as he must pay the full price despite the fact that the goods were lost or destroyed. The buyer has no remedy against the carrier, either in contract as he is not a party to the contract of carriage, or in tort as title to the goods was in the seller at the time when the loss or damage occurred. In this situation German courts have held, first, that the seller has a contractual claim against the carrier for the loss suffered by the buyer, and, secondly, that there is an express or implied assignment under which the seller has assigned his claim for damages to the buyer so that the latter, as the real party in interest, has a right to sue of his own.[69] See also Lord Goff's discussion of *Drittschadensliquidation* in the following case. In French law, as we can see from the *The Carrefour takings* case,[70] *Drittschadensliquidation* is considered as a form of *stipulation pour autrui* and treated as such.

House of Lords **26.27 (E)**

White v Jones[71]

A solicitor who is employed by a testator to draw up a new will leaving property to the plaintiff but who negligently fails to prepare the will before the testator dies will be liable to the disappointed beneficiary.

Facts: The testator had been reconciled with his daughters and instructed a solicitor, Mr Jones, to draw up a new will, leaving £9,000 to each daughter, to replace an earlier will which left them nothing. The solicitor failed to prepare the will before the testator died.

Held: The first instance court dismissed the plaintiffs' action on the ground that the solicitor owed them no duty of care. This decision was reversed by the Court of Appeal. By a majority the House of Lords dismissed the solicitor's appeal.

Judgment: Lord Keith of Kinkel (dissenting): . . . . The contractual duty which Mr Jones owed to the testator was to secure that his testamentary intention was put into effective legal form promptly. The plaintiffs' case is that precisely the same duty was owed to them by Mr Jones in tort. If the intended effect of the contract between Mr Jones and the testator had been that an immediate benefit, provided by Mr Jones, should be conferred on the plaintiffs, and by reason of Mr Jones's deliberate act or his negligence the plaintiffs had failed to obtain the benefit, the plaintiffs would have had no cause of action against Mr Jones for breach of contract, because English law does not admit of jus quaesitum tertio. Nor would they have had any cause of action against him in tort, for the law would not, I think, allow the rule against jus quaesitum tertio to be circumvented in that way. To admit the plaintiffs' claim in the present case would in substance, in my opinion, be to give them the benefit of a contract to which they were not parties. . . .

Lord Goff of Chieveley: My Lords, in this appeal, your Lordships' House has to consider for the first time the much discussed question whether an intended beneficiary under a will is entitled to recover damages from the testator's solicitors by reason of whose negligence the testator's intention to benefit him under the will has failed to be carried into effect. In *Ross v Caunters* [1980] Ch 297, a case in which

[69] BGH 29 January 1968, BGHZ 49, 356, 360.
[70] See above, p 1187.
[71] [1995] 2 AC 207.

the will failed because, through the negligence of the testator's solicitors, the will was not duly attested, Sir Robert Megarry V.-C. held that the disappointed beneficiary under the ineffective will was entitled to recover damages from the solicitors in negligence. In the present case, the testator's solicitors negligently delayed the preparation of a fresh will in place of a previous will which the testator had decided to revoke, and the testator died before the new will was prepared. The plaintiffs were the two daughters of the testator who would have benefited under the fresh will but received nothing under the previous will which, by reason of the solicitor's delay, remained unrevoked. It was held by the Court of Appeal, reversing the decision of Turner J, that the plaintiffs were entitled to recover damages from the solicitors in negligence. The question which your Lordships have to decide is whether, in cases such as these, the solicitors are liable to the intended beneficiaries who, as a result of their negligence, have failed to receive the benefit which the testator intended they should receive. . . .

. . . it has been recognised on all hands that *Ross v Caunters* [1980] Ch 297 raises difficulties of a conceptual nature, and that as a result it is not altogether easy to accommodate the decision within the ordinary principles of our law of obligations. . . .

It is right however that I should immediately summarise these conceptual difficulties. They are as follows.

(1) First, the general rule is well established that a solicitor acting on behalf of a client owes a duty of care only to his client. The relationship between a solicitor and his client is nearly always contractual, and the scope of the solicitor's duties will be set by the terms of his retainer. But a duty of care owed by a solicitor to his client will arise concurrently in contract and in tort: see *Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp* [1979] Ch 384, recently approved by your Lordships' House in *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145. But, when a solicitor is performing his duties to his client, he will generally owe no duty of care to third parties. . . .

