

## THE HIGH COURT

[2000 No. 14789P]

BETWEEN

VANESSA ROJACK

PLAINTIFF

AND

MERVYN TAYLOR AND DON BUCHALTER  
PRACTISING AS TAYLOR AND BUCHALTER SOLICITORS

DEFENDANTS

**JUDGMENT of Quirke J. delivered on the 10th day of February, 2005.**

In this case the plaintiff claims that she has suffered financial loss and damage as a result of negligence and a breach of duty on the part of the defendants.

She claims that the defendants had agreed and undertaken for reward to act as solicitors in respect of the administration of the estate of the plaintiff's late mother Dr. Hazel Boland. The plaintiff was an executrix in respect of the estate.

She claims that additional to the duty owed by the defendants to the plaintiff as her mother's personal representative the defendants owed an independent duty to the plaintiff in the latter's personal capacity as a beneficiary under her mother's will. She claims that the defendants failed to discharge that duty because they failed to advise her that she had a potential cause of action against the estate of her late mother and that she should accordingly seek independent legal advice.

It is contended that independent legal advice to the plaintiff would have led to a claim by the plaintiff against her mother's estate pursuant to the provisions of s. 117 of the Succession Act 1965 and a probable finding by the High Court that her late mother had failed to discharge her "...*moral duty to make proper provision for...*" the plaintiff. The plaintiff claims that in consequence she would have been awarded a larger share in her late mother's estate than that which was provided for her under the terms of her mother's will.

It is claimed that by reason of the defendants' breach of duty the plaintiff failed to make an application to the court pursuant to s. 117 of the Succession Act 1965 within the (then) twelve months limited by the provisions of that Act for the making of such an application. The plaintiff is now barred by the provisions of the statute from seeking the appropriate relief.

The defendants contend that they were appointed and retained and agreed to act as the solicitors on behalf of the estate of the late Dr. Hazel Boland for the purpose of administering that estate.

They admit that they owed a duty of care to the plaintiff but contend that the duty owed to the plaintiff was a duty to her in her capacity as executrix of the estate of her late mother. It is contended on behalf of the defendants that they were not retained by and did not agree to act on behalf of the plaintiff in her personal capacity as a beneficiary under the will of her late mother. They agree that they had acted for the plaintiffs on an earlier occasion in respect of a personal injuries action and that Mr. Don Buchalter of the defendants was on familiar social terms with the late Dr. Hazel Boland and with the Boland family.

In particular the defendants reject the contention that any *bona fide* or potential cause of action against the estate of Dr. Hazel Boland was vested in the plaintiff after the death of her late mother or at any time thereafter. They contend that proceedings pursuant to the provisions of s. 117 of the Succession Act 1965 or any other proceedings claiming an additional interest in the estate of Dr. Hazel Boland on behalf of the plaintiff would have been unsuccessful as a matter of probability. They argue that accordingly there was no breach on the part of the defendants of any duty owed by the defendants to the plaintiff and no consequential loss or damage sustained by the plaintiff.

**FACTUAL BACKGROUND**

The following facts are relevant to these proceedings.

1. The plaintiff was the second of the four children of Dr. Stanley Boland and Dr. Hazel Boland. The Boland family home was a substantial five bedroomed home at no. 43 North Ave. Mount Merrion in Co. Dublin (hereafter "North Avenue").

The plaintiff was born in 1995. Her siblings were:-

- (i) Maurice Boland who was born in 1949,
- (ii) Gary Boland who was born in 1952 and
- (iii) Jane Cathcart (nee Boland) who was born in 1956.

2. The plaintiff left school in 1969. She worked in Dublin and London for a short time before travelling to the United States. In 1976 she married a U.S. citizen Mr. Tom Rojack. There were five children of the marriage:-

- (i) Barry who was born in 1979,
- (ii) Melissa who was born in 1981,

- (iii) Susan who was born in 1985,
- (iv) Stanley who was born in 1988 and
- (v) Julie who was born in 1990.

3. The plaintiff, who was then the mother of two children returned to Ireland in 1982. Her father Dr. Stanley Boland had been diagnosed with cancer. The plaintiff moved, with her children, to live with her parents in North Avenue. Shortly thereafter the plaintiff's husband Tom Rojack joined his wife and children. Later that year the plaintiff's father died.

4. The plaintiff's husband returned to the United States in 1984 and thereafter maintained a relationship which the plaintiff described as "intermittent" until 1988 when, by order of a U.S. Court, the plaintiff and her husband were divorced by consent.

