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MISTAKES IN WILLS: RECTIFY AND BE DAMNED

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I. INTRODUCTION

WHERE a testator died before 1 January 1983, there was no general power for a court to rectify his will. The Courts of Equity[1] had, by tradition, the power to rectify documents *inter partes*—such as conveyances—which did not accurately record what had been agreed by those who were parties to them.[2] This power of rectification applied also to voluntary settlements,[3] where a settlor could obtain rectification by proving that the settlement did not represent his true intention.[4] But, for reasons which are not clear, it had become generally accepted that the equitable doctrine of rectification did not apply to wills.[5]

The Probate Court had always had the power, when admitting a will to probate, to exclude from it any words which had been inserted by fraud or which, for some other reason, had been inserted without the testator's knowledge and approval.[6] But this power did not permit the court to *add to* the will words which had been omitted.[7] The artificiality of this distinction can be seen in *Re Morris*[8] where, as a result of the draftsman's error, a codicil which should have revoked clauses 3 and 7 (iv) of the will revoked the whole of clause 7 as well as clause 3. Having held that the absence of the numeral (iv) in the codicil was a clerical error by which the testatrix was not bound because the draftsman's mistake had not been drawn to her attention, Latey J. recognised that authority

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[1] Not only the Court of Chancery—the major court of Equity—but also the minor courts of Equity, such as the Court of Requests.
[2] See *Snell's Equity* (30th edn., London 2000), pp. 693–704.
[3] *Thin* v. *Thin* (1650) 1 Rep. Ch. 162.
[4] *Re Butlin's S.T.* [1976] Ch. 251.
[5] Various reasons have been given for this, but none of them appears convincing. See Law Reform Committee's 19th Report, *The Interpretation of Wills*, Cmnd. 5301, 1973, para. 10.
[6] *Rhodes* v. *Rhodes* (1882) 7 App. Cas. 192, 198.
[7] *Harter* v. *Harter* (1873) L.R. 3 P. & D. 11, 19; *Morrell* v. *Morrell* (1882) 7 P.D. 68; *In the Goods of Schott* (1901) P. 190; *In the Goods of Swords* [1952] P. 368; *Re Reynette-James* [1976] 1 W.L.R. 161, 166. Words *were* added in two cases; *In the Goods of Bushell* (1887) 13 P.D. 7 and *In the Goods of Huddleston* (1890) 63 L.T. 255: but these decisions were described as "heretical" in *Schott, supra.*
[8] [1971] P. 62.

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prevented him from being able to rectify the codicil by adding the numeral (iv). He therefore held that the numeral 7 in the codicil should be excluded, leaving it to the Chancery Court, as the court of construction, to interpret the gap.

There was another limited way in which the court might attempt to effect rectification indirectly: where it was clear from the language of a will[9] both that words in it did not represent the testator's intention and what his intention was, words could be omitted, changed or inserted.[10] This power applied where two provisions in a will were irreconcilable, and other provisions in the will made it clear which of the two irreconcilable provisions needed to be changed. But the case law was not always easy to follow and it was difficult to predict when the power would or would not be exercised.[11]

In their *Second Programme of Law Reform*, published in January 1968, the Law Commission recommended that the rules governing the interpretation of wills should be examined by the Law Reform Committee; and, in October 1968, the Lord Chancellor requested the Law Reform Committee to consider

> [W]hether in relation to the interpretation of wills it is desirable—
>
> (a) to amend the law relating to the admissibility of extrinsic evidence; and
> (b) to confer upon the courts any powers of rectification.

In their 19th Report, published in 1973, the Law Reform Committee addressed both rectification and interpretation. They recommended that the court should be given power to rectify a will in any case where there was a clerical error or where there was a failure by the draftsman to understand the testator's instructions.[12] Further, they recommended that there should be no extension of the power of rectification to cases where the testator was aware of what his will said, but failed to appreciate the effect of the words used: if there is a problem in relation to a testator's understanding of the meaning of the words used in his will, that is a question of construction.

[9] Not from extrinsic evidence.
[10] *Re Neeld* [1962] Ch. 643.
[11] In *Re Cory* [1955] 1 W.L.R. 725 and *Re Riley's W.T.* [1962] 1 W.L.R. 344 insertions were made, whereas in *Re Murray* [1955] Ch. 69 and *Re Follett* [1955] 1 W.L.R. 429 the court refused to make any insertion.
[12] The L.R.C. went on to recommend that rectification claims should not, without the leave of the court, be brought more than six months after the grant of representation. Compare the time limit for bringing claims under the Inheritance (Provision for Family and Dependants) Act 1975, s. 4.

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> The dividing line between "language" and "meaning" may sometimes be hard to draw; but it has long been settled that the doctrine of rectification is confined to altering the language used by the instrument, and we see no justification for extending the doctrine in its application to wills.[13]

II. Section 20 of the Administration of Justice Act 1982

The Law Reform Committee's recommendations in relation to rectification were enacted as section 20 of the Administration of Justice Act 1982. Section 20 (1) provides that

> If a court is satisfied that a will is so expressed that it fails to carry out the testator's intentions, in consequence—
>
> (a) of a clerical error; or
> (b) of a failure to understand his instructions,
>
> it may order that the will shall be rectified so as to carry out his intentions.[14]

In order to deter spurious rectification claims which nevertheless have a nuisance value, the Law Reform Committee recommended that the standard of proof should be high, and endorsed the phrase "convincing proof" which had been adopted by the Court of Appeal in *Joscelyne* v. *Nissen*.[15] In *Re Segelman*[16] Chadwick J. observed that, although the standard of proof required in a rectification claim was the ordinary civil standard—on the balance of probabilities—"the probability that a will which a testator has executed in circumstances of some formality reflects his intention is usually of such weight that convincing evidence to the contrary is necessary".[17]

In *Re Segelman*[18] Chadwick J. suggested that section 20(1) requires the court to examine three questions:

> First, what were the testator's intentions with regard to the dispositions in respect of which rectification is sought. Secondly, whether the will is so expressed that it fails to carry out those intentions. Thirdly, whether the will is expressed as it is in consequence of either (a) a clerical error or (b) a failure on the part of someone to whom the testator has given

[13] L.R.C.'s 19th Report para 26.
[14] Section 20(2) provides as follows: "An application for an order under this section shall not, except with the permission of the court, be made after the end of the period of six months from the date on which representation with respect to the estate of the deceased is first taken out". See note 67.
[15] [1970] 2 Q.B. 86, 98. The Court of Appeal preferred this formulation to "strong irrefragable evidence" used by Lord Thurlow L.C. in *Countess of Shelburne* v. *Earl of Inchiquin* (1784) 1 Bro. C.C. 338, 341 or "beyond all reasonable doubt".
[16] [1996] Ch. 171.
[17] [1996] Ch. 171, 184.
[18] [1996] Ch. 171.

