RECENT DEVELOPMENTS IN ESTATE SOLICITOR'S NEGLIGENCE

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In 1979, the Ontario High Court in *Ungaro v Demarco*[1] settled the 100 year old question: are lawyers in Canada potentially liable in an action for negligence at the suit of their clients? In his judgment, Justice Krever definitively provided that lawyers in Canada were not immune from an action for negligence for errors in the courtroom[2]. The law has evolved since Justice Krever's significant ruling, yet the responsibility remains the same – that is, lawyers in Canada have a duty to their clients, and in discharging that duty they must meet the requisite standard of care.

Estate lawyers, like all lawyers, when accepting a retainer to provide legal services impliedly agree to use such skill, prudence and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of their tasks.[3]

This paper will consider recent developments in the law of solicitor's negligence, particularly in the context of estates and trusts. Part one of this paper will discuss the solicitor's standard of care and recent developments regarding the duty to disappointed beneficiaries, as well as the standard for non-lawyers undertaking legal work. Part two will examine the requirement for a causal nexus between the solicitor's alleged negligence and the plaintiff's loss. Part three will demonstrate the high standard imposed by the court in proving that a solicitor's failure to recommend independent legal advice is the causal connection for the plaintiff's loss. Finally, the paper will end with a word on default judgments in the context of solicitor's negligence.

Part 1: The Standard of Care

The Ontario Court of Appeal in *Ristimaki v Cooper*[4] recently enunciated the standard of care for all lawyers as follows:

> (a) A solicitor must bring reasonable care, skill and knowledge to the professional service which he or she has undertaken; see *Central & Eastern Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147 (S.C.C.), at 208;
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> (b) For a solicitor who holds himself or herself out as having particular expertise in a given area of the law, a higher standard of care applies; see *Confederation Life Insurance Co. v. Shepherd, McKenzie, Plaxton, Little & Jenkins* (1992), 29 R.P.R. (2d) 271 (Ont. Gen. Div. [Commercial List]), varied on other grounds (1996), 88 O.A.C. 398 (Ont. C.A.); and,
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> (c) A lawyer who does not adequately or diligently protect the client's interests will be found negligent: see Stephen M. Grant and Linda R.

[1] 1979 CarswellOnt 671, 8 CCLT 207.
[2] *Ibid* at para 24.
[3] *McCullough v Riggert,* 2010 ONSC 3891, 76 CCLT (3d) 71 at para 46, citing a recent paper presented by Ian Hull at the Law Society's 2009 Continuing Education Program Annual Estates and Trust summit.
[4] 2006 CarswellOnt 2373.

> Rothstein, *Lawyers' Professional Liability*, 2nd ed. (Markham: Butterworths, 1998) at 23.[5]

Generally, the obligations of a lawyer in discharging his or her duty to act reasonably and competently include:

> 1. To be skilful and careful;
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> 2. To advise his client in all matters relevant to his retainer, so far as may be reasonably necessary;
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> 3. To protect the interests of his client;
>
> 4. To carry out his instructions by all proper means;
>
> 5. To consult with his client on all questions of doubt which do not fall within the express or implied discretion left to him; and
>
> 6. To keep his client informed to such an extent as may be reasonably necessary, according to the same criteria.[6]

A lawyer is expected to exercise his or her skill with reasonable skill and diligence. Nevertheless, the following cases outline the Court's approach to a variety of situations in which lawyers fell below the requisite standard.

Recent Developments in Case Law regarding Claims of Negligence and the Standard of Care

Meier v. Rose

In *Meier v Rose* the Alberta Court of Appeal held a solicitor liable to a disappointed beneficiary where the gift failed as a result of the solicitor's failure to inquire as to the actual owner of the property to be gifted.