I am satisfied on the evidence that the divorce of the plaintiff from her husband was affected for the purpose of enabling the plaintiff to successfully claim social welfare benefits within this jurisdiction.

5. Between 1983 and 1993 the plaintiff lived with her mother Dr. Hazel Boland at North Avenue. During that time the plaintiff obtained part-time employment in a book shop in Dun Laoghaire. She also operated a small stall in the Blackrock market in Co. Dublin. Her earnings from those sources were insubstantial. During that time Dr. Hazel Boland continued to practice medicine and it is probable that the financial support for the plaintiff and her children came largely from her mother's income.

The plaintiff's divorce from her husband enabled her to apply successfully for and receive social welfare benefits as a lone parent.

6. On 24th day of June, 1992 Dr. Boland, with the assistance of her then solicitor Mr. John Hooper, executed a will. The terms of the will provided that the plaintiff Vanessa Rojack and Dr Boland's son, Maurice Boland were appointed as executors and trustees of the will which *inter alia* purported to give, devise and bequeath:

*"...my dwelling house and premises at 43 North Ave. Blackrock, Co. Dublin together with the household chattels therein...unto my daughter Vanessa absolutely."*

The will provided further that all of the remainder of Dr. Hazel Boland's "*...real and personal estate of whatsoever nature and whosoever situate...*" should be held upon trust for the purpose of dividing the residue equally between the plaintiff and her three siblings, Maurice Boland, Gary Boland and Jane Cathcart.

7. On the 8th February, 1993 the sum of IR£16,051 was lodged in the plaintiffs account. This was a gift to the plaintiff from her mother who had inherited money upon the death of an aunt.

On 11th May, 1993 the sum of IR£5,042.39 was lodged in the plaintiff's account. This was also a gift to the plaintiff from her mother.

The plaintiff indicated that her siblings had also received monetary gifts from her mother. No evidence was adduced indicating the nature or extent of such gifts or when they were made. Evidence was adduced of a loan made by Dr. Boland to her son Maurice between 1983 and 1986 (see below).

8. In 1993 Dr. Hazel Boland, after discussion with the plaintiff, decided to sell North Avenue and to purchase a larger house in Shrewsbury Lawn in Cabinteeley, Co. Dublin (hereafter called "Shrewsbury Lawn").

The objective of the purchase was two-fold that is:-

- (a) to provide Dr. Boland, the plaintiff and the plaintiff's five children with larger accommodation and
- (b) to assist in reducing the financial difficulties which the plaintiff and her mother were then encountering.

9. Dr. Hazel Boland consulted Mr. Don Buchalter of the defendants with whom she was on friendly terms and retained him for the purpose of providing the appropriate legal service relative to the sale of North Avenue and the purchase of Shrewsbury Lawn. Mr. Buchalter, who testified in these proceedings, but is in ill health, has a recollection that Dr. Boland consulted him by telephone and indicated that she wished Shrewsbury Lawn to be purchased in the joint names of Dr. Boland and the plaintiff.

Mr. Buchalter recalled a conversation during which he explained to Dr. Boland the essential difference between the purchase of the property by the plaintiff and her daughter by way of a joint tenancy and the purchase by them as tenants-in-common.

Mr. Buchalter said that he then asked Dr. Boland whether she wished to purchase Shrewsbury Lawn as a joint tenant or as a tenant-in-common with the plaintiff. He suggested that Dr. Boland might wish to consider the matter and "*...let me know*".

He said that the following day she telephoned and told him that she wished to purchase the premises as a tenant in common with the plaintiff because by doing so she would not be "*...disinheriting her other children...*" in respect of the premises at Shrewsbury Lawn.

The plaintiff, in evidence, recalled advice from Mr. Buchalter on the difference between a tenancy in common and a joint tenancy. She said that Mr. Buchalter "*mentioned*" this distinction to her mother. She said that that this advice was "*more of a mention than an explanation*".