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instructions in connection with his will to understand those instructions.[19]

In order to answer the first question, the court must admit extrinsic evidence[20] of the testator's intentions with regard to the relevant dispositions. This evidence is not restricted to evidence which is directly connected with the instructions given for the preparation of the will and may include, for example, evidence gleaned from letters written by the testator to persons other than the draftsman, or from statements made by the testator as to what provisions he had included in his will. The second question then becomes one of construing the terms of the will, to ascertain whether they carry out those intentions. If they do not, the third question is whether the defect is in consequence of a clerical error, or of a failure to understand the testator's instructions, or has come about for some other reason. It is important to emphasise that it is only defects which arise as a consequence of clerical errors or failures to understand instructions which can, strictly speaking, be rectified under section 20. It is submitted, however, that the courts should not adopt too strict an interpretation of a section which is designed to give statutory force to an equitable remedy which should be allowed to operate flexibly in order to do justice.

III. Different Types of Mistake

It may be helpful, at this point, to consider the various kinds of mistakes which may be made by draftsmen when they are preparing wills. It is submitted that there are (at least) five possible categories of mistake, which can be classified in three groups.

Group A

(i) The first type of mistake is where the draftsman understands his instructions, knows which words he has used in the will, but chooses words which are not appropriate to carry the testator's instructions into effect. For example, the draftsman knows that the testator wants to benefit only his legitimate grandchildren and inserts in the will a gift to "my grandchildren", believing that a gift so worded will benefit only legitimate issue. He is unaware of the reforms introduced by the Family Law Reform Act 1969[21] which mean that a gift to "grandchildren" prima facie includes both legitimate *and* illegitimate grandchildren.

[19] [1996] Ch. 171, 180.
[20] *I.e.* evidence from outside the will.
[21] Family Law Reform Act 1969, s. 15.

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This is a drafting error which creates a problem of interpretation, or "construction".

Group B

(ii) The second type of mistake is where there has been a clerical error. A straightforward example would be where the testator has instructed the draftsman to include in his will a legacy of £10,000 to X. The draftsman understands his instructions, but, because of a typing error, produces a will which contains a legacy of £1,000 to X, or no legacy to X at all.

(iii) Thirdly, there is a failure to understand instructions. An example would be where the testator intended to give X a legacy of £10,000, but the solicitor thought that the testator intended X to have only £1,000, or that the legacy of £10,000 was intended for Y.

Group C

(iv) The fourth category of mistake is the case where the draftsman fails to take instructions from the testator in relation to a particular point; in other words, he fails to ask sufficient questions. A simple example would be where the testator makes a will leaving everything to his wife, but the draftsman fails to ask what is to happen if she predeceases him. Whether the failure to take instructions will amount to negligence will depend on the circumstances of the individual case.[22]

(v) Lastly there is the case of legal error where the draftsman attempts to do something which the law does not permit. An example would be where the draftsman makes a mistake in relation to the Rule against Perpetuities or (more likely nowadays) in relation to the Rule against Perpetual Trusts.[23]

The five categories of mistake listed above are distinct; but, in the context of the present discussion, what really matters is how, if at all, the different kinds of mistake can be remedied or corrected. Group A consists of errors which are generally the easiest to put right. They could usually be cured even in cases where the testator died before 1983, but they have become much easier to cure where the death occurs on or after 1 January

[22] A draftsman who fails to ask a 90-year-old testator who is to benefit if his 60-year-old spouse predeceases him is less likely to be considered negligent than the solicitor who fails to ask the 60-year-old testator who is to benefit if his 90-year-old spouse predeceases him.

[23] An example might be a trust in favour of the testator's pets—without specifying a time limit.

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1983.[24] An error in this group can be put right as part of the process of interpretation or construction. Errors in Group B used to be irremediable, but if the testator dies on or after 1 January 1983, they can now be remedied by rectification. Group C consists of categories of errors which have always been, and remain, irremediable. An action may, however, lie against the draftsman in negligence.[25]

Given the significance of the division into the three groups, it is essential that errors are correctly categorised. Group B includes two types of remediable error and it does not matter greatly whether the mistake is classified as a clerical error or as a failure to understand instructions, because in either event it is rectifiable. But consider the case of the draftsman who is unaware of the terms of section 33 of the Wills Act 1837, which provides that a gift to a child[26] of the testator shall not lapse if the child predeceases the testator leaving issue. In such circumstances, the gift passes to the issue, unless a contrary intention appears in the will. Suppose that a solicitor drafts a will for a client, T, who has two adult children, X and Y, who are each to receive one half of T's residuary estate. X has a child, Z, whom T would *not* want to benefit under any circumstances. In case X dies before T, the solicitor should, therefore, include a provision in the will excluding section 33 of the Wills Act; but he does not do so. At first sight, this looks like a category (i) case—a construction case—but it is unusual in that the effect of section 33 can be ousted only by a contrary intention appearing *in the will*.[27] If nothing appears in the will, section 33 will prevail even if there is overwhelming extrinsic evidence[28] that T would not have intended Z to benefit. So this is a case of an error which is irremediable because it falls within Group C: either category (iv) or category (v).

The correct categorisation of a particular error is particularly problematic in cases where the apparent error first comes to light after the testator's death when the only direct evidence of what went wrong—or what appears to have gone wrong—will usually come from the draftsman, who is alleged to have made a mistake and who will have an interest in minimizing the effects of his own negligence. It is submitted that in *Walker* v. *Medlicott*[29] (discussed below) too much emphasis was placed by the trial judge on the

[24] See section 21 of the Administration of Justice Act 1982 and *Hawkins on the Construction of Wills* (5th edn., London 2000), chap. 2.
[25] See *White* v. *Jones* [1995] 2 A.C. 207.
[26] Or remoter descendant.
[27] See *Hawkins on the Construction of Wills*, chaps. 3 and 24.
[28] *I.e.* evidence from outside the Will.
[29] [1999] 1 W.L.R. 727.

