Solicitors' Liability for Negligence in Relation to Beneficiaries of Wills

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Does a solicitor who prepares a will and arranges to have it executed owe a duty of care to the beneficiaries of that will? This question has been recently examined by both the House of Lords (*White v. Jones [1995] 1 All ER 691, [1995] 2 WLR 187*) and the Queensland Court of Appeal (*Van Erp v. Hill, unreported, 13 February 1995*). The English case dealt with delay by a solicitor in drawing a will; the Queensland case with improper execution. In each case the disappointed beneficiary was successful against the solicitor.

The majority speeches in *White* base the duty of the solicitor to a beneficiary on the lacuna in the law left by traditional contractual bases. The solicitor has a contractual relationship with the testator; but the estate suffers no loss if the will is badly drawn or improperly executed. The proximity of the solicitor charged with drafting and arranging for execution of a will to the beneficiary was the point which enabled the disappointed beneficiary in each of those cases to succeed. The Court of Appeal in Queensland in *Van Erp* structured the argument on proximity of the solicitor and the beneficiary.

Since the decision in *Ross v. Caunters[1980] Ch 297*, in which Megarry VC at 308, held that a beneficiary was a person "who is likely to be so closely and directly affected by [the solicitor's] acts or omissions that the [solicitor] can reasonably foresee that the third party is likely to be injured by those acts or omissions", the matter had not been dealt with in a conclusive manner in Australia prior to *Van Erp. In Seale v. Perry [1982] VR 193*, the full Court of the Victorian Supreme Court declined to find such a duty of care and refused to follow *Ross v. Caunters*. However, that decision was made prior to the High Court's decision in *Hawkins v. Clayton [1988] 164 CLR 539*, which dealt with the position of a solicitor in locating an executor of a will in the solicitor's keeping.

It remains to be seen whether the trend evidenced in *Hawkins v. Clayton* will be followed and applied to beneficiaries in other appellate courts. As the English Court of Appeal was sharply divided, it may be that this matter can only be regarded as settled once it reaches the High Court.

Queensland Update

Offers To Settle & Item 27 Of The *Costs Schedule - District Court Rules*

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Plaintiff lawyers practising in the District Court in Queensland will be familiar with Item 27 of the Schedule of Costs in the District Court Rules which provides a maximum lump sum component for preparation of the hearing. The amount is currently $2,665.

Item 27(3) provides that in special circumstances, "a party may apply to the trial judge at or after trial to certify...that the taxing officer may allow a higher amount". If you have a fairly complex personal injuries action with more than one defendant, this will usually qualify as special circumstances to request an appropriate certification from the trial judge that the taxing officer have the flexibility to increase the composite amount in Item 27(1).

However, if a matter is settled before trial, it is generally thought that you cannot then go back to the court and request certification. I am aware of one unreported decision of Hanger J in the Southport District Court to this effect, but apparently there have been a couple of cases in Brisbane where the judges have allowed the parties the appropriate certification even after a settlement.

The easiest way to avoid any controversy is to specifically provide for this contingency in your offer to settle by adding "including, if applicable, such additional costs allowable under Item 27 as may have been certified to the Registrar by the trial judge upon application by the plaintiff ".

Even if you are obtaining a short form assessment from a cost assessor subsequent to an appropriately worded offer to settle being accepted by a defendant, the costs assessor then has the discretion whether to allow an additional component under Item 27. If costs cannot be agreed and the matter proceeds to taxation, it would then either be open for the plaintiff to apply to the court for such certification prior to taxation or leave it to the discretion of the taxing officer. (However, given the attitude of some taxing officers, it may be more prudent to follow the former procedure).