10. On the 8th June, 1993 Mr. Don Buchalter, who is a defendant in these proceedings, prepared a memorandum in which he expressed serious misgivings about the purchase of Shrewsbury Lawn and the sale of North Avenue. By appointment with Mr. Buchalter, the plaintiff and her mother attended at the defendant's office on the 9th day of June, 1993. Mr. Buchalter explained to them in detail his misgivings in respect of the proposed purchase of Shrewsbury Lawn and required that they sign the memorandum which he had prepared. The memorandum provided "*inter alia*" as follows:-

*“....The house will be purchased in the names of Dr. Hazel Boland and Vanessa Rojack as tenants-in-common.....The house is being taken in both names. The proceeds of sale of 43, North Avenue, Mount Merrion properly belong to Dr. Hazel Boland. The fact that Dr. Boland is utilising the net proceeds of sale to buy the new house in the two names is effect to a gift in favour of Vanessa Rojack to the exclusion of her other children. I understand that this is what is intended and are my instructions.....*

*I am not at all happy that either of you are in a position to make the substantial monthly repayments required....”*

**11.** North Avenue was sold for a sum of IR£126,000.

The purchase of Shrewsbury Lawn for the sum of IR£142,500 was funded by way of, (a) the sum of IR£62,500 from the proceeds of the sale of North Ave and, (b) a mortgage from Irish Permanent Building Society in the amount of IR£80,000.

The balance of IR£63,500 from the proceeds of the sale of North Avenue appears to have been dissipated entirely within the two month period immediately following the sale of North Avenue.

It was the evidence of the plaintiff that the sum of IR£27,680 which was lodged to her account from the proceeds of the sale was largely spent on the purchase of furniture for Shrewsbury Lawn. The remaining balance appears to have gone towards defraying the then existing debts and liabilities of Dr. Hazel Boland and of the plaintiff.

**12.** The sale of North Avenue and the purchase of Shrewsbury Lawn had been completed by the 2nd July, 1993. Dr. Boland, the plaintiff and the plaintiff's children took occupation of Shrewsbury Lawn immediately after its purchase was completed.

The mortgage in the amount of IR£80,000 with Irish Permanent Building Society was executed at this time. By arrangement, the plaintiff's former husband Mr. Tom Rojack agreed to make the repayments due on foot of the mortgage of the premises. These repayments amounted to the sum of IR£657.71 monthly. Mr. Rojack appears to have made most of these repayments between July of 1993 and February of 1994.

**13.** On the 12th March, 1994, Dr. Hazel Boland died unexpectedly.

On the date of her death, Dr. Boland was the mother of four living adult children, the eldest of whom (Maurice) was 45 years old and the youngest of whom (Jane) was 38 years old. The plaintiff was then 43 years old. On that date;

(a) Maurice Boland was married, a father of three children. He lived in Spain with his family. His financial circumstances were not good. He had borrowed sums totalling IR£20,000 from his mother between 1983 and 1986. He had repaid only £750 at the date of Dr Boland's death.

(b) Gary Boland was married, was the father of three children. He lived in California with his family. No evidence has been adduced which would indicate that he was then suffering financial hardship and

(c) Jane Cathcart (nee Boland) was married, was the mother of three children and lived with her family in Loughlinstown, Co. Dublin. Her husband was unemployed. Her financial circumstances were grave. She required an urgent advance from her interest in the estate of her late mother in the amount of IR£10,000 shortly after Dr. Boland's death.

The plaintiff, in evidence, stated that in the immediate aftermath of her mother's death she was in shock. She retained Mr. Buchalter to *“do whatever he had to do...”* in respect of the estate of her mother.

She said that she was under the impression that she would inherit Shrewsbury Lawn under the provisions of the will which her mother had made in 1992. However she said that her sister Jane advised her that the relevant section of the will was now *“null and void”* and that she would not inherit the house.

She stated that she had then telephoned phoned Mr. Don Buchalter. She said she was *“frantic”* and asked if there was *“anything I could do...”* She said that Mr. Buchalter told her that there was *“nothing I could do”*.

She said that she received that advice during the telephone conversation with Mr. Buchalter.

There was a conflict between the evidence of the plaintiff and that of Mr. Buchalter as to whether or not Mr.

Buchalter advised the plaintiff to seek independent advice during this conversation.

Mr. Buchalter, in evidence, stated that the plaintiff was *“under the impression”* that she would inherit Shrewsbury Lawn from her mother and wanted to know if she could take any steps to give effect to what she believed were her mother's intentions.

Mr. Buchalter in evidence stated that he advised the plaintiff that, having regard to the circumstances, there was nothing which she could do but if she wished to pursue the matter further she should consult another solicitor.

The plaintiff, when asked whether or not Mr. Buchalter advised her to consult another solicitor, replied *“absolutely not”*.