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evidence of the draftsman, with the consequence that the Court of Appeal felt constrained to uphold a finding on the facts which is extremely difficult to justify.

There is no doubt that some cases which would have been treated as construction cases (Group A cases), had the testator died before 1 January 1983, will now be treated as rectification cases (Group B cases).[30] An example is *Charter* v. *Charter*,[31] where the testator made a will leaving his house and his farm to his son "Forster Charter", who was made executor. The testator had had a son named Forster Charter, but this son had died before the testator made the will. The testator had two other sons, both of whom survived him: William Forster Charter and Charles Charter. William Forster Charter was never known as Forster Charter, but probate was granted to him. On a citation to recall probate, Lord Penzance, sitting as a judge of the Probate Court, received evidence of the state, circumstances and habits of the family[32] and held that the reference to Forster Charter was ambiguous. He decided in favour of Charles.[33] The House of Lords was equally divided, so Lord Penzance's decision in Charles's favour was upheld. Had this case arisen for decision on or after 1 January 1983, it is likely that it would have been decided as a rectification case: the Christian name "Forster" was a clerical error for the Christian name "Charles".[34]

It is important to appreciate that virtually[35] every successful rectification claim in relation to a professionally drawn will involves an implicit finding of negligence on the part of the draftsman. It is

[30] This is because, before 1983, it was not possible to cure errors in categories (ii) and (iii) but it was possible to cure errors in category (i).

[31] (1874) L.R. 7 H.L. 364.

[32] Charles always lived with his parents, except for a short period. The will provided an annuity for the testator's wife, to be paid "by my executor Forster Charter" as long as they should "reside together in the same house". There was a similar provision for the testator's unmarried daughter, Barbara, who also lived with her parents.

[33] (1871) L.R. 2 P & D 315.

[34] Lord Cairns L.C. did say, at page 386, that he thought that the problem arose from a clerical error (category (ii)); while Lord Chelmsford said, at page 372, that he thought that it arose from the draftsman's failure to understand the testator (category (iii)).

[35] It is possible to devise a set of circumstances where there is a professionally-drawn will which contains a clerical error which has not been caused by the draftsman's negligence. For example, a testator may send written instructions to the draftsman, indicating that he wants X to have a legacy of £1,000, whereas he intended to write "£10,000". The solicitor could not be blamed for producing a will which gives X a legacy of £1,000, even though this would amount to a rectifiable clerical error. Such an example would, however, be extremely rare (and difficult to prove on the facts). Such a case is qualitatively different from the case where the draftsman makes an assumption or a guess as to what the testator intends, which turns out to be incorrect. For example, the testator has two nephews called Robert Smith, one who lives in Oxford and the other who lives in Cambridge. The testator tells the draftsman that he wants to leave a legacy of £1,000 to "my nephew Robert Smith"; the draftsman assumes he means Robert Smith, Cambridge. If the draftsman inserts the address of Robert Smith, Oxford, on his own initiative, that would surely be negligence, and an error which is rectifiable.

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equally important to understand that not every instance of negligent will-drafting will give rise to rectification. Furthermore, there may be cases of "defective" wills which are not rectifiable, and where the draftsman is not liable in negligence either.

Where a solicitor, or a member of his staff, has made a clerical *error*, there has, by definition, been negligence. A non-negligent clerical error in the drafting of a will must surely be a contradiction in terms. Similarly, a failure by a professional will draftsman to understand the testator's instructions must surely be negligent; it is the draftsman's duty to ensure that he understands precisely what the testator intends to achieve by his will, and then to draft the will so as achieve the testator's wishes, so far as the law permits. Of course, when a solicitor first obtains instructions, his instructions may be incomplete: either because the testator has not decided about a matter which is raised by the solicitor; or because the solicitor fails to ask the testator what he wishes to happen in a given set of circumstances, and the testator does not volunteer the information. There is a difference between a case where the solicitor has failed to *understand* his instructions—where the will is rectifiable within section 20—and a case where a solicitor has failed to *obtain* instructions, where the will could be rectified only if a very strained interpretation were to be placed on the phrase "clerical error" in section 20(1)(a).[36] In such a case, the draftsman may or may not have been negligent; this depends upon the number of questions which, in any given set of circumstances, a competent solicitor should ask in order to take proper instructions to enable him to prepare a will.[37]

IV. Case-law Examples of Rectifiable Mistakes

Wordingham v. *Royal Exchange Trust Co. Ltd.*[38] is a clear example of a clerical error and shows how section 20 can operate to correct the draftsman's mistake. Mrs. Wordingham made three wills, the second and third of which each contained a revocation clause. Each will was intended to contain a provision whereby Mrs. Wordingham exercised a testamentary power of appointment in favour of her husband. The first two wills included a suitable

[36] On the authority of *Re Segelman* [1996] Ch. 171 (discussed below) it would seem that a solicitor who inserts a provision in a will without obtaining the testator's instructions and then fails to delete or amend it once he has received his instructions has made a clerical error; but it is surely going too far to describe as a clerical error a case where a provision has not been inserted in a will—such as a default provision in the event of lapse or ademption—which a testator may well have wanted to be included had he been asked by the draftsman.

[37] For an example of a case where the seeking of instructions was relevant, see *Sutherland* v. *Public Trustee* [1980] 2 N.Z.L.R. 536, discussed by R. Kerridge and A.H.R Brierley in [1999] Conv. 399 at pp. 400–401.

[38] [1992] Ch. 412 (Edward Evans-Lombe Q.C., sitting as a deputy High Court judge.)

