*David Baker**

SOLICITORS' LIABILITY FOR FAILURE OF AN *INTER VIVOS* GIFT

INTRODUCTION

This article is concerned with a quite specific problem, the question of the liability in tort of a legal adviser (usually a solicitor) who has been engaged by the initiator of an *inter vivos* legal transaction (usually a gift) for the purpose of providing a benefit to another person (the donee), and who has by negligence caused the failure of that transaction together with the loss of the benefit. The question seems essentially different from the more general question of how far solicitors may be held liable to third parties whom they have in some way damaged while performing legal work for another person. Liability there, which some cases have established and others denied,[1] depends to some extent on resolving a possible conflict of duties between that owed to the client and that to the third party. In the situation under review, however, there can be no conflict, since the solicitor is employed for the very purpose of advantaging the proposed donee. In this respect, of course, the situation under review is very close to that presented by what may be called the will cases, ie where an intending testator gives instructions to the solicitor to prepare a testamentary gift in favour of the plaintiff, and the solicitor by negligence fails in that task. Decisions of the High Court of Australia[2] and the House of Lords[3] have now established the existence of a duty of care binding the solicitor in this situation, and the conclusion of a decision in another jurisdiction has been the same.[4] The Victorian decision to contrary effect in *Seale v Perry*[5] was overruled by *Hill v Van Erp*.[6] Decisions on failed gifts in wills are now fairly numerous, but in the case of *inter vivos* transactions are limited to one decision at first instance in England, *Hemmens v Wilson-Browne*.[7] On the other hand, there are dicta of relevance to this issue in the will cases themselves. The general question that this article proposes to answer is, granted that the will cases provide a close analogy to the situation of the failed *inter vivos* gift, what conclusion as to liability does that analogy provide?

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* BCL, MA (Oxon); Senior Lecturer, Law School, Adelaide University.

1 For example, in favour of liability: *Waimond Pty Ltd v Byrne* (1989) 18 NSWLR 642; *Al-Kandari v J R Brown & Co* [1988] QB 665; against liability: *Gran Gelato Ltd v Richcliff (Group) Ltd* [1992] Ch 560.

2 *Hill v Van Erp* (1997) 188 CLR 159.

3 *White v Jones* [1995] 2 AC 207.

4 *Gartside v Sheffield, Young & Ellis* [1983] 1 NZLR 37; see also *Watts v Public Trustee* [1980] WAR 97.

5 [1982] VR 193.

6 (1997) 188 CLR 159.

7 [1995] Ch 223.

THE THEORETICAL BASIS OF THE WILL CASES

The earliest decision of a court in a Commonwealth jurisdiction that is relevant here was that in *Ross v Caunters*,[8] a case in which a legacy failed because it was made to the wife of an attesting witness to the will. Megarry VC noted some problems in relation to the disappointed beneficiary's action for negligence against the solicitor who drew up the will. The action was for pure economic loss, not generally recoverable in a negligence action except under the *Hedley Byrne* principle,[9] and also for loss of a future benefit, or expectancy, not thought at the time to be suitable for tort recovery. There was also the point that the action was being brought in tort for failure to perform a contractual duty to a third party, the testator. None of these objections was found to be insuperable. The justice of the case demanded a remedy; the situation was otherwise irremediable, the testator being dead and the estate having no remedy since it had suffered no loss. There was no indeterminacy problem since the loss was confined to one person, thus answering the pure economic loss difficulty. And the only way to do justice in these circumstances was to compensate for loss of an expectancy. The contract argument was met by pointing to *Donoghue v Stevenson*,[10] which showed that tortious duties of care might be owed to third parties by a contracting party in the performance of the contract. Further, there was no conflict between the contractual duty owed to the testator and the duty of care owed to the beneficiary. The situation was not, however, in the opinion of Megarry VC one of liability under the *Hedley Byrne* principle, but was *sui generis*. In particular, there was no reliance (in the legal sense of that term) placed by the beneficiary on the solicitor.

