CIVIL AND PROFESSIONAL LIABILITY FOR WILL MAKING AND ESTATE PLANNING — A NEW STANDARD FOR AUSTRALIAN SOLICITORS?

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I. INTRODUCTION

Like other specialist practitioners, it is clear that succession and elder law solicitors must remain ever mindful of their professional obligations and duties to their clients when engaging in will making and estate planning work or face the risk of disciplinary action.

In addition, those who do not meet the requisite standard of professional practice may be exposed to civil claims for monetary compensation. In Australia there are various traditional sources of civil liability: in tort for negligence, in contract for breach of express or implied retainer, and as a result of breach of statutory obligations contained in (State) Fair Trading Acts or the Trade Practices Act 1974 (Cth). A recent example of how such claims are traditionally pleaded is the recent decision of the New South Wales Court of Appeal in *Hendriks v McGeogh ('McGeoch')*.[1] In that case, an elderly widow sought estate planning advice from the family solicitor, with a view to effecting intervivos transfers of her properties to her sons. A family meeting was held in the solicitor's presence and it was decided to transfer one property to each son. The sons were not separately represented and although the transfer to one son was carried into effect, the transfer to the other son was not and the subject property passed to others under the widow's will. The disappointed son successfully sued the family solicitor for failing to adequately protect his interests with respect to the property transfer. Liability was founded in tort for negligence, contract for breach of retainer and statute for misleading and deceptive conduct. Damages were assessed on the basis of loss of chance.

Given that the solicitor/client relationship is fiduciary in nature, there is also potential for civil claims against lawyers engaged in will making and estate planning for equitable compensation for breach of fiduciary duty in cases where a conflict of duty and duty or conflict of duty and interest is established.[2]

In *Bolton v The Law Society*[3] Sir Thomas Bingham MR considered the policy reasons for the need to regulate and control the professional activities of lawyers in the public interest and for the protection of the public. In disciplinary proceedings, in addition to the imposition of a penalty,

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1 [2008] NSWCA 53 on appeal from *McGeoch v Hendriks* [2007] NSWSC 311 (affirming decision as to liability but damages assessed on the basis of loss of chance calculated at 80% of the damages awarded at trial).

2 *Rigg v Sheridan* [2008] NSWCA 79.

3 [1993] EWCA Civ 32.

which has a punitive element to punish the solicitor for what he or she has done and to deter others who may be tempted to behave in the same way, a regulatory body may also impose a striking off order or a period of suspension from practice with a view to preventing the offender from having the opportunity to repeat the offence or encouraging the offender to be more meticulous in his or her future compliance with the required standards as the severity of the infraction requires.[4] Sir Thomas noted that 'most fundamental of all' is the rationale 'to maintain the reputation of the solicitors' profession as one in which every member, of whatever standing, may be trusted to the ends of the earth. ... Otherwise, the whole profession, and the public as a whole, is injured. A profession's most valuable asset is its collective reputation and the confidence which that inspires ... The reputation of the profession is more important than the fortunes of any individual member. Membership of a profession brings many benefits, but that is a part of the price.'[5]

Furthermore, a lawyer who acts without the competence and diligence required of a reasonably competent lawyer faces the prospect of disciplinary action for breach of ethical and professional duties which may render him or her liable to penalty, costs and even compensation to an aggrieved party. This is particularly so when a family solicitor is dealing with various family members in the course of estate planning and will making advice, unless the extent of the retainer is carefully documented, it is clear who is the solicitor's client and all family members understand this as well as the need to access independent advice as necessary.

In *Legal Services Commissioner v Ford* ('*Ford*'),[6] a recent Queensland disciplinary proceeding, the solicitor was found to be in breach of his ethical professional duties because he had failed to act competently in assessing whether his client had capacity to make an enduring power of attorney (EPA). A penalty was imposed by way of public reprimand and the practitioner was ordered to pay the costs of the applicant Legal Services Commissioner. The outcome of these disciplinary proceedings may be indicative of a trend towards an increasingly higher standard of professional care being required of solicitors who engage in estate planning and will making work. The lawyer in question was found to have not met the requisite standard expected of a reasonably competent lawyer by his failure to question the client about specific matters related to an EPA (as set out in section 41 Powers of Attorney Act 1998 (Qld)) and by failing to use an open-ended questioning technique in doing so in order to assess his client's capacity.

After an overview of the circumstances in which liability may arise in tort in the will making and estate planning process and how professional standards and disciplinary proceedings may influence the development of a higher standard of care in professional liability cases in this context, this article will focus on a consideration of the extent to which civil liability may arise in equity. Finally the circumstances in which disciplinary action may arise following breach of equitable obligations will be considered.

II. Liability in Negligence Arising Out of Will Making

There are numerous reported cases where solicitors have been held to owe a duty to take reasonable care when acting for clients in the preparation of wills which have resulted in findings of civil liability to disappointed third party beneficiaries.[7]

4 Ibid [15].

5 Ibid [15]-[16].

6 [2008] Qld LPT, 12.

7 *Hawkins v Clayton* (1987-1988) 164 CLR 539.

In *Hill v Van Erp*[8] the majority of the High Court of Australia agreed that in order to establish a duty of care the plaintiff must establish foreseeability of loss to a beneficiary in the event of a lawyer negligently performing his/her duty to the client in drafting the will.

As to what else is required, in addition to foreseeability, Dawson and Toohey JJ focused on assumption of responsibility:

> Whilst there will usually be no specific reliance by an intended beneficiary upon a solicitor retained to attend to the will, the intended beneficiary's interests are totally and unavoidably dependent upon the proper performance of a function within the sole province of the solicitor. And, it might be added, in that situation the solicitor knows of the beneficiary's dependence and in that respect may be regarded as having assumed responsibility towards the intended beneficiary.[9]

However, Brennan CJ, Gaudron, McHugh and Gummow JJ rejected assumption of responsibility as the basis of the duty. Brennan CJ found that the duty of a lawyer to an intended but disappointed beneficiary is in the performance of the work in which the lawyer owes a corresponding duty, albeit contractually, to the testator.[10] Gaudron and Gummow JJ held that in the absence of an assumption of responsibility, the duty of care arose because the lawyer is in a position of control over the interests of the beneficiary.[11]

Various policy rationales have been identified as to why a duty of care should be found in disappointed beneficiary cases including the following:[12]

- Unless the duty is recognised, the only persons with a valid claim have suffered no loss (namely the testator and the estate) whereas the only persons who have suffered loss have no claim (the disappointed beneficiary);[13]
- As the public relies on lawyers to prepare effective wills, it would be a failure of the legal system not to impose some practical responsibility.[14] The existence of a duty of care promotes professional competence in dealing with wills[15] and enhances the lawyer client relationship;[16]
- The existence of a duty of care highlights the importance of legacies in a society that recognises the rights of citizens to freely dispose of their assets;[17] and
- Those who cause loss to others should be held responsible.[18]

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8 *Hill v Van Erp* (1995-1997) 188 CLR 159.

9 Ibid 186.

10 Ibid 170-171.

11 Ibid 198-199 per Gaudron J; at 231-232 per Gummow J.

12 For a discussion see G E Dal Pont *Lawyer's Professional Responsibility* (3rd ed, 2006) 476-477.

13 *Ross v Caunters* [1980] Ch 297, 303 per Megarry VC.

14 *Gartside v Shefield, Young & Ellis* [1983] NZLR 37, 43 per Cooke J; *Van Erp v Hill* (1995) Aust Torts Reports 81-317, 62065 per Fitzgerald P.

15 *Hill v Van Erp* (1997) 188 CLR 159, 195 per Gaudron J, 234 per Gummow J.

16 *Gartside v Shefield Young & Ellis* [1983] NZLR 37, 51 per Richardson J; *Connell v Odlum* [1993] 2 NZLR 257, 271 per Thomas J.

17 *White v Jones* [1995] 2 AC 207, 260 per Lord Goff.

18 'It is that in all justice one who is responsible for causing damage to another by his negligence ought generally to pay for it … It is altogether reasonable that those who because of their occupation and the skill, experience and expertise associated with it are engaged to perform a service which if properly performed, will benefit an identifiable person should make good the loss which the latter may suffer from the former's negligence.' *Gartside v Shefield Young & Ellis* [1983] NZLR 37, 54; see also *Van Erp v Hill* (1995) Aust Torts Reports 81-317, 62065 per Fitzgerald P.

