such throughout, but implicitly as a distinct statutory remedy rather than as an application of the general equitable remedy.<sup>60</sup> It is not thought that any great significance attaches to these differences in nomenclature and for consistency the jurisdiction will be referred to in this article as 'the power to rectify' which serves to strictly distinguish it from the equitable remedy of rectification.<sup>61</sup>

'Rectification' literally means 'made right' and hence 'corrected'. The word is wide enough to embrace corrections, additions or omissions to the will. It is axiomatic that the equitable remedy is retrospective—if granted it relates back to the time of execution of the document and after rectification the document is to be read as if it had originally been executed in its rectified form.<sup>62</sup> It is thought that the statutory power would operate in the same manner. Similarly the equitable remedy is discretionary<sup>63</sup> and it seems clear that likewise the statute creates a permissive but not mandatory power of the court, 'may order'; there is no right to demand rectification. The statutory power is limited to matters relating to the contents of the will and does not extend to correcting errors of execution, for example, by adding a second witness or substituting the

<sup>55</sup> Applications for rectification of a will are always considered strictly in accordance with the statutory provisions and not with reference to the general equitable remedy; see for example, Chadwick J's approach in *Re Segelman (decd)* (note 43 above).

<sup>56</sup> See note 31 above, sitting as a Deputy Judge of the High Court.

<sup>57</sup> See note 43 above, at 685.

<sup>58</sup> *Ibid*, p 686.

<sup>59</sup> See note 1 above; see Sir Christopher Slade at p 690; Mummery LJ at p 698 and Simon Brown LJ at 702.

<sup>60</sup> It is discussed as an alternative remedy to an action for negligence against the solicitor draftsman: '...in circumstances such as those in the present case, the claim in negligence is by no means the disappointed beneficiary's only remedy, because of the existence of the remedy of rectification—a remedy not available or considered in any of the above earlier cases', per Sir Christopher Slade (note 1 above), p 689. See this aspect of the case fully discussed below, where the three cases referred to are identified.

<sup>61</sup> The English Law Reform Committee, Nineteenth Report, *Interpretation of Wills* (note 27 above), refers to it as 'a power to rectify wills', see para 17, but also confusingly refers to 'the doctrine of rectification', at para 28.

<sup>62</sup> Per Meagher, Gummow and Lehane (note 4 above), at para 2616.

<sup>63</sup> See *Re Butlin's Settlement Trusts* (note 3 above), at 489.

correct signature for an incorrect signature.<sup>64</sup> This is an important limitation on the power of rectification since errors of execution are frequently made.<sup>65</sup>

### The standard of proof

The standard of proof required for the court to be 'satisfied' of the matters stated in the section is not stated and accordingly will be the balance of probabilities. In *Walker v Geo H Medlicott & Son* the onus of proof was described as 'an exacting one.'<sup>66</sup> Chadwick J in *Re Segelman (decd)* expressed the burden more strongly: 'In expressing that view I have kept in mind that, although the standard of proof required in a claim for rectification made under s 20(1) of the 1982 Act is that the court should be satisfied on the balance of probabilities, the probability that a will which a testator has executed in circumstances of some formality reflects his intentions is usually of such weight that convincing evidence to the contrary is necessary.'<sup>67</sup>

The provisions of s 23B<sup>68</sup> of the Wills Ordinance on extrinsic evidence may assist in this regard, although there is no direct reference or correlation between s 23A and s 23B and indeed the two could be said to be unrelated; the former being concerned with rectification and the latter with interpretation, which are two discrete matters. But the English Law Reform Committee linked the two areas of rectification and interpretation of wills, by dealing with both as related topics in the same report, and it is submitted that reference can be made to the rules in s 23B to facilitate the exercise of the power in s 23A.<sup>69</sup>

### Procedure

The procedure for rectification is commenced by application but s 23A does not state who can make the application. Most are made by disappointed beneficiaries

<sup>64</sup> See for example, *In the Estate of Meyer* [1908] P 353 (two sisters by mistake each signed the other's will).

<sup>65</sup> However some errors of execution can be saved by the 'substantial compliance' provisions in s 5(2) of the Wills Ordinance. There are as yet no reported cases on this section, which it is beyond the scope of this article to consider. Similar provisions in other jurisdictions have been judicially applied; see for example, *In re the Will and Estate of McComb* [1999] VSC 311, on s 9 of the Australian State of Victoria's Wills Act 1997.

