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Articles

Forgeries and wills -- A probate problem

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The evidentiary threshold of proving a will is a necessary consequence of the place of wills as an exercise of testamentary freedom in the common law. This is challenged most when it is suspected, or alleged, that a document being propounded as the last will of the deceased contains forged signatures. This article explores the problems that such an allegation creates and the role of the forensic document examiner in the relevant evidence being assessed by the court in deciding whether or not to grant probate or letters of administration cum testamento annexo of the propounded paper.

The significance of signing

The act of signing reverberates with significance down the centuries. It was the solemn act above all others that has been seen to formalise the testamentary act. Although prior to the spread of literacy in the nineteenth century it was the witnesses that played the most crucial role as to the testamentary intention, once the Wills Act 1837 (UK) ushered in the modern framework of wills formalities it has been signing that is the foundation of a valid will.¹ Because the act of signing came to be so important, the very act of the testator's cutting out of his signature was held to revoke the will in *Hobbs v Knight*.²

The signature of the testator being ... an essential part of a will, it is difficult to comprehend when that which is essential to the existence of a thing is destroyed, how the thing itself can exist.³

Currently it is possible, with the advent of 'dispensing powers', to overlook non-compliance with wills formalities and even to admit to probate a will that is not signed, but these are exceptional cases.⁴ Signing still remains a crucial, and usually definitive act. And it is here that we also find forgers.

The scenarios where allegations of forged signatures have arisen in probate cases involve a number of interesting -- and intersecting-- questions. There is the ever present issue of mental capacity. In an era of increasing longevity, with attendant risks of decreased mental competence -- and perhaps the greater likelihood of greedy relatives -- the matter of this vital threshold issue is likely to come regularly under scrutiny. With decreased competence perhaps comes an increased susceptibility to pressure. But with increased age may also come an increasing irascibility and, with it, impatience with family -- and changes in testamentary disposition.

In this article a number of recent cases will be considered that show how the court responds when an allegation of forgery is made in the context of an application for probate. This will include a consideration of forensic document examination and how expert evidence is used in the probate arena.

Forensic document examination

The term 'forensic' refers to the application of science to law and so a forensic document examiner (also referred to as a 'questioned document examiner') discovers and develops evidence from a document or signature that may be used in

court. A forensic document examiner was originally known as a 'handwriting expert' whose task was to determine whether handwriting/printing was authentic or forged and to confirm or eliminate a person as an author. From this grew the wider practice of drawing conclusions about the legitimacy of writing on documents.⁵

Documents may arise in a wide variety of business and personal affairs, and while document examination mainly concentrates on the identification of handwriting and signatures, it covers a variety of subjects, including:

- o the identification of handwriting, signatures, typewritten or printed matter;
- o distinguishing forgery from genuineness;
- o analysing inks, papers and other substances that are combined into documents;
- o the detection of additions and substitutions on a document;
- o the restoration or decipherment of erased and obliterated writing.⁶

As the focus is entirely upon the physical presentation of the signature and the document itself, even the language in which it is written is not important.⁷ To fulfil the required tasks, the document examiner has an increasing array of devices and techniques to compare and analyse signatures and other aspects of a document, including microscopic examination, reflected infrared and infrared luminescence techniques, ultraviolet fluorescence, thin-layer chromatography, micro-spectrophotometry and the use of electrostatic detection apparatus.⁸

When it comes to evidence of handwriting in court, there are three types of relevant evidence -- testimonial or hearsay, opinion and comparison.⁹ Generally speaking, the validity of a signature is often proven by the admission of the person who wrote it -- where the signature concerns that of a living person; by witnesses who saw the person writing; a person who heard the person acknowledge his or her handwriting; or by acceptance of the documents in the normal course of business. As noted by Lord Denman CJ in *Doe d Mudd v Suckermore*:

The clerk who constantly read the letters, the broker who was ever consulted upon them, is as competent to judge whether another signature is that of the writer of the letters, as the merchant to whom they were addressed. The servant who has habitually carried letters addressed by me to others has an opportunity of obtaining a knowledge of my writing though he never saw me write, or received a letter from me.¹⁰

From one's own experience we probably know at a glance the handwriting of our mother, father, children, spouse and many of our friends. Such familiarity with their signatures would enable us to provide some evidence by way of opinion with respect to their writing, but of a limited kind.¹¹ What is necessary to give evidence in such a case is that one can have in one's mind 'a picture of the signature' so that we can venture, under oath, an opinion of the comparison of the actual signature in front of us with the mental picture.¹² If we are not in a position to do so, then we cannot give such evidence.