Indeed, in *Hill v Van Erp*[19] it was held that in the disappointed beneficiary cases the policy considerations which usually prompt concern about duties to third parties do not apply, for the following reasons:

- There is no indeterminate liability as the intended beneficiary under a will is a specific, identifiable individual rather than a member of an unascertained class and liability is fixed by the size of the intended bequest;[20]
- The recognition of a duty would not supplant remedies available in other areas nor disturb any general body of rules constituting a coherent body of law;[21] and
- There are no conflicting duties of care as the interests of the client and the beneficiary are coincident.[22]

When a duty of care is established, the scope of the duty will be determined by the contract of retainer[23] and the standard of care, and whether it has been breached in the circumstances, is determined according to the provisions of the (State) Civil Liability Acts.[24]

Situations in which liability has been held to arise[25] include failure to take reasonable care to:

- prepare a will in a timely fashion;[26]
- ensure that the will gives legal effect to the testator's instructions;[27]

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19 (1995-1997) 188 CLR 159.

20 Ibid per Brennan J 170-171, per Dawson J 186.

21 Ibid per Dawson J 180.

22 Ibid per Brennan CJ 170-171, per Dawson J 186.

23 *Waimond Pty Ltd v Byrne* (1989) 18 NSWLR 642; *Summerville v Walsh* [1998] NSWSC 52.

24 New South Wales: s 5O Civil Liability Act 2002 (NSW); Queensland: s 22 Civil Liability Act 2003 (Qld)); South Australia: s 41 Civil Liability Act 1936 (SA)*;* Tasmania s 22 Civil Liability Act 2002 (Tas); Victoria: s 59 Wrongs Act 1958 (Vic); Western Australia: s 5PB Civil Liability Act 2002 (WA); Australian Capital Territory: Civil Law (Wrongs) Act 2002 (ACT) (no equivalent section); Northern Territory: Personal Injuries (Liabilities and Damages) Act 2003 (NT) (no equivalent section).

25 For a discussion see Reid Mortensen, 'Solicitors' Will-Making Duties' [2002] MULR 4, available online at <http://www.austlii.edu.au/cgi-bin/sinodisp/au/journals/MULR/2002/4.html?query=%5emortensen> accessed 31 August 2009.

26 *White v Jones* [1993] 3 All E R 481 (liability in negligence for having failed to act on instructions by letter to prepare a new will providing legacies to previously disinherited daughters – written instructions given mid-July, memorandum dictated by legal executive mid-August, but still no will when testator died mid-September – liability in negligence for the legacies intended for the daughters); *Strange v Redmond* (2001) QDC 356 (liability in negligence following death of client four days after giving instructions by telephone - client was elderly and had a long history of ill-health, though no sense of urgency was conveyed in the instructions - evidence established that a competent solicitor would have prepared a new will within a day or two of receipt of instructions); cf. *Queensland Art Gallery Trustees v Henderson Trout* [2000] QCA 93 (No liability for failure to prepare new will to give client's art collection to the Queensland Art Gallery before she died – evidence was that testatrix had requested amendment on the basis that the Gallery would confirm whether there were sufficient resources to exhibit her collection to her liking – Gallery failed to do so, thus no breach of any duty to Gallery as finding that client had not made a definite decision to benefit the Gallery).

27 See *Carr Glynn v Frearsons* [1998] 4 All E R 225 (solicitor liable for failure to sever joint tenancy in circumstances where the willed gift passed to joint tenant rather than the beneficiary under the will) cf. *Miller v Cooney* [2004] NSWCA 380 (no liability as solicitor did not know the property was held as a joint tenant and had no reason to believe that it was – solicitor's instructions were merely to change some of beneficiaries in a will prepared by another solicitor – held duty limited by retainer).

- ensure that a will is validly executed and attested;[28]
- advise against accidental revocation;[29] and
- discharge custodial duties.[30]

A. Duty to Ensure the Testator has Testamentary Capacity and is not Unduly Influenced by any Beneficiary?

In cases where a solicitor is involved in the preparation of a will which is subsequently set aside on the basis of lack of testamentary capacity or the probate doctrine of undue influence, for policy reasons the courts have traditionally been reluctant to impose a duty of care on the solicitor, other than to the extent of liability to the estate for the costs of the application to set aside the will.

In *Worby v Rosser*[31] the beneficiaries under an earlier will claimed against a solicitor for failure to take reasonable care to ensure that the testator had capacity to make a will and was not unduly influenced by a beneficiary under it. They claimed the costs of propounding the earlier will and resisting probate of the later will. It was held that appropriate remedies already existed by way of costs, which could be recovered from the estate. The estate could recover costs paid to the beneficiary from the solicitor at fault, so there was no need for direct action by the beneficiaries against the solicitor and therefore no reason to impose a duty to a beneficiary under an earlier will as an alternative remedy was available.[32] As noted by Chadwick LJ:

> If the solicitor's breach of duty under his retainer has given rise to the need for expensive probate proceedings, resulting in unrecovered costs, then, prima facie, those costs fall to be borne by the estate … If the estate bears the costs thereby and suffers loss then, if there is to be a remedy against the solicitor, it should be the estate's remedy for the loss to the estate. There is no need to fashion an independent remedy for a beneficiary who has been engaged in the probate proceedings. His or her costs, if properly incurred in obtaining probate of the true will, can be provided for out of the estate … (including the costs to which the beneficiary is entitled out of the estate).[33]

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28 Liability has arisen for failure to observe the interested witness rule: See *Hill v Van Erp* (1997) 188 CLR 159 and for failure to ensure a will is properly 'signed': *Summerville v Walsh* (1998) NSWSC 52. It should be noted in most Australian jurisdictions the interested beneficiary rule is no longer absolute: an application can be made to the court to validate the gift if the court is satisfied the testator knew and approved of the gift and it was made freely and voluntarily: see for example s 11(3)(c) Succession Act 1981(Qld). Likewise if the failure relates to improper execution, an application may be made to the court to validate the will under the testamentary jurisdiction (see for example s 18 Succession Act (Qld).However if through a solicitor's negligence such application needs to be made, then the costs of the application are likely to be payable by the solicitor.

29 In the past solicitors have been held liable for failing to advise that a will could be made in contemplation of marriage to a particular person. Accidental revocations by marriage will occur less frequently under new amendments operative in most Australian jurisdictions. A will can be made in contemplation of marriage generally (see for example s 14(3)(a) Succession Act 1981 (Qld)) and a disposition to a person to whom the testator is married at the time of death is not revoked (see for example s 14(2)(a) Succession Act (Qld)).

30 *Hawkins v Clayton* (1988) 164 CLR 539 (solicitors failed to notify the executor of the will or its contents until six years after the death of the deceased. The house, the main asset of estate, remained vacant and fell into disrepair. The solicitors were held liable for deterioration of the house and loss of rent).

31 [2000] PNLR 140.

32 Ibid per Chadwick LJ [25], per Peter Gibson [29].

33 Ibid per Chadwick LJ [25].

This approach was adopted in *Graham v Bonnycastle,*[34] where the court made clear that imposing such a duty could give rise to conflicts between duties to beneficiaries of different wills. McFadyen JA said:

> The imposition of a duty to beneficiaries under a previous will would create inevitable conflicts of interest. A solicitor cannot have a duty to follow the instructions of his client to prepare a new will and, at the same time, have a duty to beneficiaries under previous wills whose interests are likely to be affected by the new will. The interests of a beneficiary under a previous will are inevitably in conflict with the interests of the testator who wishes to change the will by revoking or reducing a bequest to that beneficiary.[35]

There was a further policy reason for the non-imposition of such duty - the fear of being sued by beneficiaries under prior wills could make solicitors reluctant to act for elderly testators who wished to alter their wills:

> A solicitor must be free to act in the best interests of her client when discharging her duties to make enquiries regarding the client's testamentary capacity without concerns about the interests of others. The decision as to testamentary capacity, which is a difficult one for the solicitor, should not be made more difficult by the unnecessary extension of duties to others. Concerns about lawsuits brought by beneficiaries under prior wills could create the danger that solicitors would decide against the testator's interest in determining capacity, where any doubt arose as to testamentary capacity and previous wills existed. Solicitors may be reluctant to act for elderly testators who wish to change provisions of their will, if they may also be liable for damages to beneficiaries under previous wills.[36]

This approach accords with the approach taken in the New Zealand case *Public Trustee v Till*[37] which suggests that, ordinarily, a solicitor is only required to consider and advise on testamentary capacity where the circumstances are such as to raise doubt in the mind of an ordinarily competent solicitor.[38] The Queensland disciplinary case, *Ford,* clearly sets out some of the triggers that should raise doubt as to capacity in the mind of a solicitor, such as very old age, residency in nursing home, advice from carers as to lack of cognitive capacity and difficulty of immediate recall. It was a lack of awareness of these obvious triggers of incapacity and his failure to adopt an appropriate interviewing technique when seeking his client's instructions that led to Ford's disciplinary penalty for breach of professional duty.