<sup>66</sup> See note 1 above, at 690; see also p 695.

<sup>67</sup> See note 43 above, at 684. See also Chan CJHC in *Citilite Properties Ltd v Innovative Development Co Ltd* (note 7 above), at 67, where, in a different context, the burden was expressed to be 'a heavy one'. The matter is also extensively discussed in the Australian case of *Pukallus and another v Cameron* (1994) 180 CLR 447—a contract case not further discussed here.

<sup>68</sup> Section 23B enables extrinsic evidence to be admitted to assist construction in the following situations: '(a) in so far as any part of it is meaningless; (b) in so far as the language used in any part of it is ambiguous on the face of it; (c) in so far as evidence, other than evidence of the testator's intention, shows that the language used in any part of it is ambiguous in the light of surrounding circumstances.'

<sup>69</sup> Extrinsic evidence was referred to, for example, in *Re Segelman (decd)* (note 43 above).

as in *Re Segelman (decd)*<sup>70</sup> and *Wordingham v Royal Exchange Trust Co Ltd*,<sup>71</sup> but there seems to be no reason why the application could not be made by the executors or administrators with the will annexed. The application must be made within 6 months of the date when representation to the estate is first taken out<sup>72</sup> but a grant limited to part only of the estate is disregarded for this purpose.<sup>73</sup> This six-month period is analogous to the time limit for applications to be made for financial provision out of the estate under the Inheritance (Provision for Family and Dependants) Ordinance s 6. Both time limits can be extended at the discretion of the court. So long as the personal representatives abide by these time limits they will be protected in their distribution of the estate. But this is subject to the power of the court to recover any part of the estate shown to have been wrongly distributed, which has some analogy to the right of beneficiaries to trace assets shown to have been wrongly distributed.<sup>74</sup>

### Types of mistake that can be rectified

It is important to emphasise that the statutory power to rectify mistakes in wills is limited, not general. There are several different types of 'mistake' that can be made in wills and the English Law Reform Committee identified five different categories.

First, there are clerical errors, for example the omission of '(iv)' in *Re Morris*,<sup>75</sup> or a legacy of '\$100' in figures and 'one thousand dollars' in words. Such mistakes will fall within the definition of 'clerical error'<sup>76</sup> and can be rectified.

Secondly, there are cases where the draftsman misunderstands the testator's instructions; the testator instructs the draftsman to give a property to X; the draftsman misunderstanding the instruction thinks that the testator wants to leave the property to Y and drafts the will accordingly. Another example is where the testator wants to leave a property to his wife for life and after her death to his son; the draftsman misunderstands and thinks the testator wants to leave the property to the wife absolutely and drafts accordingly. In such cases the draftsman writes what he means to write, in contrast to the first category where the draftsman does not write what he means to write. The English Law Reform Committee thought that such mistakes should be rectifiable and the legislation so provides.

<sup>70</sup> See note 43 above.

<sup>71</sup> See note 31 above.

<sup>72</sup> Wills Ordinance, s 23A (2).

<sup>73</sup> *Ibid*, s 23A (4).

<sup>74</sup> *Ibid*, s 23A (3). The equitable remedy consistent with the discretionary nature of the principles would not be applied where to do so would prejudice *bona fide* third party rights; see Meagher, Gummow and Lehane (note 4 above), para 2616. Similar principles would no doubt apply to the statutory power.

<sup>75</sup> See note 20 above.

<sup>76</sup> Fully discussed below.

The third category is more difficult—a failure to appreciate the legal effect of the words used in the will; ie a failure to adopt correct or appropriate language to give legal or constructional effect to the testator's intentions. The draftsman understands what the testator wants and tries to achieve it, but by error in drafting fails to effectuate the intention. This type of mistake can be illustrated by *Citilite Properties Ltd v Innovative Developments Co Ltd* where a claim for rectification of a contract of sale of land failed, because Le Pichon J characterised the mistake as '... not one of fact: rather, it was one of legal effect of one of the provisions of the agreement.'<sup>77</sup> An example given by the English Law Reform Committee in relation to wills was: 'All my property to my wife and after her death to my son John',<sup>78</sup> where the intention is to give the property absolutely to the wife but the clause as written would, in law, confer an unintended life interest on the wife.<sup>79</sup> Another example would be where the testator wants to give a property to two children in shares as tenants in common but the will is drafted, 'To my two children jointly.' In such cases the mistake arises out of a failure to understand the legal or the constructional effect of the words used.<sup>80</sup> The English Law Reform Committee thought that such mistakes were more a matter of construction and that where the words of the will cannot be shown to be not those which the testator (or draftsman) meant to use (clerical error) or were intended to be used on his behalf (failure to understand instructions) rectification was not an appropriate remedy. The legislation followed this proposal.