**14.** A grant of Probate of the will of Dr. Hazel Boland was extracted on 20th July, 1994, and shortly thereafter Shrewsbury Lawn was sold for the sum of IR£174,000.

After distribution of the assets of the estate the plaintiff received the proceeds of her 50% interest in Shrewsbury Lawn, (IR£42,729). She also received the sum of IR£22,000 being her share, (with her siblings), in the balance of Dr Boland's estate.

The balance of the estate comprised *inter alia*, (i) Dr Boland's 50% interest in Shrewsbury Lawn, (ii) a pension of IR£24,000, (iii) a tax free fund in the amount of IR£4,500, (iv) a motor car with a value of IR£4,500, (v) household goods to the value of IR£5,000 and (vi) two properties (at Chapel Ave. and Bath Ave. in Dublin) which were retained by the estate in the short term. The two properties was occupied by *“controlled tenants”* within the meaning ascribed to that term by the Rent Restrictions Act. That fact rendered them of little immediate value to the estate. Subsequently

the Bath Avenue property was sold and the proceeds of the sale, (just in excess of IR£100,000), were distributed equally between the plaintiff and her three siblings.

On 29th July, 1994 the plaintiff lodged the sum of £42,729 (her interest in the proceeds of the sale of Shrewsbury Lawn) into her bank account. By 17th January, 1995, the plaintiff's account was overdrawn.

15. After the sale of Shrewsbury Lawn the plaintiff and her five children sought and obtained rented residential accommodation largely in the Blackcock and Stillorgan areas of Dublin.

Later the plaintiff established a recruitment agency called "Second Shift". She received a modest grant (IR£5,000 each for two persons) from the government agency FÁS for this project. In evidence she indicated that this business made money "*from time to time*" but was ultimately unsuccessful. It was closed by the plaintiff in 2000.

16. When the plaintiff had exhausted her share of the proceeds from the sale of Shrewsbury Lawn she was obliged on at least two occasions to draw sums (in the amount of IR£2,500) from her share in the residue of the estate.

In evidence the plaintiff acknowledged that in total a sum in excess of IR£54,250 was paid out of her bank account between July 1994 and January 1995. She stated that it had been paid out "*largely in the payment of debts...*" because the "*...immediate...*" payment of those debts was required at that time.

17. The relationship between the plaintiff and the late Dr. Boland was a very close one. Dr. Boland provided the plaintiff and her children with living accommodation, maintenance, (including sustenance), and very substantial financial support for the entire of the ten year period between 1983 and 1993. She was devoted to the plaintiff's children (her grandchildren) and treated them with great kindness and generosity.

18. Mr. John Costello from Messrs. Eugene F. Collins and Company Solicitors and Ms. Paula Fallon from Messrs. Paula Fallon and Associates Solicitors testified as expert witnesses in these proceedings. Both are acknowledged experienced and established experts in the administration of the estates of deceased persons and in the law relating to Probate. Both are or were members of the Probate Committee of the Law Society.

There was little if any inconsistency in their testimony.

Both agreed that good practice requires solicitors who are retained to advise executors that the primary duty of an executor is to protect the interests of the estate and to ensure that, so far as is practicable, no step is taken which will affect the interests of the estate to its detriment.

Both agreed that it is inappropriate practice for a solicitor advising the estate to advise the executor on the prospects of that executor making a successful claim against the estate. That is so because it is inconsistent with the duty of a solicitor acting on behalf of the estate to give advice which might have the effect of jeopardising the interests (and, perhaps the proper administration) of the estate.

Both agreed that circumstances in a particular case could arise which would impose a concurrent tortious duty, (separate from the solicitors contractual duty), on a solicitor advising an executor. Ms. Fallon could not envisage such circumstances. She said that "*any solicitor in the exercise any duty must exercise a duty of care.*"

Mr. Costello said that such a tortious duty could arise from an earlier personal relationship between a solicitor and an executor. He said that if the discharge of that duty could have consequences detrimental to the interests of the estate then the duty of the solicitor was to advise the executor to seek independent legal advice.

Both agreed that good conveyancing practice required that, before completing the sale or purchase of property on behalf of a client, a solicitor should remind the client that the sale or purchase may have implications in respect of any will made by the client prior to the proposed disposition of property.

Mr. Costello said that if he had been in Mr. Buchalter's position he would have felt it necessary to write to the Probate Committee of the Law Society seeking advice. Ms. Fallon did not agree. She said that it was the express policy of the Probate Committee to refuse to give advice in individual cases.

