Legal Malpractice and the Disappointed Beneficiary under English and German Law

submitted by

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Recognising and solving a problem becomes remarkably easier when it shows up wearing a peculiar foreign costume.
- Karl N. Llewellyn -

I. Introduction

The matter of this survey is the so-called disappointed-beneficiary cases. In these cases an intended beneficiary of a will suffers a loss, because the will is rendered invalid due to legal malpractice of the will-preparing lawyer. There are several difficult problems contained in these cases. The problems shall be examined by comparing the solutions for these cases under English and under German law.
As will be seen below, policy-considerations form the core of the leading court-decisions dealing with that problem in England as well as in Germany because no satisfactory theoretical solution to the problem is been found yet. But in both jurisdictions it seems that the courts and writers concerned with these cases seem to tend to the opinion that the policy reasons are speaking for a solution in which the lawyer is held liable to the disappointed beneficiary. Since the theoretical problems are still not solved, these policy arguments are of crucial importance in the disappointed-beneficiary cases. Next to a survey of the conceptual issues it shall therefore be tried to examine these policy arguments carefully.
The fairly complicated conceptual problems are mainly concerned with the question whether a claim should be in contract or in delict. Particularly interesting in this regard is that a claim against the lawyer is allowed under both of the jurisdictions, but whilst in English law the claim is a delictual one, on the other hand the German law took the contractual way. This makes a comparative survey particularly interesting.
In England, just recently, the House of Lords was concerned with this problem in *White v Jones*[1]. It was a close three to two decision which shows how contentious the issue is. The majority-judges allowed the claim in tort. The decision has found some attention in the English legal world since it has not only an impact in the confined area of the disappointed-beneficiary situation. It is likely to have

[1] All E.R. [1995] 1 691.

repercussions for the tort of negligence as a whole. Together with *Henderson v. Merett* it shows a more relaxed approach in allowing recovery for economic loss under the tort of negligence. This development will be portrayed in mored detail in the course of this survey.

The German Supreme Court has decided a case like *White v. Jones* about thirty years ago. It will be examined to what extent it is still valid. To do so requires that the German law-institutes 'Vertrag mit Schutzwirkung zugunsten Dritter' or 'contract with protective effects *vis-à-vis* third parties'[2] and the 'Drittschadensliquidation' will be portrayed. These have gained some influence in the discussion about the concerned cases in the English legal world. They were even discussed in the mentioned decision of *White v Jones*, but eventually rejected as not suitable for the peculiarities of English law. The question will be discussed whether these institutions provide at least a proper solution against the German legal background.

Finally the survey will be completed with a comparison of the situation under English and German law.

[2] translation from Markesinis, German Tort Law, at p.56.

II. English law

1. Legal background to *White v Jones*

a) Broader developments in the tort of negligence

In the disappointed-beneficiary cases one is dealing with so-called pure economic losses[3]. Here the plaintiff suffers neither personal harm nor is there any damage to his property. The legacy which the testator intends to give to the plaintiff has never become part of the plaintiff´s assets since the will containing was never validated. Thus the losses suffered by the disappointed beneficiary are mere expectations or more precisely *spes successionis*, and therefore pure economic loss. These losses are recoverable under a contractual claim but, in principle, they are not recoverable in tort as far as negligence is concerned[4]. From this principle there is an exception arising out of *Hedley Byrne v Heller*[5] but this exception is only applicable, if certain conditions are fulfilled. Accordingly there has to be a 'special relationship' between plaintiff and defendant and 'reasonable reliance' on the defendant´s side. The *Hedley Byrne* -exception is basically concerned with negligent misstatements, although the exact scope of *Hedley Byrne* is rather unclear[6]. It was especially uncertain whether this case opened the door for recovery of economic loss, not only in the field of misstatements but also for other acts or omissions. Such an interpretation seemed to be possible, especially after *Junior Books Ltd. v Veitchi Co. Ltd*[7]. At the same time, Lord Wilberforce developed his two-step approach in determining a duty of care in *Anns v Merton L.B.C.*[8]. According to this approach, a duty of care arises, first when there is sufficient proximity between the wrongdoer and the victim, and secondly, when there are no reasons against establishing such a duty[9]. This is a wideranging approach to establish a duty and, together with a broad interpretation of *Hedley Byrne v Heller,* it would have extended liability for pure

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[3] see in general Bernstein *Economic Loss* esp. at p. 95-127.
[4] Howarth *Textbook on Tort* p. 267; Stapleton *Duty of Care* at p. 249.
[5] [1964] A. C. 465.
[6] see for this and the following Stanton *The Modern Law of Tort* at p.337-9.
[7] [1983] 1 A. C. 520.
[8] [1978] A. C. 728.
[9] At p.751F-752B.

economic loss considerably. The *Junior Books Ltd. v. Veitchi Co. Ltd.* was a kind of summit in this development as it could be interpreted as a decision that generally allows recovery of pure economic loss in those cases where there existed a relationship of very close proximity between the plaintiff and the defendant[10]. But during the eighties in series of cases[11] the courts again denied liability for economic loss in a negligent context, and returned to the old 'exclusionary rule'[12]

However, *Anns* was later overruled by *Murphy v Brentwood District Council*[13]. According to this decision a recovery for pure economic loss only seems possible based on the *Hedley Byrne*-principle, understood as requiring a special relationship between the tortfeasor and the victim and it is clear that it applies to neither acts nor omissions.

b) *Stipulatio in alteri*

Since the possibilities to recover such a loss in tort are rather confined, it may be preferable to fashion such a claim in contract. However, some other peculiarities of the English law have to be taken into account. In the disappointed-beneficiary situation, there is contract between the testator and the lawyer, the defendant. At the same time there are hardly ever contractual relations between the disappointed beneficiary, the plaintiff, and the lawyer. Given this, the question arises as to what extent a person, who is not party to a certain contract, may sue on the basis of an act which constitutes a breach of that contract. This is a typical problem in Common Law where the principle of consideration applies. In other words a promise gains legal recognition only if the promisor is promised something in return[14]. Particularly English courts hold on to this principle rigidly[15]. Because of the strict adherence to that doctrine, a valid contract in favour of a third party is not possible under English law (no *stipulatio alteri* or *jus quaesitum tertio*). This impairs or even prevents the possibility to recover in the disappointed-beneficiary situation under a contractual claim.

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[10] Stanton *The Modern Law of Tort* at p.337.
[11] *Balsamo v. Medici* (1984) 1 WLR at p.951; *Muirhead v. Industrial Tank Specialities Ltd.* (1986) QB at p.507; *Simaan General Contracting Co. v. Pilkington Glass Ltd.* (1988) QB at p.758.
[12] Hutchison *Murphy's Law* at p.16.
[13] [1991] A. C. 398.
[14] Dias/Markesinis *English Law on Torts* at p.50.
[15] Dias/Markesinis, *loc cit.*.

c) Privity of contract

Since there is, on the other hand, a contract, viz. between the testator and the lawyer, another peculiarity of English law has to be considered. This is the privity of contract rule. The privity of contract doctrine has a long history the content of which still remains somewhat unclear[16]. In an old case *Winterbottom v Wright*[17] a rule was established, that a plaintiff who was a third party to a contract could not make a claim in tort, that is, a claim based on an *independent* tort duty, if the conduct of the defendant identified as tortious also constituted a breach of the contract[18]. The reason for this would appear to be that the third party should not be allowed to have more rights than the contracting parties themselves. If this approach would be taken literally, it would yield some strange results. It therefore seems possible for the contracting parties to curb the rights of an outside of the contract standing third party. This would be, at least in the second line, a contract with encumbering effects towards a third party. This rather hardlinig approach which was later addressed as the 'privity-fallacy', has been relaxed in the course of time, especially in the famous *Donoghue v Stevenson* case[19], where a claim in tort for a third party was allowed. The situation in England at the moment is therefore that it is not possible for contracting parties to confer benefits towards a third party. In this regard the situation in England is different from the situation under most of the continental european jurisdictions. But like everywhere else in Europe it is not possible to impose duties on third parties.

But the meaning of the privity rule has remained still somewhat vague even today. There have been recent decisions where it was handled pretty rigidly as in *Tai Hing Ltd. v Liu Chong Hing Bank*[20] when Lord Scarman noted that: '[T]heir Lordships do not, however, accept that the parties´ mutual obligations in tort can be any greater than those to be found expressly or by necessary implication in their contract'[21]. In this view the contract has absolute priority. Another interpretation rather looks at the privity-doctrine as an inconsistency-principle where a tort claim will be denied if it leads to a circumvention of the contract. This will only apply if the circumvention is

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[16] Howarth *Textbook on Tort* at p.214-22; Stapleton *Duty of Care* at p.249-52.
[17] (1842) 10 M.&W. 109; 152 E.R. 402.
[18] Stapleton *Duty of Care* at p.250.
[19] [1932] A. C. 562.
[20] [1986] A. C. 80 at p. 107.
[21] at p.107G.

unacceptable and this provides further relaxation from the rigidity of the privity-doctrine. Such an approach is, as will be shown below, adopted by the House of Lords in *White v Jones*.

d) History of disappointed-beneficiary cases in England and other jurisdictions

The first common-law country allowing a claim of the disappointed beneficiary against the negligent lawyer was the United States of America. This was in a case before the Californian Supreme Court called *Biakanja v Irving*[22] where the claim was allowed in tort. This is today legal practice in most American States, apart from New York where the courts, as in England, continue strictly to apply privity of contract. A first case of this kind in a Commonwealth state, was decided in Canada, in *Whittingham v Crease & Co.*[23] where the court allowed the claim in tort on the basis of the *Hedley Byrne*-principle.