If a *comparison* between signatures is to be made, that is generally the province of the expert witness.¹³ The role of the expert here is to provide an opinion by pointing out similarities or differences between the various specimens. Then it is for the court to draw its own conclusion. As remarked by Patteson J in *Mudd v Suckermore*:

All evidence of handwriting, except where the witness sees the document written, is in its nature comparison. It is the belief which a witness entertains upon comparing the writing in question with an exemplar in his mind derived from some previous knowledge.¹⁴

The document examiner as expert may be asked to undertake a range of tasks in addition to handwriting, such as determining what has happened to a document, when it was created, or deciphering information on the document that has been obscured, obliterated or erased. A document examiner may also be requested to examine items on a document to establish the manufacturing source, similarities or differences, first production date or date used. In making the required comparisons in any given case, the 'primary duty' of the document examiner, as with 'a forensic expert in any discipline', is:

to objectively and independently serve the court and not the party instructing them. This has recently been codified by various courts throughout Australia in terms similar to Sch 7 (Expert Witness Code of Conduct) of the Uniform Civil Procedure Rules 2005 (NSW).¹⁵

How then does the handwriting expert proceed?

A leading Australian document examiner, Chris Anderson, states that the principle on which the identification of handwriting is based is a simple one -- 'people are all alike; people are all different':

All handwritings are alike; if this were not so we would not be able to read another person's handwriting. All handwriting is different; if this were not so we would not be able to identify the handwriting of close relatives and friends with whom we correspond.¹⁶

Since no two people write *exactly* the same, handwriting identification therefore is usually based on two accepted principles, namely, writing habits and the individuality of the writing.

There are two main methods by which a forger produces a signature that looks very like a known genuine signature of a particular person:

The first and most common method involves the use of an actual model signature in proximity to the document to be forged. The second method of simulation involves the forger's ability to recollect the signature he proposes to imitate and to produce it on the document to be forged without a direct reference to a model.

Traced forgeries are fraudulent signatures which have been executed by actually following the outline of a genuine signature with a writing instrument. Such a signature may be produced with the aid of carbon paper by first tracing a carbon outline and then covering this with a suitable ink stroke. Or the forgery may be traced from an outline made visible by transmitted light.¹⁷

A further method uses a genuine signature but via 'cut and paste' it is incorporated into another document, often involving reproduction through photocopying or faxing.¹⁸

When it comes to proving whether a signature is genuine or not, the forensic document examiner works on the basis of comparisons between known genuine signatures, 'exemplars', and the signature or signatures in question. Where the relevant person is elderly and/or frail, it is important to have signature samples at a proximate time to the time of the signature being scrutinised. The examiner looks to things like fluency, the nature of pen stops, pen lifts, shape and size of the writing and the manner of formation of particular letters. Other aspects of document examination may become relevant in wills cases, like the presentation of the paper, evidence of timing of the creation of documents; but the main issue is usually that of signature. As explained by Anderson:

All the factors which identify handwriting fall into two general and somewhat overlapping groups -- class and individual characteristics.

- (i) Class characteristics are those common to a number of writers and may result from such influences as the writing system studied, family associations, trade training, or foreign education as well as carelessness and haste in execution.
- (ii) Individual characteristics are those which are highly personal or peculiar and unlikely to occur in combination in other instances.¹⁹