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clause, but the solicitor who drafted the third will made a mistake and omitted it. It was held that this was a clerical error and that it could be rectified under section 20(1)(a). The judge construed the words "clerical error" as meaning "an error made in the process of recording the intended words of the testator in the drafting or transcription of his will".[39] There was some *obiter* discussion as to whether a clerical error could occur where a testator writes his own will; it was suggested that it could. This question had also been discussed (again *obiter*) in the construction case of *Re Williams*, where Nicholls J. had thought that "a testator writing out or typing his own will can make a clerical error just as much as someone else writing out or typing a will for him".[40]

Re Segelman[41] is a more difficult case, which involved a testator who left a will containing a clause which provided that property was to be held in trust for those within "the class of persons set out in the schedule hereto ..." There was, however, a proviso which read:

> Provided that ... if any of the said persons set out in the schedule shall die in my lifetime or within 21 years of my death leaving issue ... then such issue shall stand in the place of such person and shall be eligible to benefit under this trust.

The schedule contained the names of six members of the testator's family but the names of five of them were followed by the words "and his issue". The conflict between the proviso (which implied that issue would take only if and when the named beneficiary had died within the relevant period) and the words "and his issue" in the schedule meant that it was not clear whether the issue of the five named persons could benefit while their named ancestor was alive. The problem had arisen because the solicitor had drafted the proviso *before* he was given the names which were inserted in the schedule and then seems to have overlooked the terms of the proviso. The mistake arose because the solicitor did not have full instructions when he produced the draft will. Once the names for inclusion in the schedule had been provided by the testator, the solicitor should have deleted the proviso. This was, quite clearly, not a case of a failure to understand the testator's instructions; rather it was a case where the solicitor, having understood perfectly well what the testator intended, allowed words (*i.e.* the proviso) to remain in the will which defeated the testator's intentions. Chadwick J.—adopting what might be considered to be

[39] Edward Evans-Lombe Q.C. referred to the definition of "clerical error" contained in *R.* v. *Commissioner of Patents ex parte Martin* (1953) 89 C.L.R. 381.
[40] [1985] 1 W.L.R. 905, 912.
[41] [1996] Ch. 171.

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a fairly liberal interpretation of section 20(1)(a)—concluded that the mistake amounted to a clerical error, with the consequence that the will could be rectified.[42]

V. A Dilemma for the Claimant

The procedure for claiming rectification differs depending upon whether the application is opposed.[43] *Wordingham* and *Segelman* are both cases where the solicitors admitted that they had made mistakes[44] and in each of them the solicitor appears to have assisted in the rectification application.[45] This obviously makes life much easier for the claimant. It has already been pointed out that virtually every successful rectification case involves an implicit finding of negligence on the part of the draftsman. A draftsman who admits that he has made a mistake is engaged in a form of damage-limitation exercise. Although he will have to pay the costs incurred in relation to the rectification itself, these will usually be considerably less than the tortious damages which he, or his insurers, would have to pay to disappointed beneficiaries under the principle established by the majority decision of the House of Lords in *White* v. *Jones*.[46] *Wordingham* is a straightforward example of this. The solicitor omitted from the will a clause exercising a testamentary power of appointment in favour of the testatrix's husband. Had the power to rectify the will not existed, and had the husband sued the solicitor in negligence, it is almost certain that the solicitor would have had to compensate the husband for a significant loss. The costs associated with the rectification application would have been trifling in comparison.

[42] Chadwick J. ordered the deletion of the proviso.

[43] The procedure relating to non-contentious probate proceedings is set out in rule 55 of the Non-Contentious Probate Rules 1987, made under section 127 of the Supreme Court Act 1981. If there is a probate action pending, the rectification application should be made in those proceedings. If there is no such action, the rectification application should be made in the Family Division if it is not contentious (unless a question of construction arises in which case a construction summons should be brought in the Chancery Division). If the application is to be opposed, an action should be begun in the Chancery Division. The Civil Procedure Rules 1998 apply to all proceedings in the County Court, the High Court and the Court of Appeal (Civil Division). Part 57 of the Civil Procedure Rules (in force since October 2001) covers contentious probate, rectification, and substitution and removal of personal representatives.

[44] By contrast, in *Horsfall* v. *Haywards* [1999] 1 F.L.R. 1182 (considered below), the solicitors originally denied negligence. By the time of the trial, however, they admitted that they had been negligent.

[45] In *Wordingham*, the solicitor "frankly accepted that the omission of a provision representing the substance of what had been clause 4 of the 1979 will was, in the light of his instructions, an error on his part." [1992] Ch. 412, 416. In *Segelman*, the solicitor "had overlooked the proviso in clause 11(a) of the draft will ... [and] ... failed to appreciate on 5 May ... that the proviso which he had included in the draft will on his own initiative had become inapt ... [He] simply forgot that the proviso was there." [1996] Ch. 171, 182 and 184.

[46] [1995] 2 A.C. 207. See also *Carr-Glynn* v. *Frearsons* [1999] Ch. 326; [1999] Conv. 399; and note 72.

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A claimant may, however, be confronted by a solicitor who refuses to admit that the will is rectifiable, perhaps because the solicitor—convinced that he has not made a mistake—does not consider that it is just that he should have to bear the costs of the rectification application. In such a case, a disappointed beneficiary is faced with a dilemma: he expected to receive a benefit under the will but finds, on the testator's death, that it has not materialised; he believes that the testator's solicitor has made a mistake, but the solicitor denies it. What is he supposed to do? This is the problem which faced the claimant[47] in *Walker* v. *Medlicott*.[48] That case will now be examined, because it contains some reasoning which is seriously open to question, and sits uneasily with the decision in *Horsfall* v. *Haywards*,[49] which will be discussed thereafter.

VI. *Walker* v. *Medlicott*

In *Walker* v. *Medlicott*, the testatrix (Mrs. Collins) was a childless widow who presented herself at the offices of the defendant solicitor, saying that she wanted to make a will. She brought with her a note which recorded, inter alia, that her house and its contents were to go to Bobbie Walker, her favourite nephew; and the residue was to be divided between other nephews and nieces, excluding Bobbie. The solicitor made a handwritten attendance note of what he understood to be her instructions. As well as a number of relatively minor differences between what had been suggested in Mrs. Collins's *aide-memoire* and what the solicitor noted as her final instructions to him, there was one significant difference: the solicitor's note made no reference to a specific devise of the house to Bobbie. The will as drafted and executed contained no specific devise of the house, which formed part of the residuary estate to be divided equally between all the nephews and nieces, including Bobbie. There was evidence that, on a number of occasions after she executed her will, Mrs. Collins had stated that she had left the house to Bobbie.[50] Bobbie brought this action for damages against the defendant solicitor, claiming that he had been negligent in failing to include a devise of the house to him, contrary to the instructions of the testatrix.