As I have said, the scope of the solicitor's duties to his client are set by the terms of his retainer; and as a result it has been said that the content of his duties are entirely within the control of his client. The solicitor can, in theory at least, protect himself by the introduction of terms into his contract with his client; but, it is objected, he could not similarly protect himself against any third party to whom he might be held responsible, where there is no contract between him and the third party.

In these circumstances, it is said, there can be no liability of the solicitor to a beneficiary under a will who has been disappointed by reason of negligent failure by the solicitor to give effect to the testator's intention. There can be no liability in contract, because there is no contract between the solicitor and the disappointed beneficiary; if any contractual claim was to be recognised, it could only be by way of a ius quaesitum tertio, and no such claim is recognised in English law. Nor could there be liability in tort, because in the performance of his duties to his client a solicitor owes no duty of care in tort to a third party such as a disappointed beneficiary under his client's will.

(2) A further reason is given which is said to reinforce the conclusion that no duty of care is owed by the solicitor to the beneficiary in tort. Here, it is suggested, is one of those situations in which a plaintiff is entitled to damages if, and only if, he can establish a breach of contract by the defendant. First, the plaintiff's claim

is one for purely financial loss; and as a general rule, apart from cases of assumption of responsibility arising under the principle in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465, no action will lie in respect of such loss in the tort of negligence. Furthermore, in particular, no claim will lie in tort for damages in respect of a mere loss of an expectation, as opposed to damages in respect of damage to an existing right or interest of the plaintiff. Such a claim falls within the exclusive zone of contractual liability; and it is contrary to principle that the law of tort should be allowed to invade that zone. . . .

(3) A third, and distinct, objection is that, if liability in tort was recognised in cases such as *Ross v Caunters* [1980] Ch 297, it would be impossible to place any sensible bounds to cases in which such recovery was allowed. In particular, the same liability should logically be imposed in cases where an inter vivos transaction was ineffective, and the defect was not discovered until the donor was no longer able to repair it. Furthermore, liability could not logically be restricted to cases where a specific named beneficiary was disappointed, but would inevitably have to be extended to cases in which wide, even indeterminate, classes of persons could be said to have been adversely affected.

The fact that the problems which arise in cases such as the present have troubled the courts in many jurisdictions, both common law and civil law, and have prompted a variety of reactions, indicates that they are of their very nature difficult to accommodate within the ordinary principles of the law of obligations. It is true that our law of contract is widely seen as deficient in the sense that it is perceived to be hampered by the presence of an unnecessary doctrine of consideration and (through a strict doctrine of privity of contract) stunted through a failure to recognise a jus quaesitum tertio. But even if we lacked the former and possessed the latter, the ordinary law could not provide a simple answer to the problems which arise in the present case, which appear at first sight to require the imposition of something like a contractual liability which is beyond the scope of the ordinary jus quaesitum tertio. In these circumstances, the effect of the special characteristics of any particular system of law is likely to be, as indeed appears from the authorities I have cited, not so much that no remedy is recognised, but rather that the system in question will choose its own special means for granting a remedy notwithstanding the doctrinal difficulties involved.

We can, I believe, see this most clearly if we compare the English and German reactions to problems of this kind. Strongly though I support the study of comparative law, I hesitate to embark in an opinion such as this upon a comparison, however brief, with a civil law system; because experience has taught me how very difficult, and indeed potentially misleading, such an exercise can be. Exceptionally however, in the present case, thanks to material published in our language by distinguished comparatists, German as well as English, we have direct access to publications which should sufficiently dispel our ignorance of German law and so by comparison illuminate our understanding of our own.

I have already referred to problems created in the English law of contract by the doctrines of consideration and of privity of contract. These, of course, encourage us to seek a solution to problems of this kind within our own law of tortious negligence. In German law, on the other hand, in which the law of delict does not allow for the recovery of damages for pure economic loss in negligence, it is natural that the judges should extend the law of contract to meet the justice of the case. In a case such as the present, which is concerned with a breach of duty owed by