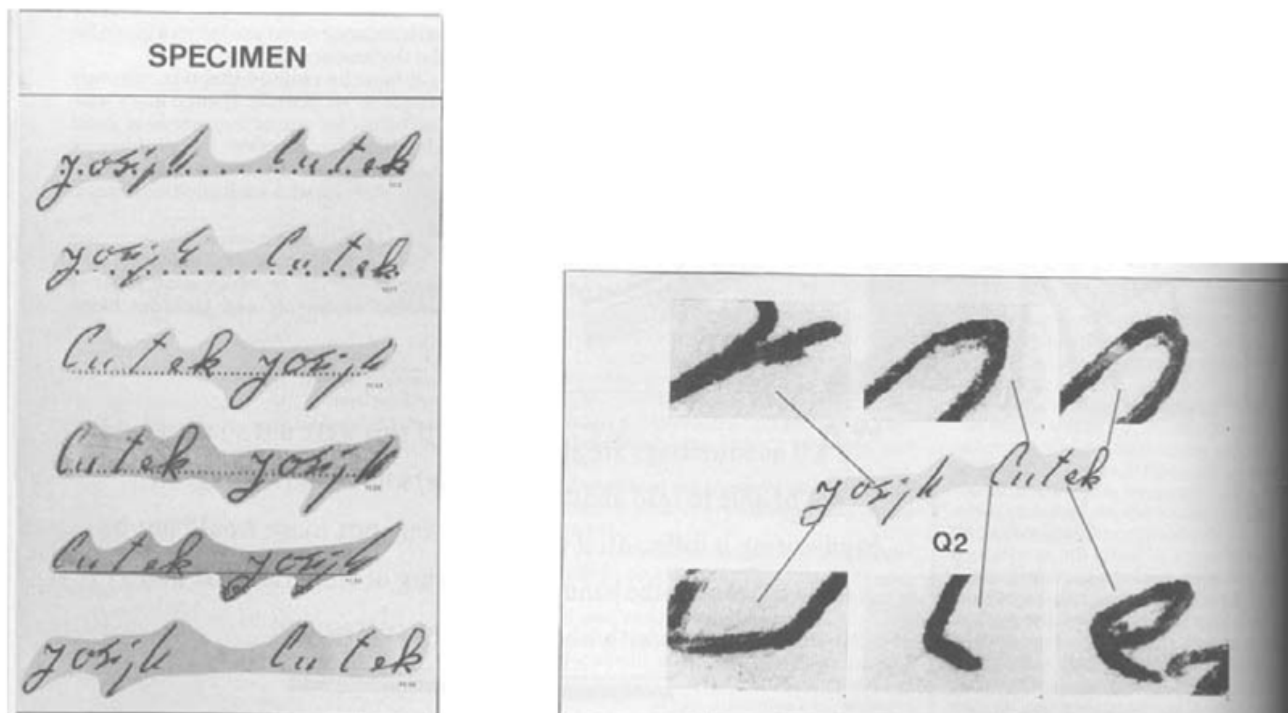
'Class characteristics' may include things like the time at which a person learned to write. People of our parents' and grandparents' generations write, or wrote, differently from us.²⁰ Their patterns of handwriting and writing styles were often more formal -- the cursive or running style,²¹ rather than the 'modified cursive' for example of the 1960s, which was rather like joined up printing style, without the loops of the cursive style. Then there are the 'individual

characteristics', such as the style that might emerge when a natural left-hander is forced to write right-handed-- as was inflicted in certain religious schools before the middle of last century; or where a child has switched schools, even countries, at a critical point in their learning of handwriting and has developed an idiosyncratic style, with distinct differences from his or her peers. Some examples of different writing styles are included as an appendix to this article.²²

Forgeries have a number of distinct characteristics that the document examiner looks for. Anderson groups these into primary and other identifiers. The primary signs are:

- o Written at speed which is markedly slower than the genuine signatures.
- o Frequent change of the grasp of the pen or pencil.
- o Blunt line endings and beginnings.
- o Poor line quality with wavering and tremor of the line.
- o Retracing and patching.
- o Stops in places where writing should be free.²³

An example included by Anderson is as follows:



A freehand simulation (forgery) of the specimen signature (left) showing macro photographs (right) highlighting the pen lifts and added strokes which are indications of forgery.²⁴

But there are three other features of forged signatures that the document examiner knows:

- o Any forgery will, of necessity, exhibit a considerable degree of similarity to the general run of genuine signatures in the more obvious features of letter design.
- o Some forgeries will resemble at least one genuine signature in almost every detail.
- o No two genuine signatures of any length are replicas of each other.²⁵

Document examiners are also alert to the signs of tracing, which are often seen where replica signatures are found. As

explained by Paul Westwood, Steven Strach and Michelle Novotny in a detailed chapter on document examination in a leading text on expert evidence:

Forgers frequently resort to tracing to minimise the risk of introducing some gross pictorial error into the signature, or because of an inability to reproduce a reasonable freehand copy of the signature.

If more than one signature is required to give effect to some fraudulent purpose, the forger will frequently make the mistake of producing two or more tracings from the one genuine master signature. The degree of coincidence between these signatures would provide irrefutable evidence that they were all traced from a common model and thereby allow them to be identified as spurious.

In general terms, if two or more signatures of reasonable length exhibit total coincidence in form then it can be said with confidence that they are all based on a common unknown model or that one of the signatures under examination may be the model from which the other signature(s) were traced.²⁶

The probate arena also contains its own particular areas of danger -- that the forger may have taken a long time in the planning and execution of their crime:

In probate matters one has to be mindful of the possibility that a sample of purportedly genuine signatures of the deceased may contain forged signatures on relatively inconsequential documents written well before the date of the suspect will. These innocuous forgeries may be written by the person who forged the testator's signature on the disputed will and could be designed to bias a comparison of the sample signatures in favour of the will forgery.²⁷

In other words, the veracity of the exemplars must be assiduously proved as they form the basis upon which the expert's opinion is grounded. A singular warning was sounded in this respect by Holland J in the case of *Sumner v Booth* where insufficient samples of genuine signatures and their timing formed the basis of the experts' reports:

it seems to me that a handwriting expert who is given one sample of the handwriting and acts on it, as [the expert] did in this case, is leaving himself open to a very powerful attack. [The expert] did have some other samples of the signature and handwriting of the deceased, but, according to his evidence, he relied only, or certainly basically, upon the one sample ...