In this case the plaintiff, Robert Meier, alleged solicitor's negligence in the preparation of his deceased brother's will. The solicitor, Alex Rose, had worked for the plaintiff's brother, Gary Meier (the testator), for over 20 years in over 50 transactions. On July 20, 2000, the testator arrived at Mr. Rose's office, without an appointment, to provide instructions for the preparation of his will within 24 hours as he was leaving the next day on vacation. The testator gave instructions that he wanted to leave "Mark's quarter and half section" of his land in the Seba Beach area (the "Seba Beach lands") to his brother, Robert Meier. Mr. Rose informed the testator that the description "Mark's quarter and half section" was an inadequate description and requested the testator telephone him with the legal description of the land from the title which the testator had at his home. The testator gave the proper legal description later that day.

[5] *Ibid* at para 58.
[6] *Meier v Rose,* 2012 ABQB 82 at para. 19 [*Meier]*, citing *Millican v Tiffin Holdings Ltd* (1964), 50 WWR (NS) 673 at 675 (Alta SC), aff'd 1967 CanLII 51 (CSC), [1968] SCR 183 [*Millican]*.

Robert Meier was aware that his brother intended to leave him the Seba Beach lands, and Mr. Rose testified that the testator's intention to leave these lands to his brother did not change after the will was executed. Unfortunately, upon the testator's death it was discovered that the gift of the Seba Beach lands to his brother failed because the testator's company, not him personally, legally owned the land.[7]

It is important to note the particular circumstances of the relationship between the testator and Mr. Rose. Mr. Rose testified that Gary Meier was not a "detail" man, and it was his expectation that Mr. Rose would address all of the legal technicalities of his matters.[8] In the past, this included determining the correct registered owner of land for legal documents, as Gary Meier often referred to land as "his", regardless of whether it was owned personally or by his company.

In this matter the Court considered whether there is a duty of care owed by a solicitor to a disappointed beneficiary under a will, and if so, what is the standard of care. The Court reviewed the law regarding the third party beneficiary rule from its development in the decision of *Ross v Caunters*[9], citing the principle that the duty owed to the beneficiary, and to the client, is merely the duty to use proper care in carrying out the client's instructions for conferring the benefit on the third party.[10] Next, the Court adopted the rationale behind the duty from *White v Jones*[11], where the Court noted "… the only person who may have a valid claim has suffered no loss, and the only person who has suffered a loss has no claim".[12]

Graham v. Bonnycastle

In 2004 the Alberta Court of Appeal adopted the third party beneficiary rule from *Graham v Bonnycastle*[13], stating that "the extension of liability [is] limited to an identified third party beneficiary, in circumstances where both the solicitor and client knew of the client's intention to benefit that individual by the transaction. Liability arises only where the interests of the client and the third party are in harmony and there is no possibility of conflict."[14]

In the case at bar, the Court found that Mr. Rose owed a duty of care to his client, the testator, to effectively execute a will that would confer the intended benefit to his brother. Further, since all of the evidence points to the fact that the testator at all times intended to gift the Seba Beach lands to his brother, the Court found that there was no possibility of conflict between the interests of the testator and his intended beneficiary.

In determining the standard of care the Court cited *Central Trust Co v Rafuse*[15] for the proposition that "[a] solicitor is required to bring reasonable care, skill and knowledge to the performance of the professional service which he has undertaken."[16] The requisite standard of care is considered to be that of the reasonably competent solicitor, the ordinary competent solicitor and the ordinary prudent

[7] *Ibid* at para 2.
[8] *Ibid* at 38.
[9] [1979] 3 All ER 580 (Ch D).
[10] *Ibid* at 599.
[11] [1995] 1 All ER 691 (HL).
[12] *Ibid* at 704-5.
[13] 2004 ABCA 270.
[14] *Ibid* at para 22.
[15] [1986] 2 SCR 147.
[16] *Ibid* at 208.

solicitor.[17] It has been held that the issue is not whether the lawyer made a mistake, but whether he was negligent – in other words, that an ordinarily competent lawyer would not have made such an error.[18]