In England, a disappointed beneficiary-situation was first decided in *Ross v Caunters*[24] in 1980, where Sir Robert Megarry V-C determined the duty of care owed by the lawyer to the intended beneficiary by following the two-stage theory of Lord Wilberforce from *Anns v Merton L.B.C* [25]. With regard to the problem of pure economic loss he held that *Hedley Byrne* is not seen as limiting possibility to recover economic loss to cases of negligent misstatements. This merely clarifies that there is no general rule against recovery of such a loss. On these grounds, he allowed the claim against the lawyer in tort. This decision was generally welcomed in the United Kingdom[26], but there was also criticism of the extension of *Donoghue v Stevenson* (via *Anns*) to cases dealing with pure economic loss[27]. Nevertheless, the situation changed when *Murphy v Brentwood* was decided, as from then on again a special relationship based on the *Hedley Byrne*-principle was required for recovery of pure economic loss. The question therefore arose whether *Ross v. Caunters* is still good law or overruled by *Murphy*.

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[22] 49 Cal 2d 647, 320 P 2d 16, 65 ALR2d 1358 (1958).
[23] (1978) 88 DLR (3d) 353.
[24] [1980] 1 Ch 297.
[25] At 309F-310A.
[26] See e.g. Cane *Negligent Solicitors and Disappointed Beneficiaries*.
[27] See e.g. Kaye *The Liability of Solicitors in Tort* at p.683.

In Australia, the Supreme Court of Victoria in *Seale v. Perry*[28] refused to follow *Ross v. Caunters*, and departed from the decision of the Supreme Court of Western Australia *in Watts v. Public Trustee for Western Australia*[29]. *Ross v. Caunters* was also rejected by Lord Weir in *Weir v. J.M. Hodge & Son*[30]

Against the described background the House of Lords was concerned with a disappointed beneficiary-case in 1995 in *White v Jones.*

2. *White v. Jones*

a) The facts of the case

In *White v Jones,* the testator, who had quarrelled with the plaintiffs, his two daughters, executed a will cutting them out of his estate. After he had reconciled with his daughters, he sent a new will to his solicitors giving them instructions to rewrite the old one. Accordingly, the plaintiffs were to receive gifts of £ 9,000 each. When the solicitors got the letter, they remained inactive for almost two months. Meanwhile the testator died before the new dispositions to the plaintiffs were put into effect.
The plaintiffs brought an action against the solicitors for damages for negligence, but this was dismissed on the grounds that the solicitor owed no duty of care to the plaintiffs. The plaintiffs then appealed to the Court of Appeal, which allowed the claim and held that the plaintiffs were entitled to damages of £ 9,000 each. The appeal of the solicitors to the House of Lords was dismissed by a three-to-two decision.

b) The judgments

Lord Goff[31]:

Lord Goff gave the leading judgments of the majority of judges who dismissed the appeal and held the solicitor liable to the disappointed beneficiary.

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[28] [1982] V.R. 193.
[29] [1980] W.A.R. 97.
[30] 1990 S.L.T. 266.
[31] At p.252B.

After giving the facts and describing the judgments of the courts below, Lord Goff proceeded with an observation of the experiences in other countries, notably in the Anglo-Saxon legal world. He then described what he regards as the 'conceptual difficulties' involved in this case. First, he stated that a solicitor acting on behalf of his client owes a duty of care only to his client, a duty of care that is concurrenty in tort and in contract[32]. On the other hand the solicitors owes in general a duty of care in tort to a third party while discharging his duties to his client. In the disappointed-beneficiary situation he does not owe such a duty in contract either as there is no contract between himself and the disappointed beneficiary. Due to the doctrine of privity of contract and the doctrine of consideration, there is no *ius quaesitum tertio* under English law which might allow a claim under contract between the testator and the solicitor.

Secondly, Lord Goff stressed that the loss concerned is purely economic which is in tort of negligence, only recoverable under the *Hedley Byrne* -principle which requires assumption of responsibility. Moreover the loss of the disappointed beneficiary is a mere expectation, a *spes succesionis* that failed to come to fruition. Such losses are usually ruled by a contractual regime. Thirdly, Lord Goff raised the problem of establishing reasonable bounds if recovery is allowed in cases like *Ross v. Caunters.* He mentioned two objections against liability in the disappointed-beneficiary situation but these have, from his point of view, no substance. The testator owes the plaintiff no duty and therefore, logically, such a duty cannot be imposed on the solicitor. Furthermore he immediately rejected the well-known argument that to allow a claim against the solicitor would effectivly increase the size of the estate, which already has been transferred to the beneficiary under the old will. Finally, he emphasised that in the case before the House of Lords they are dealing with an omission of the solicitor and, as a general rule, there is no liability in tortious negligence for omissions.

Lord Goff then considered *Robertson v. Fleming*[33], where Lord Campbell contended that a solicitor's liability in the disappointed-beneficiary cases 'can hardly be the law of any country where jurisprudence has been cultivated as a science'. Lord Goff immediately rejected this as an authority for the present case because it is far more

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[32]Lord Goff is citing *Midland Bank Trust Co. Ltd. v Hett, Stubbs & Kemp* [1979] Ch.384 and *Henderson v. Merrettt Syndicates Ltd.* [1995] 2 AC 145 here.

[33][1861] 4 Macq. 167.

than a hundred years old and the mentioned statements do not form part of the *ratio decidendi* of *Robertson v. Fleming.*

Under the headline 'the impulse to do practical justice', Lord Goff proceeded with the policy reasons which he deems to be relevant in this case and which are, from his point of view, clearly demanding the solicitor´s liability. He began by stating that the only person with a valid claim, the testator, has suffered no loss, and the only person who has suffered a loss, the disappointed beneficiary, has no valid claim. This creates a lacuna in the law which needs to be filled. Moreover, Lord Goff emphasised the importance of legacies. Since the solicitor has negligently caused a loss he deems it being unjust if the solicitor goes scot-free. Finally, he mentioned the reliance of the public in solicitors´ ability and diligence in preparing an effective will.

Lord Goff then discussed *Ross v. Caunters*. In this case, Sir Robert Megarry V-C established liability of the solicitor by direct application of *Donoghue v. Stevenson* via the two-step test developed by Lord Wilberforce in *Anns*. He observed that some difficulties in the present case have not, or only briefly, been addressed by Sir Robert Megarry V-C such as the *spes successionis* -issue and the question if the claim has to be fashioned in tort or in contract.

Lord Goff later surveyed the German approach to the matter. He described the institute of a 'Vertrag mit Schutzwirkung zugunsten Dritter' (contract with protective effect for third parties) which was invoked by the German Supreme Court in BGH NJW 1965 at p.1955[34]. This is a case similar to the *Ross v. Caunters* and the *White v. Jones* decisions. However, he deemed this doctrine as 'extending the law of contract beyond orthodox contractual principles'. Furthermore, he mentioned another German law institute, the so-called 'Drittschadensliquidation', which was developed to deal with cases of transferred loss. In England, in shipping law, solutions for the transferred loss-issue have been achieved and these resemble the German approach quite closely. Lord Goff contended that the disappointed-beneficiary situation is very similar to the transferred-loss but there are certain distinctions which call for an independent solution of the former issue.

Eventually Lord Goff rejected any contractual solution to the problem as this would conflict with the longstanding doctrines of consideration and privity of contract. The present case does not seem appropriate to reconsider these fundamental principles.

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[34]which is actually not correct as will be shown below.

Finally, Lord Goff introduced his tortious solution to the problem. He stated that the *Hedley Byrne* -principle cannot be applied to the problem because under normal circumstances there is no assumption of responsibility by the solicitor towards the intended beneficiary. Since, on the other hand, practical justice demands liability of the lawyer, there is a lacuna in the law which needs to be filled. He therefore suggested that the House of Lords 'should in cases such as these extend to the intended beneficiary a remedy under the *Hedley Byrne* principle by holding that the assumption of responsibility by the solicitor towards his client should be held in law to extend to the intended beneficiary. The beneficiary who (as the solicitor can reasonably foresee) may, as a result of the solicitor´s negligence, be deprived of his intended legacy in circumstances in which neither the testator nor his estate will have a remedy against the solictor should be given a remedy in tort[35]'. This solution is deemed by Lord Goff to do practical justice and does not cause serious conceptual problems.

Lord Mustill[36]:

From Lord Mustill comes the leading dissenting judgment allowing the appeal. He began explaining why, from his point of view, practical justice is not demanding liability of the will-preparing lawyer. He stated that there is no duty of care owed to the disappointed beneficiary neither in tort nor in contract in respect of the solicitor´s work for the testator. This is because there is no contract between the lawyer and the intended beneficiary. In tort, the lawyer does not owe a duty of care to the extent that it would cover damage like this. Since there is no duty of care, Lord Mustill deemed the notion of 'fault' here either tautologuous or inaccurate, as legal fault does not exist in a vacuum but must be related to a legal right of the person who complains. He met the argument that the negligent solicitor would otherwise go scot-free with the notion that 'this must depend on the rules of his profession and the rigour with which they are enforced. The purpose of the courts, when recognising tortious acts and their conseqences, is to compensate those plaintiffs who suffer actionable breaches of duty, not to act as second-line disciplinary tribunals imposing

[35]at p.279B.
[36]276G-292E.

punishment in the shape of damages'[37]. Lord Mustill proceeded addressing the real root of the issue; the rule of the law of succession which provides that the dispositions of the testator will only come into effect when contained in a valid will. This he saw as the crucial cause of why the intended beneficiaries' expectations become frustrated. Moreover he stressed that the benefits have to be conferred by the testator, not by the solicitor, who only assists the testator in doing so.

Lord Mustill then posed the question of whether a claim could sustain in contract anyhow. As no claim was brought before court in contract this question is merely hypothetical. He asked whether the testator could be regarded as the agent of the intended beneficiary. The testator acts to conclude a contract between the solicitor and the beneficiary but rejects this assumption immediately as this would not comply with the intentions of the parties involved. The possibility of an auxiliary promise from the solicitor to the beneficiary is ruled out by mentioned doctrines which inhibit a *jus quaesitum tertio* in English law. Lord Mustill continued scrutinising the other conceivable route of a contractual claim via the estate. In this case, the claim the testator undoubtfully had against the negligent solicitor during his lifetime would be enforced by the estate. However, such a claim not only would have an strange look, there is another serious problem. The claim the testator had against the solicitor would be merely for the delay. He would be compensated only for the inconvinience and expense resulting from the failure to draft the will in appropriate time. The content of this claim is quite different from what the disappointed beneficiary claims, viz. estate or parts of the estate intended by the testator to be transferred to him via the new but non-valid will. Lord Mustill then conluded that there is no contractual remedy available in the disappointed-beneficiary cases.