The fourth category is cases of uncertainty; the words used and intended to be used do not convey any or any clear meaning; the testator meant something but his true intention is unclear. An example would be: 'A decent sum to everyone who has been nice to me during the last years of my life.' It was thought that such mistakes were better dealt with as a matter of construction since to try to rectify them would in effect involve making the testator's will for him.

The last category is simply lacuna, the testator never had any intention relevant to the situation which arose; the testator simply fails to provide for a particular circumstance, for example, what should happen if all the beneficiaries named in remainder should predecease the life tenant. It was not thought that the Court should have a power to add the missing limitation, for the same reason noted above.

<sup>77</sup> See note 7 above; see Le Pichon J at 87.

<sup>78</sup> See note 27 above, para 22.

<sup>79</sup> This error was thought to be so prevalent in home-made wills that a separate provision was enacted as s 22 of the Administration of Justice Act 1982 (copied as s 23C in the Wills Ordinance) creating a presumption that this wording should give an absolute interest to the spouse.

<sup>80</sup> The court refused to intervene on this basis in *In the Estate of Beech* [1923] P 46 and in *Collins v Elstone* [1893] P 1; but contrast *Re Butlin's Settlement Trusts* (note 3 above), at 487; see also note 10 above.

Thus the English Law Reform Committee did not recommend that a general power to rectify wills should be introduced to enable the Court to correct all types of mistake which occur in wills; they recommended that the power of rectification should be available only in the limited circumstances of the first two categories and should not be available where the true intention of the testator was unascertainable or non-existent. It was thought that such a limited power would correspond to the availability of the power to rectify other types of instruments. These recommendations were reflected in the legislative reform in England in 1982<sup>81</sup> and in Hong Kong in 1995 and, as was recognised by Chadwick J in *Re Segelman (decd)*,<sup>82</sup> the statutory provisions preserved the recommended distinctions between the different categories of mistake.

Thus not all types of mistake can be rectified; it is only where the will fails to carry out the testator's intentions 'in consequence' of the two circumstances specified—a 'clerical error' or 'a failure to understand the testator's instructions'. The meaning of these two phrases can now be considered in the light of the applicable case law.

### Clerical errors

The phrase 'clerical error' is not defined in s 23A and the phrase is not a term of art. Guidance on the meaning can be found in several commentaries and cases, in particular in the three fully reported decisions on the corresponding English legislation.

#### *Re Williams (decd)*

In *Re Williams (decd)*<sup>83</sup> there was no claim for rectification, the case centering on the admission of extrinsic evidence under s 21 of the English 1982 Act, but the judge did clarify one point in an obiter comment: 'It was suggested in the course of argument that s 20 could not apply to a home-made will such as the one before me, because "clerical error" in s 20(1)(a) suggests a clerk. I do not accept this. A testator writing out or typing his own will can make a clerical error just as much as someone else writing out or typing a will for him.'<sup>84</sup>

#### *Wordingham v Royal Exchange Trust Co Ltd*

The meaning of the phrase was directly considered in *Wordingham v Royal Exchange Trust Co Ltd*.<sup>85</sup> In that case the solicitor had been instructed to draft a new will altering the previous will in specified particulars but otherwise not

<sup>81</sup> Although it can be noted that not all of the recommendations of the Report were wholly carried into effect, see Chadwick J in *Re Segelman* (note 43 above), at 685.

<sup>82</sup> *Ibid*, at 685.

<sup>83</sup> *Wiles v Madgin* [1985] 1 All ER 964.

<sup>84</sup> *Ibid*, at 969.

