

# Wills: Liability of Attorney to an Intended Beneficiary for Negligent Drafting of a Will

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became law subsequent to the commencement of the *Branch case*. Under this law the conservation commission is permitted to make certain state aid available to counties and towns upon their passing a resolution indicating their desire to acquire and improve lands for public access to navigable lakes or streams in their county or town. The commission must find that the project will best serve the public interest and the need of the state as a whole.<sup>18</sup> There are, however, limitations in that cities are not eligible for this aid, nor may a county or town receive aid to improve existing accesses which they already own.

Through this decision construing Section 23.09(14) and in view of more recent Section 23.09(15), it appears that Wisconsin has wholeheartedly adopted a policy of promoting public access to navigable waters. The condemnation power and the offer of financial assistance under certain circumstances may instill a desire in county boards to develop public accesses and recreational facilities in their respective areas. On the other hand the riparian landowner seems to be fighting a losing battle in view of the manifested state policy. His defenses appear limited to situations where the taking of land is pursuant to the arbitrary action of the condemning authority.

Perhaps the most significant point of this decision concerns the subject of damages. The benefit which the landowner receives in excluding the public by virtue of his ownership of land surrounding the lake will not be considered by the court as a property right. Thus, such personal benefit will not enter into a "before the taking" valuation and cannot be compensated for as an element of damages.<sup>19</sup>

JERRY D. GULL

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**Wills—Liability of Attorney to an Intended Beneficiary for Negligent Drafting of a Will:** Robert Lucas alleged in his complaint that defendant L. S. Hamm, an attorney at law, had agreed with testator, Eugene Emmich, to prepare a will and codicils for him by which plaintiffs were to be beneficiaries of a trust provided for in the will and to receive 15% of the residue. The instruments provided that the "trust shall cease and terminate at 12 o'clock on a day five years after the date upon which the order distributing the trust property to the trustee is made by the court having jurisdiction over the probate of this will." The defendant attorney, who was also counsel for the executors, advised plaintiffs, after the death of testator and admission of the will to probate, that the trust provision was invalid and advised plaintiffs to make a settlement with the blood relatives of the testator. Plaintiffs allege that the attorney's negligent drafting, which violated the statu-

<sup>18</sup> 49 A.G. 141-142.

<sup>19</sup> *Branch v. Oconto County*, *supra* note 1, at 602, 109 N.W. 2d at 109.

tory laws relating to restraints on alienation and the rule against perpetuities,<sup>1</sup> resulted in a loss of \$75,000 to them. Defendant attorney's demurrer was sustained and appeal was taken. The Supreme Court of California upheld the trial court's decision, *Lucas v. Hamm*, 15 Cal. Rptr. 821, 364 P. 2d 685 (1961), but stated that an attorney could be liable in both tort and contract to an intended beneficiary who did not receive the benefit because of the attorney's negligent drafting of the will.

The Court expressly overruled *Buckley v. Gray*.<sup>2</sup> The *Lucas* case held, however, that under the facts the attorney did not breach the standard of conduct requiring the skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly exercise,<sup>3</sup> since the area of rules against perpetuities is a "technicality-ridden legal nightmare."<sup>4</sup> The invalidity of the provision of the will might occur because of the remote possibility that the order of distribution of the probate court would be delayed to a period exceeding that provided for by the rules against perpetuities; but the Supreme Court decided that as a matter of law the attorney had not breached the standard of conduct, because an attorney of ordinary skill acting under the same circumstances might well have failed to recognize the danger.<sup>5</sup>

Prior to the *Lucas* decision, the almost universally accepted view was that some form of privity was necessary for an attorney's liability to a third person (not his client) for mere negligence rather than fraud, collusion, malicious or intentionally tortious conduct.<sup>6</sup> The basic reason for refusal to extend liability appears to be that "There would be no bounds to actions and litigious intricacies if the ill effects of the negligence of men may be followed down the chain of results to the final effect."<sup>7</sup> To extend an attorney's liability to persons not in privity "would make the practice of law one of such financial hazard that few men would care to incur the risk of its practice."<sup>8</sup> The "good faith" of the attorney's actions is a criterion which outweighs the financial loss to a third person not a client.<sup>9</sup> The courts have generally held that no duty is owed by an attorney to act with reasonable care, skill, and diligence toward anyone except his client.<sup>10</sup>

<sup>1</sup> Cal Civil Code §715.2 and former §§715.1 and 716.

<sup>2</sup> 110 Cal. 339, 42 Pac. 900 (1895).

<sup>3</sup> *Lucas v. Hamm*, 15 Cal. Rptr. 821, 364 P. 2d 685 (1961).

<sup>4</sup> *Id.*, at 690, citing Leach, *Perpetuities Legislation*, 67 HARV. L. REV. 1349 (1954).

<sup>5</sup> *Supra* note 3, 364 P. 2d at 690.

<sup>6</sup> 5 AM. JUR. *Attorneys at Law* §147 (1936); 7 C.J.S. *Attorney and Client* §52 (1937).