Lord Mustill now considered whether the claim could succeed in tort. He started with *Ross v. Caunters*, but observed that this judgment was based on the two-step test yielded by Lord Wilberforce in *Anns v. Merton London Borough Council.* Since the decision was overruled by *Murphy v. Brentwood D.C.,* the whole situation has to be reconsidered. He then took *Hedley Byrne* as a starting point and contended that in that case there are notably four issues: (1) mutuality; (2) special relationship; (3) reliance and (4) undertaking of responsibility. Lord Mustill continued with a thorough survey of these issues. He concluded that in the cases of disappointed-beneficiary

[37] 278C.

there is no special relationship and no 'mutualitiy', the latter being the essence of the *Hedley Byrne*-decision[38]. From his judgment it appears that Lord Mustill understood 'mutuality' as contact of any kind between the plaintiff and the defendent. He therefore considered *Hedley Byrne* to be too different to include the disappointed-beneficiary situation under its umbrella. Finally, he surveyed whether *Donoghue v. Stevenson* provides a solution for the present case. He first admitted that this decision cannot give rise directly to a duty in the concerned cases. However, it opens up the possibility of inferring a new duty in new types of special relationships that are remote from the one in *Donoghue v. Stevenson* itself[39]. Finally, Lord Mustill responded to this question negatively because such a duty would apply to any situation where A promises B a reward to perform a service for B, in circumstances where it is foreseeable that performance of the service with care will cause C to receive a benefit, and that failure to perform it may cause C not to receive that benefit'[40]. This would mean a substantial extension of the area of potential liability which is not justified by any principled reasoning.

In other words Lord Mustill did not acknowledge the possibility for such a claim in tort, and he therefore allowed the appeal of the solicitor.

The other Judgments in *White v. Jones*:

Lord Keith of Kinkel agreed with Lord Mustill and also allowed the appeal of the solicitors[41]. He pointed out that the disappointed beneficiarie´s claim presupposes that the solicitor owed them exactly the same duty in tort as he owed in contract to the testator. However, such a duty could not be owed them in contract due to the ban of a *jus quaesitum tertio* in English law and Lord Keith doubted that the law could recognise circumvention of this rule in tort. *Hedley Byrne* as well as *Henderson v. Merrett Syndicates Ltd.*[42] were not deemed as apt authorities since, in the present case, there is no direct relationship between the intended beneficiary and the will-preparing lawyer.

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[38] 289B.
[39] 290F.
[40] 291D.
[41] at p.251A-252B.
[42] [1994] HL at p.122.

Lord Browne-Wikinson dismissed the appeal. In his view a duty of care arises from an extension of the principle of assumption of responsibility as explored in *Hedley Byrne*. This is achieved by drawing an analogy as in *Caparo Industries Plc. v. Dickman*[43]. By examining *Nocton v. Lord Ashburton*[44] on the one hand and *Hedley Byrne* and *Henderson v. Merrett* on the other, Lord Browne-Wilkinson mentioned two categories of special relationships out of which a duty of care arises, (1) where there is a fiduciary relationship and (2) where the defendant has voluntarily answered a question or tenders skilled advice or services in circumstances where he knows, or ought to know, that an identified plaintiff will rely on his answers'[45]. He admitted that the present case falls into neither category but, because a close analogy can be drawn, it should be appropriate to open up a new category where a special relationship should be deemed to be present. Finally, Lord Browne-Wilkinson demonstrated why, in his view, it is also fair, just and reasonable to impose liability on the negligent solicitor.

Lord Nolan completed the judgments and also dismissed the appeal[46]. According to him simple justice demands that the disappointed beneficiary is able to recover his frustrated expectations from the solicitor who has assumed responsibility by undertaking a task which is potentially harmful. In Lord Nolan's view, a professional man or an artisan who agrees to exercise his skill in a manner which, to his knowledge, may cause loss to others, if carelessly performed, may thereby implicitly assume a legal responsibility towards them'[47].

c) Analysis of the decision

The judgments in *White v. Jones* are scrutinised below, with particular regard to the legal background described above.

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[43][1990] 2 A.C. at p. 605
[44][1914] A.C. at p.932.
[45]at p.274F.
[46]at p.292F.
[47]at p.294A.

(1) Economic loss

As far as the issue of pure economic loss is concerned it has to be observed that this case, together with *Henderson v. Merrett,* is one of the few occasions where courts in England have allowed recovery on the basis of tort of negligence outside the field of negligent misstatements[48]. There was, however, disagreement among the judges and it was a close three to two decision.

Lord Keith disagreed on this matter as he regards *Hedley Byrne* as being a narrow exception from the principle that pure economic loss is not recoverable. This exception is dependent on reliance and a direct relationship creating sufficient proximity. Both he deemed this as not being given here and he therefore found himself unable to allow the claim in tort. Furthermore, he emphasised that the loss is a mere expectation, only existent in the mind of the testator, and even if were to have legal effect it would only become a mere '*spes successionis* of an ambulatory charactor'.

Lord Goff dismissed the appeal, allowing recovery for this pure economic loss. His first point was that he deemed recovery possible in cases of 'assumption of responsibility' under the principle in *Hedley Byrne*. He also admitted that mere expectations fall in the exclusive domain of contractual law. After a rather perfunctory survey of *Hedley Byrne v. Heller*, compared with the thorough examinations of Lord Browne-Wilkinson and especially of Lord Mustill, Lord Goff came to the conclusion that the normal disappointed-beneficiary case does not fit into the *Hedley Byrne*-principle. But he maintained that the House should, in such cases, extend to the intended beneficiary a remedy under the *Hedley Byrne* principle by holding that the assumption of responsibility by the solicitor towards his client should be held in law to extend to the intended beneficiary[49]. In his approach, to extend the assumption of responsibility *in law,* Lord Goff seems to differ from the other majority judgments of Lord Browne-Wilkinson[50] and Lord Nolan[51], which convey the impression that they regard the assumption as being real[52]. For Lord

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[48]see Whittaker *Future Directions* at p.193.
[49]at p.268D.
[50]at p.274B.
[51]at p.293H.
[52]see S. Whittaker *Future Directions* at p.192 and his criticism of Lord Goff's concept of an assumption of responsibility extended *in law* at p.205.

Goff, such an assumption of responsibility is merely a deemed while the other judges regard it as actual. His result he deemed being justified by all the policiy reasons he mentioned before. Lord Goff then pointed out that the objection to unlimited liability does not apply since liability, in the present case, is owed only to the disappointed beneficiaries in respect of a particular will[53]. In this instance, Lord Mustill expressed a completely opposite view. He considered it impossible to draw a reasonable boundary between cases like this and those cases where A promises B for reward to perform a service for B, in circumstances where it is foreseeable that performance of the service with care will cause C to receive a benefit, and that failure to perform it may cause C not to receive that benefit'[54].

Lord Browne-Wilkinson also doubted that the case can be placed under the *Hedley Byrne*-principle as reliance will often be missing in cases like this. On the other hand, his Lordship held that the disappointed-beneficiary cases can and should have a remedy rendered by an analogy to the *Hedley Byrne*-principle, the method of drawing an analogy to be approved by *Caparo Industries Plc. v. Dickmann*[55]. The analogy he based on the assumption that there are two kinds of special relationships discovered yet where a duty of care exists, that is the fiduciary relationship on the one hand (traced back by him to *Nocton v. Lord Ashburton*[56]); and on the other hand a situation 'where the defendant has voluntarily answered a question or tenders skilled advice or services in circumstances where he knows or ought to know that an identified plaintiff will rely on his answers'[57](the *Hedley Byrne* -situation). A common feature in both these situations, in Lord Browne-Wilkinson´s belief, is the voluntary assumption of the defendant to act in the plaintiff´s affairs. Such an assumption he also found in the disappointed-beneficiary cases as well and due to the awareness of the solicitor that the economic well-being of the intended beneficiary depends on the proper discharge of his duties. Lord Browne-Wilkinson proposed to include the disappointed-beneficiary cases under the *Hedley Byrne*-principle by the way of analogy.

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[53]cf. to this matter Howarth *Textbook on Tort* at p.285-6.
[54]at p.291D.
[55][1990] 2 A.C. at p.605.
[56][1914] A. C. at p.932.
[57]at p.274F.

Lord Mustill showed a much narrower approach to the exception to the general rule contained in *Hedley Byrne* that pure economic loss is not recoverable under the tort of negligence than the other Lordships apart from Lord Keith. According to Lord Mustill a somehow mutual relationship is a basic feature of the *Hedley Byrne*-case which cannot be found in the disappointed-beneficiary cases. He therefore rejected any application of the *Hedley Byrne*-principle. For him only *Donoghue v. Stevenson* offered a possible foundation for such a claim because it '[o]pened up the possibility of inferring a quite new duty in new types of special relationships far distant from those which existed in *Donoghue v. Stevenson* itself'[58]. But, in his view, such a solution is ruled out since it would extend the area of liability for negligence considerably and this is not justified by any principled reasoning in cases such as *White v. Jones*.

Lord Nolan´s approach seems to be similar to what was stated by Lord Browne-Wilkinson in his judgment. The will-preparing solicitor has assumed responsibility by venturing on a potentially harmful activity with regard to third parties. A duty of care therefore arises towards the third party and by the breach of it the solicitor may become liable.

Economic loss is a very difficult issue and therefore almost inevitably contentious[59]. *White v. Jones* was deemed to be auspicious that it would take the problem closer to a solution before it was released[60]. It is doubtful whether *White v. Jones* can meet these expectations. It was a split decision and even the majority judges, voting for liability of the will-preparing solicitor appeared to confine the scope of their decision to the special situation of the disappointed-beneficiary cases[61]. However, what may be stated is that *White v. Jones* did prove that economic loss is recoverable under the tort of negligence also if any reliance of the plaintiff may be missing[62]. Further impact of the decision in this regard seem to be hardly foreseeable.