a professional man, A, to his client, B, in circumstances in which practical justice requires that a third party, C, should have a remedy against the professional man, A, in respect of damage which he has suffered by reason of the breach, German law may have recourse to a doctrine called Vertrag mit Schutzwirkung für Dritte (contract with protective effect for third parties), the scope of which extends beyond that of an ordinary contract for the benefit of a third party: see Professor Werner Lorenz in *The Gradual Convergence*, edited by Markesinis (1994), pp 65, 68–72). This doctrine was invoked by the German Supreme Court in the *Testamentfall* case (BGH 6 July 1965, NJW 1965, 1955) which is similar to the present case in that the plaintiff, C, through the dilatoriness of a lawyer, A, (instructed by her father, B) in making the necessary arrangements for the father's will, was deprived of a testamentary benefit which she would have received under the will if it had been duly made. The plaintiff, C, was held to be entitled to recover damages from the lawyer, A. Professor Lorenz has expressed the opinion (p 70) that the ratio of that case would apply to the situation *Ross v Caunters* itself. In these cases, it appears that the court will examine 'whether the contracting parties intended to create a duty of care in favour of' the third person (BGH NJW 1984, 355, 356), or whether there is to be inferred 'a protective obligation . . . based on good faith . . .' (BGHZ 69, 82, 85 et seq). (Quotations taken in each case from Professor Markesinis's article on 'An Expanding Tort Law—the Price of a Rigid Contract Law' (1987) 103 LQR 354, 363, 366, 368.) But any such inference of intention would, in English law, be beyond the scope of our doctrine of implied terms; and it is legitimate to infer that the German judges, in creating this special doctrine, were extending the law of contract beyond orthodox contractual principles.

I wish next to refer to another German doctrine known as Drittschadensliquidation, which is available in cases of transferred loss (Schadensverlagerung). In these cases, as a leading English comparatist has explained:

'the person who has suffered the loss has no remedy while the person who has the remedy has suffered no loss. If such a situation is left unchallenged, the defaulting party may never face the consequences of his negligent conduct; his insurer may receive an unexpected (and undeserved) windfall; and the person on whom the loss has fallen may be left without any redress.' See Markesinis, *The German Law of Torts*, 3rd edn (1994), p 56.

Under this doctrine, to take one example, the defendant, A, typically a carrier, may be held liable to the seller of goods, B, for the loss suffered by the buyer, C, to whom the risk but not the property in the goods has passed. In such circumstances the seller is held to have a contractual claim against the carrier in respect of the damage suffered by the buyer. This claim can be pursued by the seller against the carrier; but it can also be assigned by him to the buyer. If, exceptionally, the seller refuses either to exercise his right for the benefit of the buyer or to assign his claim to him, the seller can be compelled to make the assignment: see Professor Werner Lorenz in *Essays in Memory of Professor FH Lawson* (1986), pp 86, 89–90, and in *The Gradual Convergence*, pp 65, 88–89, 92–93; and Professor Hein Kötz in Tel Aviv University Studies in Law (1990), vol 10, pp 195, 209. Professor Lorenz (*Essays*, at p 89) has stated that it is at least arguable that the idea of *Drittschadensliquidation* might be 'extended so as to cover' such cases as the *Testamentfall* case, an observation which is consistent with the view expressed by the German Supreme Court that the two doctrines may overlap (BGH 19 [sic] January 1977, NJW 1977, 2073 = VersR 1977, 638: translated in Markesinis, *The German Law of Torts*, p 293). At

all events both doctrines have the effect of extending to the plaintiff the benefit of what is, in substance, a contractual cause of action; though, at least as seen through English eyes, this result is achieved not by orthodox contractual reasoning, but by the contractual remedy being made available by law in order to achieve practical justice. . . .

It may be suggested that, in cases such as the present, the simplest course would be to solve the problem by making available to the disappointed beneficiary, by some means or another, the benefit of the contractual rights (such as they are) of the testator or his estate against the negligent solicitor, as is for example done under the German principle of Vertrag mit Schutzwirkung fur Dritte. Indeed that course has been urged upon us by Professor Markesinis, 103 *LQR* 354, 396–397, echoing a view expressed by Professor Fleming in (1986) 4 *OJLS* 235, 241. Attractive though this solution is, there is unfortunately a serious difficulty in its way. The doctrine of consideration still forms part of our law of contract, as does the doctrine of privity of contract which is considered to exclude the recognition of a jus quaesitum tertio. To proceed as Professor Markesinis has suggested may be acceptable in German law, but in this country could be open to criticism as an illegitimate circumvention of these long established doctrines; and this criticism could be reinforced by reference to the fact that, in the case of carriage of goods by sea, a contractual solution to a particular problem of transferred loss, and to other cognate problems, was provided only by recourse to Parliament. Furthermore, I myself do not consider that the present case provides a suitable occasion for reconsideration of doctrines so fundamental as these.