In *Ford* the legal practitioner was requested to prepare a will and enduring power of attorney (EPA) for an elderly client who resided in a nursing home. The will was to disinherit her family (a change from her previous will) and benefit a friend who facilitated the arrangement for the will and EPA in her favour. Shortly prior to this the practitioner was told that the client had cognitive impairment and memory loss by a nurse. A few months previously the practitioner was asked to register (though this was actually not a legal necessity) the existing EPA in her favour as the client had dementia and was unable to manage her own affairs. When asked to prepare the new will and enduring power of attorney, the solicitor did not revoke the existing EPA nor give notice to the prior attorney.[39] All of the above factors should have been triggers for lack of capacity.

When the practitioner brought the EPA to the nursing home for signature, the EPA form was left largely incomplete, thus indicating that the practitioner had not gone through the specific mat-

34 (2004) 243 DLR (4th) 61.

35 Ibid [29] per McFadyen JA.

36 Ibid [30] per McFadyen JA.

37 [2001] 2 NZLR 508.

38 *Public Trustee v Till* [2001] 2 NZLR 508 per Randerson J [25]-[26].

39 S 46 PAA Act 1998 (Qld).

ters required by section 41(2) Powers of Attorney Act 1998 (Qld) (PAA)[40]. The witness (usually the practitioner) must certify that principal has capacity to make the EPA.[41] It was in respect of this certification that the practitioner was considered to have not met the appropriate standard of professional conduct. Justice Fryberg found that the solicitor Mr Ford had not adequately ensured that his client had capacity by his failure to address the matters set out in section 41(2) PAA. Justice Fryberg considered that 'the most striking example of that lack of care and attention is to be found in the form of Power of Attorney which he took with him. That document had been prepared by Mr Ford's secretary and she had left the paragraphs dealing with the actual appointment of the attorney incomplete.'[42] In particular, various boxes dealing with the details of the appointment of the attorney were not ticked, and boxes which related to whether the client understood the specific matters listed were also left unticked. As Fryberg J said:

> When that was drawn to Mr Ford's attention, it is fair to say he candidly admitted the omissions created in his mind doubts about whether he had, in fact, gone through each of the matters in the power of attorney with Mrs Adams.[43]

The Tribunal noted that the Office of Adult Guardian has prepared guidelines for persons who act as witnesses to enduring powers of attorney[44] which draw specific attention to the matters noted above and to the importance of the interview process, and in particular describe the questioning technique which should be used as a matter of good practice, ie the use of open-ended questions rather than close-ended questions.[45] In *Ford* it was found that the practitioner was unaware of the difference between open-ended and close-ended questions and had failed to keep a record of all steps taken in assessing his client's competence as contemplated by the guidelines. In all the circumstances the Tribunal found that his 'conduct in relation to execution of the documents fell short of a standard of competence and diligence that a member of the public was entitled to expect of a reasonably competent Australian legal practitioner.'[46]

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40 S 41 Powers of Attorney Act 1998 (Qld), available at <http://www.austlii.edu.au/au/legis/qld/consol_act/poaa1998240/> viewed 31 August 2009, provides as follows: '41 Principal's capacity to make an enduring power of attorney

(1) A principal may make an enduring power of attorney only if the principal understands the nature and effect of the enduring power of attorney.

(2) Understanding the nature and effect of the enduring power of attorney includes understanding the following matters; that the principal may limit the power of attorney; when the power begins; once the power begins the attorney has full control over exercise of the power given; the principal may revoke the EPA at any time he or she has capacity to make an EPA and if the principal lacks such capacity he or she cannot oversee the use of the power; the power given to the attorney continues if the principal has impaired capacity.'

41 *Powers* of Attorney Act 1998 (Qld) s 44.

42 *Legal Services Commissioner v Ford* [2008] LPT 12 p 17 [30]-[40].

43 *Legal Services Commissioner v Ford* [2008] LPT 12 p 18 [10].

44 The QLS has adopted the Office of the Adult Guardian Capacity Guidelines for witnesses of enduring powers of attorney, June 2005, available at <http://www.justice.qld.gov.au/files/Guardianship/capacityguidelines.pdf> viewed 1 September 2009.

45 Ibid 20. It is suggested that practitioners refer to the *Office of Adult Guardian capacity guidelines for witnesses of enduring powers of attorney* which refer to how an interview should be conducted, which can be accessed on the QLS website, under Resources for Practitioners. The recent QLS Succession Law Conference October 2008 featured a session by specialist geriatrician, Dr Peteris Darzins, on how to assess capacity and the appropriate questioning technique, 'Professional Skills – the 6-Step Capacity Workshop with Dr Peteris Darzins'.

46 *Legal Services Commissioner v Ford* [2008] LPT 12, 23[1].

The *Ford* decision indicates that a legal practitioner who is alert to triggers of possible incapacity (such as an elderly client being resident in a nursing home; radical changes proposed to an existing will; appointment and/or instructions facilitated by a proposed beneficiary; and notice of impaired decision-making capacity or dementia from carers), and who acts appropriately where such triggers arise by adopting an appropriate questioning technique (open rather than closed questioning), seeks the advice of the patient's GP or specialist advice in appropriate cases (particularly in contentious situations where the estate is large) and carefully documents what he or she has done in this regard, will generally have no reason for concern in respect of disciplinary proceedings for breach of professional duty and it follows likewise that there would be no grounds for concern in regard to civil liability for breach of duty in contract or tort.

The *Ford* decision makes it clear that the important and relevant consideration for these purposes is that the practitioner follows the correct process for obtaining instructions, especially where instructions are taken from elderly clients and there is a possibility of incapacity, as opposed to focusing on whether an error of judgment is made in the determination of capacity. Where the correct process is followed there can be no grounds for concern as to civil liability arising. It is clear that making capacity assessments is not always easy for legal practitioners, especially for those acting for older clients, and that the ultimate determination of capacity in cases where a will is challenged on the grounds of incapacity will involve detailed analysis by a court of expert medical evidence.

The case of *Sharp v Adam*[47] illustrates the difficulties which solicitors often face when taking instructions for wills in circumstances where the physical and mental health of the client is deteriorating. It is also a good illustration of a solicitor who followed the appropriate process of ascertaining capacity as well as any reasonable lawyer in the circumstances could, but ultimately whose decision her client had testamentary capacity was not upheld by the court. The lawyer was considered to have taken a 'golden rule' approach to determining capacity and accordingly no civil liability arose in the circumstances.

In *Sharp v Adam* the testator died aged 70, with severe symptoms of multiple sclerosis. In the last years of his life he lost speech and his eyesight was severely affected. He could only communicate by movement of his head and eyes. He communicated with his solicitor for a number of years via a spelling board, but in later years could only communicate by blinking. His earlier wills left some legacies to close employees (he was a veterinary surgeon who ran a successful horse stud) and divided his large residuary estate between his two daughters. His last will, made about one year before his death, left the residue of his estate to two employees after some small pecuniary legacies. His daughters were entirely excluded from the last will. The employees sought to uphold the last will and the daughters contested it. There was no suggestion on the facts of any undue influence on the part of the employees and all the evidence was that they were deserving. The evidence that there had been no change in the relationship with the daughters which explained their exclusion from the last will was largely uncontested (with some small contest in cross-examination). It was ultimately held that the will could not be upheld as it was made with a lack of capacity resulting from mental deterioration caused by the multiple sclerosis.