## **THE LAW**

The general duty of a solicitor to his client is well established. The duty of a solicitor who has been retained to advise the personal representative of a deceased person is to advise and assist the personal representative in the due and proper administration of the estate in accordance with the directions contained within the testator's will.

No obligation has been imposed, by statute or otherwise, which requires a personal representative to notify the children of a testator of their right to make an application under s. 117 of the Succession Act 1965. It follows that no such obligation or duty is imposed upon the solicitor retained to advise the personal representative.

It follows further that no duty is imposed upon such a solicitor which would require (a) scrutiny by the solicitor of the personal circumstances of each beneficiary for the purposes of establishing if they have a potential claim under s. 117 of the Act of 1965, (b) advice from the solicitor to beneficiaries to the effect that either (1) that they have such a potential claim or (2) that they may have such a claim and should seek separate independent legal advice.

It has been correctly pointed out by Mr. Speirin in his excellent work "*The Succession Act, 1965 and Related Legislation, A Commentary*" 3rd Ed. (Dublin 2003)." At p. 353 that:

*"[it] has even been suggested that it might be unwise for a personal representative to give such advice.....it is argued that he would be imprudent (particularly if he was a professional executor), to do anything by way of notifying the child, or otherwise, which would encourage or instigate proceedings under s. 117. The bringing of such an application would to some extent frustrate the directions contained in a will and would prejudice beneficiaries thereunder to whom the executor would be accountable."*

I am satisfied on the evidence (and indeed it is not disputed) that Mr. Buchalter was, in the first instance, retained by the plaintiff to advise her in her capacity as the personal representative of her late mother. Accordingly, the duty imposed upon Mr. Buchalter was the duty imposed upon any solicitor who has been retained to advise a personal representative in the administration of an estate.

Accordingly, no duty was imposed upon Mr. Buchalter to give unsolicited advice to the beneficiaries of Dr. Boland's will either (a) as to the existence or prospects of any potential claim they might have pursuant to s. 117 of the Act of 1965 or (b) that they should seek independent legal advice *simpliciter*.

The fact that a personal representative is also a beneficiary does not give rise to such a duty. There is no basis for drawing a distinction between one child who is a personal representative and another child who is not.

It follows that there was no duty upon Mr. Buchalter to give the plaintiff unsolicited advice or notice of the kind referred to above either in her capacity as a beneficiary of the estate of her late mother or in her joint capacity as executrix and beneficiary.

A solicitor advising a personal representative who receives an enquiry from the child of the relevant testator in relation to a potential claim by that child against the estate pursuant to s. 117 of the Act of 1965 has a duty to the estate and possibly to the child to advise the child to seek independent legal advice upon the matter.

For the reasons outlined above a solicitor who, in similar circumstances, receives no such enquiry has no such duty.

Mr. Boyle S.C. on behalf of the applicant argues that in addition to the contractual duty owed by a solicitor advising a personal representative, a concurrent tortious duty may arise in particular cases. He says that this duty may result from an independent proximate relationship between the solicitor and the personal representative.

He says that such a relationship exists in this case because Mr. Buchalter had formerly acted on behalf of the plaintiff in the conduct of court proceedings. He had acted on her behalf in connection with the procurement of social welfare benefits. He was on familiar social terms with her.

It is contended that this social and former "*solicitor and client*" relationship imposed a duty upon Mr. Buchalter to give unsolicited advice to the plaintiff to the effect that either (a) that she had a potential claim against the estate pursuant to s. 117 of the Act of 1965 or (b) that she should seek independent legal advice. It is argued that this advice should have been given because, in the circumstances of this case, the plaintiff had a potentially successful claim against the estate pursuant to the provisions of s. 117 of the Succession Act.

It is difficult to understand how, for practical purposes, Mr. Buchalter could have advised the plaintiff to seek independent legal advice without identifying why she should seek such advice.

It is not outside the bounds of possibility that particular circumstances might arise in an individual case which would impose upon a solicitor such as Mr. Buchalter a tortious duty, independent from and concurrent with the contractual duty owed by him to the estate, to protect the interests of a beneficiary. I make no finding on that issue.

However I cannot envisage any circumstances where such a duty would not be wholly discharged by advice to the beneficiary to seek independent legal advice. I can envisage no circumstances where further advice of any kind could be given to the beneficiary by the solicitor having regard to the solicitor's obligations to the estate.