[47] The terminology of the Civil Procedure Rules 1998 is adopted in this article, even where the case precedes the Rules. "Plaintiffs" are referred to throughout as "claimants".
[48] [1999] 1 W.L.R. 727. Simon Brown and Mummery L.JJ. and Sir Christopher Slade.
[49] [1999] 1 F.L.R. 1182. Hirst, Mummery and Buxton L.JJ.
[50] There was evidence of conversations which took place both before and after the will was executed that the testatrix had a clear and settled intention that Bobbie Walker should inherit the house.

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On the basis of these facts, the trial judge[51] appears to have inferred (although he did not expressly say so)[52] that the testatrix must have changed her mind while she was in the solicitor's office and decided to treat all her nephews and nieces equally. Accordingly, he held that the solicitor had not been negligent. The Court of Appeal had a problem with this. As Sir Christopher Slade—who gave the Court's leading judgment—said, there was "considerable force"[53] in the submission that "any such inference [was] quite unrealistic".[54] In other words, the Court of Appeal thought that the trial judge had come to a finding on the facts which could not be supported. But Sir Christopher then went on to draw the inference "on the balance of probabilities" that there had been "a genuine misunderstanding between the testatrix and [the solicitor]"[55] which arose because the solicitor thought that the gift to Bobbie of a share of the residue was in substitution for the specific devise of the house. He began by suggesting that "even if [the solicitor] misunderstood the testatrix's instructions, it by no means follows that such misunderstanding constituted negligence on his part".[56] Later, he said:

> If the claimant had a valid claim in negligence, then a fortiori he would have had a good claim for rectification of the will. (I say "a fortiori" because, as I have already indicated, proof of the factors necessary to ground a claim for rectification would not ipso facto establish negligence on the part of [the solicitor]).[57]

Simon Brown L.J. took the same line, holding that;

> ... this whole unfortunate case is explicable in terms of a non-negligent but rectifiable misunderstanding ...[58]

As previously explained, virtually every successful rectification claim in relation to a professionally drawn will involves an implicit finding of negligence by the draftsman. The concept of a non-negligent, but rectifiable, misunderstanding (if the misunderstanding was between the testator and a professional will draftsman) is, with respect, a contradiction in terms. Rectification is available only

[51] Judge Perrett Q.C., in the Birmingham County Court.
[52] [1999] 1 W.L.R. 727, 736F.
[53] 737A.
[54] 736G; and see note 50.
[55] 738C.
[56] 738D.
[57] 739C.
[58] At 743H. Mummery L.J. took a different approach: "For the reasons given by Sir Christopher Slade I agree that the judge was entitled to find on the evidence that [the solicitor] prepared the draft will in accordance with the instructions given to him by the testatrix ...". (741C) But Sir Christopher Slade had *not* given reasons for thinking that the trial judge was entitled to find on the evidence that the solicitor had prepared the draft will in accordance with the testatrix's instructions.

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where the draftsman has made a mistake, has been negligent. It is respectfully submitted that the only convincing explanation of what happened in *Medlicott* was that the solicitor had been negligent. The testatrix had gone to the solicitor's office with an *aide-memoire* which gave her house—almost certainly the most valuable asset she owned—to her favourite nephew. On the supposition that she did not change her mind in the brief period during which she was in the solicitor's office, how could the solicitor possibly have "misunderstood" her without being negligent? Surely it was his duty to make sure that, if the testatrix had changed her mind as to the destination of the most significant asset in her estate, he was clear about this and made a note to that effect. Yet there was no reference to a change of mind on the file: and the solicitor did not draw the testatrix's attention to it when he sent her the engrossed will.

The Court of Appeal nevertheless held that there was no evidence of a sufficiently convincing nature to establish that any misunderstanding or failure to carry out instructions on the part of the solicitor constituted negligence. Maybe the Court of Appeal recognised that this conclusion was not entirely satisfactory, and maybe this is why they went on to give an additional, or alternative, reason for their decision.[59] They held that, *whether or not the solicitor had been negligent*, the claimant should have mitigated his loss by making an application for rectification.[60] It is respectfully submitted that not only is the reasoning flawed—for if there had been no negligence, rectification would not have been available as a remedy—but it also places the disappointed beneficiary in a very difficult position. Moreover, it can lead to injustice.

The general principle is that a claimant must act reasonably in the avoidance or mitigation of his loss. Accordingly, he is not required to embark upon uncertain, complicated, or difficult litigation, in order to protect his own legal adviser from the consequences of his carelessness.[61] In *Medlicott*, it was contended on behalf of the claimant that, because the defendant solicitor was denying that there had been any failure to carry out the testatrix's instructions, an action for rectification would have been as hotly

[59] Simon Brown L.J., while agreeing with Sir Christopher Slade and Mummery L.J., confined his judgment to the second ground on which the appeal failed *i.e.*, the failure to mitigate the loss by seeking rectification. Mummery L.J., by contrast, indicated that the mitigation point did not arise for decision because he held that the solicitors had not breached any duty of care owed to the claimant.

[60] *Quaere* whether Bobbie Walker would have a claim in negligence against his own solicitors who advised him to bring negligence proceedings against the will draftsman rather than make an application for rectification.

[61] See *Pilkington* v. *Wood* [1953] Ch. 770, 777 (Harman J.).