The Court found that, although a solicitor is entitled to place an appropriate degree of reliance upon the client and the information he provides having regard to the circumstances, a solicitor is not relieved from the responsibility to ensure that his instructions are complete or sufficiently accurate in law or otherwise in order to achieve the testator's intended result.[19] Mr. Rose was aware that, although the testator knew the difference between his companies and himself, he often did not make that distinction.[20] Therefore, the Court found that a reasonably competent solicitor in the circumstances would have made further inquiries regarding whether the testator himself or the testator's company was the correct registered owner of "his" land. [21] For instance, asking the testator who owned the land and/or conducting a search at the land titles office to ascertain ownership.[22] Further, the Court held that the limited time frame stipulated by Mr. Meier for the completion of the will did not limit the standard of care required of the defendant solicitor "including to be skilful, careful and advise on all relevant matters in that time period."[23]

The Court awarded damages to the plaintiff equal to the value of the land as of the date of the death of the testator, plus pre-judgment interest. In addition, the lease revenue which would have been earned by the plaintiff was included.

Dhillon v Jaffer

In *Dhillon v Jaffer*[24] the solicitor, Jalal A. Jaffer, was found to have breached his duty of care and was held liable in negligence for improperly dealing with a non-client's money.[25] In this case, the appellant's estranged wife, Mrs. Dhillon, entered into a contract of purchase and sale of the appellant's property while he was in India under a forged "Special Power of Attorney".[26] For reasons that are unclear, Mrs. Dhillon refused to complete the sale. The purchasers were successful in a suit for specific performance and obtained judgment from Mr. Justice Macdonald in default of the appellant's appearance.[27] Mrs. Dhillon retained Mr. Jaffer to defend against the purchasers' motion for a vesting order. Macdonald J. declined to vary his order of specific performance, however he stated in his oral reasons that he had a great deal of sympathy for Mrs. Dhillon because she had supported her four children while her husband was in India, and that he wanted to "ensure that the net sale proceeds are directed in such a manner as to ensure Mrs. Dhillon's ability to utilize the same to acquire alternate accommodation"[28] This comment was made in relation to Mrs. Dhillon's stated intention of bringing *Family Relations Act* proceedings. Macdonald J. ordered that the title of the property be vested in the names of the purchasers and that

[17] *Ibid.*
[18] *285614 Alberta Ltd v Burnett, Duckworth & Palmer (1993),* 139 AR 31 at 36; *Millican* at 674.
[19] *Meier* at para 53.
[20] *Ibid* at para. 38.
[21] *Ibid* at para. 58-59.
[22] *Ibid* at para 54.
[23] *Ibid* at para 59.
[24] 2012 BCCA 156.
[25] *Ibid* at para 2.
[26] *Ibid* at para 4.
[27] *Ibid* at para 6.
[28] *Ibid* at para 8.

the proceeds of the sale be held in trust by Mr. Jaffer for the appellant, Mr. Dhillon.[29] Instead, Mr. Jaffer paid the proceeds to Mrs. Dhillon.

Upon the appellant's return to Canada he learned of the fraudulent conveyance and successfully sued Mrs. Dhillon and his son for fraud.[30] He then sued Mr. Jaffer. In the negligence action the trial judge held that Mr. Jaffer was not negligent for following MacDonald J.'s order.[31] The Court of Appeal overturned this decision on the basis that the vesting order clearly states that the proceeds belong to the appellant.[32] Further, it was found that the trial judge failed to consider whether Mr. Jaffer owed the appellant a duty of care as a non-client.[33]