White v Jones[11] concerned intended legacies that failed because of dilatoriness by the defendant solicitors in altering the testator's will to include them. The argument in favour of liability that the House accepted, by a majority of three to two, proceeded largely on the same lines as that in *Ross v Caunters*.[12] In particular, the majority stressed the injustice that would arise through the absence of any other legal remedy and the fact that in the absence of a remedy the solicitor's negligence would go unsanctioned. But the majority had differing views as to the basis of the liability. Lord Goff of Chieveley thought that the case should be regarded as one of *Hedley Byrne* liability.[13] He held that the solicitor assumed responsibility in law towards the beneficiary, and the absence of reliance on the latter's part should not take it outside the *Hedley Byrne* principle. Placing liability within *Hedley Byrne* answered objections based on the loss being pure economic loss, and the finding of

8 [1980] Ch 297
9 *Hedley Byrne & Co Ltd v Heller and Partners* [1964] AC 465.
10 [1932] AC 562.
11 [1995] 2 AC 207.
12 [1980] Ch 297.
13 [1995] 2 AC 207, 268–9.

an assumption of responsibility answered possible objections in the instant case that the negligence consisted in an omission to act. Lord Goff's opinion appears to entail that the assumption of responsibility is both of legal liability and of willingness to perform the work. Lord Browne-Wilkinson found the basis of the liability to be rather different.[14] Although akin to *Hedley Byrne* liability, the assumption of responsibility he found was one of fact, ie an undertaking to carry out a task with a specific person in mind as the beneficiary of the task, rather than an assumption of legal liability to that person. Where the defendant assumed such a responsibility, rather than making a misstatement, a duty of care could arise without reliance on the part of the plaintiff. Lord Nolan thought that liability should be based on an assumption of responsibility by the defendant solicitor towards the plaintiff, without indicating whether the assumption was of legal liability or merely of willingness to act on the plaintiff's behalf.[15] He also thought that actual reliance on the part of the plaintiffs existed on the facts, though that reliance seems to be more in the order of the passive reliance referred to by Megarry VC in *Ross v Caunters*.

Hill v Van Erp[16] concerned the same problem as that in *Ross v Caunters*, ie the liability of a solicitor for the failure of a legacy to the wife of an attesting witness. By a five to one majority the High Court of Australia held that the solicitor who drew up the will was liable in negligence to the plaintiff because of the failure of the gift. As in the House of Lords in *White v Jones*, the majority reasoning was based on the feeling that the justice of the case demanded a remedy, overcoming objections based on the nature of the cause of action. But, again as in the House of Lords, there was a complete absence of unanimity as to the basis of the cause of action. Brennan CJ expressly denied that the cause of action arose out of an assumption of responsibility by the solicitor towards the beneficiary under the *Hedley Byrne* principle, but made no attempt to classify the nature of the cause of action.[17] Dawson J (with whom Toohey J agreed), thought that there had been an assumption of responsibility of a kind, and reliance of a kind, though this was not actual reliance by the plaintiff, but was of the character of the general reliance placed by the public on solicitors' to make sure the formalities of wills were in order.[18] Gaudron J based her decision on the factor of control by the solicitor over a legal right vested in the plaintiff (as opposed to a mere interest), thus harking back to an earlier judgment of hers in *Hawkins v Clayton*.[19] Her rationale ignores the fact that the plaintiff had never acquired an actual legal right, but had merely been thwarted in the legitimate expectation she would obtain one.[20] Gummow J went out

14 Ibid 275–6.
15 Ibid 293–5.
16 (1997) 188 CLR 159.
17 Ibid 171.
18 Ibid 184–5.
19 (1988) 164 CLR 539.
20 (1997) 188 CLR 159, 199.

of his way to express his disagreement with the extension by the House of Lords of the concepts of assumption of responsibility and reliance to a case of this sort.[21] He could find neither present on the facts before him. The duty of care in question was therefore *sui generis*, arising out of the need to do justice and the policy of the matter.