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[58] at p.290F.
[59] Atiyah *Negligence and Economic Loss* at p.248; Howarth *Textbook on Tort* at p.285-6; Hutchison *Murphy´s Law* at p.3; Markesinis *Expanding Tort Law* at p.354.
[60] Rogers *Winfield and Jolowicz on Tort* preface at p.V.
[61] see Lord Nolan at p.293D; Lord Goff at p.269E; Lord Browne-Wilkinson at p.276B.
[62] Hutchison *Murphy´s Law* at p.33. In general rejecting the concept of 'reliance' Stapleton in *Duty of Care* at p.283-4.

(2) The doctrines of privity of contract and no *jus quaesitum tertio*

The doctrines of privity of contract and no *jus quaesitum tertio* complicate the task of drawing a reasonable boundary between contract law and the tort of negligence in English law. Here both doctrines are treated together since the first is, according to Lord Goff, 'considered to exclude the recognition of a *jus quaesitum tertio*'[63].

For Lord Keith, it seems, this is the main obstacle allowing a claim against the solicitor. Because of this doctrine, he considered a contractual solution to the matter to be ruled out, a view he shared with all the other judges. Since, for him, a tortious claim against the lawyer would mean *de facto* a clear circumvention of this principle, he rejected such an approach as well. Lord Goff, against it, did not see an unacceptable circumvention of this principle here[64]but he failed to say why circumvention in this case is acceptable[65]. Lord Browne-Wilkinson did not address the problem, so it seems that the circumvention-argument evidently has not appealed to him either. Lord Mustill mentioned the 'no *jus quaesitum tertio*' just briefly, when examining the possibility of claiming against the solicitor in contract. He then did exclude the possibility of a claim in contract with, the mere notion of the doctrine, but he admitted that English law may be inching towards the direct enforcement of contracts, or benefits intended to be conferred under them, by persons standing outside the mutual obligations created by the bargain'[66]. When he scrutinised the possibility of a tortious solution, Lord Mustill mentioned the issue again so it may be concluded that he has a rather relaxed attitude to it. Lord Nolan, meanwhile, was only concerned with the matter vicariously by discussing the

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[63]at p.266D.
[64]at p.268F.
[65]see Howarth *Textbook on Tort* at p.286.
[66]at p.281C.

concurrence of contractual and tortious duties. He stated that *Henderson v. Merrett* has shown that the contractual duty to the partner in contract can coexist with a duty of care in tort to a third party. As regards the relationship between these duties, he contended that the existence and terms of the contract may be relevant in determining what the law of tort may reasonably require of the defendant in all the circumstances'[67].

As mentioned above, the meaning of the doctrine of privity is still somewhat unclear and an attempt should be made to describe possible meanings and find similarities with the judgments in *White v. Jones.*

(1) The first conceivable meaning is that the existence of a contract excludes any independent claim of a third party in tort when the damage-causing conduct constitutes a breach of that contract. This is what is known as the 'privity fallacy' and be been abandoned in English law since *Donoghue v. Stevenson.* It is certainly a strange approach. It means far more than excluding a contract in favour of a third party, a rule that still forms part of the contemporary English law up to a certain, or rather uncertain, grade. This rigid approach, however, to allows exactly the opposite: that is to conclude contracts with the effect of depriving third parties of rights they might have had without the contract - in this case a claim against a perpetrator in tort.

(2) Another restricted view of the privity of contract-doctrine is based on a distinction of the loss that is suffered. If the loss consists of personal injury or physical damage, there is no problem in recovering it in tort provided that the requirements are fullfilled (no matter if the loss is caused by a breach of contract which distinguishes this

[67]at p.294G.

approach from (1)). If the loss against it is economic then recovery in principle is excluded apart from very narrow exceptions under the *Hedley Byrne*-principle. This appears to be the view of Lord Keith. He considered a claim of the disappointed beneficiaries to be ruled out because their claim in tort is for exactly what was owed by the solicitor to the testator in contract[68]. Lord Keith did not say, however, if in such a case a tortious claim remains possible for whatever reason.

(3) A third approach would exclude a tortious claim if such a claim were inconsistent with expressed or implied terms of the contract. This view was adopted in *Tai Hing Ltd. v Liu Chong Hing Bank.*

(4) A further view could be considered to be opposite Lord Keith´s approach that a circumvention of the privity of contract-rule, as understood in (2), is possible when such a circumvention is acceptable because there are reasons justifying it. It seems that Lord Goff has used such an approach in his judgment. He deemed a contractual solution to the disappointed-beneficiary cases as an illegitimate circumvention of the privity of contract-principle[69]. On the other hand he then granted the intended beneficiaries in tort what they would have received if the solicitor had discharged his contractual duties owed to the testator properly. In other words, the beneficiaries receive the same as what would have been the outcome of a contractual claim which he found inadequate due an account of the circumvention argument. Thus, to allow this claim would also mean a circumvention of privity-rule albeit in tort. This is what was complained about by Lord Keith and why he rejected the tortious route. Since Lord Goff allowed the claim, he must have found that the implied circumvention was acceptable in this case. Lord Goff did not give reasons why he thinks a

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[68] cf. at p.251C.
[69] at p.266D.

circumvention in tort is acceptable and he was critisised for this[70]. Lord Mustill´s opinion on this matter did not become clear from his judgment. However, as he did not reject the claim on the same grounds as Lord Keith, on the other hand claiming that no authorities would sustain such a claim and that to open up a new area in tort of negligence could not be justified in this case, it may be concluded that he would allow a circumvention in tort if it was 'acceptable'. He therefore shares Lord Goff´s view on this matter.

(5) A very relaxed view of the privity-rule would be if the tortious claim were only influenced by the contract by defining the content of the claim. In this situation, there is only a tenuous connection between contract and tort claim. Lord Nolan stated in his judgment: the existence and terms of the contract may be relevant in determining what the law of tort may reasonably require of the defendant in all the circumstances'[71]. This may indicate that he supports the portrayed approach but it should be taken into account that his judgment is rather short so this could be overinterpretation.

d) Conclusion

What impact will *White v. Jones* have on the landscape of English law? This is difficult to predict, not only for the more general issues such as economic loss and the privity of contract rule, but for the disappointed beneficiary situation itself, because two out of five judges denied any claim against the will-preparing lawyer. In addition Lord Mustill presented some strong arguments against it in his rather long and thorough judgment. His objections are not only of a conceptual nature but his judgment also raises certain doubts about the policy reasons which hitherto

[70]Howarth *Textbook on Tort* at p.286.
[71]at p.294G.

dominated the discussion on the disappointed-beneficiary situation and clearly seemed to speak for a lawyer´s liability. This will be considered in more detail later on when compared with the German situation. Furthermore the tortious solution adopted in the majority of judgments is based mainly on policy-considerations. The conceptual weaknesses are obvious as being admitted even by the judges approving it by stressing that conceptual issues should not stand in the way of justice. There is a possibility that in future that a contractual solution will be favoured, as is already suggested by many writers[72].

What can be observed is that the result of *Ross v. Caunters* has survived although the claim of disappointed beneficiaries has a new basis now. While Sir Megarry V-C based a claim in tort on *Donoghue v. Stevenson* through the famous but discarded two-step test of Lord Wilberforce from the *Anns*-case, the majority of the House of Lords now opened a category of its own where economic loss is recoverable under the tort of negligence. It did so not by applying the *Hedley Byrne*-principle itself to the disappointed-beneficiary cases but by drawing an analogy to this doctrine.

That this new-founded category will be capable of encompassing other situations than the disappointed-beneficiary situation seems to be unlikely because the judges allowing the claim stressed that they regard their findings as confined to the peculiarities of this special situation. On the other hand, most of the judges show a rather relaxed approach towards the privity of contract-doctrine in the sense that a tortious claim remains possible as long as a circumvention of contract is justified and therefore acceptable. Moreover *White v. Jones* proves again that reliance is not necessarily a prerequisite for recovery of damages when liability is based on *Hedley Byrne*.

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[72]Markesinis *Expanding Tort Law* at p.354; Whittaker *Future Directions* at p.192.

III. German Law

In Germany a case similar to *White v Jones* was decided by the German Supreme Court ('Bundesgerichtshof', BGH) in 1965[73]. The claim of the disappointed beneficiary was allowed but, unlike in England, on a contractual basis. To have a proper understanding of the decision, a brief introduction into the German legal background shall be given first.

1. General situation

Unlike English law German Private Law is statutory. The core of it is the 'Bürgerliches Gesetzbuch' or BGB which came into force on January 1st 1900. Like most of the Continental civil codes it, is strongly influenced by the French 'code civil'. A legal system based on a code naturally has to follow different rules from a common law system. A civil lawyer trying to find out what the law says about a certain matter will first study his code then he will look into the commentaries explaining the provisions and, if his work is thorough, he will pursue the references to court decisions and articles on the issue. Since all the fields such as law of contract, law of tort, family law and law of succession are covered by not more than approximately 2000 paragraphs, those paragraphs have to be rather abstract. Thus a civil lawyer tends to think in more abstract ways, compared whith a common lawyer who notably works with the more concrete court decisions. Due to the described situation, court decisions are less important in a civil law system. It is no problem for courts to overcome former decisions if they deem it apt to adopt a new view. If they

[73] BGH 1965 NJW at p. 1955.

do so, it is not dependent on the route that the legal discourse has taken in the meantime. Thus writers have a strong influence in such a system. Accordingly, the survey of German law with regard to the disappointed-beneficiary cases will put more emphasis on the concepts developed by writers and rather less on the fairly old decision of the BGH.

2. Borderline between contract and delict: Same problem the other way around

As mentioned above, there is some criticism about the tendency in English law to apply tortious solutions to contractual matters in order to circumvent the inconvenient doctrines of the contract law such as the privity-rule and the doctrine of consideration. In Germany it is the other way around. Here one finds that more and more contractual solutions are adopted to issues that are delictual in nature to offset the weaknesses of the law of delict in the BGB[74].