<sup>85</sup> See note 31 above.

to make a completely new will. The new will as drafted included the desired alterations but failed to include a clause exercising a power of appointment in favour of the husband of the testatrix, which had been included in the previous will. It was clear that the testatrix had intended that the new will should include a clause precisely in the terms of the clause in her previous will exercising the power of appointment and had so instructed the solicitor. The solicitor accepted that the omission of the provision was, in the light of his instructions, an error on his part. It was decided that this was an error made in the process of recording the intended words of the testatrix and as such constituted a clerical error within s 20(1)(a).<sup>86</sup> The will was rectified to include a clause in identical terms to that in the previous will exercising the power of appointment. The importance of the power to rectify was emphasised by the fact that if the will could not be so rectified the judge stated that he would have struck out the whole of the new will as not having received the full knowledge and approval of the testatrix. A relatively straightforward case. The testator's instructions and intentions were clear; the solicitor admitted his error and the omitted words could be exactly determined by the clause in the previous will.

Edward Evans-Lombe QC (sitting as a Deputy Judge of the High Court) referred to the following definitions of the phrase:

- (i) *Theobald on Wills* defines the phrase; 'The expression "clerical error" points to the nature of the error not to the person who made it. It appears to cover the situation where the material words were inserted in, or omitted from, the will owing to an error on the part of the testator, the draftsman or the engrosser, who did not advert to the significance and effect of the words inserted or omitted...'<sup>87</sup>
- (ii) Latey J in *Re Morris* described the facts of that case as follows: 'The introduction of the words "Clause 7" instead of "Clause 7(iv)" was *per incuriam*. The solicitor's mind was never applied to it, and never adverted to the significance and effect. It was a mere clerical error on his part, a slip. He knew what the testatrix's instructions and intentions were, and what he did was outside the scope of his authority.'<sup>88</sup>
- (iii) Latey J<sup>89</sup> approved a passage in *Mortimer on Probate and Practice*:<sup>90</sup> 'Where the mind of the draftsman has never really been applied to the words of the particular clause, and the words are introduced into the will *per incuriam*, without advertance to their significance and effect, by a mere clerical error on the part of the draftsman or engrosser, the

<sup>86</sup> The statement of claim sought rectification on both grounds, para (1)(a) and (1)(b) of s 20 (1) but counsel did not, in the light of the evidence proceed on ground (b) at the hearing.

<sup>87</sup> J B Clark and J G Ross Martyn, *Theobald on Wills* (London: Sweet & Maxwell, 15th ed 1993), p 40.

<sup>88</sup> See note 20 above, at 1067.

<sup>89</sup> *Ibid*, at 1066.

<sup>90</sup> (London: Sweet & Maxwell, 2nd ed 1927), p 91.

testator is not bound by the mistake unless the introduction of such words was directly brought to his notice.<sup>91</sup> Edward Evans-Lombe QC commented in *Wordingham* that this passage must apply where the error is one of omission and not inclusion.<sup>92</sup>

- (iv) Reference was also made to the useful judicial comments in the Australian case of *R v Comr of Patents, ex p Martin*. 'A clerical error, I would think, occurs if a person either of his own volition or under the instructions of another intends to write something and by inadvertence either omits to write it or writes something different.'<sup>93</sup> In the same case Fullagar J commented, 'But the characteristic of a clerical error is not that it is in itself trivial or unimportant, but that it arises in the mechanical process of writing or transcribing. There is no evidence that a mistake so arose in the present case, and it is very difficult to see how it could have so arisen. The mistake, however innocently made, consists in a simple mis-statement of fact, and that is the whole of the matter.'<sup>94</sup>
- (v) Similarly in *Re Sharpe's Patent, ex p Wordsworth* Langdale MR stated, 'And in every case which has occurred, it has plainly been intended to do no more than to amend mere slips or clerical errors made by the parties, or the agents of the parties, who intending to make an accurate enrolment, have, by mere inadvertence, made an enrolment which was not what it purported to be, a true statement of that which the party intended at the time...'<sup>95</sup>

After considering these authorities Edward Evans-Lombe QC in *Wordingham* concluded:

It seems to me that the words 'clerical error' used in s 20(1)(a) of the 1982 Act are to be construed as meaning an error made in the process of recording the intended words of the testator in the drafting or transcription of the will. That meaning is to be contrasted with an error made in carrying his intentions into effect by the drafter's choice of words and with a mistaken choice of words because of a failure to understand the testator's intentions, a circumstance covered by sub-s(1)(b).<sup>96</sup>

<sup>91</sup> This passage was also cited by Chadwick J in *Re Segelman* (see note 43 above), at 685.