As regards policy, there were a number of arguments mentioned in *White v Jones* and *Hill v Van Erp* that strengthened the conclusion that the justice of the case demanded a remedy. Lord Goff in *White v Jones* dismissed the prospect of excessive liability being imposed on solicitors because of the decision, since liability was to a small, determinate number.[22] Lord Browne-Wilkinson pointed out that the overwhelming likelihood was that the situation would prove irremediable, since the will would normally have been locked away after its execution until after the testator's death.[23] In both cases, emphasis was placed upon the public responsibility of the solicitors' profession in ensuring the properly ordered transfer of legal estates from the dead to the living. Members of the High Court in *Hill v Van Erp* added that the decision in no way threatened the ability of solicitors to compete for business.

It will be noted that the above arguments in favour of a duty of care that survived the scrutiny of both higher courts are, with one exception, equally applicable to *inter vivos* transactions such as gifts. Indeed it would be a perverse state of the law if it were to draw any general distinction between the two classes of case. The one exception, however, is of some importance. The will cases emphasise the irremediability of the situation, the testator being dead and the estate having no remedy arising from the contract with the solicitor, since the estate has suffered no loss. Neither of these arguments is relevant in the case of the failed *inter vivos* gift where the donor remains alive and is able to reinstate the gift on discovering its failure, or to sue the solicitor for damages on the contract. This argument has at least plausible force. In the will cases, the situation is irremediable so the law provides a remedy. In the gift case, it is remediable, so there is no need for legal intervention. Indeed, there are dicta in both *White* and *Hill* (by Lords Goff and Brown-Wilkinson in *White*,[24] and Brennan CJ in *Hill*[25]) accepting this point. These remarks are made very much obiter: they were not necessary for the decision in those cases and could hardly have been made in response to any argument presented by counsel to the court. They are, of course, influential granted their source. One of the main purposes of this article, however, is to suggest that the

21 Ibid 230.
22 [1995] 2 AC 207, 269.
23 Ibid 276.
24 Ibid 262, 276 respectively.
25 (1997) 188 CLR 159, 168.

plausibility of the argument is in fact spurious, and that this distinguishing factor between the case of the will and that of the deed is misconceived.

THE DECISION IN *HEMMENS v WILSON-BROWNE*[26]

This case, though only one at first instance and decided by an acting judge, assumes some importance in being the only decision to date in which the liability of a solicitor for negligence in the execution of the legal formalities necessary for the making of an *inter vivos* gift has had to be determined.

The essential facts in *Hemmens* were few and not in dispute. Mr Panter and Mrs Hemmens proposed to leave their respective spouses and set up home together in premises leased by Mr Panter. This they did, but after two days Panter regretted his action and returned to his wife. Hemmens was without present means and in danger of becoming homeless. Panter accepted some responsibility for this. He gave instructions to a solicitor, Mr Saynor, employed by the defendant firm, to draw up a document conferring on Hemmens an immediate right to call upon Panter in the future for the sum of £110 000. Saynor drew up a document designed to carry that intention into effect. This document was presented to Panter and signed by him in the presence of Saynor and Hemmens. But it was of no effect. It did not qualify as a deed of gift since it was not under seal; it could not operate as a declaration of trust, since there was no defined trust fund; and there was no consideration to revive an imperfect gift in equity. Panter, on discovering the invalidity of the gift, refused to take steps to validate it. The action brought by Hemmens against Saynor and his firm turned on whether Saynor owed Hemmens a duty of care in tort, since it was found as a fact by the court that Saynor had been negligent in drawing up the document. Hemmens sought to establish this by analogy with the *Ross v Caunters* duty of care owed by a solicitor to a legatee in drawing up a will. There was also an argument, based on a statement made by Saynor to Hemmens that the document was akin to a trust, and that liability arose under the case of *Hedley Byrne v Heller*. Both these arguments failed before Judge Moseley. Only the first ground is considered in this article.

The *Ross v Caunters* principle, having at that stage been confirmed by the Court of Appeal in *White v Jones*, was binding on Judge Moseley. But it concerned gifts by will. Should it be extended to gifts *inter vivos*? The judge could see no reason in logic or policy why that extension should not be made. Further he was able to cite authority from two sources supporting this conclusion, the first from a textbook on professional negligence[27] and the second a dictum of Sir Donald Nicholls VC in the

26 [1995] Ch 223.