In order to prove negligence there must be a duty of care, a breach of the applicable standard of care, and a causal connection between the breach and the loss suffered.[34] Further, when the loss is purely economical, "the duty of care requires a proximate relationship between the tortfeasor and the victim – something more than just forseeability of harm – and no policy reason for denying liability."[35] The Court held that a relationship of proximity existed in this case because Mr. Jaffer was holding money on the appellant's behalf as sole registered owner of the property.[36] The Court found that Mr. Jaffer fell below the standard of care for appropriating an entire asset based on "obiter extemporaneous remarks by a judge in chambers that do not find any expression in the formal order".[37] The only sensible reading of his remarks is that he hoped the proceeds would be frozen so Mrs. Dhillon would be entitled to her fair share when she proceeded with an action under the *Family Relations Act.*[38]

Ultimately, the Court of Appeal concluded:

> The trial judge set the standard for solicitors dangerously low. The problem facing the respondent was not in an arcane or esoteric area of the law; it called for the application of elementary principles that all lawyers must know:
>
> 1. The formal court order is the governing instrument, not the reasons for judgment.
>
> 2. If you are handling another's money, do not give it to your client without the owner's consent.
>
> 3. You are responsible for a non-client's money that comes into your hands; if a conflict of interest arises, do not prefer one party over another.

[29] *Ibid* at para 11.
[30] *Ibid* at para 15.
[31] *Ibid* at para 20.
[32] *Ibid* at para 26.
[33] *Ibid* at para 28.
[34] *Ibid* at para 29, citing *Mustapha v Culligan of Canada Ltd*, 2008 SCC 27 at para 3.
[35] *Ibid* at para 29.
[36] *Ibid* at para 34.
[37] *Ibid* at para 26.
[38] *Ibid* at para 46.

> 4. If you are unclear what to do with money pursuant to a court order, ask the court to clarify the order or pay the money into court. Do not simply choose the interpretation that best suits your client.
>
> 5. No one can be deprived of his or her property without due process of law.
>
> 6. A judge cannot reapportion matrimonial property except in accordance with the Family Relations Act.
>
> 7. A specific performance action is not a Family Relations Act proceeding.
>
> 8. Do not assume a judge has forgotten 5, 6 and 7 above and then act on that assumption.
>
> 9. Interpret an order by giving each term a sensible meaning and in harmony with the other terms.

As a result, the Court held that Mr. Jaffer's conduct "fell well below the standard of care expected of a reasonably competent lawyer in the circumstances."[39]

Part 2: The Solicitor's Negligence Must be Causally Connected to the Loss

In addition to demonstrating that a solicitor owes his or her client (or third party beneficiary) a duty of care and has failed to meet the requisite standard of care, a causal connection between the solicitor's breach of the standard of care that caused the loss suffered by the claimant must be established. In *Hill v. Hamilton-Wentworth (Regional Municipality) Police Services Board*[40], McLachlin, C.J.C. held that the starting point is the 'but for' test – that is, if, on a balance of probabilities, the compensable damage would not have occurred but for the negligence, then the causation requirement is met.[41]

Ladner v Wolfson

The issue in *Ladner v Wolfson*[42] was whether a constructive trust may be imposed over insurance proceeds when there is no proprietary nexus between the life insurance policy referenced in the separation agreement and the other life insurance payable to the husband's estate on his death.

The plaintiff had entered into a separation agreement with her former husband (now deceased). The agreement provided that the husband was required to maintain life insurance to cover his spousal support obligations.[43] When her husband died, the plaintiff discovered that his estate was insolvent, except for the proceeds of three insurance policies which named his estate as beneficiary (i.e., not the plaintiff).[44] The plaintiff successfully sued the estate and she was awarded the amount of her spousal

[39] *Ibid* at para 47-48.
[40] 2007 SCC 41, [2007] 3 SCR 129.
[41] *Ibid* at para 93.
[42] 2011 BCCA 370, leave to appeal denied 2012 CanLII 22145 (SCC).
[43] *Ibid* at para 2.
[44] *Ibid* at para 3.

entitlement under the separation agreement.[45] She then claimed a constructive trust over the insurance policy proceeds in order to gain priority over his other creditors. She was unsuccessful at trial, and on appeal the Court held that with the entry of the order for payment of damages the plaintiff's cause of action merged in that order and the trust action therefore ceased to exist.[46] According to Huddart J.A., "the litigation was at an end".[47]