The solicitor, who had acted for the testator for many years, adopted what might be described as a 'golden rule' approach in the face of such difficult instructions from a client with clearly impaired capacity. She involved another lawyer from her firm and the testator's GP and questioned

47 [2006] EWCA Civ 449.

her client stringently about the change in the will and the hurt it would cause the daughters. She maintained extensive diary notes of all dealings. On one occasion when her client was to execute the will in the presence of the other lawyer and GP, they decided not to proceed because of a feeling capacity might be dubious at that time. Eventually the will was executed and the solicitor, the other lawyer, and GP testified that despite the testator's impairments they all believed he had at the time the requisite capacity to make a will.

In *Sharp v Adam* the outcome eventually depended on expert medical witnesses; a professor in neuropsychiatry for the daughters and a consultant neurologist for the employees. The professor was of the view there was no capacity because of cognitive impairment. Ultimately the trial judge found the will was made with a lack of capacity at the relevant time. In coming to this decision, which was upheld by the Court of Appeal, the trial judge was particularly persuaded by the evidence of the neurologist for the employees, who conceded that a lack of rational explanation for the change in the will was an important factor in deciding whether judgment was impaired. Lord Justice May concluded his judgment in the Court of Appeal by citing Lord Cranworth's famous dictum from *Boyse v Rossborough*:[48] 'There is no possibility of mistaking midnight from noon, but at what precise moment twilight becomes darkness is hard to determine.'

The fine line here between rational judgment and impaired judgment was indeed as hard to determine as the line between twilight and darkness. In this most challenging situation for a solicitor, as well as family members and employees, the solicitor was described effectively as having taken a textbook approach.[49] There was no suggestion of adverse costs implications for the solicitor, despite the will not being upheld, as she had done all that was reasonable in her power to ensure there was sufficient capacity to proceed and to follow her client's instructions.[50] The solicitor had followed a correct process and having done so could not be responsible for any error of judgment. It can be seen from *Sharp v Adam* that given the challenges which not infrequently present to solicitors in practice when taking instructions and making capacity assessments, civil liability should not be lightly imposed in cases where a will is overturned because a testator is subsequently found to not have capacity, particularly as the imposition of such liability may well impede a solicitor's ability to appropriately and freely act on a client's instructions.

1. A higher standard of care in civil professional liability cases following Ford?

A question which arises following the *Ford* disciplinary decision is whether a higher standard of care will now be imposed in civil liability cases founded in negligence, following the statements in *Ford* as to what is currently required of a reasonably competent practitioner, particularly in relation to the expectation that practitioners have notice of, and abide by published guidelines of authoritative bodies such as the Queensland Law Society. In this context the question for consideration is whether a practitioner ought to know of the existence of the *Office of Adult Guardian* capacity guidelines[51] which relate to the witnessing enduring powers of attorney, and furthermore whether a competent practitioner ought to follow these guidelines.

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48 *Sharp v Adam* [200] EWCA Civ 449, [96] citing Lord Cranworth (1857), 6 HLC 3, 45; see paper by Richard Neale, 'Testamentary Capacity – An English Perspective' QLS Succession Law Conference, October 2007, Brisbane.

49 [2006] EWCA Civ 446, [27].

50 Ibid.

51 Office of the Adult Guardian Capacity Guidelines for witnesses of enduring powers of attorney, June 2005, available at <http://www.justice.qld.gov.au/files/Guardianship/capacityguidelines.pdf> viewed 1 September 2009. These guidelines have been re-published on the Queensland Law Society website.

In particular, the guidelines refer to using an open-ended questioning technique rather than the use of close-ended questions. Open-ended questions tend to enable the client to explain and affirm his or her choices, while close-ended questions frequently lead nowhere as the client simply answers yes or no. As the question of capacity is task, time and place specific – it depends what the client wants to do, for example, make a will, EPA or a contract. The aim of dialogue should be to ensure the client can understand the nature of the act, understand the available choices and appreciate the consequences of his or her choice. Eliciting that the client has this understanding is more likely to follow from the use of open-ended questions. The technique is helpful because sometimes a client who presents with capacity issues can affirm his or her choices and understanding of the consequences in a way that leaves the practitioner in no doubt that the client has capacity to do the required act.

The guidelines also set out a list of factors which may indicate impaired capacity, such as where a client is forgetful of recent events, more likely to repeat themselves, easily influenced by others about their decision making, or particularly anxious about having to make decisions.

It is clear from the disciplinary proceedings that the practitioner Ford did not know the difference between open-ended and closed-ended questions, and indeed it may be that this may have been so for many will and estate planning practitioners at the relevant time. Another question which arises out of the circumstances in *Ford* is whether the mere publication of guidelines, without more, requires that practitioners have knowledge of these guidelines and are required to amend their practice according to these standards? Does the mere failure to follow published guidelines, without more, amount to failure to engage in competent practice? What if the published guidelines are not considered to reflect best practice and not generally adopted by practitioners as standard practice? For example, a recent memorandum to Queensland solicitors from the practitioners' indemnity insurer suggested that practitioners who hold wills in safe custody must search daily newspapers to check death notices and notify executors that they hold the will (without apparent limitation as to the extent or range of such searches – international, national or local). Anecdotal evidence is such that most estate practitioners regard this memorandum as imposing too onerous a duty on practitioners, which is not supported by the leading Australian case on holding wills in safe custody.[52]

For the purposes of determining the standard of care in professional negligence cases, it is clear that this is assessed by reference to established practice at the time of the alleged breach of duty[53] and not improvements or changes to best practice which have been subsequently adopted by the profession – the defendant cannot take advantage of the benefit of hindsight to impose a higher standard of care.[54] This common law approach has been largely affirmed following the enactment of the various Civil Liability Acts. For example, Civil Liability Act 2003 (Qld) section 22 and the Civil Liability Act 2002 (NSW) section 50 set out a standard of care for professionals in essentially the same terms. These sections provide that a professional does not breach a duty in providing a professional service if it is established that the professional acted in a way that (at the

52 *Hawkins v Clayton* (1988) 164 CLR 539 (solicitors held liable in negligence where they had been notified of the deceased client's death and the likelihood the executor might not know of this but failed to inform the executor for six years in which time the estate deteriorated in value).

53 *Roe v Minister of Health* [1954] 2 QB 66.

54 *H v Royal Alexandra Hospital for Children* (1990) Aust Torts Reports 81-000 (no finding of civil liability in medical negligence case as warning of risk of AIDS transmission through anti-haemophilic therapy not standard medical practice at time of alleged negligence).

time the service was provided) was widely accepted by peer professional opinion by a number of respected practitioners in the field as competent professional practice. There is an exception if the court considers the peer professional opinion to be contrary to law or irrational. Peer professional opinion does not have to be universally accepted to be considered widely accepted and the fact that there are differing peer professional opinions does not prevent one or more opinions being relied on.

The recent unanimous decision of the New South Wales Court of Appeal in *Dobler v Kenneth Halverson and Ors; Dobler v Kurt Halverson (by his tutor)*,[55] which involved a claim brought against a general practitioner after a young man suffered cardiac arrest and hypoxic brain damage, has clarified the effect of the legislative provisions concerning the standard of care in professional negligence cases. The decision suggests the following framework for analysis to determine the standard of care for professionals:

- First, apply the common law test in *Rogers v Whitaker*[56] – in particular, that while evidence of acceptable practice is a useful guide for the courts, it is for the courts to adjudicate on what is the appropriate standard of care;[57]
- Second, determine whether the defendant has established the statutory defence available from section 5O Civil Liability Act 2002 (NSW) and its equivalent provisions[58] (that the professional acted in a manner that – at the time the service was provided – was widely accepted in Australia by peer professional opinion as competent professional practice); and
- Third, if the statutory defence is available, determine whether the defence should be refused by reference to the irrationality (or similar) exception available in section 5O(2).[59]

The section 50 defence was recently applied, though the defence was held to have not been made out on the facts, in the context of the professional liability of solicitors in *Permanent Custodians Limited and Anor v King and Ors*.[60] In that case Schmidt AJ accepted that the solicitor did not act 'in a manner that (at the time the service was provided) was widely accepted by peer professional opinion as competent professional practice.' He noted it was common practice to meet separately with an elderly father in a situation such as this to ascertain he had understanding of his son's business and the true risk he was taking on as mortgagor of increased borrowings. Therefore in the

55 [2007] NSWCA 335, Giles JA (Ipp JA and Basten JA agreeing), delivered 26 November 2007 (*Dobler v Halverson)*. The appeal was from the NSW Supreme Court decision of McClellan CJ (Common Law) in *Halverson & Ors v Dobler; Halverson (by his tutor) v Dobler* [2006] NSWSC 1307.