In the instant case I am satisfied that the relationship between Mr. Buchalter and the plaintiff at the time of Dr. Boland's death and immediately thereafter did not give rise to any duty of the kind contended for on behalf of the plaintiff.

There is, however, another reason why there was no obligation upon Mr. Buchalter to give advice to the plaintiff of the kind referred to, whether solicited or otherwise. That is because I am satisfied, on the evidence, that the plaintiff had no cause of action whatever against the estate pursuant to the provisions of s. 117 of the Act of 1965.

### **THE CLAIM UNDER SECTION 117**

Section 117 of the Act of 1965 provides *inter alia*:-

*"(1) Where, on application by or on behalf of a child of a testator, the court is of opinion that the testator has failed in his moral duty to make proper provision for the child in accordance with his means, whether by his will or otherwise, the court may order that such provision shall be made for the child out of the estate as the court thinks just.*

*(2) The court shall consider the application from the point of view of a prudent and just parent, taking into account the position of each of the children of the testator, and any other circumstances which the court may consider of assistance in arriving at a decision that would be as fair as possible to the child to whom the application relates, and to the other children..."*

In *M(F) v. M(T)* [1970] 106 I.L.T.R. 82 the principles applicable to applications made by the children of testators pursuant to s. 117 of the Act of 1965 were identified by the High Court (Kenny J.) in the following terms:-

*"It seems to me that the existence of a moral duty to make proper provision by will for a child must be judged by the facts existing at the date of death, and must depend upon:*

- (a) The amount left to the surviving spouse, or the value of the legal right if the survivor elects to take this,*
- (b) The number of the testator's children, their ages, and their positions in life at the date of the testator's death,*
- (c) The means of the testator,*
- (d) The age of the child whose case is being considered, and his or her financial position and prospects in life,*
- (e) Whether the testator has already in his lifetime made proper provision for the child."*

The onus of proving that the testator has failed in his or her moral duty to make proper provision for a child rests upon the applicant under s. 117. That onus has been described as “*relatively high*” (see *C. C. and Anor v. W.C. and Anor*. [1990] 2 I.R. 143).

In that case the Supreme Court (Finlay C.J.) confirmed additionally that the applicant pursuant to s. 117 must establish a positive failure in moral duty on the part of the testator and a need for the provision on the part of the applicant.

It is decidedly not the function of the court to seek to stand in the shoes of the testator and intervene on the ground that the court would, as testator, have made a different testamentary disposition. (see *C.C. v. W.R.* (Supra)).

Applying the criteria identified in *M.(F) v. M.(T)* to the instant case (on the basis that Dr. Boland left no surviving spouse on the date of her death) it is clear that the outcome of any claim made on behalf of the plaintiff against the estate would be dependent upon consideration by the court of all of the facts as they existed at the date of Dr. Boland’s death and in particular:-

A. Dr Boland’s means,

B. the number, respective ages, and the positions occupied by all of her surviving children,

C. the plaintiff’s age, financial position and prospects in life and

D. whether Dr. Boland had already in her lifetime made provision for the plaintiff.

#### **A. Dr. Boland’s means**

The net value of Dr. Boland’s estate was estimated by the Revenue Commissioners at IR£88,783.60 on the date of her death (the properties at Chapel Ave. and Bath Ave. were deemed to have little value on the date of death).

Under the terms of Dr. Boland’s will the estate was divided equally between her four surviving children and each received a sum of approximately IR£22,000. Subsequently each received equal shares in the proceeds of the sale of Bath Avenue.

The value of Dr. Boland’s interest in Shrewsbury Lawn at the date of her death was roughly equivalent to the net value of her estate as estimated by the Revenue Commissioners.

Accordingly, if Dr. Boland had bequeathed to the plaintiff her interest in Shrewsbury Lawn then there would have been no residual assets in her estate for distribution between the plaintiff and her siblings at the date of Dr. Boland’s death.

#### **B. Dr. Boland’s children, their ages, and the position in life which they occupied at the date of Dr. Boland’s death.**

At the date of Dr. Boland’s death she was the mother of four adult children of whom the eldest (Maurice) was 45 years old and the youngest Jane was 38 years old. The plaintiff was then 43 years old.

All four of Dr. Boland’s children were married with children. The plaintiff was the mother of five children. They all lived with Dr. Boland. The plaintiff’s three siblings were each parents of three children whom they were supporting in family circumstances.