The plaintiff commenced a negligence action against her solicitors for failing to pursue a trust claim before or concurrently with the damage claim. The trial judge found that the solicitors failed to meet the standard of care expected by a reasonably competent lawyer in failing to advance the trust claim at a point when the Court could have addressed it.[48] As a result, the plaintiff was awarded damages on the basis that it was more likely than not that a good conscience trust claim would have been successful.[49]

The solicitors appealed. On appeal, the Court found that the trial judge erred because there was no basis for the imposition of a good conscience trust in this case.[50] The husband had no fiduciary or other equitable obligations to the plaintiff that continued after they had settled their affairs by means of a separation agreement, and accordingly the first condition for imposing a good conscience constructive trust was not met. [51] Even assuming that there was a fiduciary relationship and a corresponding breach of a fiduciary duty, in this case, there was no proprietary connection between the husband's wrongful act and the existing life insurance policies.[52] The trial judge found that the policies that remained in force at death were not the ones contemplated by the separation agreement.[53] Therefore, any negligence by the solicitors in failing to pursue a trust claim could not have caused a loss to the plaintiff.[54]

Michiels v Kinnear[55]

This case stands for the proposition that solicitors can escape liability in negligence if clients do not disclose all relevant facts to their solicitors and fail to ask for clarification if there is something that the client does not understand.[56] Some key facts: the plaintiff's husband was diagnosed with terminal cancer, he had an initial meeting with the defendant solicitor to draft his will, and a subsequent meeting that the plaintiff attended for him to sign the will[57] (the plaintiff had a grade 4 education and alleged she was illiterate). During that meeting, the plaintiff understood that she would inherit the matrimonial home upon her husband's death.[58] The plaintiff was presented with a transfer/deed to sign, and she was told that she had to sign it if she wanted to continue to access the property.[59] The transfer/deed gave the plaintiff's niece and nephew-in-law a 99 per cent interest in the property as joint tenants, and gave

[45] *Ibid* at para 7.
[46] *Ibid* at para 6.
[47] *Ladner Estate*, 2001 BCSC 943 (CanLII); *Ladner v. Ladner*, 2004 BCCA 366 (CanLII) at para 52.
[48] 2011 BCCA 370 at para 10.
[49] *Ibid* at para 13.
[50] *Ibid* at para 60.
[51] *Ibid* at para 48.
[52] *Ibid* at para 53.
[53] *Ibid* at para 50.
[54] *Ibid* at para 28, 60.
[55] 2011 ONSC 3826.
[56] *Ibid* at para 158.
[57] *Ibid* at paras 29-30.
[58] *Ibid* at para 31.
[59] *Ibid* at para 32.

the plaintiff's sister-in-law a one per cent interest as a tenant in common, subject to a life interest in favour of the plaintiff and her husband.[60]

Soon after her husband's death, the plaintiff moved into an apartment. Her niece and nephew-in-law moved some of her belongings into the apartment and moved their own belongings into the matrimonial home. Sometime in 2005, her niece and nephew-in-law wished to mortgage the home, but were not permitted because of the plaintiff's life interest. At the plaintiff's sister-in-law's request, the plaintiff met with another lawyer and signed documents giving up her life interest.[61] The plaintiff alleged that she did not understand that she had given up her ownership of the property until 2006 when she went to sell the property. The plaintiff claimed that had it not been for the conveyance in question, she would have inherited the property under her husband's will, and/or pursuant to her rights as a joint tenant.[62] The plaintiff began a claim against her niece, nephew-in-law and sister-in-law alleging misrepresentation, unconscionability, *non est factum*, lack of consideration, coercion, undue influence and unjust enrichment. In addition, she claimed negligence and breach of fiduciary duty against the solicitor who prepared the transfer/deed and other documentation with respect to her and her husband's estates. [63]