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disputed as the action for negligence, so that it was legitimate to bring the negligence proceedings first. But the Court of Appeal did not accept this. The Court considered that the evidence would have been precisely the same in both actions: if the claimant had a valid claim in negligence, he would equally well have a valid rectification claim.[62] And the Court considered that there is a compelling reason why rectification proceedings, when available, should be instituted before the disappointed beneficiary begins an action for negligence against the will draftsman: to avoid the possibility of abuse.[63] The Court was right to be concerned about this. One of the consequences of the imposition of a duty of care on the solicitor draftsman[64] towards the person who, owing to the failure of the draftsman to carry out the testator's instructions, takes no benefit, or a benefit less than that which the testator intended, is that beneficiaries under the will take benefits which the testator did not intend them to have,[65] and the draftsman (or his insurers) has to compensate the disappointed beneficiaries. Where the remedy of rectification is available, the possibility of a manufactured negligence claim in order to enlarge the value of the estate justifies the court in requiring the claimant to pursue that remedy.[66]

But although rectification avoids the double benefit problem and the risk of abuse which follows from it, the Court of Appeal did not address the difficulty which occurs where the draftsman refuses to admit that he has been negligent and so refuses to co-operate in

[62] Sir Christopher Slade at 739C was of the opinion that, if the claimant had a valid claim in negligence, then a fortiori he would have had a good rectification claim because "proof of the factors necessary to ground a claim for rectification would not ipso facto establish negligence on the part of [the solicitor]". It has already been submitted that every rectification claim must necessarily amount to an allegation of negligence, although the converse is not true: not every negligence claim will involve a rectifiable mistake.

[63] Sir Christopher Slade said, "... I do not think that the law should encourage the bringing of actions against solicitor draftsmen in such circumstances". (739E) As Mummery L.J. suggested, double recovery (by friends and family) leads to "... a possibility of abuse ...". (742D) Simon Brown L.J. included the following passage towards the end of his judgment "Where, as here, there is always the risk of a family manufacturing a negligence claim in order to enhance the value of the estate from which the family will benefit at the expense of the solicitor, the court is justified in requiring the claimant instead to pursue his remedy of rectification. I hasten to say that there has been no suggestion whatever in the present case that this claimant or his witnesses have been guilty of any such deceit. I make the point merely to indicate why the situation here is, in a number of respects, so very different from the norm". (744E–F).

[64] The duty of care is owed by all those engaged in the drafting of wills for profit, not just solicitors: *Esterhuizen* v. *Allied Dunbar* [1998] 2 F.L.R. 668.

[65] For recent examples of this, see *Corbett* v. *Newey* [1998] Ch. 57 and *Corbett* v. *Bond Pearce* [2001] 3 All E.R. 769.

[66] *Walker* v. *Medlicott* differed from *Ross* v. *Caunters* [1980] Ch. 297, *White* v. *Jones* [1995] 2 A.C. 207 and *Carr-Glynn* v. *Frearsons* [1999] Ch. 326 because in none of those cases would the claimant have had a remedy if the claim in negligence had been denied. See also *Gorham* v. *British Telecommunications Plc* [2000] 1 W.L.R. 2129, where the Court of Appeal held that an insurance company advising a customer on pensions and life cover owed the customer's dependants a duty of care not to give the customer negligent advice which adversely affected their interests as he had intended them to be.

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the rectification process. Their Lordships made it sound as though the claimant had jumped the gun by suing the solicitors for negligence. But, to be fair to the claimant, he had not been negligent in the first place. And if someone else had been, or might have been, negligent it was, surely, that other person's duty to suggest the possibility of a rectification application; or, at the very least, that the disgruntled person should seek independent legal advice promptly, bearing in mind the six month time limit from the date of the grant for bringing rectification proceedings. A disappointed beneficiary who misses the time limit because the negligent solicitor has been unhelpful or obstructive should not be penalised.[67]

The Court of Appeal seemed to believe that the claimant would suffer no prejudice by being required to bring rectification proceedings before he brought negligence proceedings. It is respectfully submitted, however, that this is not so. A rectifiable mistake must amount to negligence, but, as has been explained above, not every case of negligent will-drafting amounts to a mistake which is rectifiable under section 20. The disappointed beneficiary may be convinced that a mistake has been made, but he may not know precisely how that mistake arose, particularly where the will draftsman denies that he was at fault. The would-be claimant may find it almost impossible to work out whether the mistake he believes the draftsman made falls into what has been classified above as Group B or Group C.[68] If the claimant is obliged to proceed with a rectification claim first, he may subsequently discover that the circumstances are such that he has brought the wrong proceedings[69] because the mistake does not fall within Group B.

Sir Christopher Slade concluded his judgment by expressing his sympathy for the claimant in his disappointed expectations: a

[67] In *Chittock* v. *Stevens* ([2000] W.T.L.R. 643) the judge (D. Donaldson Q.C., sitting as a deputy High Court judge) held that the guidelines set out by Megarry V.-C. in *Re Salmon* ([1981] Ch. 167) as being relevant to the decision whether the time-limit for making an application under the Inheritance (Provision for Family and Dependants) Act 1975 should be extended were capable of being transposed to applications under section 20(2) of the Administration of Justice Act 1982 to seek rectification of a will out of time. In applying those guidelines, the judge held that it was just and proper that time should be extended in a case where a will had been negligently drafted by a solicitor, who had omitted the clause leaving the testator's estate to his wife if she survived him for one month (which she did). The wife had initially decided not to apply for rectification because she believed that the matrimonial home was in joint names and therefore passed to her by survivorship. This turned out to be a mistake: the home was, in fact, in the testator's sole name. The judge was particularly swayed by the fact that the assets had not been distributed on the faith of the will as unrectified. This factor outweighed the fact that, in all probability, the widow had a good claim in negligence against the solicitor who drafted the will.

[68] See Section III above.

[69] An example of the problem for the claimant is provided by the facts of *Horsfall* v. *Haywards* [1999] 1 F.L.R. 1182, which will be considered in the next section.

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sympathy which it is difficult not to share, bearing in mind the weight of evidence as to the true intentions of the testatrix. The trial judge had held that the solicitor had not been negligent, a conclusion which left the Court of Appeal troubled. In order to justify the barely justifiable, the Court of Appeal constructed the concept of a non-negligent misunderstanding: "In all the circumstances it is by no means inconceivable that ... [the solicitor] was left with the impression that the gift to the claimant of a share in residue was intended by the testatrix to take the place of a gift of the house itself, whilst the testatrix herself intended the gift of a share in residue to be additional to, rather than in substitution for, a gift of the house itself".[70] But if there was any doubt in the solicitor's mind as to what the testatrix intended, it was his duty to ensure that he did understand, either during the interview or by raising the issue in correspondence thereafter. It is respectfully submitted that the Court of Appeal should have characterised the solicitor's conduct as negligent. Had it done so, would it have been right to deny Bobbie Walker a remedy because he had brought negligence proceedings as opposed to a rectification claim?