27 Rupert Jackson, *Jackson and Powell on Professional Negligence* (3rd ed, 1992) 324.

Court of Appeal in *White v Jones*.[28] He concluded that no obstacle existed in general to the translation of the principle of the will cases to *inter vivos* gifts. Next, however, Judge Moseley had to decide whether the facts of the case before him justified the imposition of a duty of care on the solicitor. *Ross v Caunters* had been decided using the formulation of duty of care in tort propounded by *Anns v London Borough of Merton,*[29] which had been replaced by the threefold test laid down in *Caparo Industries v Dickman*,[30] ie that the harm should be reasonably foreseeable, that a relationship of proximity should exist between defendant and plaintiff, and that it should be fair and reasonable that a duty of care should exist between them. The first two requirements were found to be obviously satisfied on the facts of the case. The third presented difficulties that the judge admitted were not easy to solve. The extract he quoted from the judgment of Sir Donald Nicholls VC in *White v Jones* specified that a similar principle to that of the will cases would apply in the case of an *inter vivos* gift where the invalidity of the gift was discovered after the donor's death. By implication this might be taken to mean that, if the discovery were made before the death, and the donor had the opportunity of putting the matter right and refused to do so, no liability on the part of the solicitor would arise. Seizing on this, Judge Moseley gave examples of cases in which a similar inability to put the matter right would justify the imposition of liability on the solicitor.[31] An irrevocable deed of settlement may have been drawn up by the defendant lawyer conferring its benefit on the wrong person. If so, the intended beneficiary should have redress against the lawyer. Also where an employer had engaged a solicitor to draw up a tax avoidance scheme on behalf of an employee, and through negligence had failed to achieve that object, the tax would be payable and the employee without any ability to escape it. In this situation the solicitor should be liable to the employee. The underlying principle of the will cases, that of the irremediability of the legacy's failure, should therefore apply also to the case of *inter vivos* gifts. Further possibilities were the insanity, bankruptcy or insolvency of the donor after discovery of the invalidity. But no such situation existed on the facts of the present case. Panter was alive and able to rectify the matter by giving fresh instructions to Saynor or another solicitor. The reason this had not been done was that he had changed his mind. In those circumstances it would offend against common sense to grant Hemmens a remedy against the solicitor, Saynor. No duty of care on his part therefore existed.[32]

A SECOND GROUND FOR THE DECISION IN *HEMMENS*

Judge Moseley gave a second reason for his conclusion in *Hemmens*. This was that Panter, remaining alive, had a remedy in contract against the solicitor whether by

28 [1995] 2 AC 207, 227.
29 [1978] AC 728, 752–2.
30 [1990] 2 AC 605.
31 The examples are in fact taken from the passage from Jackson, above n 22.
32 [1995] Ch 23, 237.

refusing to pay his bill or by recovering damages for the cost of employing another solicitor to draft an appropriate document. This argument provides an alternative approach to the irremediability reasoning, but looks at it from the point of view of the need to sanction the negligence of the solicitor rather than to rectify the injustice to the intended beneficiary. There is certainly some emphasis in the case law considered above on the unsatisfactory state of the law if solicitors, despite negligence on their part, were to escape scot-free. There is, however, a degree of legal and logical confusion about the point being made here. For example, if the solicitor's bill is unpaid, this could be of benefit to a testator's estate just as much as to a living donor. Secondly, if the donor sues to obtain damages for having the same work carried out by another solicitor, there is no need for remediability by sanction since the damage caused by the donee's failing to obtain the benefit under the original transaction will now have been rectified. And if the donor claims damages in the absence of any intention to negotiate the gift through another solicitor then the sanction appears to be ineffective since, as in the case of the will, no loss has been suffered. At this point, however, it may be suggested that a claim for damages should be available simply by reason of the rendering of a defective service, without the need to establish that this has caused loss (in the same way that such an action is available for the supply of defective goods under a contract of sale). To quote Treitel's *Law of Contract*, prima facie 'the mere fact that the plaintiff did not receive the performance for which he bargained is considered a loss of his'.[33] This argument seems equally available to the estate of a testator to which the testator's claims for breach of contract descend, where a testamentary gift fails through the solicitor's negligence, though all the case law up to now has assumed that the estate cannot establish a claim to damages.