I therefore return to the law of tort for a solution to the problem. For the reasons I have already given, an ordinary action in tortious negligence on the lines proposed by Sir Robert Megarry V-C in *Ross v Caunters* [1980] Ch 297 must, with the greatest respect, be regarded as inappropriate, because it does not meet any of the conceptual problems which have been raised . . . Even so it seems to me that it is open to your Lordships' House . . . to fashion a remedy to fill a lacuna in the law and so prevent the injustice which would otherwise occur on the facts of cases such as the present. In the *Lenesta Sludge* case [1994] 1 AC 85, as I have said, the House made available a remedy as a matter of law to solve the problem of transferred loss in the case before them. The present case is, if anything, a fortiori, since the nature of the transaction was such that, if the solicitors were negligent and their negligence did not come to light until after the death of the testator, there would be no remedy for the ensuing loss unless the intended beneficiary could claim. In my opinion, therefore, your Lordship's House 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 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 solicitor. Such liability will not of course arise in cases in which the defect in the will comes to light before the death of the testator, and the testator either leaves the will as it is or otherwise continues to exclude the previously intended beneficiary from the relevant benefit. I only wish to add that, with the benefit of experience during the 15 years in which *Ross v Caunters* has been regularly applied, we can say with some confidence that a direct remedy by the intended beneficiary against

the solicitor appears to create no problems in practice. That is therefore the solution which I would recommend to your Lordships. . . .

Notes

(1) In a Dutch case where a notary had negligently delayed the making of a will, delictual liability to an intended beneficiary was established on the basis on Article 1401 of the old BW, which was strongly influenced by the French Code civil.[72]

(2) The extension of tortious liability by the majority in *White v Jones* is very contentious, as can be seen from the powerful dissenting speech by Lord Mustill which we cannot set out in full because of its length. According to his view, the result of the majority could not be arrived at by an application of the existing authorities in tort law, and he did not consider it legitimate 'simply to create a specialist pocket of tort law . . . sufficient to provide a remedy in the present case'. Lord Mustill expressed his 'instinctive preference for a contractual solution'. After all, it was the plaintiffs' 'only possible complaint . . . that they failed to receive a benefit from the testator (via his estate) which they would have received if the solicitor had done his job'. The special feature of the case was that 'the conferring of the benefit on the plaintiff was to be done by the testator, not by the solicitor himself. The undertaking to do the work and the intended conferring of the benefit were therefore directed along two sides of a triangle'. Lord Mustill therefore explored 'whether whatever rights the plaintiff may possess can be derived in one way or another' from the contract. However, like Lord Keith, he ultimately rejected this approach: (i) the doctrine of transferred loss, even if transplanted to English law, would not give a remedy; (ii) it could not be said that the testator had acted as an agent for the intended beneficiary to make a contract between the solicitor and the beneficiary, with subsequent ratification by the beneficiary; and (iii):

> Nor is the proposition improved by implying into the contract of retainer an auxiliary promise by the solicitor to give the beneficiaries the rights which the testator had by contract secured for himself. 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. How far the courts will be able to go remains to be seen. This is not the occasion to find out, for no claim in contract is before the court. But even under a much expanded law of contract it is hard to see an answer to the objection that what the testator intended to confer on the new beneficiaries was the benefit of his assets after his death; not the benefit of the solicitor's promise to draft the will.[73]

(3) Would the plaintiffs in *White v Jones* have a claim after the coming into force of the Contracts (Third Party Rights) Act 1999?

[72] Hof van Beroep Amsterdam 31 January 1985, NJ 1985, 740. Since 1992 delictual liability would be based on Art 6:162 BW.

[73] *White v Jones* [1995] 2 AC 207, 281 (HL).

English Law Commission,
Report on Contracts for the Benefit of Third Parties[74] **26.28 (E)**

7.19 In fixing the boundaries of our proposed reform, we have encountered most difficulty with the situation where a solicitor negligently fails properly to draw up a will thereby causing loss to the intended beneficiaries of the will. Should those beneficiaries have the right to sue the solicitor under a reform of privity? While we can certainly see the force in allowing those beneficiaries a cause of action, we do not think that this is best rationalised as effecting the parties' intentions to confer that right. Moreover, as the House of Lords in *White v Jones* has now held that the prospective beneficiaries have an action in the tort of negligence against the solicitor, we see no pressing practical need to stretch our facilitative reform in order to achieve what is widely perceived to be the just solution.

7.20 The wording of our proposed reform is therefore not intended to include negligent willdrafting (and analogous) situations. The crucial words are that the promise must be one to confer a benefit on the third party. The solicitor's express or implied promise to use reasonable care is not one by which the solicitor is to confer a benefit on the third party. Rather it is one by which the solicitor is to enable the client to confer a benefit on the third party. . . .