The trouble with a rectification claim is that there is a very short time-limit for bringing it. Where the will draftsman denies any negligence and asserts that the will was drafted in accordance with the testator's instructions, the disappointed beneficiary has a problem: he must seek independent legal advice at the earliest opportunity. There is no suggestion that the solicitor in *Walker* v. *Medlicott* advised Bobbie Walker to consult an independent solicitor about the possibility of a rectification claim. Had he done so, the solicitor consulted by the disappointed beneficiary would have been in some difficulty. Time will probably be running when he is first consulted. One possibility might be to try to reach an agreement with the solicitor acting on behalf of the personal representatives whereby that solicitor agrees that his clients will support (or at least not oppose) an application for rectification made out of time. Such an agreement would give the disappointed beneficiary and the personal representatives an opportunity to gather and assess evidence as to the testator's true intentions. But what if the solicitor acting for the personal representatives does not co-operate? The beneficiaries under the will[71] may well consider that they have no reason to consent to an extension of time to enable a disappointed beneficiary to garner evidence with the object of depriving them of some or all of their inheritance. The position of the independent solicitor, consulted by the disappointed beneficiary,

[70] Sir Christopher Slade at 738D.
[71] Who may, themselves, be, or include, the personal representatives.

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is not one to be envied: if the weight of the evidence is such that, on the balance of probabilities, a rectification application ought to be made, and he fails to issue an application in time, and the court subsequently refuses to entertain an application out of time, *he* will run the risk of having to pay damages to the disappointed beneficiary.[72] But if he advises his client to bring a rectification claim and it transpires that the mistake is negligent but not rectifiable, he may end up having to pay the costs of those rectification proceedings himself.

VII. *Horsfall* v. *Haywards*

In *Horsfall* v. *Haywards*[73] the testator made his will in 1985 and it was his intention—an intention known by his widow and his two nieces—that the house in which he and his wife lived[74] should be held in trust for her for life, with the remainder interest passing to the two nieces in equal shares. Clause 4(1) of the will left the house in trust for the widow for life and, after her death, upon the trusts of the residuary estate. Under clause 5, the residue was left to the widow absolutely if she should survive the testator by twenty-eight days, which she did. So, as drafted, the will provided that the widow was entitled to the house absolutely.

The testator died at the end of 1992; and in June 1993 probate of his will was granted to his widow and one of his two nieces. In September 1993 the house was sold and the proceeds were remitted to the widow in Canada.[75] The niece who was a personal representative was aware that the proceeds of sale were being remitted to Canada, but she had not taken an active part in the administration of the estate; the order to remit the money had been given by the widow. It was not until more than a year later that the niece began to wonder what had happened to her (and the other niece's) interest under the will. She therefore consulted the solicitor who had drafted the will—and who was administering the estate—and he told her that it had never been the testator's intention that the nieces should obtain any interest in the house under the deceased's will.

In due course, the nieces consulted other solicitors and in February 1997 brought an action for negligence against the

[72] The damages could be substantial. In *Horsfall* v. *Haywards* (see below), the solicitors were ordered to pay damages of £87,503.17 for professional negligence *i.e.*, the value of the beneficial interest in remainder in the property.

[73] [1999] 1 F.L.R. 1182.

[74] The house had originally been vested in the testator and his wife as beneficial joint tenants. At the same time as the testator had executed his will, the wife had executed a deed of gift of her beneficial interest in the house to her husband.

[75] The widow was a Canadian and had now returned to Canada.

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testator's solicitors, who, having originally denied negligence, finally admitted that they had been negligent. Nevertheless, they raised issues of causation, quantum and mitigation. The trial judge[76] held against them on all points and they appealed. Before the Court of Appeal, the only matter of substance related to mitigation: the claim that the nieces should have mitigated their loss by applying for rectification under section 20 of the 1982 Act. By the time *Haywards* reached the Court of Appeal, *Medlicott* had been decided: and counsel for the solicitors[77] attempted to persuade the Court of Appeal that the alternative ground for its decision in *Medlicott*—that a disappointed beneficiary who claimed that the testator's will failed to record the testator's instructions should exhaust his remedy of rectification before bringing proceedings in negligence—should be followed. The Court of Appeal did not agree.

Mummery L.J.[78]—giving a judgment with which both Hirst and Buxton L.JJ. agreed—was prepared to assume that a rectification application would be likely to succeed. He pointed out, however, that the essential question was whether the nieces had failed to take reasonable steps by not bringing those proceedings, which should have been brought within six months of the grant of probate in June 1993. Mummery L.J. considered that there were two practical matters which meant that the nieces had not acted unreasonably in failing to bring rectification proceedings. First, the nieces relied on the solicitor, who had drafted the will and who subsequently acted in the administration of the estate, to deal with matters appropriately. There was no evidence that he had given any advice about the possibility of a rectification claim; nor was there any evidence that he had cautioned against the sending of the net proceeds of sale of the house to the widow in Canada. In other words, it was the fault of the solicitor that rectification proceedings had not been begun in time; and it was the fault of the solicitor that the proceeds of sale had been remitted to Canada. It would, therefore, have been unjust to penalise the nieces for placing reliance on the solicitor's skill and expertise. Secondly, the widow had made a statutory declaration in Canada in which she made it perfectly clear that, if the testator's will were to be rectified, she would not voluntarily remit the net proceeds of sale to England, with the result that proceedings would have to be commenced in

[76] Evans-Lombe J. (who had also decided *Wordingham*—see note 38 above).
[77] Who had also acted for the solicitor in *Medlicott*.
[78] Who had also sat in *Medlicott*.

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Canada, the costs of which were likely to extinguish the entire fund.[79]

VIII. Reconciling the Cases

It is respectfully submitted that *Haywards* is correctly decided; but can it be reconciled with *Medlicott*? In *Medlicott* there was no question of having to institute proceedings in another jurisdiction, but the two cases appear to be similar in that they both involved defendant solicitors who (a) were negligent,[80] (b) maintained that they had not been negligent, (c) did not warn the claimants about the possibility that they might need to apply for rectification, and (d) did not make it clear to them that there was a strict time-limit in relation to rectification proceedings. The cases are, essentially, similar and it is submitted that they cannot be reconciled. *Haywards* is to be preferred.[81]

There is an apparent distinction between the two cases, but it is submitted that, on a proper analysis, it is *not* a reason for deciding the two cases differently; rather, it is an added reason for preferring the approach taken in *Haywards* to the approach taken in *Medlicott*.