56 [1992] HCA 58; (1992) 175 CLR 479 (*Rogers v Whitaker)*.

57 At 487 per Mason CJ, Dawson, Brennan, Toohey and McHugh JJ. See also *Naxadis v Western General Hospital* (1999) 197 CLR 269, 275-276 per Gaudron J; *Rosenberg v Percival* (2001) 205 CLR 434, 439 per Gleeson J.

58 For comparative legislation see: Queensland: s 22 Civil Liability Act 2003 *(*Qld*)*); South Australia: s 41 Civil Liability Act 1936 (SA)*;* Tasmania s 22 Civil Liability Act 2002 (Tas); Victoria: s 59 Wrongs Act 1958 (Vic); Western Australia: s 5PB Civil Liability Act 2002 (WA); Australian Capital Territory: Civil Law (Wrongs) Act 2002 (ACT) (no equivalent section); Northern Territory: Personal Injuries (Liabilities and Damages) Act 2003 (NT) (no equivalent section).

59 For a discussion see B Madden & T Cockburn 'Three dimensions of the standard of care in professional negligence cases' (2008) 4 (8) *Australian Civil Liability Bulletin (ACLB)* 95; republished B Madden & T Cockburn 'Three dimensions of the standard of care in professional negligence cases' (2008) 16 (6) *Australian Health Law Bulletin (AHLB)* 88; and P King 'Faint Heart Wins Fair Battle: Court of Appeal Uphold Trial decision in *Halverson v Dobler'* (2008) 16 (4) *Health Law Bulletin* 50. Given that the various provisions are not uniform across Australia, a different approach to construction to that applied in New South Wales may arise in other jurisdictions: see M Williams, *Proving medical negligence across Australia* 2009 (May) *Health Law Bulletin*.

60 [2009] NSWSC 600.

circumstances the solicitor needed to advise the elderly father that it was in his interests to obtain independent legal and financial advice.[61]

Ultimately therefore, the question as to whether a practitioner will be found liable in negligence for failure to comply with any published guidelines as to will and estate planning practice will be determined by an assessment on the available evidence as to whether the defence of meeting the standard of 'widely accepted by peer professional opinion by a significant number of respected practitioners in the field as competent professional practice' is made out.

This 'reasonable solicitor' approach to the determination of the appropriate standard of care in tort can be contrasted with the 'reasonable consumer test' which has been applied in assessing the liability of suppliers of goods and focuses on the reasonable expectations of the consumer as the determinant as to whether goods supplied meet an acceptable standard.[62] Such a test is not appropriate for the determination of the relevant standard of care for professional services given the information imbalance which exists between the professional and client; consumers may not be in a position to make an accurate assessment as to what is a reasonable standard of professional service. As noted by Sir Thomas Bingham MR in *Bolton v The Law Society*,[63] it is therefore in the public interest that the professional activities of lawyers be regulated and controlled more so than any other profession or vocation.[64]

2. Duty to ensure the doctrine of suspicious circumstances is avoided?

Under the doctrine of suspicious circumstances, where a beneficiary or other person in a position to exercise undue influence is involved in the preparation of a will, that person bears the onus to establish that the will was made with the testator's knowledge and approval. In cases where it is alleged that the solicitor's action or inaction has resulted in the will being put to proof under the doctrine of suspicious circumstances, in the event of a finding of negligence there may be adverse costs consequences against the solicitor even if the will is upheld.[65]

It was strongly argued in *Dore (as executor of the will of WH Chenhall (dec'd) (Dore)*[66] that the solicitor, Dore, who prepared a will for a client under which he was to take a substantial benefit in the absence of independent legal advice and/or the fully informed consent of the client, should not be entitled to his costs of proving the will as his irregular practice, apparently in conflict of duty to a client had caused the need for expensive proceedings to resist probate of the will. However in that case the will was ultimately upheld and the solicitor Dore was held entitled to be entitled his costs[67] (the issue of costs being abandoned in oral argument in Court of Appeal proceedings).[68]

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61 Ibid [38]-[41].

62 See for example s 7 Consumer Guarantees Act 1993 (New Zealand) .

63 [1993] EWCA Civ 32 [15]-[16].

64 For a discussion of professional responsibility more broadly see E Dal Pont, *Lawyers Professional Responsibility* (3rd ed, 2006).

65 *Nock v Austin* (1918) 120 CLR 519, 525 per Barton J, Gavan Duffy J.

66 [2006] QCA 494.

67 [2006] QSC 140.

68 [2006] QSC 494, [57].

III. Civil Liability Arising Out of Breach of Equitable Obligations?

In addition to the prospect of civil liability arising out of will and estate planning advice on the traditional grounds of negligence, contract and statute, and the possibility of a higher standard of care being imposed on practitioners following the *Ford* decision, recent cases indicate that there may also be an increased prospect of civil liability arising out of breach of equitable obligations, particularly in the context of abuse of a special relationship of influence and fiduciary duties.

A. Civil Liability Arising Out of the Application of a Wider Concept of Undue Influence in Will Cases?

Because of difficulties in successfully raising the probate doctrine of undue influence to set aside a will due to the necessity to prove coercion, cases involving in a 'real sense' undue influence are often argued on the basis of the doctrine of suspicious circumstances and/or lack of capacity.[69] For example, given the absence of relevant evidence of coercion, the *Dore* case was argued on these two grounds, albeit without success. In *Dore* McMurdo J pointed out, that in order to make out an allegation of undue influence in the probate jurisdiction as a challenge to a will, there must be proof 'that the testator was coerced into making [the] will, and on no view of the facts was that case open.'[70] However, His Honour went on to state '… there was no argument that the equitable doctrine of undue influence should now extend to a will.'[71] A reasonable inference from Justice McMurdo's comment is that he would have liked to hear argument along these lines. A number of commentators (both academic[72] and judicial[73]) have raised the possibility of applying the equitable doctrine of undue influence to wills, mostly because the difficulty of proving coercion as required by the estate doctrine which makes it a practically unenforceable remedy.[74]

This very issue was raised recently in a New South Wales Court of Appeal decision, *Trustee for the Salvation Army (NSW) Property Trust v Becker*[75] where there was strong evidence of coercion, but ultimately insufficient evidence to overturn the will. In that case Ipp JA[76] said 'I would note that the equitable doctrine of undue influence does not apply to testamentary gifts.'[77] His Honour later continued 'the nub of the criticism is that the law does not provide adequate protection to those affected by a vulnerable testator who is coerced or tricked into making a will.'[78]

Another recent decision, *Burnside v Mulgrew*,[79] illustrates the difficulty of proceeding with an allegation of undue influence in the making of a will. In that case a will was made properly by a solicitor for an elderly lady and independently witnessed. The beneficiaries were a 50 year old

69 Fiona Burns, 'Elders and Testamentary Undue Influence in Australia' (2005) 28 *UNSWLJ* 145 at 159, 163; Pauline Ridge 'Equitable Undue Influence and Wills' (2004) 120 *LQR* 617, 622.

70 [2006] QCA 494, [56].

71 Ibid [56].

72 Kerridge, 'Wills made in Suspicious Circumstances: The Problem of the Vulnerable Testator' (2000) 59 *CLJ* 310; Ridge 'Equitable Undue Influence and Wills' (2004) 120 *LQR* 617; Burns, 'Elders and Testamentary Undue Influence in Australia' (2005) 28(1) *UNSWLJ* 145.

73 *Bridgewater v Leahy* (1998) 194 CLR 457, 474-475.

74 Pauline Ridge, 'Equitable Undue Influence and Wills' (2004) 120 *LQR* 617, 622.

75 [2007] NSWCA 136.

76 Mason P and McColl JA concurring.

77 Ibid [62].

78 Ibid [70].

79 *Burnside v Mulgrew; Re the estate of Doris Grabovaz* [2007] NSWSC 550.

friend and niece. Six months later a will-kit will was purportedly executed in favour of a community service carer who attended on the testator. The estate was worth two and a half million dollars. Ultimately the court was not satisfied that the signature on the will was that of the testator. In addition, one witness denied that she had attested the will, her evidence being that she was asked to sign the carer's will. Probate of the will in favour of the carer was refused. The court noted that an allegation of undue influence was not pressed in submissions,[80] presumably due to the practical difficulty of raising the probate doctrine, although the facts would seem to patently raise the issue of undue influence.