The case also, in my opinion, illustrates the dangers of attempting to make a judgment of the effect of ill health and senility upon a person's handwriting. It so often happens in this Court that the suspicion which is put forward as the basis of a challenge to the handwriting of a person relates to the handwriting of old people, people on their death-beds or people during a time of serious illness when, in order to get their affairs in order, they desire to make a will.

The case also illustrates the danger for experts in giving handwriting evidence and opinions of their failure to know the physical conditions under which a signature was written. ... In this case not only was the deceased 92 years of age and frail; not only was his progressive deterioration, particularly as to his physical frailty, such as to make it necessary for him to have hospital care; but he was sitting up in bed, propped up by pillows, with a tray sitting on the bed in front of him, and it was on that that he signed his name on the will ...

However, in my opinion, the handwriting expert who gives evidence of this sort can do it in a manner which will be persuasive or acceptable to the court only with a great deal of caution and qualification ...²⁸

Keeping in mind the document examiner's cardinal rule, that 'people are all alike; people are all different', as well as the warnings sounded by Holland J, let's now see how some wills, in the case of suspected forgery, have fared in court.

Forgery cases in the succession context

A few cases will demonstrate how difficult the issue of forgery is to argue, and how the court responds to an allegation that a will and/or its signature is not genuine.²⁹ There is a common theme: someone has a lot to gain, and a lot to lose. How does the court deal with these apparently desperate cases?

Burnside v Mulgrew; Re Estate of Grabovaz³⁰

Doris Miriam Ivy Grabovaz died on 27 August 2005, aged 90. Her estate, comprising property in New South Wales, was worth about \$2.5 million. On 13 December 2004, Ms Grabovaz had made a will appointing her lifelong friend, June Eveline Burnside, as executor and gave her such furniture, contents and effects as she might choose. Ms Grabovaz then divided her residuary estate equally between June and Doris's niece, Olive Brown. However another will, dated 1 July 2005, was propounded as Ms Grabovaz's last will by Lina Angela Mulgrew, her carer in her last years. Lina was employed by a community care service agency to provide personal care for Ms Grabovaz from October 2004 until her death in August the following year. This later will left all of Ms Grabovaz's estate to Lina.

The issues focused on whether the signature on the 2005 will was really that of Ms Grabovaz. If so, did she know and approve of the will? Another possible issue, though it was not pressed, involved the circumstances in which the will was allegedly signed: was there undue influence?³¹ But first, some more information about each of the wills as narrated in the account of the case in the judgment of Brereton J.

(a) The 2004 will³²

On 13 December 2004, June took Ms Grabovaz to her solicitor, Mr Fowler, to make her will, but she remained outside while the will was being prepared. As noted above, this will benefited June and Olive Brown. June stated that she did not have any prior knowledge of Ms Grabovaz's plans. Mr Fowler was very professional. He satisfied himself concerning Ms Grabovaz's mental capacity to make the will. He also asked her whether she felt pressured or coerced in any way to make her will, to which she responded, 'No, definitely not.' The solicitor in such a case is the 'front line'. The experienced probate practitioner will have to make such judgments regularly as a practical, even commonsense, matter, assessing the client's competence within the known framework of expected understanding of those who wish to make wills.

Once the solicitor was satisfied in these respects, Ms Grabovaz then signed the will in his presence and that of a Justice of the Peace from his office. They were both present when she signed and they then witnessed her signature. There was no issue raised about the validity of this will. It was signed and witnessed properly. Ms Grabovaz then told Olive about the will and that she was a beneficiary.

(b) The 2005 will³³

According to Lina, about April 2005 Ms Grabovaz told her she wanted to change her will. At this time Lina stated that she was visiting Ms Grabovaz 'every second day' and continued to do so until Ms Grabovaz's death. Lina also said that Ms Grabovaz asked her to obtain a will kit and then to arrange for two people to be there as witnesses when she had finished the will. If this will was valid, its effect was to revoke the earlier.

The issue therefore was as to whether it had satisfactorily passed the standard of proof required of wills in the circumstances. The problem was, and is, indeed one of proof. In wills cases the broad approach to proof is clear -- and it is critically one of *onus* in the circumstances of the particular case.