The following issues are apprehended as causing the weaknesses[75]: §831 Bürgerliches Gesetzbuch provides that a master is not held liable for acts of his servant if he has certain excuses. Such excuses are rather easy to achieve and are not available under the law of contracts. The law of contract also provides more favourable rules of evidence for the person suffering loss. Unlike French law[76], there is no general provision for delictual liability. §823 confines liability for unintended harm to certain legally protected rights ('Rechtsgüter') and, moreover, pure economic loss ('Vermögensschaden') is not recoverable under this provision. Those

[74]Lorenz *Anmerkungen zur BGH-Entscheidung* in 1966 JZ at p.143.
[75]Palandt before §823 note 23
[76]For the situation in French law see Whittaker *The French Experiment* at p.327.

losses which are primary economic losses are only recoverable under German law of delict if the tortfeasor has acted intentionally (§ 826).

An attempt is to set off the mentioned weaknesses by contractual means. These include the 'Vertrag mit Schutzwirkung zugunsten Dritter' or 'contract with protective effects *vis-à-vis* third parties'[77], the 'Drittschadensliquidation', the '*culpa in contrahendo*' and the 'positive Forderungs-(or Vertrags-)verletzung'. They provide contractual remedies for persons who suffer losses and come away empty-handed under the fairly rigid German law of delict. In the disappointed-beneficiary situation, the 'contract with protective effects *vis-à-vis* third parties' and the 'Drittschadensliquidation' are of particular interest. They shall be describe in more detail below.

3. 'Vertrag mit Schutzwirkung zugunsten Dritter' or 'contract with protective effects *vis-à-vis* third parties'

In German law, it is possible for the contracting parties to stipulate rights in favour of a third party so that the third party is enabled to demand that the promisor carries out his promise (*stipulatio alteri* or *jus quaesitum tertio*). Such a contract is called 'Vertrag zugunsten Dritter'[78] which may be translated as a 'contract in favour of a third party'. Its rules are set out in §§ 328 Bürgerliches Gesetzbuch[79] (German Civilian Code).

This concept allowed for the development of the institute of the 'contract with protective effects *vis-à-vis* third parties'. In German law there is a distinction between

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[77] translation from Markesinis *German Tort Law* at p.56.
[78] see in general Lorenzen *Die Einbeziehung Dritter in vertragliche Schuldverhältnisse - Grenzen zwischen vertraglicher und deliktischer Haftung* 1960 JZ at p.108.
[79] in the following BGB.

primary or main duties arising from the contract and so-called secondary duties[80]. The primary duties are in a '*do ut des*'-relation to each other. This means that a party agreed to such an obligation - to deliver the goods, for instance - only because the other party agreed to a corresponding obligation such as - if it is a normal sales-contract - to pay the purchase price (this concept seems to resemble the English consideration-concept). Generally speaking, there are two main groups of secondary duties. The first group of duties have a serving function towards the main duties[81]. They shall ensure that the purpose of the contract will be achieved, for example the duties in a sales-contract to deliver the goods at the right time and in the right manner. The other group of secondary duties shall protect the rights of the partners in contract. These rights are largely protected by the law of delict. However, by concluding and performing a contract, the legally protected rights of the contracting parties are exposed in a particular way to the actions of the respective partner. It is the function of the secondary duties to set off these special dangers. It is normally possible to sue for the fulfilment of a secondary duty when the duty is breached. In this case, the claim is not for fulfilment of the duty (as the purpose of the duty is to avoid a breach which cannot be made undone) but sounds in money for recovery of the damages caused by the breach.

In the statutory ruled 'contract in favour of a third party', the third party acquires the right to claim the primary or main duty of the contract, for instance to demand that the seller delivers the goods to him and not to the promisee. On the other hand, in a 'contract with protective effects *vis-à-vis* third parties', the third party has no right to the primary duty of the contract. Thus, in the sales-contract example, he cannot

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[80]Medicus in *Münchner Kommentar zum BGB* before §242 note 24-32.
[81]the distinction was developed by Stoll in *Die Lehre von den Leistungsstörungen*

with protective effects *vis-à-vis* third parties' there is no increase in risks. Whilst in a 'contract with protective effects *vis-à-vis* third parties' the creditor owes a contractual duty of care, not only to his contracting partner, but also to the intended beneficiary of the protective effects. Here there is only one risk for which he will be held liable for and which is transferred. Another characteristic feature of the 'Drittschadensliquidation' is an accidental shift of the loss ('zufällige Schadensverlagerung').

5. The disappointed-beneficiary situation under German law

The various approaches adopted by writers and the BGH of the disappointed-beneficiary issue will be portrayed, as follows:

a) Gerhard Kegel (*Lachende Doppelerben* in Festschrift für Flume [1978] Vol. I at p.545)

Kegel seeks a solution to the problem in the law of succession. His basic idea is to regard the old but valid will as unvalid and replace it with the new but invalid will due to negligence of the will-preparing lawyer. The beneficiaries under the old will therefore only receive what is granted to them under the new will and the intended beneficiaries of the new are treated as if the new but ill-prepared will was valid. The reason for this solution becomes readily recognisable from the title of Kegel´s article: *Lachende Doppelerben* which may be loosely translated as 'happy double heirs'. Kegel argues that the assets of the family as a whole increase if the old will remains valid and the new will is carried out effectively due to the recovery from the negligent lawyer[87]. This he deems as unjustified because in the disappointed-beneficiary cases the true intentions of the testator are known. It is just a question of giving them way instead of carrying out the old will which is known was not to be the will of the testator when he deceased. Technically, *Kegel* achieves the result as follows[88]: he argues that the German law of succession knows of certain situations where an actually valid will will be disregarded. For the above mentioned reasons he then draws an analogy to these cases.

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[87] *Kegel* at p.554.
[88] *Kegel* at p.556

b) Reinhard Zimmermann (*Lachende Doppelerben? - Erbfolge und Schadensersatz bei Anwaltsverschulden* in Familienrechtszeitung 1980 at p.99)

Zimmermann takes a critical view of *Kegels* approach and offers a different solution to the problem. He deems the above described solution as not practicable since there is no room for such an analogy drawn by *Kegel*. Such an analogy is only possible if there is a lacuna in the law. However, there is a positive rule demanding that a valid will must be followed. The statutory exceptions of this rule are very confined and therefore not capable of an analogy[89]. For *Zimmermann,* there is no claim of the disappointed beneficiary at all. The 'contract with protective effects *vis-à-vis* third parties' is ruled out because there is no special relationship beween the testator as the creditor of the contractual obligation and the disappointed beneficiary as the third party[90]. Since there is no accidential shift of loss, the loss could only occur for the intended beneficiary, neither 'Drittschadensliquidation' does help[91]. A delictual solution is impossible because none of the legally protected rights of §823 I BGB is impaired and, moreover, this provision does not compensate for pure economic losses[92]. *Zimmermann* believes the disappointed beneficiary to be in such a weak position lies with the rigid law of succession and because there are certain good reasons for its rigidity, he deems the result to be justified[93].

c) Werner Lorenz (*Anmerkung zu BGH* Juristen Zeitung 1966 at p.143)

In his critique of the BGH-decision *Lorenz* agrees with the court with regard to the result but he did not share the conceptual route that was adopted by the BGH. He proposes offering the beneficiary the status of a party of the contract between testator and solicitor[94]. He justifies his view with the observation that the claim of the disappointed beneficiary is an attempt to gain what was the content of the contract,

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[89] *Zimmermann* at p.101.
[90] *Zimmermann* at p.99.
[91] *Zimmermann* at p.100.
[92] *Zimmermann* at p.99.
[93] *Zimmermann* at p.101.
[94] *Lorenz* at p.144.

not merely damages for the breach of certain secondary duties[95]. Thus the 'contract with protective effects *vis-à-vis* third parties' is the wrong remedy[96].

d) The German Supreme Court - BGH NJW 1965 at p.1955

The facts which underlie the decision of the BGH in 1965 were very similar to the facts in *White v Jones*. A solicitor was asked to draft a will for the testator and for the validity of the will, it was necessary to consult a notary. The solicitor failed to consult such a notary within a reasonable time during which the testator died. The intended beneficiaries of the new will now sued the solicitor for their losses. The plaintiffs succeeded before all courts.

The BGH, as well as the court of appeal, denied a 'Vertrag zugunsten Dritter' ('contract in favour of a third party') like it is provided by § 328 BGB. But while the court of appeal applied the concept of a 'contract with protective effects *vis-à-vis* third parties' in this case, the BGH expressly left open the question of the correctness of this reasoning, which is often overlooked when this decision is referred to[97]. However, it stated that the lawyer, in any case, owed the plaintiff a *contractual* duty of care under the principle of good faith. This is because of the close family-connection between the contractual partner of the lawyer, the testator, and the plaintiff[98]. Furthermore, the lawyer's performance of the contract was especially intended to serve the plaintiff's interests, which was clearly foreseeable for the defendant[99]. The BGH rejected the objection of the defendant that the loss of the plaintiff is merely an expectation, not a damage in a legal sense[100].

6. Conclusion

It is not that easy to judge the situation in Germany since the BGH-decision is more than 30 years old and the issue is no longer in the focus of attention of the legal discourse in Germany. The task becomes even more complicated with the approach

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[95] *Lorenz* loc.cit.
[96] see above at??? it only remedies breaches of secondary duties.
[97] at p.1956. Therefore it is not correct, if Lord Goff contends that the BGH had invoked the 'contract with protective effects *vis-à-vis* third parties' in this case.
[98] at p. 1957.
[99] at loc. cit..
[100] at p. 1958.

of the BGH not to adopt one of the several institutes to remedy the disappointed-beneficiary situation but rather to base the claim on the good-faith principle. The conceptual approach of the court seems to be a bit strange in its decision. Court contended that it must not decide whether the 'contract with protective effects *vis-à-vis* third parties' should be applied to the situation[101]. Instead, it is maintained that there in any case would be a duty of care arising from the good-faith concept. This is strange because this concept is rather unclear and, in the event of it being applied, much effort is usually spent on arguing if and why a claim may be based on it. Furthermore, it is a concept which is applied subsidiary - this means it is only available if other bases for the claim are not applicable. But the court, more or less, merely states that the good-faith principle has to be applied.