The action was dismissed. The court found that the plaintiff gifted the real estate and personal property in issue. The transactions were not unconscionable as she was able to protect herself, was not taken advantage of, and was not the victim of any undue influence.[64]

The Court held that "[t]he reasonableness of a lawyer's impugned conduct will be assessed in light of the time available to complete the work, the nature of the client's instructions, and the client's experience and sophistication."[65] Further, it is incumbent upon an illiterate client to point out to the lawyer his or her illiteracy to alert the lawyer to the fact that he or she may not understand what is being discussed.[66] In this case the plaintiff did not inform her solicitor of her inability to understand.

The Court found that the solicitor breached the standard care in a number of instances, including the failure to insist upon the plaintiff obtaining independent legal advice regarding the potential conflict of interest between the plaintiff and her husband, the failure to propose other options for accomplishing the intended gift, and the failure to make detailed inquiries about the extent of the impact the gift would have on their estates. Further, the solicitor should have explained further the concepts of joint tenancy and tenancy-in-common, as well as the interplay between her husband's will and the deed to her niece and nephew-in-law.[67]

Furthermore, the Court concluded that even if the solicitor had met his standard of care, it was likely the plaintiff would have proceeded with the gift.[68] Therefore, neither the solicitor's negligence nor his breach caused or contributed to the plaintiff's loss, as gifting the property was clearly her intention when she met with the solicitor.

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[60] *Ibid* at paras 33-37.
[61] *Ibid* at para 12.
[62] *Ibid* at para 9.
[63] *Ibid* at para 8.
[64] *Ibid* at para 129.
[65] *Ibid* at para 155.
[66] *Ibid* at para 158.
[67] *Ibid* at para 159.
[68] *Ibid* at para 172.

Notably, the Court held that if the plaintiff's loss was caused by her solicitor, the loss would have been apportioned on a 50/50 basis based on the the plaintiff's contributory negligence of failing to advise that she did not understand what was happening.[69]

Part 3: Independent Legal Advice

Ansari v Messier

In *Ansari v Messier*[70] the Court dismissed claims of breach of contract and negligence against Arthur Skagen, the solicitor who acted on behalf of the plaintiffs in relation to a share purchase transaction. The plaintiffs (the purchasers) retained Mr. Skagen after they had executed the share purchase agreement in issue.[71] Mr. Skagen was recommended to the plaintiffs by the vendor of the shares. However, the plaintiffs alleged they were unaware that Mr. Skagen was also the vendor's corporate lawyer and the firm had an ongoing personal and business relationship with the respondent.[72]

The Court held that Mr. Skagen should have disclosed the relationship the law firm had with the respondent before agreeing to act for the plaintiffs, and should have obtained a written waiver of any conflict from the plaintiffs.[73] The Court was satisfied that the plaintiffs would have signed this waiver given that they were, in fact, aware that Mr. Skagen was the respondent's corporate lawyer. The Court went on to state that once the plaintiffs began to have reservations about proceeding with the transaction, Mr. Skagen should have recommended they seek independent legal advice due to his ongoing relationship with the respondent.[74] Nevertheless, the trial judge concluded that the plaintiff's would not have changed their actions had Mr. Skagen recommended that the plaintiffs seek independent legal advice, especially considering they did speak to another lawyer before closing the transaction.[75] Ultimately, the plaintiffs decided to close because they were not willing to risk loss of their $50,000 deposit and a potential lawsuit by the respondent.[76]

Regarding the claim that Mr. Skagen failed to meet his standard of care in his advice to the plaintiffs regarding the purchase of the shares, the Court found that Mr. Skagen was not retained to assess the commercial viability of the company; or to advise in relation to accounting and financial aspects of the transaction.[77] Moreover, by the time he was retained, the plaintiff had signed the second Agreement and had already removed most of the clauses in issue.[78] Since the Court found that Mr. Skagen's failure to recommend independent legal advice most likely did not affect the outcome of the transaction, the allegations of negligence were dismissed.