It has been suggested above that, on a true reading, *Medlicott* is a case of a negligent misunderstanding of the testatrix's instructions, a misunderstanding which could have been rectified if the correct steps had been taken in time. *Haywards* was treated, in the Court of Appeal, as a case of a clerical error, an error which could have been rectified if the correct steps had been taken in time. But was *Haywards* a case of a clerical error? It is by no means certain that it was. It was a case of a mistake, but it is not clear how the mistake came to be made, and it may not have been "clerical". It is possible that the mistake was a clerical error, or that it was a failure to understand the testator's instructions, in either of which cases it would have been a Group

[79] The widow indicated that she would challenge the deed of gift (see note 74) on the basis that she had not received independent legal advice, and would also seek relief under the Inheritance (Provision for Family and Dependants) Act 1975 on the basis that the testator's will had not made reasonable financial provision for her. The solicitors argued that these possible claims by the widow should reduce the damages payable to the nieces. The Court of Appeal rejected this argument on the basis that such claims were entirely speculative: and the damages awarded were of an amount equal to the remainder interest in the house which the nieces had lost.

[80] The defendant solicitors in *Haywards* began by denying negligence, but, by the time the action came on for trial, they admitted that they had acted in negligent breach of duty. The solicitor in *Medlicott* never admitted negligence, but it has been explained above that *if* (as the Court of Appeal thought) he misunderstood the testatrix's instructions, he must have been negligent too.

[81] In the recent case of *Grattan* v. *McNaughton* [2001] W.T.L.R. 1305 a widow brought separate negligence and rectification proceedings and failed in both; (she succeeded in a claim for family provision). This is consistent with the approach being suggested here.

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B error and rectifiable: but it may have been a drafting error (Group A) or it may have been some other form of mistake (Group C). If the error was not a not a Group B error, it could not be rectified.[82]

If the solicitor's mistake in *Haywards* was not rectifiable, this may, at first sight, appear to provide a possible explanation for the contrast between the two approaches. But it is submitted that it does not. Even leaving on one side the fact that the Court of Appeal in *Haywards* did not attempt to justify the distinction between that case and *Medlicott* on the basis that *Haywards* did not involve an error which could have been rectified, the possibility actually reinforces, rather than detracts from, the argument that *Medlicott* was wrongly decided.

The fact that, in *Haywards*, it is clear that a mistake had been made, but it is not clear whether the error is rectifiable, emphasises a difficulty faced by any claimant in a case where there appears to have been negligence in relation to the drafting of a will but the draftsman does not admit that he has been negligent and does not himself suggest that there should be an application for rectification.[83] To suggest, as the Court of Appeal suggested in *Medlicott*, that the disappointed beneficiary should *not* bring negligence proceedings, but should *instead* apply for rectification is putting him in an invidious position, because he may not know whether the mistake is a rectifiable one. Indeed, the mistake may not be of a type which is rectifiable. The correct, and safe, way of proceeding is for the claimant to apply for rectification and, *at the same time*, to bring proceedings for negligence.

IX. Conclusion

Where a potential beneficiary believes that the draftsman of a will has made a mistake which may be rectifiable, but where the draftsman denies negligence and does not suggest, or assist in, an application for rectification, the correct approach is simultaneously to bring proceedings *both* for negligence *and* for rectification. He should bring the negligence action against the draftsman, and the rectification proceedings against the executor; the two sets of proceedings should then be dealt with together. There are three possible outcomes.[84] First, it is possible that the court may hold that there has been an error which is negligent but not rectifiable.

[82] Whether the mistake in *Haywards* could be classified as "clerical" would depend both on a close examination of the facts, and on how liberal the court was prepared to be in its construction of section 20 of the Administration of Justice Act 1982.

[83] As the solicitors appear to have done in *Wordingham* and *Segelman* (see above).

[84] A drafting error, which can be cured by construction, creates no real problem.

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In this case, the rectification claim will be dismissed, but the disappointed beneficiary will recover damages in tort from the draftsman.[85] It is arguable that in such a case the disappointed beneficiary should recover from the draftsman the costs not only of the successful negligence proceedings, but also of the unsuccessful rectification application.[86] Secondly, the court may hold that there has been an error which can be rectified. In this case, the claimant will obtain rectification[87] and will also obtain damages from the draftsman equivalent to his costs in the rectification proceedings,[88] because every successful rectification claim involving a clerical error by a professional will draftsman or a failure by a professional will draftsman to understand his instructions involves an implicit finding of negligence on his part.[89] Thirdly, the court may hold that there has been no negligence, so that, *ipso facto*, the will cannot be rectified. In this case, the would-be beneficiary will find himself paying the costs of two sets of unsuccessful proceedings, although given that the evidence in the two sets of proceedings will be the same, the extra costs involved should not be excessive.[90] Whatever the outcome, the institution of two simultaneous sets of proceedings means that all issues will be properly aired and that the allegedly negligent draftsman will have a chance to defend himself in proceedings to which he is a party. If rectification proceedings are kept separate from negligence proceedings, there is always the danger that a meritorious claimant—such as Bobbie Walker in *Medlicott*—will be denied the remedy to which he is entitled. Such an outcome must be unjust, all the more so because it can so easily be avoided.

[85] The beneficiaries named in the will will receive a windfall in the sense that they retain gifts which the testator did not intend them to have. This is what happened in *Corbett* v. *Newey* (see note 65) and, it is suggested, *Medlicott*.

[86] The application would not have been made had the draftsman—who has now been found to be negligent—admitted his negligence in the first place.

[87] This is what happened in *Wordingham* and *Segelman*.

[88] He will, of course, also obtain his costs in the negligence proceedings themselves.

[89] The beneficiaries named in the will lose their windfall benefit in this case.

[90] In this case the beneficiaries named in the will retain the gifts which the testator intended them to have.

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