<sup>92</sup> See note 31 above, at 209.

<sup>93</sup> (1953) 89 CLR 381, per Williams ACJ at 395, a case concerned with the rectification of a clerical error in a patent registration; cited by Edward Evans-Lombe QC in *Wordingham* (note 31 above), at 209.

<sup>94</sup> *Ibid*, at 406.

<sup>95</sup> (1840) 3 Beav 245, at 254, another patent case.

<sup>96</sup> See note 31 above, p 210.



*Re Segleman (decd)*

In *Re Segleman (decd)*<sup>97</sup> a solicitor on his own initiative included in a draft of the will a proviso to a clause which had the effect of restricting the class of beneficiaries who were entitled to take under the clause. On receipt of further instructions the solicitor failed to re-evaluate the need for the proviso in the light of those instructions. The will was executed with the proviso included. Chadwick J concluded that the failure to delete the proviso from the draft will on receipt of the further instructions did not arise from any failure to understand those instructions; the solicitor admitted that he simply forgot that the proviso was there. The mistake was if anything a clerical error and the judge concluded that it could properly be regarded as such for the purposes of s 20(1)(a) of the 1982 Act. Accordingly the will was rectified to delete the proviso. It will be noticed that this was regarded as a case of a clerical error and not as a failure to understand instructions, because the solicitor did understand the instructions and once the mistake had been pointed out, he would have agreed that the proviso had been included by mistake and should have been deleted.

Chadwick J cited several of the passages noted above, in particular the passage from *Mortimer*,<sup>98</sup> and added the following observations:

But for my part, I do not think that the jurisdiction conferred by s 20(1)(a) of the 1982 Act is limited to cases in which 'the intended words of the testator' can be identified with precision. In my view, the jurisdiction conferred by s 20(1), through para (a), extends to cases where the relevant provision in the will—by reason of which the will is so expressed that it fails to carry out the testator's intentions—has been introduced (or, as in the present case, has not been deleted) in circumstances in which the draftsman has not applied his mind to its significance or effect. It is to this failure to apply thought that Latey J and the editor of *Mortimer* attach the phrase '*per incuriam*'. As Nicholls J pointed out in *Re Williams (decd)*, a testator writing out his own will can make a clerical error just as much as someone else writing out a will for him.<sup>99</sup>

**Failure to understand his instructions**

The reference in section 23A (1)(b) to 'a failure to understand his instructions' presupposes: that there were 'instructions'; that there is proof of these instructions; that there has been a failure to understand these instructions and that consequently the will fails to carry out the testator's intentions. All of these matters are likely to be contentious since they will suggest, at least where

<sup>97</sup> See note 43 above, at 686.

<sup>98</sup> See note 90 above.

<sup>99</sup> See note 43 above, at 686. *Re Williams (decd)* is cited at note 83 above.

solicitors are involved, negligence. Further, there are the practical issues of evidence: are written copies of the instructions, whether as written by the testator where the instructions were given in writing, or as recorded by the solicitor where the instructions were taken orally, available? In the absence of such written contemporary evidence the essential matters referred to above will be difficult to prove.