Next, however, it is suggested that, even if there is a claim for damages against the solicitor by reason of the defective drafting of the gift or will, this hardly constitutes a sufficient reason to find the requirement of remediability satisfied. In the first place, the amount of damages is almost certain to be small compared with the loss inflicted on the donee or beneficiary and therefore to constitute a woefully insufficient sanction. Secondly, the action does nothing to rectify the injustice done to the disappointed person, since any money recovered belongs to the donor or the estate. It is significant that Lord Goff in *White v Jones* spent no time at all considering the possibility of an action in its own right by the estate, but a good deal of time considering whether the estate could recover damages on behalf of the beneficiary under *Albazero/Linden Gardens Trust*[34] principles.[35] His conclusion was that these cases were distinguishable from the will cases on the ground that

33 G H Treitel, *The Law of Contract* (10th ed, 1995) 868.

34 *The Albazero* [1977] AC 774; *Linden Gardens Trust Ltd v Lenesta Sludge Disposals Ltd* [1994] 1 AC 85.

35 [1995] 2 AC 207, 267.

they concerned a transferred loss that the transferor would have suffered personally apart from the transfer, whereas in the will cases the testator could suffer no personal loss. However, the purpose of examination of these cases was to see whether the estate's action could provide compensation for the beneficiary, not whether it could provide a sanction against the solicitor. Further, as Lord Goff pointed out, even if the law could be extended to enable the estate to sue on the beneficiary's behalf, there would be no means of compelling the estate to do so, so the considerable possibility of injustice would remain. The conclusion must therefore be that, even though the availability of an action for breach of contract may exist for the donor, this is not a sufficient reason to deny a remedy to the intended beneficiary.[36]

THE FIRST REASON IN *HEMMENS*

The first reason in *Hemmens* has more apparent cogent force. It takes as its basis the irremediability of the failed gift by will, compared with the remediability of the failed gift *inter vivos*, where the donor remains alive and competent. This distinction, however, is open to the objection that it ignores a fundamental difference of principle between the two types of gift. The former creates a liability only to take place in the future, even though the will is drawn up by the solicitor and executed immediately. It is ambulatory; it speaks from death. The gift *inter vivos* of the *Hemmens* type is intended to create an immediate liability on the part of the donor. If an intending testator were to discover the invalidity of a legacy drawn up in the will before the time of the testator's death, the matter could be put right by the giving of fresh instructions in the matter. Should there be a change of mind on the testator's part and the legacy not be reinstated, the intended legatee has lost nothing, since it is always the case that a legacy is revocable before death. In the case of the immediate *inter vivos* gift the case is different. Where the invalidity of the gift is discovered after it should have taken effect, the negligence of the solicitor has here undoubtedly caused loss to the intended donee. Further this loss is correctly described as irremediable, since what has been lost is the acquisition of a binding cause of action against the donor. Of course the donor may give fresh instructions to the solicitor to perfect the gift. But this amounts to a new gift. And the possibility of a change of mind, whether due to a change of heart or of the donor's financial circumstances, is all too readily apparent. In order to allow the *inter vivos* cases to fall into line with the principle established by the will cases, the critical moment for testing the intention of the donor should be the date on which the liability of the latter

36 *Carr Glynn v Frearsons* [1998] 4 All ER 225 is English Court of Appeal authority that, even if the testator's estate has a cause of action for substantial damages, this does not necessarily bar an action by the proposed beneficiary in respect of the same loss.

is intended to arise. If the donor's intention to give exists at that point, then a subsequent change of mind should be irrelevant.