<sup>7</sup> *National Saving Bank v. Ward*, 100 U.S. 195, 202 (1880).

<sup>8</sup> *Rose v. Davis*, 288 Ky. 674, 157 S.W. 2d 284, 285 (1941).

<sup>9</sup> *Kasen v. Morrell*, 18 Misc. 2d 158, 183 N.Y.S. 2d 928 (Sup. Ct. 1959).

<sup>10</sup> So implanted is the concept of privity as a requirement for an attorney's liability that one court found, through strained interpretation, that the disappointed beneficiary under a negligently drawn will was actually the client of

*Lucas v. Hamm* is a breakthrough in the solid "citadel of privity" concept of attorney's liability for negligence. However, its result is not too startling in view of the law's growing relaxation of a demand for privity between an alleged tortfeasor and the injured party. Liability has been imposed on manufacturers whose goods if negligently made are reasonably certain to place life and limb in peril.<sup>11</sup> This has been extended to liability for damage to tangible property,<sup>12</sup> as well as where the only risk of harm has been to an intangible interest.<sup>13</sup> The California Supreme Court in *Biankanja v. Irving*<sup>14</sup> placed liability upon a notary public to an intended beneficiary, where the notary public's negligence consisted in a failure to have the will properly attested. This decision was not based on the notary's unlicensed practice of law, as the court reiterated in the *Lucas* case the negligence factors that had been approved in *Biankanja v. Irving*.<sup>15</sup>

The court in the *Lucas* case held that an intended beneficiary of a negligently drawn will could also recover as a third-party beneficiary since the intent of the promisee (testator) was to benefit the persons named in the will.<sup>16</sup> Sixty-six years before, the California Court said in *Buckley v. Gray* that the contract with the attorney was merely one of employment and the promisee's intent was merely to make disposition of her estate in accordance with her desire. Third persons were only incidentally or remotely benefited.<sup>17</sup> Has the testator's intention, in approximately a half century, become more benevolent? Perhaps, the California Court has finally recognized the real reason why a person employs an attorney to draw a will—to confer benefit upon some third person at testator's death. The underlying policy now appears to be that justice demands that the negligent attorney should bear the loss, rather than the innocent beneficiary. Former fears of a flood of litigation and the burden upon the profession are disregarded.

If a suit of this type is brought on a theory of contract rather than

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the scrivener. *Schirmer v. Nethercutt*, 157 Wash. 172, 288 Pac. 265 (1930); *Ward v. Arnold*, 52 Wash. 2d 581, 328 P. 2d 164 (1958).

<sup>11</sup> *Mac Pherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916).

<sup>12</sup> *Cohan v. Associated Fur Farm*, 261 Wis. 584, 53 N.W. 2d 788 (1952).

<sup>13</sup> *Glanzer v. Shepard* 223 N.Y. 236, 135 N.E. 275 (1922). But, liability to third persons not in privity for negligence has not generally been extended where the third person is not specifically known or identified. *Ultramares Corporation v. Touche*, 255 N.Y. 170, 174 N.E. 441 (1931).

<sup>14</sup> 49 Cal. 2d 647, 320 P. 2d 16 (1958).

<sup>15</sup> In restating the rule it was said that the determination whether in a specific case the defendant will be held liable to a third person not in privity is a matter of policy and involves the balancing of various factors, among which are the extent to which the transaction was intended to affect the plaintiff, the foreseeability of harm to him, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between defendant's conduct and the injury and the policy of preventing future harm, *Lucas v. Hamm*, *supra* note 3, 364 P. 2d at 687.

<sup>16</sup> *Lucas v. Hamm*, *supra* note 3, 364 P. 2d at 689.

<sup>17</sup> *Buckley v. Gray*, 110 Cal. 339, 42 Pac. 900, 902 (1895).

tort, the damages recoverable may not be the same and a different statute of limitations may apply.<sup>18</sup> Third-party beneficiary contract actions are usually based on strict liability rather than a negligence standard for performance. However, in the present type of situation the attorney only "impliedly agrees to use such skill, prudence, and diligence as lawyers of ordinary skill and capacity commonly possess and exercise in the performance of the tasks which they undertake."<sup>19</sup> The beneficiary's position under the contract is not any better than that of the promisee.