7.25 It is our view, therefore, that the negligent will-drafting situation ought to lie, and does lie, just outside our proposed reform. It is an example of the rare case where the third party, albeit expressly designated 'as a beneficiary' in the contract, has no presumed right of enforcement. Indeed it is arguable that, by merely adjusting the wording of the second limb to include promises that are 'of benefit to' expressly designated third parties, rather than those that 'confer benefits on' third parties, we would have brought the negligent will-drafting situation within our reform. But we believe that those words draw the crucial distinction between the situation where it is natural to presume that the contracting parties intended to confer legal rights on the third party and the situation where that presumption is forced and artificial. . . .

7.27 However we must add that, while we consider that negligent will-drafting should fall outside our proposed reform, at a theoretical level we prefer the view that the right of the prospective beneficiaries more properly belongs within the realm of contract than tort. It is very difficult to explain the basis of the claim, which deals with an omission and pure economic loss, as being other than one to enforce the promise of the solicitor (albeit by a party who was not intended to have that right). Had *White v Jones* been decided against the potential beneficiaries, we would have seriously contemplated a separate provision—outside our general reform—giving prospective beneficiaries a right to sue the negligent solicitor for breach of contract. The primary basis of such a provision would have been that a right of action for the beneficiaries is the only way to ensure that the promisee's expectations engendered by the solicitor's binding promise are fulfilled. But given the decision in *White v Jones* the practical need for such a provision has been obviated.

Note

A footnote to paragraph 7.25 of the Report clarifies that

> our reform is based on a model of a contract for the benefit of third parties and does not seek to embrace the wider German concept of a contract with protective effects for third parties. We would be afraid of the uncertainty that the generalised legislative introduction of that German concept would create.

[74] For this Report, see n 6 above.

Is the Law Commission's intention sufficiently expressed in the wording of section 1 of the Contracts (Third Party Rights) Act 1999?

Cass civ (1), 14 January 1981[75] **26.28a (FR)**

Right of pre-emption overlooked

A notary who draws up and notarises a contract for the sale of land without having regard to the existence of a third person's right of pre-emption will be liable to that person.

Facts: Mrs Rieu and her three daughters, Mrs Mellet, Mrs Martina and Mrs Fleudin, were joint proprietors of agricultural land. On 7 June 1960 they sold three pieces of land to the Compagnie Nationale d'Aménagement de la région du Bas-Rhône et du Languedoc (CNARBRL) by way of a notarised document, drawn up by notary Q. The contract contained a pre-emption clause in favour of the sellers: if the buyers were to sell the land or let it on lease they would give priority to the sellers on equal conditions. In 1961 the CNARBRL decided to sell the three pieces of land. They approached Q in order to have the sale arranged. Q replied by letter of 12 July 1961 and asked whether the sellers had waived their right of pre-emption. On 17 July 1961 the CNARBRL wrote back and requested Q to go ahead with the sale without replying to his question. On 18 January 1962 the CNARBRL sold the pieces of land to Mrs Bernavon by way of notarised document, drawn up by Q. In 1976, Mrs Mellet, who had meanwhile become the sole owner of the agricultural land holdings, sued the CNARBRL, Mr and Mrs Bernavon and Q. She demanded a declaration that the sale of 18 January 1962 did not affect her rights, as well as damages.

Held: The first instance court and the appeal court upheld the claim. The further appeal of the notary was dismissed.

Judgment: . . .—Wheras Q contests that the appeal court has upheld his liability to Mrs Mellet although, on the one hand, the notary is under a duty to give advice to the parties of a notarized transaction only and that this duty cannot be invoked by a third person . . .;

—Whereas, however, notaries are liable, even to third persons, for every fault causing harm which they commit in exercising their functions; they are particularly obliged to examine the correctness of documents which they are requested to draw up and not to notarize a contract which they know to be illegal because it is made by defrauding the rights of other interested parties; the appeal court held, both on its own findings and in adopting the findings of the first instance court, that Q who had known the right of pre-emption, which the CNARBRL had granted the Rieus by way of the document of 7 June 1960 that was correctly published, had abstained from making sure, before notarizing the contract of resale for the pieces of land, that the Rieus had waived that right, and that he had nevertheless notarized the contract of 18 June 1962 in violation of the rights of the beneficiaries of the right of pre-emption and in misunderstanding the legal provisions with regard to the publicity of land holdings; the appeal court could conclude from this that the notary, who had knowingly lent his official services to the drawing up of such a document and had

[75] JCP 1982.II.19728, annotated by M Dagot.