Fiona Burns has argued persuasively that it is more appropriate to apply a modified doctrine of undue influence to testamentary gifts, rather than applying the equitable doctrine applicable to inter vivos transactions which triggers a rebuttable presumption of undue influence when certain facts or relationships exist.[81] She suggests that a three tiered approach should be adopted, which involves a reformulation of:

- The definition of undue influence;
- The evidence that can be relied on to prove undue influence; and
- The standard of proof.[82]

There is much to be said in favour of this approach, which more carefully considers the different approach taken to testamentary cases rather than inter vivos cases, to which the rebuttable presumptions in equity apply. Its attraction is that it does not seek to apply the equitable rules to wills 'holus bolus', without a consideration of the differing rationales for their approaches.

While a reformulation of the doctrine of undue influence as it applies to wills may enable more applicants to successfully overturn wills in appropriate cases on the grounds of a undue influence, given the existing case law and policy considerations identified and discussed in *A* above, it is unlikely that the courts would shift from their traditional reluctance to impose a duty of care on the solicitor in such cases, other than to the extent of liability to the estate for the costs of the application to set aside the will.[83]

The position might be different if it could be shown that the solicitor has benefited from the will or estate planning advice such that civil liability could be imposed as a third party to undue influence on the basis of agency[84] or notice.[85]

Furthermore, under the related, but distinct, doctrine of unconscionable bargains, if it is established that the client is labouring under a special disability and there has been an unconscientious taking of advantage of that special disability by a solicitor, there is a prospect that where a solicitor takes a benefit under the will or estate planning transaction, even if this benefit is limited to professional fees, he or she may be susceptible to civil liability in the form of equitable remedies such as equitable compensation payable to the estate or such other equitable remedy as is necessary to do practical justice in the circumstances of the case.[86]

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80 Ibid [62].

81 Fiona Burns, 'Reforming Testamentary Undue Influence in Canadian and English Law' (2006) 29 *Dalhousie Law Journal* 455.

82 Ibid 481.

83 *Worby v Rosser* [2000] PNLR 140.

84 *Cf Nathan v Dollars & Sense Finance Ltd* [2007] 2 NZLR 747.

85 *Bank of New South Wales v Rogers* (1941) 65 CR 42 *Barclays Bank plc v O'Brien* [1994] 1 AC 180.

86 *Commonwealth Bank v Amadio* (1982-1983) 151 CLR 447; *Bridgewater v Leahy* (1998) 194 CLR 457.

B. Civil Liability Following Breach of Fiduciary Duty in Will Making and Estate Planning Advice?

Although the possibility of conflicting duties to his or her client/testator and beneficiaries who may have taken under previous wills was regarded as a policy reason against the imposition of civil liability in negligence in *Worby v Rosser*[87] and *Graham v Bonnycastle,*[88] there is no reason why a solicitor who places himself or herself in a position of possible conflict of duty and duty in the course of giving will and estate planning advice should be protected from civil liability. Recent cases[89] indicate that actions against solicitors for breach of fiduciary duty, in addition to suits in negligence or for breach of contractual retainer or statutory obligation, are becoming more common.[90] In the context of will making and estate planning advice, those who act as the family solicitor and do not carefully specify and document the extent of the retainer, and in particular who the client is, are particularly susceptible to civil claims for breach of equitable obligations.

For example, in *Hendriks v McGeoch*[91] the defendant family solicitor gave will and estate planning advice. The majority agreed that a contractual relationship existed – an express or at least implied retainer[92] with the plaintiff (in addition to another client, the plaintiff's mother).

In addition, Basten JA[93] held that 'a solicitor may have a duty of care "even in situations where a contractual relationship cannot be established".'[94] Factors which indicated the existence of a duty of care in this case were: Hendriks' statements to the effect that he was 'looking after' the respondent's interests and that the respondent had an 'entitlement' to Mollymook; his assurances as to the contents of Mrs McGeoch's will and her intentions in that respect; his insistence that the respondent remained liable for half of the costs incurred by the solicitors; and the risk to the respondent of reasonably foreseeable loss if the duty were not fulfilled.[95] His Honour then concluded that although no duty of care will be owed to a third party 'where performance of the duty would or could conflict with the solicitor's obligations to a client ... where performance of the duty involves carrying out the client's instructions, no such potential for conflict arises.'[96] Although the solicitors argued that no duty was owed to the respondent as any such duty would have conflicted with their duties to Mrs McGeoch, this argument failed as it was not supported by the facts: 'at least between December 1995 and March 1996, protection of the respondent's interests would not only have been in accordance with Mrs McGeoch's instructions, but reasonably necessary in order to carry them into effect.

The solicitors were found to be in breach of duty on the grounds that a) they should have taken steps to make the agreement of December 1995 legally enforceable or if their instructions were to

87 [2000] PNLR 140.

88 (2004) 243 DLR (4th) 617.

89 Such as *Milatos v Clayton Utz* [2007] NTSC 44; *Ibrahim v Pham* [2007] NSWCA 215.

90 For a discussion of the conceptual basis of liability in contract and tort and the distinction between new duties of care and fiduciary duties see *Mothew v Bristol and West Building Society* [1996] EWCA Civ 533.

91 [2008] NSWCA 53. On appeal from *McGeogh v Hendriks* [2007] NSWSC 311.

92 Per Spigelman CJ at [3]-[5]; Giles JA at [16]-[17]; cf. Basten JA dissenting at [64]-[66].

93 Spigelman CJ agreeing, Giles JA not deciding.

94 Ibid [69] citing *Astley v Austrust Ltd* [1999] HCA 6; 197 CLR 1 at [47]-[48] per Gleeson CJ, McHugh, Gummow and Hayne JJ.

95 Ibid [71].

96 Ibid [72] citing *Hawkins v Clayton* (1987-1988) 164 CLR 539 (custodial duty) and *Hill v Van Erp* (1997) 188 CLR 159 (witnessing by beneficiary's husband).

the contrary, to advise both brothers that this would not be done; and b) in failing to render agreement enforceable on part of Jon, whilst at same time assuring him that his interests were being looked after, Hendriks breached his duty to Jon.[97] Damages were assessed by reference to loss of chance calculated at 80 per cent of the loss suffered.[98]

Accordingly, where a solicitor assumes responsibility for advising others, in addition to his or her client, civil liability in negligence may arise if the interests of all are not protected. Although not argued as a basis of liability in *Hendriks v McGeoch,*[99] given the possibility of a conflict of duty and duty arising in cases where a solicitor acts for several parties in the one transaction, the potential for a claim for breach of fiduciary duty arises, giving rise to claims for equitable compensation. Such a claim may have also been successful in *Hendriks* had it been raised.

The *Dore*[100] decision also raises the issue of the potential for claims for breach of fiduciary duties against solicitors who prepare wills. In that case a solicitor, Christopher Dore, drew a will for a client and friend, and took a substantial benefit under it (shares in a company worth approximately $1 million).[101] The client was not independently advised. After finding that the bequest in favour of the solicitor should be upheld, Justice McMurdo noted that there was no 'argument that there should be some impact upon the bequest to Mr Dore in consequence of the law relating to fiduciary duties.'[102] The inference was the court would have liked to hear argument on this point. Given that there was an obvious conflict of personal interest and duty to the client it would seem that such an argument was not without some merit.