Two of the plaintiff’s siblings (Maurice and Jane) were in difficult financial circumstances on the date of Dr. Boland’s death. Jane required an urgent advance from Dr. Boland’s estate in the amount of IR£10,000 shortly after Dr. Boland’s death.

Her husband was unemployed at that time.

#### **C. The plaintiff’s age, financial position and prospects in life at the date of Dr. Boland’s death.**

On the date of Dr. Boland’s death the plaintiff was 43 years old and was the mother of five children.

She was divorced from her husband Tom Rojack who apparently made intermittent small payments to her. He had made some mortgage repayments in respect of Shrewsbury Lawn in the amount of IR£657.71 monthly.

No evidence was adduced in these proceedings indicating that the plaintiff had ever taken steps against Mr. Tom Rojack seeking maintenance or support payments from him for herself or for their five children.

#### **D. Provision made by Dr. Boland for the plaintiff during Dr. Boland’s lifetime.**

During the early part of her life the plaintiff was provided by her parents with a full private education, maintenance, financial and emotional support and a standard of living commensurate with her parents’ means.

Between 1982 and the date of her death in 1994, Dr. Boland provided the plaintiff and her five children with a substantial comfortable home. She paid all of the costs associated with the provision of that home. The household, maintenance clothing, recreational expenses and educational costs for the plaintiff and for the plaintiff’s children were all borne largely by Dr. Boland during this entire period.

In February 1993, Dr. Boland gave the plaintiff a gift in the amount of IR£16,051. In May of 1993, Dr. Boland made a gift to the plaintiff of the sum of IR£5,042.39.

In July of 1993, Dr. Boland provided the plaintiff with a 50% interest in Shrewsbury Lawn. That interest had a net value of IR£42,729.00 immediately after Dr. Boland’s death in July of 1994.

Although the plaintiff, in evidence, indicated that Dr. Boland had, from time to time provided the plaintiff’s siblings with gifts, no evidence was adduced identifying any particular gift. It is unclear if the gifts were monetary. No attempt was made by the plaintiff to estimate their value.

Maurice Boland had borrowed sums totalling IR£20,000 from Dr. Boland between 1983 and 1986. Those sums were provided as loans from Dr. Boland. The evidence adduced indicated that she expected to be repaid that sum with interest. On the date of Dr. Boland's death Maurice had made only one repayment (in the amount of IR£750.00). Responsibility for the maintenance, upkeep, education and welfare of the plaintiff and her children has, at all material times, rested upon the plaintiff and her husband Mr. Tom Rojack. It was not the responsibility of Dr. Boland between 1982 and the date of her death in 1994. However Dr. Boland undertook the greater part of that responsibility throughout this entire time. She discharged it in a particularly generous manner.

I am satisfied on the evidence that prior to her death Dr. Boland made substantial and generous provision for the maintenance, welfare and upkeep of the plaintiff. By providing maintenance, upkeep and educational and financial support for the plaintiff's children Dr. Boland further supplemented her generous provision for the plaintiff.

## **CONCLUSION**

In addition to providing the plaintiff and her children with maintenance, care upkeep and financial support Dr. Boland made a number of monetary gifts to the plaintiff, particularly in 1993.

It is contended on behalf of the plaintiff that the moral duty owed by Dr. Boland to the plaintiff required Dr. Boland to bequeath her beneficial share in Shrewsbury Lawn to the plaintiff.

Such a disposition would have excluded all three of the plaintiff's siblings, from any share in their mother's estate (other than a (then) doubtful future contingent property interest).

The provision for the plaintiff made by Dr. Boland prior to her death and by her will was substantially greater than any commensurate provision made by her for the plaintiff's siblings, two of whom were, at the time, suffering financial hardship.

Taking into account the factors identified by the High Court (Kenny J.) in *M(F) v. M(T)* and having regard to the generous provision made for the plaintiff by Dr. Boland prior to her death and in her will I consider it most unlikely that any court would have found that Dr. Boland, "...by (her) .. will or otherwise..." had "*failed in her moral duty to make proper provision for the plaintiff in accordance with her means*".

It follows that in the circumstances of this case the plaintiff had no prospect of making a successful claim against her mother's estate pursuant to the provisions of s. 117 of the Act of 1965.

It follows inescapably that Mr. Buchalter could not have been obliged or under a duty to give the plaintiff unsolicited advice that she had such a claim or indeed that she should seek independent legal advice.

It follows further that the plaintiff's claim fails.