[69] *Ibid* at para 174.
[70] 2011 BCSC 655
[71] *Ibid* at para 15.
[72] *Ibid* at para 112.
[73] *Ibid* at para 448.
[74] *Ibid* at para 455.
[75] *Ibid* at para 456.
[76] *Ibid* at para. 459.
[77] *Ibid* at para 460.
[78] *Ibid* at para 471.

Evans v Mullen

This action was dismissed despite the Court's determination that the defendant solicitor failed to recommend independent legal advice due to a lack of causation and abuse of process defences.

The solicitor, Mr. Mullen, papered a sale of the plaintiff's companies to his son based on the instructions from the plaintiff's accountant, Robert Smith.[79] The plaintiff claimed at trial that he intended to control his companies until he died and had no intention to sell.[80] As a result the plaintiff sued his son, with whom he settled, and Mr. Mullen. He did not sue Mr. Smith, who instructed Mr. Mullen.

The Court accepted Smith's testimony that the plaintiff wanted to sell his companies to his son in order to be released from $1 million in liabilities.[81] Further, it was claimed that the plaintiff did not request Mr. Mullen's advice on the best structure for doing so, as he preferred to rely on the expertise of Mr. Smith.[82]

Mr. Mullen argued that he had no duty of care to the plaintiff because he was the solicitor of the companies only – that is, he had a limited retainer to simply document transactions as instructed.[83] However, the Court noted that a duty of care can arise to a non-client even in the absence of a retainer in certain circumstances.[84] Particularly, this duty of care is limited to when the lawyer knows or ought to know that the non-client is or may be relying upon him to protect his interests.[85] In this case, a "relationship of proximity" existed. Thus, the Court concluded that Mr. Mullen should have recommended to Mr. Smith that Mr. Evans obtain independent legal advice to discuss potential conflict of interest issues.[86] Although Mr. Smith believed he was acting for the Companies and only "papering" transactions, and he knew that Mr. Smith was providing advice to the plaintiff, it was held to still be incumbent upon Mr. Mullen in the circumstances to communicate with Mr. Smith to recommend independent legal advice for the plaintiff.[87]

Regarding causation, the Court considered whether the plaintiff would have actually heeded Mr. Mullen's recommendation and sought out independent legal advice; and, if advice had been sought, whether the advice would have changed his position.[88] The Court found that it was likely the plaintiff would not have sought independent legal advice because he had complete confidence in his financial advisor, Mr. Smith.[89] Further, the plaintiff failed to establish that he would have taken a different course of action if he had consulted with an independent lawyer.[90] Thus, the action against Mr. Mullen was dismissed.[91]

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[79] *Ibid* at para 122.
[80] *Ibid* at para 8.
[81] *Ibid* at para 151.
[82] *Ibid* at para 12.
[83] *Ibid* at para 4, 132.
[84] *Tracy v Atkins,* 1979 CanLII 760 (BC CA), (1979), 16 BCLR 223 (CA).
[85] *Ibid* at para 142.
[86] *Ibid* at 143.
[87] *Ibid* at para 143.
[88] *Ibid* at para 147.
[89] *Ibid* at para. 148.
[90] *Ibid* at para 152.
[91] *Ibid* at para. 154

***York v York* (Failure to recommend ILA)**

Devey York, the daughter of the deceased, Stanley York, was the plaintiff at trial and one of the appellants on appeal. In 1989 Stanley transferred a one-half interest in his home to his daughter, causing the title to be registered in the name of Devey and her father as tenants in common.[92] Ken York, a respondent, the deceased's son, was legally adopted by his grandparents (Stanley's parents), but was always treated as a son by the York family. The family relationship was relevant, as Ken was not legally Devey's brother and would not inherit on intestacy from Stanley.