Solicitors have been held liable for breach of fiduciary duty in other contexts in a number of recent cases. For example, in *Milatos v Clayton Utz,*[103] the solicitors were held liable in damages for breach of fiduciary duty for intentionally failing to disclose that previous advice given was incorrect, and that the client should seek independent legal advice. When the relevant partner realised that easements affecting the client's property were inconsistent with building on the land, he failed to disclose this and advise the client to seek independent advice. In failing to disclose the firm's negligence, there was a conflict between the solicitor and client's interests. To avoid a breach of fiduciary duty, the onus was on the solicitor to show there was full and comprehensive disclosure of the conflict of interest, which he failed to satisfy.[104]

In the earlier case of *Maguire v Makaronis*[105] the Victorian professional conduct rules forbad a solicitor acting for both borrower and lender without the written consent of the parties. Written consent was obtained in the appropriate form, but the solicitors did not disclose that they were in fact the lenders. The court held that the solicitors had breached the fiduciary duty to avoid a conflicting engagement, such as arose where the solicitors were the lender and the client the bor-

97 Ibid [81] per Basten JA, Spigelman CJ agreeing, Giles JA not deciding.

98 Ibid [88]-[90] Per Basten JA, Spigelman CJ and Giles JA agreeing. This approach to causation is not without controversy. In the context of a medical negligence claim, on 4 September 2009, the High Court of Australia recently granted leave to appeal in a loss of chance case, *Gett v Tabet* [2009] NSWCA 76 which overturned *Rufo v Hosking* [2004] 61 NSWLR 678 and abolished loss of a chance claims in New South Wales.

99 [2008] NSWCA 53. On appeal from *McGeogh v Hendriks* [2007] NSWSC 311.

100 *Dore (as executor of the will of WHB Chenhall dec'd)* [2006] QCA 494.

101 Dore could have taken $20 million under the will as residuary beneficiary in the event of the widow predeceasing her husband (which was quite likely as the widow herself was very ill), which did not eventuate.

102 *Dore*, above n 100 [56].

103 *Milatos v Clayton Utz* [2007] NTSC 44.

104 Ibid [446].

105 (1997) 188 CLR 449.

rower. To negative any such breach of duty, it was for the solicitors to show informed consent to their acting with a divided loyalty. In the circumstances of *Maguire v Makaronis* fully informed consent meant consent in light of having received independent and skilled advice from a third party. This did not occur and the mortgage was rescinded subject to terms for repayment of the loan.

It would seem that there is no reason in principle why a solicitor who takes it upon himself or herself to act for several parties in will and estate planning cases should not face civil liability consequences for equitable compensation where a loss is subsequently suffered. Indeed, breach of fiduciary duty was raised, albeit unsuccessfully on the facts, in litigation arising out of estate planning advice in the decision of the New South Wales Court of Appeal in *Rigg v Sheridan*.[106] In that case a solicitor was instructed by a widow, her son, and nephew to implement an agreed family arrangement. This comprised a deed of transfer, a deed of residency, and transfers of certain real estate. The widow transferred real estate and other assets she had recently inherited under the will of her late husband to her nephew (the appellant) and her son. Under the transaction the appellant and her son assumed liability for the substantial business debts of her late husband, and they agreed to allow the widow to reside rent free in the homestead on one of the properties. They also agreed to pay all outgoings and keep the homestead in good repair. The solicitor implemented the transaction, acting for all three parties. Some years later the businesses failed and the bank moved to obtain possession of the former matrimonial home where the widow had been living as contractual licensee of her nephew. The widow brought proceedings to have the family arrangement set aside for undue influence or as an unconscionable transaction, and sued the solicitor for negligence. The nephew brought a cross claim against the solicitor for negligence and breach of fiduciary duty.

The widow's case completely failed as much of her evidence was unreliable and she had forgotten a lot of what had happened in the interval before the transaction was implemented.[107] The cross claim was also dismissed as there was found to be no breach of fiduciary duty and no negligence.[108]

The cross claimant appealed claiming as damages or equitable compensation the costs he had incurred in the long trial which he was unable to recover from the impecunious widow. The appellant argued that the solicitor, in acting for all parties in transaction was in a situation of potential conflict between duties he owed widow and appellant. It was alleged that it was his duty to advise the nephew to instruct another solicitor and that this would have ensured that widow had independent legal advice and eliminated the risk that she would later attempt to have the transaction set aside.

The appeal was dismissed with costs. It was held that by acting for all parties in implementing an agreed transaction which the widow fully understood, the solicitor was not in a situation of conflict between incompatible duties. In this case there was no real sensible possibility of conflict at the outset, and nothing happened before the transaction was implemented which created a conflict or a real sensible possibility of conflict. As to the sufficiency of disclosure for the purposes of obtaining fully informed consent, it was held that the supposed reduction in risk of a challenge by the widow which would have resulted if the nephew had instructed a separate solicitor was not a material fact which the solicitor was bound to disclose to the nephew. The relevant fact for this

106 [2008] NSWCA 79.

107 Ibid [12].

108 For a discussion of the findings of the trial judge see [24]-[29].

purpose was that solicitor was acting for all parties, however, as the nephew was aware of that fact there was no breach of duty. Handley JA[109] therefore concluded that the claim that there was a breach of fiduciary duty failed for the following reasons:[110]

> The judge's findings establish that there was no real sensible possibility of conflict in this case. There was no evidence, expert or otherwise, of any occasion when Mr Sheridan had to choose between two or more ways in which the transaction could be framed or implemented where the interests of the appellant and those of the widow might have diverged. There was also no evidence that any fact relating to the merits or wisdom of the transaction came to the knowledge of Mr Sheridan before it was implemented that should have been disclosed to the appellant or the widow or both and was not.
>
> Mr Parker submitted that Mr Sheridan should have disclosed to the appellant, as a relevant material fact, the benefit he would obtain by instructing another solicitor. This was that the transaction would be less open to challenge, and less likely to be challenged, because the widow would have had independent legal advice.
>
> The Court was not referred to any authority that extends a solicitor's fiduciary duty of disclosure to a fact of this nature. The earlier cases involved material facts relating to the merits or wisdom of the transaction. The facts were such that knowledge of them was likely to cause the principal to reconsider the proposed transaction and either withdraw from it, or seek to renegotiate its terms.
>
> The material fact relied on here does not relate to the merits or wisdom of the transaction itself. Knowledge of that fact would not have caused the appellant to reconsider his approach to the transaction by withdrawing from it, or attempting to renegotiate its terms. In my judgment the fact was not relevantly material and Mr Sheridan's fiduciary duty to the appellant did not require him to disclose it.
>
> The appellant also knew that Mr Sheridan was acting for the widow when he instructed him. The reasoning of Millett LJ suggests that it is only the existence of a duty to another principal that must be disclosed unless there is already something more than a theoretical possibility of a conflict.
>
> There was no finding and no evidence in the present case that Mr Sheridan did anything 'with the intention of furthering the interests of [one client] to the prejudice of ... the other', or that he intentionally allowed the performance of his obligations to one to be influenced by his relationship with the other. There was also no evidence that an actual conflict of duty ever arose which prevented him fulfilling his duty to the appellant because of a conflicting duty to the widow.[111]

In any event, even if a breach of fiduciary duty was established, it was held that this alleged breach was not a cause of the appellant's loss as the suggested disclosure would not have induced him to instruct another solicitor and would not have prevented the widow challenging the transaction. Accordingly the claim for breach of fiduciary duty also failed on causation grounds.[112] His Honour found that the trial judge's finding that the widow would have still brought proceedings even if the appellant had found another solicitor could not be disturbed[113] for the following reasons: the disclosure contended for would not have led the appellant to instruct another solicitor;[114] there was no reason for the appellant to foresee or be concerned about the risk of a legal challenge by

109 Beazley JA and Giles JA agreeing.

110 Ibid [49].

111 Ibid [42]-[45]; citing Millett LJ in *Bristol and West Building Society v Mothew* [1998] Ch 1 CA per Millett LJ at 19.

112 Ibid [57] citing *Beach Petroleum NL v Kennedy* (1999) 48 NSWLR 1 [444], [447], [449]; cf. *Brickenden v London Loan & Savings Co* [1934] 3 DLR 465 PC.

113 Ibid [55].

114 Ibid [49].

the widow;[115] the appellant's retainer of a separate solicitor would not have prevented the widow bringing the proceedings;[116] and the widow's case failed, not because her instructions did not support valid equitable claims, but because they were not substantially true.[117]

It is clear from *Rigg v Sheridan* that in appropriate fact circumstances a solicitor acting for more than one party in an estate planning matter may be found liable to pay equitable compensation for breach of fiduciary duty.[118]

To avoid the possibility of such liability arising the solicitor should carefully document the scope of his or her retainer. For example, in *Ibrahim v Pham*[119] the Court of Appeal held that a solicitor was not in breach of any tortious or fiduciary duty for having failed to insist the client obtain legal and investment advice on a related contract, not the subject of her retainer. The solicitor advised the client to obtain such advice, who emphatically rejected this suggestion. In that case it was found to be material that the solicitor's retainer was only to advise on a loan and mortgage, not the investment contract in question.