The recent English Court of Appeal's decision in *Walker v Geo H Medlicott & Son*<sup>100</sup> provides a good illustration of the difficulties. There was a claim for negligence based on the allegation that the solicitor draftsman had failed to carry out the testatrix's instructions. The claim failed because of an insufficiency of evidence to prove a mismatch between the instructions and the will. There were two extant documents which were offered as evidence: a fairly cryptic contemporary note in the testatrix's own hand which was described as an aide-memoire for the purposes of giving the solicitor instructions; and a handwritten attendance note by the solicitor recording what he understood to be his instructions. The attendance note had been prepared when the solicitor interviewed the testatrix and took further and clarifying oral instructions from her regarding the will; these instructions he said would be recorded as a matter of usual procedure in the attendance note. The attendance note differed in some respects from the testatrix's aide-memoire and in particular the note contained no reference to any specific devise of a particular house in favour of the plaintiff. The will was drafted in the terms of the attendance note. The plaintiff claimed that the will should, in accordance with the testator's intentions, have included a specific devise of the house to him. The allegation was firmly denied by the solicitor on the basis that the will did carry out the testatrix's instructions to him as recorded in his attendance note and thus did carry out her intentions. He supported his case with evidence of the careful procedures that he invariably took to ensure that he did fully and correctly understand and record the testatrix's intentions when taking instructions to draft a will.<sup>101</sup> In the light of this evidence the first instance judge concluded that the allegation that the solicitor had negligently neglected or misunderstood the instructions, and thus had failed to give effect to the testatrix's intentions, was not proved beyond a balance of probabilities. This finding was upheld by the Court of Appeal. Mummery LJ referred to the need for '...undisputed or convincing evidence of the solicitor's failure to understand and carry out the testator's intentions, at least in cases where the solicitor does not admit his failure.'<sup>102</sup> On this basis the difficulties of obtaining rectification under this heading will be apparent.

<sup>100</sup> See note 1 above.

<sup>101</sup> See these procedures reviewed and set out, *ibid*, at 695.

<sup>102</sup> *Ibid*, at 700.

It seems clear that rectification under this heading requires the intervention of a third party draftsman (whether solicitor or otherwise) or amanuensis; persons who draft their own will can hardly bring themselves within the provision. Nor does this heading in terms cover another common type of mistake, namely a failure to effectuate clearly understood instructions or intentions where by reason of a failure to understand the legal effect of the words used, the writer fails to use language which is effective to achieve those intentions. It can be suggested that this category of mistake is in fact the one most frequently made, at least in home-made wills. Common examples are: 'to my grandchildren equally' where the intention is to include all of the grandchildren but the class closing rules are not excluded; 'my flat [named] to my daughter' where the intention is to give the flat free of mortgage but s 64 of the Probate and Administration Ordinance<sup>103</sup> is not excluded and 'my car to my son' where the intention is to give the car owned at the death not the car owned at the date of the will.<sup>104</sup> Similarly seeking to devise by will a flat owned jointly by the deceased and another person.<sup>105</sup> In all these cases rectification would not be ordered because the words used in the will are the words intended to be used or the words the draftsman was instructed to use. There is a difference between failing to carry out the testator's intention by reason of misunderstanding his intentions (which is rectifiable within the heading) and a failure to carry out understood intentions because of error or ineptitude in drafting (which is not).<sup>106</sup> Some of the comments in the judgments in *Walker v Geo H Medlicott & Son*,<sup>107</sup> which could be regarded, out of the context of the whole, as expressing the principles too widely need to be read cautiously. Thus Sir Christopher Slade commented, '...I have assumed...that a beneficiary who, due to the negligent failure of the solicitor-draftsman of a will to carry out the testator's instructions, takes no benefit under the will in its form as executed, has a good cause of action against the solicitor who drafted the will, even though he also has a good claim for rectification.'<sup>108</sup> Similarly, Mummery LJ said, '[The Plaintiff's] essential complaint was that the will did not represent his aunt's wishes as a result of a failure on the part of [the solicitor] to carry out the instructions of the testatrix in the drafting of the will. If he wished to establish that case, rectification was obviously the appropriate remedy and should have been sought by him within the time limit set by statute.'<sup>109</sup>

<sup>103</sup> I.e. Probate and Administration Ordinance (Cap 10).

<sup>104</sup> Thus resulting in ademption when the car is sold and replaced by another: see *Re Sikes* [1927] 1 Ch 364.

<sup>105</sup> See *Carr-Glynn v Frearson (a firm)* [1998] 4 All ER 225, discussed below.

<sup>106</sup> See the discussion above where this distinction is emphasised.

<sup>107</sup> See note 1 above.

<sup>108</sup> *Ibid*, at 697.

<sup>109</sup> *Ibid*, at 700.