On August 21, 2003, Devey and her father signed a transfer of ownership of the home as tenants in common to Ken and Devey as joint tenants.[93] Devey alleged that Ken, and the other respondent Morley Stonehouse, the notary public who prepared and registered the transfer of title, procured the transfer by means of duress and unconscionable conduct.[94] Devey alleged that neither she nor Stanley had the mental capacity to understand the nature and consequences of the transfer due to intoxication.[95] The trial judge did not accept Devey's allegations that Ken provided alcohol to her and to Stanley.[96] This action was dismissed.[97]

On appeal to the British Columbia Court of Appeal, the plaintiffs alleged, among other claims, that the trial judge erred in finding that the notary was not negligent. It was further contended that the notary acted in a conflict of interest in representing all three family members. The appeal against the order dismissing the claims against Ken York was dismissed. However, the appeal against the order dismissing the independent claims against Stonehouse for breach of his professional duties and breach of fiduciary duties owed to Devey York was allowed.[98]

The Court of Appeal held that the trial judge erred in failing to consider whether Stanley or Devey required independent legal advice. In particular, the trial judge failed to consider whether Stanley and Devey would have signed the transfer if the right to apply for partition and sale of the property had been explained to them. [99] Stonehouse acknowledged the following: that Devey lost at least one-quarter of the property she might inherit by signing the document; that he did not recommend any of the three Yorks get independent legal advice; and, that he did not consider there was any conflict among the three of them. As a result, a new trial was ordered to determine whether Stonehouse breached his professional or fiduciary duties to Devey.[100]

As can be seen above in *Ansari v Messier* and *Evans v Mullen*, the fact that a lawyer fails to recommend independent legal advice is not necessarily fatal if the plaintiff cannot prove that the lawyer's negligence caused his or her loss. It remains to be seen how the court will assess the negligence of Stonehouse in the new trial in *York v York*. However, it is arguable that since Stonehouse neglected to explain the consequences of the title transfers, the court may find that but for his negligence in suggesting the plaintiffs speak with a lawyer, they would not have suffered the loss.

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[92] *Ibid* at para 2.
[93] *Ibid* at para 4.
[94] *Ibid* at para 5.
[95] *Ibid*.
[96] *Ibid* at paras 17, 59.
[97] 2010 BCSC 707.
[98] *Ibid* at para 75.
[99] *Ibid* at para 66.
[100] *Ibid* at para 75.

Despite the results in these cases, it is prudent for lawyers to recommend independent legal advice.

Part 4: A Word on Default Judgments in Negligence Claims

Hodgson v Mundulai

A solicitor's negligence claim is not a liquidated debt and accordingly, the Ontario Superior Court of Justice held that default judgment was not appropriate.

The plaintiffs alleged that the defendant solicitor, Aliamisse Mundulai, breached the standard of care by failing to exercise the skill of a reasonably competent lawyer. The plaintiff had a default judgment signed without forewarning Mr. Mundulai.[101] A default judgment requires a claim for liquidated damages.[102] Since a claim for negligence is not a liquidated claim, a default judgment in this case was irregular and was required to be set aside.[103]

Conclusion

Reducing the number of mistakes in our estates and trust practices can often be achieved by ensuring clear communication and engaging in thorough discovery of your clients' issues and intentions.[104] In communicating clearly and plainly with clients, the risk of misunderstandings that result in improperly executed bequests will be reduced. Moreover, performing an adequate enquiry of your clients' intentions will help to ensure that we discharge our duty of care to our clients as well as our obligation to meet the standard of care to avoid an action in negligence.

[101] *Ibid* at para 14.
[102] *Ibid* at paras 19-20.
[103] *Ibid* at para 20.
[104] Pauline R Sheps, "Landmines for lawyers when drafting wills", LAWPRO Webzine August 2011 <http://www.practicepro.ca/enewsletters/pdf/Landmines4Lawyers.pdf>.