Thus, the decision is more or less founded on pure policy-consideration rather than orthodox legal reasoning. However, policy ideas within a society are subject to change during the course of time. This is well illustrated by what Lord Campbell said in *Robertson v. Fleming* in 1861, viz. that to allow a claim against the will-preparing lawyer by the disappointed beneficiary could hardly be the law of any country where jurisprudence has been cultivated as a science.

Whether one of the other theories which were introduced above will ever succeed is subject to speculation. It should be mentioned that the BGH later adopted *Kegel's* thought of the 'happy double heirs'[102] but the case was markedly different from the disappointed-beneficiary situation. In studying the solutions offered to the problem under law, it is conspicious that no one suggested the application of the 'Drittschadensliquidation' although it was sometimes part of the considerations[103]. There are mainly two features in the disappointed-beneficiary cases which prevent a solution under the 'Drittschadensliquidation'. Firstly there is no accidential shift of the loss since the loss could from the outset only occur for the intended beneficiary. Secondly the lawyer has to face an increase in risks. Not only does he has a duty of care towards his client, the testator, but also, if he is held liable to the intended beneficiary, he owes a duty of care to him. Thus the 'Drittschadensliquidation' can

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[101] Lorenz in *Anmerkungen zur BGH-Entscheidung* JZ ?1966? at p.143 calls this 'unbefridigend' (unsatisfactory).
[102] BGH in NJW 1979 at p.2033.
[103] cf. BGH at p.1957; Lorenz at p.144.

not be applied in the concerned cases and does not provide help for the disappointed beneficiary[104].

In this regard, the 'contract with protective effects *vis-à-vis* third parties' is often considered an insecure option because of the conceptual problems involved. There are doubts emerge from the question as is whether there is a special relationship between the creditor of the performance of the contract, the testator, and the third party, that is the disappointed beneficiary. Meanwhile in most of these cases there is a strong personal relationship between them, mostly even a family relation. But this depends on the nature of the draft of a will. From this point of view, an ordinary sales-contract concluded by one member of the family would have protective effects towards the rest of the family, or even to close friends of the buyer, if the other conditions are fulfilled[105]. Another problem is that the clusters of cases where the 'contract with protective effects *vis-à-vis* third parties' were applied, were those where the duty in question was a duty of conduct. This is a secondary duty. But in these cases it is dealt with a primary or main duty, viz. the duty to prepare a proper will, which is not complied with properly or, as in this case, and in *White v Jones*, the duty is not fulfilled within a reasonable time[106]. Furthermore, the institute was, until then, never applied to economic loss[107]. For these reasons, a solution under the institute of 'contracts with protective effects *vis-à-vis* third parties' seems rather inappropriate.

In summary one may say that the situation under German law may be even less clear than in English law. There is hardly any discussion about these cases in Germany, at the moment, but it is to be hoped that when attention is again focused on it in Germany that the discourse may benefit from what is now being said in the course of the *White v. Jones* case in England and the academic reflection about it.

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[104] other opinion is uttered by B.S. Markesinis *An Expanding Tort Law - The Price of a Rigid Contract Law* LQR ?1987? at p.368 where he deems this institute as being most appropriate to the disappointed-beneficiary situation.

[105] This point is raised by Zimmermann at p. 99.

[106] at p. 1957.

[107] at p. 1957.

IV. Comparison

A comparison between the solutions adopted under English and German law are of particular attraction as it should be borne in mind that the supreme courts have presented the same results but with opposite conceptual approaches, as the House of Lords allowed the claim in tort and the BGH against it allowed it in contract.

A further similarity is that both courts found themselves confronted with conceptual difficulties which they could not overcome by convincing legal reasoning but both deemed their solutions to be justified by the equities of the cases. The Majority in the House of Lords wanted to allow the claim in tort but agreed that it could not be achieved simply by bringing the matter under the *Hedley Byrne* -principle, the case which they deemed as a starting point for a solution of the disappointed-beneficiary situation. They then drew an analogy but were confronted with the objection that such an analogy is inappropriate because, in the disappointed-beneficiary situation, there is no 'special relationship' or 'mutuality' at all, a feature which Lord Mustill thinks is essential in the *Hedley Byrne* decision. Finally, the majority of the Law Lords were not concerned by such conceptual problems because they saw their mission in carrying out 'practical justice'[108]or 'simple justice'[109].

The BGH had a similar approach towards the issue. The court disregarded the conceptual problems involved by simply leaving open what construction could bring a result, such as the accomplished, and holding that it is justified by the principle of good faith in any case[110]. Evidently, the court was convinced that clearcut policy considerations speak for the liability of the lawyer.

While the House of Lords took the route in tort, the BGH preferred the contractual way, depending on the peculiarities of the English and German law systems. Because of the rather rigid adherence to the principle of consideration, the privity-doctrin and the no *jus-quaesitum-tertio* rule, there is a tendency in England to seek a solution in law of delict, particularly in the tort of negligence, for cases which would otherwise fall under the law of contract[111]. In Germany it is the exact opposite. In

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[108]Lord Goff at p.259F.
[109]Lord Nolan at p.293D.
[110]BGH NJW 1965 at p.1956.
[111]see B.S. Markesinis *An Expanding Tort Law - The Price of a Rigid Contract Law* LQR ?1991? at p.354.

account of the already mentioned weaknesses in the law of delict, especially that economic loss is not recoverable unless it is caused intentionally, courts and writers prefer to seek solutions rather in contract.

The choice of which law should be applied to the issue is important as this decision is bound to have some important repercussions[112]. Looking at the law of conflicts, a contractual approach would be choice-orientated while a delictual solution would ask for the place (*locus*) of the commission of the tort. With regard to the kind of loss being purely economical contract law would be the natural basis for granting remedy while in tort law this is, in England as well as in Germany, only possible in certain peculiar instances. Furthermore, in both systems, different standards of care apply, especially when adopting a tortious solution to the disappointed-beneficiary situation. The problem would arise in defining the content of a duty of care without falling back on the contract. In contract and delictual law, the limitation periods are also different.

In the following comment is made on what is said about the nature of the disappointed-beneficiary situation, whether it should be deemed contractual or delictual. Lord Mustill, eventually rejecting any kind of liability of the solicitor, admits an instinctive preference for a contractual solution'[113]. This estimation he shares with quite a lot of academic writers in England[114]. On the other hand, *Lorenz* claims that these cases belong to the law of delict and it is only due to the weaknesses of the German law of delict that courts adopt contractual solutions. In JZ 1966 at p.145 he dicusses the 'bemerkenswerte Tendenz des deutschen Rechts verstärkt, Tatbestände, die eigentlich ins Deliktsrecht gehören, in die Vertragshaftung einzubeziehen' (which may be translated as 'the remarkable tendency in German law to bring cases under contractual liability which indeed belong to the law of delict'). This estimation is precisely the opposite of his English colleagues. The suspicion may be aroused that, due to the conceptual problems involved in this case, the lawyers concerned might find a better solution in the field of law which its legal system is just not adopting. They could possibly benefit from experiences in

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[112]for the following see B.S. Markesinis *The German Law of Torts - A Comparative Introduction* at p.306.

[113]at p.282F.

[114]e.g. D. Howarth *Textbook on tort* at p.283; B.S. Markesinis *An Expanding Tort Law - The Price of a Rigid Contract Law* LQR ?1991? at p.354.; S. Whittaker *Privity of Contract and the Tort of Negligence: Future Directions* OJLS ?1996? at p.191.

foreign countries, which might show them that they would fall out of the frying-pan into the fire by applying the other area of law to the cases. The English solution in tort raises problems by bringing it in line with the precedents. The adopted approach, viz. opening up a new category by the means of analogy, is confronted with the objection that it will be difficult to draw up reasonable boundaries for this category[115]. In Germany, on the other hand, the contractual solutions suffer due to the fact, that one has to take a very relaxed approach to the contractual institutes in question to solve the case with them. Whether a tortious or contractual solution is preferrable and if maybe no liability at all should be the answer to the matter shall be surveyed in greater detail below. At the moment it is sufficient to say that the solutions in England as well as in Germany are not really convincing from a conceptual point of view.

[115]see Lord Mustill at p.291C-E.

V. Analysis of the disappointed-beneficiary situation

Comparison of the disappointed-beneficiary situation under English and German law has shown that the solutions adopted by the courts are not satisfactory in conceptual regards in neither of the countries. The structure of the cases will be surveyed to discover why they cause such theoretical difficulties. The aim is to establish if there are similarities in the structure of the disappointed-beneficiary situation and other cases solved respectively by the means of the *Hedley Byrne* -principle in England and the 'contract with protective effects *vis-a-vis* third parties' in Germany.

The problems in these cases are overcome by both supreme courts on the grounds of policy reasons. These policy considerations are examined in a second step, to find out whether the courts are correct in their opinion that justice demands liability of the solicitor towards the disappointed-beneficiary.

1. Sructure of the cases decided on the grounds of the *Hedley Byrne* principle

a) *Hedley Byrne*

Comparing the structure of *White v. Jones* with *Hedley Byrne* was one of the major concerns of the law lords in *White v. Jones* itself. They all agreed that there were strong differences between the situations in both cases which led Lords Keith and Mustill to the conclusion that *Hedley Byrne* cannot be applied at all, while the other Lords drew an analogy.