## Rectification and negligence actions

At the time of the English Law Reform Committee's Report in 1973, a solicitor's liability for drafting a will, which included a mistake of any of the types noted above, was thought to be limited to an action for breach of the contract of retainer or for breach of the duty of care to the testator in negligence, both actions confined to the testator or to his estate. The measure of damages in such actions would almost invariably be small, being limited to the loss suffered by the testator or his estate for the mistake in his will—probably nominal. The substantial loss would fall on the beneficiaries who by reason of the mistake lost or were deprived of their benefits under the will; for example, the effect of the mistake in *Re Morris*,<sup>110</sup> if not rectified, would have been to deprive all of the legatees who were listed in the sub-paragraphs numbered (i) to (xx) of clause 7 of their rightful pecuniary legacies. But at the date of *Re Morris*, 1970, it was not thought that a solicitor could be sued in tort by disappointed beneficiaries who had been deprived of their testamentary benefits by his negligence—if such a remedy had then been recognised it is likely that the solicitor would not have been as frank in his admission of mistake! Thus the English Law Reform Committee were able to complacently conclude that their proposed recommendations would not unreasonably increase the responsibilities of their branch (ie the solicitors') of the profession.<sup>111</sup> Subsequent developments in the tort of negligence would shatter such complacency.

It is not appropriate in this article to attempt an exhaustive review of the development of a solicitor's liability in negligence for errors in, or in respect of, wills.<sup>112</sup> The seminal decision in *Ross v Caunters*,<sup>113</sup> where a solicitor was held liable in negligence to the beneficiaries of a will for the failure to adequately supervise the execution of the will, will be well known to practitioners. The maturity of the tortious liability can be found in the House of Lords' decision in *White v Jones*<sup>114</sup> where the principles were stated by Lord Goff as follows:

In my opinion, therefore, your Lordships' House should in cases such as these extend to the intended beneficiary a remedy under the *Hedley Byrne* principle,<sup>115</sup> by holding that the assumption of responsibility by the solicitor towards his client should be held in law to extend to the intended

<sup>110</sup> See note 20 above.

<sup>111</sup> See note 27 above, para 33.

<sup>112</sup> The development of negligence actions in relation to wills is summarised by Sir Christopher Slade in *Walker v Geo H Medlicott & Son* (note 1 above), at 687 and 688 to which reference can be made. For a full up-to-date discussion of all the relevant cases, see R Kerridge and AHR Brierley, 'Will making and the avoidance of negligence claims' [1999] Conv 399-413.

<sup>113</sup> [1979] 3 All ER 580, building on the landmark decision in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1963] 2 All ER 575.

<sup>114</sup> [1995] 1 All ER 691.

<sup>115</sup> See *Hedley Byrne & Co Ltd v Heller & Partners* (note 113 above).

beneficiary who (as the solicitor can reasonably foresee) may, as a result of the solicitor's negligence, be deprived of his intended legacy in circumstances in which neither the testator nor his estate will have a remedy against the solicitor.<sup>116</sup>

Further explanation was provided by Lord Browne-Wilkinson:

To my mind it would be unacceptable if, because of some technical rules of law, the wishes and expectations of testators and beneficiaries generally could be defeated by the negligent actions of solicitors without there being any redress. It is only just that the intended beneficiary should be able to recover the benefits which he would otherwise have received.<sup>117</sup>

In *White v Jones*<sup>118</sup> the solicitor was held liable for delay in carrying out instructions to prepare a new will providing for legacies to the plaintiffs. The principle of liability was extended by 'permissible incremental extension' in *Carr-Glynn v Frearsons*<sup>119</sup> to include liability for failing to advise and ensure that a notice of severance of joint tenancy should be, and was, served inter vivos on a jointly owned property made subject to a specific devise in the will. A decision which has been described as 'the real nightmare',<sup>120</sup> because it extends the liability beyond the proper execution or drafting of the will, into ancillary and related matters. However for the purposes of this discussion it can be noted that in none of these cases, *Ross*, *White* or *Carr-Glynn*, was there any possible redress by recourse to rectification since the mistakes in each, which gave rise to the claims in negligence, could not be cured or mitigated by rectifying the will.<sup>121</sup> In each of those cases the disappointed beneficiary's only remedy was a claim in negligence.<sup>122</sup>

### Mitigation of loss by rectification

In the most recent case of *Walker v Geo H Medlicott & Son (a firm)*<sup>123</sup> the mistake (if any, and thus the alleged negligence) of the solicitor consisted not of a failure to see that a will was properly attested (as in *Ross*), or of a failure to

<sup>116</sup> Ibid at 710, cited with approval by Chadwick LJ in *Carr-Glynn v Frearsons (a firm)* (note 105 above), at 231.