IV. Professional Liability for Breach of Professional or Ethical Duties Following Breach of Equitable Obligations

A solicitor's professional duty to avoid conflicts of interest may also render him or her subject to complaint to a Legal Services Commission, and subject to disciplinary consequences including a penalty or suspension from practice.

Most Australian jurisdictions have now introduced rules worded in substantially the same terms as the Law Council of Australia Model Rules of Professional Conduct. These rules reinforce the fiduciary nature of the solicitor/client relationship and work in tandem with the law of fiduciary duties and tort, albeit breach of professional rules does not give rise to any private cause of action,[120] unless the behaviour amounts to fraud. In particular professional rules which require a solicitor to act honestly and fairly, with competence and diligence, and with reasonable promptness in the service of the client[121] and professional rules that relate to solicitor/client conflicts[122] may render a solicitor who acts negligently, or inadequately in light of good practice or in conflict with self and client or client and client interest liable to disciplinary consequences on complaint to the Legal Services Commission.

There is a specific rule in most Australian jurisdictions that relates to a solicitor receiving a gift under a client's will:[123]

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115 Ibid [50].

116 Ibid [51]-[52].

117 Ibid [54].

118 Recently in *Permanent Custodians Limited and Anor v King and Ors* [2009] NSWSC 600 a solicitor was held liable for breach of fiduciary obligation in circumstances where the trial judge was 'well satisfied that a conflict existed and that Mr Vertzayas failed in his duty to Mr Charles King to advise him of its existence and to deal with that conflict' (per Schmidt AJ, 99) *Rigg v Sheridan* was distinguished on the facts: see [98]-[100].

119 *Ibrahim v Pham* [2007] NSWCA 215.

120 *Harrison v Lederman* [1978] VLR 590, 594 per Gillard J; G E Dal Pont, *Lawyer's Professional Responsibility* (3rd edition, 2006) 19.

121 See for example, rule 2 *Legal Profession (Solicitors) Rule* 2007 (Qld).

122 See for example, rules 8 and 9 *Legal Profession (Solicitors) Rule* 2007 (Qld).

123 Law Council of Australia Rule 10.2.

> A practitioner who receives instructions to draw a will under which the practitioner will, or may receive a substantial benefit must:
>
> - Decline to act on those instructions and
> - Offer to refer the person to another practitioner who is not an associate of the practitioner.
>
> Unless
>
> - The person instructing the practitioner is a member of the practitioner's immediate family or a practitioner who is a partner, employer, or employee, of the practitioner.
> - 'Substantial benefit' means a benefit which has substantial value relative to the financial resources and assets of the person intending to bestow the benefit.

Queensland has only recently adopted a similar rule, as of 1 July 2007,[124] perhaps as a result of the findings in *Dore*. Prior to this the Queensland rule did not explicitly deal with the situation of a solicitor receiving a substantial benefit under the will of a client and it would certainly be more difficult to pursue Dore for breach of the previous Queensland professional rule. The previous Queensland rule was a broad obligation to avoid a conflict of duty and personal interest, which was worded in terms of ensuring fidelity to the client's interest unaffected by any interest of the practitioner, and where such interest is adverse, declining to act or withdrawing from representation unless the client is fully informed and voluntarily assents to the practitioner acting.[125]

It is an open question whether a complaint will be made to the Legal Services Commission for potential breach of the relevant professional rules in respect of the *Dore* matter.[126]

Professional rules also regulate the extent to which a solicitor can act for more than one party in a transaction such that a conflict of duty and duty may arise. For example, in Queensland, Rule 8 provides:

> Acting for more than one party
>
> 8.2 A solicitor must avoid any conflict of interest between two or more clients of the solicitor or the solicitor's law practice.
>
> 8.3 A solicitor who or whose law practice intends to act for a party to any matter where the solicitor or the solicitor's law practice is also intending to accept instructions to act for another party to the matter must be satisfied, before accepting a retainer to act, that each party is aware that the solicitor is intending to act for the others and consents to the solicitor so acting in the knowledge that the solicitor:
>
> 8.3.1 may be, thereby, prevented from:
>
> (a) disclosing to each party all information relevant to the matter within the solicitor's knowledge; or
> (b) giving advice to one party which is contrary to the interests of another; and
>
> 8.3.2 will cease to act for all parties if the solicitor would, otherwise, be obliged to act in a manner contrary to the interests of one or more of them[127]

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124 *Legal Profession (Solicitors) Rule* 2007 (Qld), rule 10.

125 Superceded Qld Solicitors Handbook rule 9.

126 Dore has already appeared before the Legal Services Tribunal in relation to improperly charging a commission for acting in the administration of a deceased estate. There was a finding of unprofessional conduct, but not professional misconduct. The sanction was a fine of $10 000 and costs and a public reprimand: *Legal Services Commission v Christopher Patrick Dore* [2006] LPT 009 (15/12/06).

127 See for example *Legal Profession (Solicitors) Rule* 2007 (Qld), rule 8.

On the facts in *Hendriks v McGeoch*, the solicitor who put himself in the position of acting in estate work for a mother and two sons, one of whom ultimately had a conflicting interest to that of his the mother, also potentially rendered himself liable to complaint to the relevant State professional disciplinary tribunal for acting for more than one party in the absence of the fully informed consent of each party. By contrast, as the solicitor in *Rigg v Sheridan* was found to have been acting for both parties with consent, the prospect of disciplinary proceedings was unlikely to arise.

V. Conclusion

Solicitors who engage in estate planning and will making work, like all professionals, will be held civilly liable to compensate those who suffer loss due to their action or inaction in cases where they fail to meet the appropriate standard of professional competence in advising their clients. It may be that a higher standard of care will be imposed for the future in relation to the process which a competent solicitor ought to follow in matters where there may be questions as to whether a client has capacity following the findings in the *Ford* disciplinary proceedings. Traditionally civil liability has been founded in tort, contract and pursuant to legislation such as the (State) Fair Trading Acts and the Trade Practices Act (Cth), as was recently illustrated by *Hendriks v McGeoch*.

In appropriate cases it may also be that civil liability may be found to arise for breach of equitable obligation, such as breach of fiduciary duties to avoid conflicts of duty and duty and conflicts of duty and interest or as a consequence of breach of other equitable obligations such as the abuse of a special relationship of influence, as was suggested in *Dore* and argued in *Rigg v Sheridan*. Recently the spectre of breach of professional duty and disciplinary proceedings has arisen particularly in relation to the duty of due diligence and the duty to avoid conflicts of interest.

While it is acknowledged that solicitors who act in will and estate planning matters will be often face difficult judgement calls, for example as to whether a client has capacity and/or whether to act for more than one party in a transaction, as indicated by the outcome in *Sharp v Adam,* provided that the correct process is followed, there will generally be no liability in negligence arising out of an error in judgement, particularly in capacity assessment cases. To avoid civil liability and/or disciplinary proceedings where a solicitor has acted in estate planning and will making matters in cases where there are various family members involved, or in circumstances where the solicitor may take a benefit from the will or transaction, prudence dictates that a range of risk minimisation strategies should be adopted.

In particular, the practitioner needs to keep up to date with developments not only in the relevant law, but also the professional practice and procedures to be followed when acting in particular matters. S/he needs to carefully document the scope and limits of her retainer, to consider whether potential conflicts of interest arise and whether it is appropriate for the client or other family members to be advised to take independent legal advice. It is important to exercise extreme vigilance in taking instructions and maintain careful notes of instruction. Ideally the solicitor should meet with the client on his own or at least provide an opportunity for private instructions. In some cases it may be wise to consider having an additional witness to the giving and taking of instructions. Recent cases (particularly *Ford)* have indicated the importance of using an open-ended questioning technique in all dialogue with clients and being particularly diligent in cases where there are triggers or possible incapacity, such as where there is a radical change in instructions (compared to previous wills or EPAs), where the client is resident in a nursing home, where carers have pointed

out the possibility of impaired decision making capacity, and where the appointment to receive instructions is facilitated by someone other than the client, in particular a party who may have a financial interest in the relevant matter.

Failure to adopt appropriate risk management strategies may mean that wills and estate planning practitioners face the sceptre of civil liability and disciplinary proceedings.