The difference between the gift by will and the *inter vivos* gift also affects the legal analysis of the two situations. In the case of the gift by will, there is no difficulty in saying that a duty of care exists toward the intended beneficiary on the part of the solicitor (granted the existence of the legal decisions to that effect). Should the testator discover while still alive the existence of a mistake that would have brought about the failure of the gift and that was caused by the solicitor's negligence, a change of mind on the testator's part does not affect the original duty of care. There is still a duty of care and a breach. However that breach has not caused the intended beneficiary loss, since testators may change their mind at any time until the moment of death so that no causal relationship exists between the breach and the loss. The case of the *inter vivos* gift is different. Where an immediate gift is intended, the failure of the solicitor to effect a valid gift undoubtedly causes loss to the intended donee. A duty having been recognised, liability for breach must inevitably follow. Therefore the only way in which the solicitor can escape liability for negligence, as Judge Moseley recognised, is by a finding that the solicitor owed no duty of care, hence the difficulty that the court experienced in deciding whether a duty of care should be imposed.

PROBLEMS WITH THE DUTY SITUATION IN *HEMMENS*

The duty situation itself in *Hemmens* gives rise to problems. It is one of those unusual cases in which the duty is dependent on facts that occurred after the defendant acted. Solicitors in this situation cannot know whether they are under a duty of care; they are merely able to foresee that they might be. There are other examples of this of course. For instance, a duty of care may be established towards persons not alive at the time the facts establishing duty and breach occurred, who later are affected by that breach. Another example is the duty of care not to cause injury to the human foetus, which depends on the child being born alive.[37] Again, two persons may agree to exclude a duty of care on the part of one of them should certain facts occur. The determination of a duty of care depends on the occurrence or non-occurrence of those facts. These cases, at least in practical terms, give rise to little difficulty. The essential facts establishing the duty in the first two cases are readily verifiable. In the second the parties themselves have specified the fact or facts determining whether a duty arises.

By comparison, the facts upon which the *Hemmens* duty depends are by no means certain. By virtue of the decision in *Hemmens* itself, the solicitor knows that if the donor survives mentally intact and solvent there will be relief from liability in

37 *Watt v Rama* [1972] VR 353; *Lynch v Lynch* (1991) 25 NSWLR 411.

negligence. But, under the dicta of Sir Donald Nicholls VC in *White v Jones* and Judge Moseley himself in *Hemmens*, other events may occur that establish a duty of care on the solicitor's part, in particular the death, insolvency, bankruptcy or insanity of the donor at a time when, apart from one of these events, the donor still intended that the gift should be made. There is no reason why the subsequent events should be limited to those stated. For example, a law might be passed proscribing gifts of that kind, having no retrospective effect and thereby not affecting the gift in question had it been initially validly created. Presumably there could also be an event creating a duty of care on the solicitor's part.

A further question would arise if it were the prospective donee who had become, for example, insane or bankrupt (assuming the occurrence of such an event after the donor also became incompetent) or, again on this assumption, the donor may have expressed a motive for the gift that later proves unfounded, for example, that the donee has led a good and upright life, when it emerges that the latter has been embroiled in some scandal. Should a court take into account the probable attitude of a donor who had remained competent in determining the duty issue? Another complicating factor is what is meant by a change of mind. That was an easy question to answer in *Hemmens*, since Panter was alive and of sound mind, and the very question had been put to him and answered. More difficult cases are readily imaginable. Suppose, for example, that the donor discovers the invalidity of the gift, then dies soon afterwards without communicating an intention in the matter to the solicitor. Ought a court to investigate the likely decision of the donor by taking evidence on this point from persons who are themselves likely to have an interest one way or the other? Of course the same issue could arise in the case of a testator who discovers the invalidity of a legacy shortly before dying. But the will cases have not suggested a need to explore the thought processes of the testator before death. Rather the emphasis has been on the unlikelihood of the discovery, since the will would have been locked away until death, hence the need for a duty of care on the solicitor's part. This might conceivably be a problem in future for the will cases, though one that should be soluble by causal principles rather than by attempting to make the duty of care of the defendant depend on later events. If the defect in the will is discovered in plenty of time to repair it, then the solicitor's negligence should not be regarded as causative of the plaintiff's loss, if the matter remains unrectified. If it is discovered shortly before death, with very little opportunity for the testator to put it right, then the negligence should operate as a cause of the loss. But this difficulty need not arise at all in the case of *inter vivos* gifts, if an immediate duty of care binding the solicitor were to be recognised.