Firstly, in *Hedley Byrne* there was no contract between the plaintiff and the defendant. In the *White v. Jones* situation there is a contract, albeit not between plaintiff and defendant but between the defendant and the testator. In *Hedley Byrne*, on the other hand, there was at least a contact between plaintiff and defendant and without it there could have been no claim at all. The contact is a *conditio sine qua non* for the loss suffered by the plaintiff. This differs again from the disappointed-beneficiary cases since it might well be that there is no contact at all between the plaintiff and the defendant, although the plaintiff might suffer a loss. Thus the structure of the disappointed-beneficiary cases is very remote from the situation in *Hedley Byrne*.

b) *Spring v. Guardian Assurance*[116]

In this decision, the plaintiff used to work for the defendant in the financial services industry. Following disagreements about his work , he decided to leave and work as an agent for another firm. However; before he could start work, the rules of the body regulating the industry required his old employer, the defendant, to provide a reference to the new employer. The defendant sent such a reference. It was damning and accused the plaintiff of dishonesty. The new employer thereupon refused to allow the plaintiff to start work. But it turned out that the reference was mistaken in its accusation. The plaintiff, at worst, could be accused of having taken on work beyond his degree of experience. At best, he was a competent employee whose employer was at fault in failing to give him proper support and training. In any case he was not dishonest.

In a four to one decision, the House of Lords found that the old employer, the defendant, owed a duty of care to the plaintiff who could then recover the losses he suffered due to the negligent reference. In this case, there was a contact between plaintiff and defendant since the plaintiff was in a working relationship with the defendant. On the other hand, with regard to the act causing the actual harm, viz. the issuing of the negligent written reference, there was no contact between plaintiff and defendant, as this happened only between the old and the new employer. Accordingly, unlike in *Hedley Byrne*, there could not be reliance involved on the plaintiff side. In this regard, the case resembled the *White v. Jones* situation.

c) *Henderson v. Merett*[117]

In *Henderson v. Merett*, the plaintiffs were investors in the Lloyd's insurance market, known as 'names'. They were members of syndicates managed as agents by the defendant underwriters. The plaintiffs were either 'direct names' that is the syndicate to which the names belonged, managed by the members' agents themselves, or 'indirect names' that is the members' agents placed the names with syndicates managed by other agents and entered into agreements with the managing agents of those syndicates delegating their own responsibilities to them. The relationship

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[116]?1994? 3 All ER at p.129.
[117]?1994? 14 PD at p.64.

between names, members´ agents and managing agents was regulated by agreements which gave the agent 'absolute discretion' in respect of underwriting business conducted on behalf of the name but it was accepted that it was an implied term of the agreements that the agents would exercise due care and skill in the exercise of their functions as managing agents. The plaintiffs sued the defendants alleging that the defendants had been negligent in the management of the plaintiffs´syndicates. Because they ran out of time they could not sue for the breach of contract anymore so they had to sue in tort.

The House of Lords found for the plaintiffs and allowed the claim against the underwriters in tort under the *Hedley Byrne* principle. They allowed the claim of the 'direct names' as well as of the 'indirect names'. In case of the former there was a direct, viz. contractual contact between the plaintiff and the defendant unlike in the *Hedley Byrne* situation where there was merely a 'special relationship'. There was no direct contact between the 'indirect names' and the defendants, merely a vicarious contact conveyed by the agents of their syndicates which concluded agreements on behalf of the 'indirect names' with the managing agents. Since they knew of the construction of the business, there was reliance involved on the plaintiffs´ side that the defendants would act with reasonable care.

d) Conclusion

In examining the cases above it has become obvious that the situation in *White v. Jones* is different from *Hedley Byrne* and other cases decided under the established principle. Unlike in *Hedley Byrne*, there is no necessary contact between the plaintiff and the defendant in *White v. Jones* and neither is reliance. In *Henderson v. Merett* there is at least a vicarious contact in the case of the 'indirect names' established by the managing agents by acting on the plaintiffs´ behalf. *Spring v. Guardian Assurance* is closer to the disappointed-beneficiary situation as there is no contact between the plaintiff and defendant in the moment that the loss-causing act is committed. Furthermore, there is no reliance on the plaintiff´s side. On the other hand, the defendant in *Spring v. Guardian Assurance* is acting to discharge a duty emerging from the rules of the body that regulates the industry, while in *White v. Jones* the defendant acts to fulfil his obligations from a contract to a third party.

At this stage, it may be stated that the situation in *White v. Jones* considerably differs from other *Hedley Byrne* cases and this alone necessitates a special justification why liability should arise here. However, there is another point which makes the disappointed-beneficiary situation unique and which is, in my view, crucial for an evaluation of the disappointed-beneficiary cases. It stems from what has already been said by Lord Mustill and Zimmermann when they contended that the real reason for the loss of the disappointed-beneficiary lies in the law of succession and not in the lawyer's negligence[118]. Indeed, on expection of the causal chain there is a fundamental difference in the disappointed-beneficiary situation. In *Hedley Byrne*, the bank gives a negligent statement, the plaintiff relies on it and there is the loss. In *Spring v. Guardian Assurance,* there is the negligent reference issued; the third party (new employer) relies on it and the loss occurs. When the agents in *Henderson v. Merett* conclude negligently risky insurance contracts then, after the event of damage, the loss of the plaintiffs occurs. In *White v. Jones*, against it, when the lawyer fails to draft a proper will, or he fails to do so within a reasonable time, and the testator dies the loss also occurs. But unlike the other cited cases, this is only because of the certain rules of succession which favour, under both English and German law, a older but valid will instead of a newer but invalid will. It is easy to conceive a law of succession which would give the intended beneficiary of a newer, but for formal reasons, invalid will, the opportunity to prove the real intentions of the testator when he died, and then to overrule the valid will no longer complying with the testators intentions. Under such a less rigid succession-law, the negligent act of the will-preparing lawyer would not cause such a loss which it is now claimed for in the disappointed-beneficiary cases. He would just be liable for the inconvenience such a complicated way of inheriting would cause.

This normative element in the chain of causation is not contained in the other mentioned *Hedley Byrne* cases. It makes *White v. Jones* special and poses some serious questions. There is the often uttered objection that to hold the lawyer liable to the disappointed beneficiary means circumventing the rules of the law of succession which favours of the beneficiary of the older but valid will. Furthermore, it is responsible for the odd result that, from an economical point of view, the estate of

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[118]Mustill at p.278D and Zimmermann in *Lachende Doppelerben? - Erbfolge und Schadensersatz bei Anwaltsverschulden* at p.101.

the testator has increased, dependent on the case, it may be even doubled in size. Furthermore, In the chain of causation, the effect of the law of succession is closer to the loss than the negligent act of the lawyer. As long as the testator is still alive, the mistake of the lawyer can still be amended. Then the lawyer´s negligence would not lead to a loss of the intended beneficiary at all. This indeed suggests that it is the law of succession rather than the lawyer´s negligence which causes the loss.
What becomes clear, in my opinion, is that there are peculiarities inherent in the disappointed-beneficiary cases which make them a category of their own. Whether there is justification for liability of the lawyer in this field shall be surveyed when I am dealing with the policy reasons.

2. Structure of cases decided under the institute of 'contracts with protective effects *vis-a-vis* third parties'

In Germany, the most common solution which favours the disappointed beneficiary adopts the institute of 'contracts with protective effects *vis-a-vis* third parties'. The BGH has expressly left open the question of whether the institute might be applied, but its judgment shows some sympathy for this approach. In the following a few cases will be introduced where the institute of 'contracts with protective effects *vis-a-vis* third parties' is applied. The structure of the cases will then be compared with the disappointed-beneficiary cases to find out the extent of differences and similarities.

In BGH NJW 1978 at p.2502 the police of a town had concluded a contract with a company about towing illegally parked cars. By towing such a car the company´s employees negligently damaged the vehicle. The BGH allowed a claim under the institute of 'contracts with protective effects *vis-a-vis* third parties'.
BGH NJW 1976 at p.712 dealt with a mother entering a supermarket for a purchase. She was accompanyed by her child. The child then slipped on a lettuce leaf which was lying on the ground and was hurt. The BGH allowed the claim of the child against the supermarket on the grounds of a 'contracts with protective effects *vis-a-vis* third parties'.
The facts of BGH NJW 1982 at p.2431 were pretty complicated. For the purposes of this survey, they are simplified to an appropriate level. The consul of a foreign

country approached a professional expert on real estate and asked for an evaluation of certain premises. The expert negligently gave a misstatement. A bank of the consul's state of origin relied on that, gave a loan for a project concerning the mentioned premises and consequently suffered a loss. The BGH held that a contract was concluded between the consul and the expert and that this contract had 'protective effects *vis-a-vis* third parties'. He deemed the foreign bank to be a third party which was under the protective umbrella of this contract.

Examining these cases, the same phenomenon can be discerned as described above. In none of the cases is a normative effect in the chain of causation involved as in the disappointed-beneficiary cases were the law of succession has a part to play. A further observation shows that the disappointed-beneficiary case is the only one were the loss is a mere expectation. In the towing company's case, the third party suffered physical loss; the child in the other case suffered personal injury and the bank in the last case lost parts of the loan it had approved. Again, as in the English situation, it becomes pretty obvious that the disappointed-beneficiary cases do not really fit in the category of other cases decided under the principles.

3. The policy reasons involved

It has now become apparent that there are some serious problems under both English law and German law which impair a conceptual sound solution in favour of the disappointed beneficiary. In spite of this, the supreme courts in both countries have decided to hold the will-preparing lawyer liable towards the disappointed beneficiary. They did so because of the policy reasons or 'the reasons of justice[119]' involved. Since these deliberations are the decisive factor, the validity of the policy reasons in the case shall be scrutinised as follows:

a) The one-has-no-claim-one-has-no-loss issue

One argument often heard in the disappointed-beneficiary issue is that the only person who could have a valid claim (the testator) has suffered no loss, and the only

[119]Lord Goff at p.259G.

person who has suffered a loss (the disappointed beneficiary) has no claim. From this it is concluded that there is a lacuna in the law[120].