A problem arises when the question is asked whether Wisconsin would adopt the third-party beneficiary theory of recovery. The general view is that the *promisee's* intent to benefit the third person is necessary, and that the *promisor's* intent (which is usually to get the promisee's consideration) is immaterial.<sup>20</sup> This is also the position of *Vrooman v. Turner*,<sup>21</sup> which the Wisconsin court purportedly relies on in *Rowe v. Moon*.<sup>22</sup> The court, however, substitutes the *promisor's* intent for that of the *promisee's* as controlling, as well as declaring that some privity must exist between the *promisor* and the third party, whereas the *Vrooman* decision required privity between the *promisee* and the third party.<sup>23</sup> The Wisconsin Court would probably have to clarify<sup>24</sup> or disapprove the language in the *Rowe* case before giving an intended beneficiary a third-party beneficiary claim against an attorney as promisor, since it could hardly be said that the scrivener intended to confer a benefit upon the intended beneficiary.<sup>25</sup>

The possibility of tort liability for an attorney in Wisconsin would seemingly be contra to the decision of *Peterson v. Gales*.<sup>26</sup> A beneficiary of a will, however, is known to the attorney who prepares the instrument, in contrast to the *Peterson* case where the abstract company did

<sup>18</sup> The Statute of Limitations for a contract action is usually for a greater period than that for a tort action (generally 6 years as opposed to 3 years) 49 A.L.R. 2d 1216 (1956).

<sup>19</sup> *Supra* note 17. *Accord*, Wade, *The Attorney's Liability for Negligence*, 12 VAND. L. REV. 755 (1959); 5 AM. JUR. *Attorneys at Law* §124 (1936); Wlodarek v. Thrift, 178 Md. 453, 13 A. 2d 774 (1940).

<sup>20</sup> RESTATEMENT, CONTRACTS §133, 1(a) and 1 (b) (1932); 4 CORBIN, CONTRACTS §776 (1951); 2 WILLISTON, CONTRACTS §357 (3rd ed. 1959).

<sup>21</sup> 69 N.Y. 280, 25 Am. Rep. 195 (1877).

<sup>22</sup> 115 Wis. 566, 92 N.W. 263 (1902). (This case has never been cited in any subsequent decision.)

<sup>23</sup> The privity requirement was probably answered in *Tweedale v. Tweedale*, 116 Wis. 517, 93 N.W. 440 (1903) in which privity was established by law and which gave a donee beneficiary a "vested right" before acquiring knowledge of the contract.

<sup>24</sup> This could be done by viewing the promisor's intent as objectively intending the natural and probable consequences of the promised act, rather than the promisor's subjective intent.

<sup>25</sup> The California Court did this in *Lucas v. Hamm*, 15 Cal. Rptr. 821, 364, P. 2d 685 at 689 (1961).

<sup>26</sup> 191 Wis. 137, 210 N.W. 407 (1926), wherein an abstract company which prepared an abstract for the grantor was not liable to the grantee for failure to disclose a restrictive covenant, because of the absence of privity of contract.

know the grantee. The attorney's standard of conduct would probably also require clarification, since in *Malone v. Gerth*, an action by a client against his attorney, a somewhat variable test was proposed:

If an attorney is fairly capacitated to discharge the duties ordinarily incumbent upon one of his profession, and acts with a proper degree of attention and with reasonable care, and *to the best of his skill and knowledge*, he will not be responsible. [Emphasis added]<sup>27</sup>

Once a court removes the requirement of privity for tort liability or adopts a liberal view of third-party beneficiary doctrine, only the case by case method of determining the limits of liability for attorneys, and other professions, will allow one to state the law with any amount of certainty. Lawyers may protest this increased imposition of liability, attorney liability insurance may increase both in rates and coverage, but the possible value to the profession, if attorneys are aware of this greater liability, is an advantage to the profession which should not be quickly dismissed.

At present it would be too speculative to predict whether the California attorney 1.) will exercise a greater degree of care or 2.) show restraint in adopting new methods<sup>28</sup> or 3.) continue to practice in the same manner as he did prior to *Lucas v. Hamm*.

ALLAN E. IDING

**Wills—Pouring Over into Testamentary Trust of Another:** A mother and her son planned and drafted together her last will dated May 2, 1946, and his will dated May 3, 1946. The draft of the latter will was in existence on the date the former will was executed. According to a trust provision in the mother's will, one-half of the trust assets were left "to my son's trust estate, which is willed to charities including those of my choosing."<sup>1</sup> She died testate on November 19, 1947. The son later revoked his will and made a subsequent will dated February 14, 1958, which omitted all charities. He died testate on January 4, 1959. On September 11, 1959, the executors of the son's will filed a petition to construe the final judgement in the mother's estate for the purpose of determining whether any assets in the mother's estate should be inventoried in the son's estate. *Held*: the will by which testatrix made a be-

<sup>27</sup> 100 Wis. 166, 75 N.W. 972 (1898). This statement of the standard of care has been interpreted, however, as merely requiring ordinary skill and care as commonly possessed and exercised by attorneys in that jurisdiction. 45 A.L.R. 2d 12 (1956).

<sup>28</sup> It has been asserted that California physicians and surgeons have resorted to the use of expensive precautions unnecessary for treatment but rather as a legal precaution, have refrained from the use of new drugs, and have been reluctant to employ novel techniques because of the impact of malpractice litigation and high jury awards in that state. *The California Malpractice Controversy*, 9 STAN. L. REV. 731 (1956).

<sup>1</sup> Estate of Brandenburg, 13 Wis. 2d 217, 222, 108 N.W. 2d 374, 376 (1961).