JUSTICE AND POLICY IN THE *HEMMENS* SITUATION

It is easy enough to mount an argument defending *Hemmens* against the charge of uncertainty. The *ratio decidendi* of the case is clear: the solicitor owes no duty of

care to the donee, granted the continued existence of a donor capable of saving the gift. That satisfies at least the Goodhart view of precedent.[38] But the case approved in principle the extension of the duty of care in relation to the drawing up of wills to the drafting of *inter vivos* gifts, and indicated certain situations in which a duty of care would be imposed in the light of later events. The principle of later events establishing the duty may seem to be integral to the decision. If so, the uncertainty referred to above as to the legal position of a solicitor drafting an *inter vivos* gift is a necessary consequence. Legal uncertainty is present in other areas of duty and is not a ground in itself for rejecting the principle upon which the duty is based. If *Hemmens* rested upon some obvious need to do justice, the uncertainty it produces would be acceptable. But the equity arguments in favour of the disappointed donee are strong. Once the principle in the will cases has been found to be acceptably applied to *inter vivos* gifts, the only ground for denying a duty of care in the *Hemmens* situation is the third ground under *Caparo Industries and Dickman*,[39] the fair and reasonable ground, as Judge Moseley recognised. It is clear that this ground lets the court into matters of both policy and justice. As regards the former, there is no obvious policy ground for excluding a duty of care. A policy argument based on the fact that the recognition of a duty of care, arising independently of whether the gift can be saved, will lead to excessive liability on the part of the solicitors must fail. The gift cases are likely to remain outnumbered by the will cases, where a duty is clearly established, and an argument based on excessive liability in the will cases was rejected in *White v Jones*. Australian courts, since abandoning proximity as a test of, rather than as a conclusion as to, the existence of a duty of care, have not propounded by significant majority reasoning a general test for duty of care. (There is support for the three-tier approach in *Caparo Industries v Dickman* from Kirby J in two recent decisions,[40] while Gleeson CJ is opposed to it.[41]) But cases such as *Bryan v Maloney*[42] and *Hill v Van Erp* show that policy factors play an important part in deciding whether a duty of care exists. Further, the limited ambit of the duty of care in *Hill* was stressed by all the members of the majority. The justice of the case seems capable of being resolved by providing an answer to the question: who should bear the risk of a change of mind by the intending donor: the negligent solicitor or the innocent intended donee? Posed in this way, the question may seem to provide its own answer.

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38 A L Goodhart, *Essays in Jurisprudence and the Common Law* (1931) 1. Goodhart took the view that the *ratio decidendi* of a case was limited to the facts found material by the court. Cross criticised this view in his *Precedent in English Law* (2nd ed, 1968) 71, on the grounds that it paid 'scanty regard to the process of reasoning adopted by the judge and the relation of the case to other decisions'.

39 [1990] 2 AC 605.

40 *Pyrenees Shire Council v Day* (1998) 162 CLR 330, 418–20. He repeated these views in *Perre v Apand Pty Ltd* (1999) 198 CLR 180.

41 *Perre v Apand Pty Ltd* (1998) 198 CLR 180, 191–2.

42 (1992) 185 CLR 609.

CONCLUSION

The law in this area is extremely unsettled, consisting as it does of high-level dicta and one low-ranking decision. This article therefore attempts to address the problem largely by reference to principle. The present paucity of authority on this question should not lead to the conclusion that it is of little importance. In the nature of things the will cases will continue to outnumber the gift cases. But equity has a quite substantial amount of case law on failure of gifts.[43] At some stage it will no doubt become necessary for the courts to deliver a more considered conclusion as to the liability of a person who has brought about such a failure by giving negligent legal advice.

43 Maher, Gummow and Lehane, *Equity* (3rd ed, 1992) ch 6; Hanbury and Martin, *Modern Equity* (15th ed, 1997) ch 4.