There are two objections to this argument. The first is that it is rather a description than a statement containing any material justice consideration. This is because one is dealing here with pure economic loss and as far as pure economic loss is concerned, there is always the question of wether such a loss should have a legal relief. This is because there are many acts which cause an economic loss to another one, but the act itself is based on a maxim which is socially acknowledged. This applies, in particular, to a society which is based on free-market principles, where there are numerous actions which cause economic loss to competitors, but which are necessary to keep things going in a free market. The question, therefore, is not, whether an act (or omission or statement) causes economic loss, but to determine if it is carried out in a socially inadequate way. According to that, it is not the point to determine if there is economic loss. On a second step it has to be asked whether the person suffering the loss should be protected against it by the law. In this case, of course, it may easily be stated that the lawyer acted inadequately socially, because he negligently breached his contractual obligations. But again there is the already mentioned consideration that contained in the chain of causation is the effect of the law of succession. This makes it rather doubtful that the loss suffered can be traced back to the lawyer´s negligence in a way that sufficiently satisfies the rules of the tort of negligence. The one-has-no-claim-one-has-no-loss argument contributes nothing to this question. It is merely a description. A prerequesite for its application is to decide whether the suffered loss shall be recoverable. Since this is the question, the argument is of no value and is rather apt to disguise the real issue.

The second objection is that the notion is normally used in so-called 'transferred loss' situations or in German law in context of the 'Drittschadensliquidation'. It applies to cases where the damage is shifted 'fortuitously', which means that there must be a 'legal relationship' between the creditor and the harmed third party. Due to this, the damage shifts to the party that does not have its own contractual claim against the initial debtor[121]. The shift is not due to extraneous circumstances but to

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[120]see Lord Goff at p.259H; Sir Donald Nicholls V.-C. (Court of Appeal) at p.220G; D. Howarth *Textbook on Tort* at p.284; B.S. Markesinis *An Expanding Tort Law - The Price of a Rigid Contract Law* LQR ?1987? at p.368.

[121]Palandt before §249 note 112.

legal provisions that separate bearing the risk and ownership of a thing from each other. From this situation, it follows that the loss which is shifting remains the same as if it would have been when it were suffered by the contractual partner when there would not have been the mentioned separation. However, in the disappointed-beneficiary situation, the loss that is suffered is completely different from what the testator, as the partner in contract of the will-preparing lawyer, could have suffered. Furhtermore, the shift of the loss is by no means fortuitous. The claim of the disappointed beneficiary is different from any claim the testator ever could have against the lawyer. Thus, the notion of one-has-no-claim-one-has-no-loss is completely misleading because the claim of the one person in this situation is for inconvenience suffered from the negligent preparation of the will. The loss the other person has suffered is in not achieving the intended benefits under the new ill-prepared will. There is no relation between the claim and the loss.

For these reasons, the one-has-no-claim-one-has-no-loss argument has carries no weight in the disappointed-beneficiary situation. Therefore, It can be disregarded.

b) Scot-free argument

Another important argument involved is that the negligent lawyer should not go scot-free and that it is fair, just and reasonable to impose liability on him[122].

Lord Mustill has replied to this in a forceful manner[123]. He admitted that it might be unfair if the solictor goes scot-free although he has failed to do his job properly. Meanwhile, this is not a question of the law of torts but of the rules of his profession and the rigour with which they are enforced. He states that the purpose of the courts when recognising tortious acts and their conseqences, is to compensate those plaintiffs who suffer actionable breaches of duty, and not to act as second-line disciplinary tribunals imposing punishment in the shape of damages'[124]. What is evident is that the validity of this objection depends on whether the law of delict has

[122]see the majority judgments of Lord Goff at p.260E; Lord Browne-Wilkinson at p.276A; Lord Nolan at p.293D.
[123]at p.278C.
[124]278C.

a punishment function or not, and this is not quite clear[125]. But at least it may be stated that the prime aim of tort law is compensation, not punishment.

c) No recovery for the 'poor' disappointed-beneficiary

There is another equity-consideration underlying the approach to a decision in favour of the disappointed beneficiary and that there must be something wrong with the law if the plaintiff is not relieved by an award of money.

Again it is considered that the loss suffered by the disappointed beneficiary is actually a result of the rigid rules of the law of succession[126]. It is argued that, without the rigid succession-law, there would be no difficulty to correct the failure of the lawyer by just acknowledging the new, albeit improperly-drafted, will, at least in cases where the validity of the new will can be proved beyond any reasonable doubt. That would be in compliance with the real dispositions of the testator, the intended beneficiary would be happy and there would be no question of the liability of the lawyer[127]. However, the law of succession decides otherwise under both English and German law and strictly acknowleges only the last wishes contained in a valid will complying with the formal rules. There are good reasons for this. Legal certainty speaks for it and that is even more convincing in a sensitive matter such as dealing with the last will of a deceased person, who cannot be personally asked anymore about his real intentions[128]. Moreover, the formal rules ensure that the testator is acting with appropriate seriousness and does not abuse the will as an instrument to tame disobedient relatives, or, if he does so, he has to do so in compliance with the strict formal rules of the law of succession, which are likely to make him think twice[129].

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[125]see R.W.M. Dias & B.S. Markesinis *Tort Law* at p.15ff., W.V.H. Rogers *Winfield & Jolowicz on Tort* at p.1f., D. Howarth *Textbook on Tort* at p.6ff., K.M. Stanton *The Modern Law of Tort* at p.11ff..

[126]Lord Mustill at p.278D; R. Zimmermann *Lachende Doppelerben? - Erbfolge und Schadensersatz bei Anwaltsverschulden* at p.100f., G. Kegel *Die Lachenden Doppelerben: Erbfolge beim Versagen von Urkundspersonen* at p.554.

[127] Notwithstanding possible contractual claims from the estate concerning the poor performance of the lawyer of his duties out of the contract with the testator.

[128]R. Zimmermann *Lachende Doppelerben? - Erbfolge und Schadensersatz bei Anwaltsverschulden* at p.101.

[129]R. Zimmermann ibid. The seriousness, for example, might be doubted in the *White v Jones* case where the testator first quarelled with his daughters and disinherited them and then decided otherwise when they were reconciled. Of course the testator is free to do with his assets as he pleases, but the strict formal rules of the law of succession shall provide that he will consider his decisions thoroughly.

It must be admitted that this counter-argument described above is convincing, on the other hand, it is based on a premise which is not that sure. Basically, it explains why the beneficiary under the old will receives benefits and not the intended beneficiary under the invalid new will. It does not explain why the will-preparing lawyer should not be liable in tort to the disappointed-beneficiary. For this, it would be necessary to assume that if there is an assessment taken by one field of law (here the law of succession) then it should not be circumvented by another field of law (here the law of torts). However, this premise is by no means accepted unanimously. There are cases where a claim in tort is denied because it would have circumvented another law-field's result as in *The Aliakman 1986 AC at p.785, Jones v. Department of Employment 1989 QB 1* or *Corbett v. Burge, Warren and Ridgley 1932 48 TLR 626* [130]. On the other hand, such circumvention was recently accepted in *Spring v. Guardian Assurance* where a tort claim was allowed, although the plaintiff could not succeed under the claim of defamation.

From my point of view a circumvention should only be prohibited if the aim of the other field of law is to protect the defendant. In this case, the rigid rules of the law of succession do not include protecting a negligent will-preparing lawyer. Therefore, in my view, the circumvention argument is not effective in this case.

Nevertheless, the assumption that the disappointed beneficiary should receive some relief in the form of money is not an argument but a result which needs to be justified by legal reasoning.

d) Some other arguments

Some other arguments are briefly described below. Lord Goff mentioned the importance of legacies for people[131]. This argument is surely not of crucial importance but it may have some supportive effect when a solution in favour of the disappointed beneficiary is presented. Another objection is the unlimited claims argument[132]. This is no problem provided one does not look at the persons involved but at the point that there is only one estate involved with what the will-preparing lawyer deals with. His liability is confined to the content of it and therefore there is no problem of unlimited claims.

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[130] see D. Howarth *Textbook on Tort* at p.287.
[131] at p.260B-D.
[132] Lord Goff deals with it at p.269E.

VI. Conclusion

After this close look at the disappointed-beneficiary cases what is the solution? Well, first, it should be stated that to hold the lawyer liable in this situation causes some considerable conceptual problems under English as well as German law. In fact no satisfactory solution has yet been presented. In Germany two of the three academic writers which were referred to above denied a claim of the disappointed beneficiary against the lawyer and all three agree that the BGH-solution is not based on orthodox legal reasoning. The conceptual approach of the majority judges in *White v. Jones,* not the result, was also subject to some critisism.

Basically, as a solution for the disappointed-beneficiary situation, three approaches were suggested. One is to allow the claim against the lawyer, either in tort or in contract, as it is done by the English and German supreme courts respectively. Another way favours the invalid but new will, instead of the old one. There is then no disappointed beneficiary anymore and therefore no claim against the lawyer. The third way is to hold on to the status quo and not allowing a claim of the disappointed beneficiary.

The problem with the first way of allowing a claim against the lawyer is that there is, as mentioned before, no convincing concept of how to do so. Considering this, at least clear-cut reasons of justice should demand such a result. It could be hoped then that one is dealing with a case where the perception of justice has taken place faster than the understanding of it, and that a reasonable concept based on, as Lord Goff puts it, 'orthodox legal reasoning' will be developed later. However, Lord Mustill, in my view, successfully destroyed the impression that there are such clear-cut policy-reasons. I think what is fair in this case is still subject to discourse.

The second way which develops a solution out of the law of succession instead of a tort law solution is the way which appeals to me mostly. This is because it is complies with the testator´s last wishes and would create a solution where the lawyer´s negligence were effectively removed. On the other hand, as Reinhard Zimmermann has shown, such a solution lies in the hand of parliament which has to change the law but it is not possible for the courts to overcome the expressed will of the legislative assembly.

For these reasons I would follow Lord Mustill and those who deny liability of the lawyer because this is, notwithstanding further developments in the English or German law, the only acceptable result from a conceptual point of view. Compliance with the acknowledged concepts of law, in my view, bears some justice in itself, provided that the concept is just. There should not be liability in the disappointed-beneficiary cases.

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