<sup>117</sup> Note 114 above, p 718.

<sup>118</sup> See note 114 above.

<sup>119</sup> See Thorpe LJ (note 105 above), at 237.

<sup>120</sup> See R Kerridge and AHR Brierley, (note 112 above), at 412 (together with the decision in *Clarke v Bruce Lance & Co* [1988] 1 All ER 364) and which 'may put an intolerable strain on some solicitor/client relationships', *ibid*, at 413.

<sup>121</sup> See this point made by Sir Christopher Slade in *Walker v Geo H Medlicott & Son* (note 1 above), at 688.

<sup>122</sup> *Ibid*, at 689.

<sup>123</sup> See note 1 above.

draw it up at all (as in *White*), or of a failure to advise the testator to take some action to ensure that the relevant asset fell into his estate (as in *Carr-Glynn*), but of an alleged failure to draft the will in accordance with the testatrix's instructions. It was accepted in the case that the solicitor owed a duty of care to the beneficiaries but a negligence action was not the only remedy since the mistake was capable of solution by rectification. If it could have been sufficiently proved that the omission of the specific devise, which was complained of, was due to a failure to understand the testatrix's instructions, the will could have been rectified to include the omitted clause. The first instance court found that on the evidence the plaintiff had failed to prove his claim by convincing evidence and so both the negligence action, and consequently any possible rectification claim (the onus of proof being the same for both actions) failed.<sup>124</sup> But the importance of the case lies in the Court of Appeal's ruling that where a plaintiff beneficiary claims against a solicitor for negligence in respect of a mistake in the drafting of a will (as in this case), the plaintiff would be expected, if the mistake was capable of rectification, to mitigate any loss by taking action to have the mistake rectified and to exhaust that remedy before considering bringing proceedings for negligence against the solicitor.<sup>125</sup> The reason for requiring the plaintiff to seek rectification as an initial remedy is that if such an action is successful the estate will be distributed correctly according to the will and the 'loss' if any will fall on the beneficiaries who were not intended to benefit. Whereas if a successful remedy in negligence alone is pursued, the will as drafted will stand and the 'adventitious' beneficiaries will retain their benefits and the damages, and thus the loss will be paid, and borne, by the solicitor or insurers without affecting the will or the estate.<sup>126</sup> Mummery LJ explained the point as follows:

If this course [*pursuing rectification*] is not taken in cases where there is undisputed or convincing evidence of the solicitor's failure to understand and carry out the testator's intentions, an anomalous situation, which could have been cured by rectification, would arise: the unrectified will would be effective to confer a benefit on a person who was *not*, on the facts, intended by the testator to benefit from his estate; and a benefit for a person whom the testator intended to benefit from his estate would be provided not from his estate, as he intended, but by his solicitor (or his solicitor's insurers). That situation would not correctly reflect the intentions of the testator or the justice of the case.<sup>127</sup>

<sup>124</sup> See Sir Christopher Slade, *ibid*, at 690, 697.

<sup>125</sup> See *Pilkington v Wood* [1953] 2 All ER 810.

<sup>126</sup> See note 124 at 697. Thus providing the answer to the conundrum: 'How do you double the value of your estate on death which is receivable by your beneficiaries?'

<sup>127</sup> *Ibid*, at 700.

It was also thought that there might be possibility of abuse by the family manufacturing a negligence claim in order to enhance the value of the estate from which the family will benefit at the expense of the solicitor—although there was no suggestion of any such abuse in this case.

### Conclusion

The court in *Walker v Geo H Medlicott & Son (a firm)*<sup>128</sup> was anxious, by insisting on rectification where appropriate, to prevent a doubling, in effect, of the value of a deceased's estate receivable by the beneficiaries. The decision will provide some comfort to solicitors by partially stemming the tide of negligence claims against them arising out of the drafting of wills and will encourage and enhance the importance of recourse to the statutory power to rectify wills. The clarification of the power to rectify wills under s 23A of the Wills Ordinance by the case law has delimited the boundaries of the jurisdiction thus facilitating applications seeking the exercise of the court's power.

<sup>128</sup> See note 1 above.