(c) Onus of proof³⁴

Brereton J referred to the principles 'conveniently summarised' by Powell J in *Re Eger; Heilprin v Eger* in 1985:

1. the onus of proving that an instrument is the will of the alleged testator lies on the party propounding it; if that is not established, the court is bound to pronounce against the instrument;
2. this onus means the burden of establishing the issue; it continues during the whole case, and must be determined upon the balance of the whole evidence;
3. the proponent's duty is, in the first place, discharged by establishing a prima facie case;
4. a prima facie case is one which, having regard to the circumstances so far established by the proponent's testimony, satisfies the court judicially that the will propounded is the last will of a free and capable testator;
5. unless suspicion attaches to the instrument propounded the testator's execution of it is sufficient evidence of his knowledge and;
6. facts which might well cause suspicion to attach to an instrument include:

- a. that the person who prepared, or procured the preparation of, the instrument receives a benefit under it;
 - b. that the testator was enfeebled, illiterate or blind when he executed the instrument;
 - c. where the testator executes the instrument as a marksman when he is not;
- 7. where there is no question of fraud, the fact that a will has been read over to or by a capable testator is, as a general rule, conclusive evidence that he knew and approved of its contents;
 - 8. a duly executed will, rational on its face, is presumed, in the absence of evidence to the contrary, to be that of a person of competent understanding; sanity is to be presumed until the contrary is shown;
 - 9. facts which, if established, may well provide evidence to the contrary include:
 - a. the exclusion of persons naturally having a claim on the testator's bounty;
 - b. extreme age or sickness;
- 10. however, while extreme age, or grave illness, will call for vigilant scrutiny by the court, neither (even though the testator may be in extremis) is, of itself, conclusive evidence of incapacity; it will only be so if it also appears that age, or illness has so affected the testator's mental faculties as to make them unequal to the task of disposing of his property.³⁵

Applying these principles to the facts in hand, Lina Mulgrew, as the proponent of the later will, bore the onus of proving it.³⁶ The fact that the testator was very elderly was a relevant matter, as was that the will benefited a 'stranger'-- Lina -- someone unrelated to Ms Grabovaz, both of which came within point 9 in the list above. If Lina did not succeed, the 2004 will would stand unassailed.

But what of the sub-text -- that the signature of Ms Grabovaz on the 2005 document may not have been genuine? As Brereton J focused on the onus of proof of the document as a whole, the suggestion of forgery did not need to be tackled head-on, even at all. He said that, while a court 'should not make an affirmative finding of serious wrongdoing in the absence of comfortable satisfaction that the evidence supports that finding':

it does not follow that the absence of sufficient evidence to make a finding, to the 'comfortable satisfaction' standard referred to in *Briginshaw v Briginshaw*, that there has been fraud or forgery or other serious misconduct, has as its necessary corollary that the opposing case must proceed.³⁷

In other words, just because a case of forgery is *not proved* to the requisite standard of proof, does not mean, as its corollary, that there is a necessary finding that there was *no* forgery. It is just that it was not proved. So, what could be said about the 2005 will?

In such cases the judge will begin by making his or her own observations about the handwriting. Brereton J commented that, from his own observations of the document, the signature was in cursive handwriting and that it was clearly an original and not 'a machine reproduction of handwriting'.³⁸

On the expert evidence, provided by Michelle Novotny,³⁹ the signature did not appear to be a tracing. Hence, as noted by Brereton J, 'it must, therefore, be a freehand copy if it is a forgery at all and, if so, at least to the untrained eye, it seems an extraordinarily good one'.⁴⁰ But there were other features that 'raised curiosity' for the court, 'especially once they are pointed out' by the expert.⁴¹ Novotny's report revealed some interesting details, demonstrating the way that the forensic document examiner works in such cases, leading her to conclude that the signature was, in this case, a simulation:

A comparison of [the] questioned signature ... and the specimen Doris Grabovaz signatures revealed similarity in general appearance as well as a number of differences between them, particularly subtle details.

The letters in the questioned signature ... are proportionately shorter and broader than the letters in the specimen signatures. There is also a wider space between the names 'Doris' and 'Grabovaz' in this questioned signature compared with the specimen signatures.

I observed numerous interruptions to the fluency of the questioned signature ... in the form of pen stops and/or pen lifts. The questioned signature exhibits in the order of 15 such interruptions which, by comparison with the specimen Doris Grabovaz signatures, are uncharacteristic. Furthermore, the pen stops/lifts occur not only between a number of the letters (as occurs in the specimens) but also in the middle of the structures of a number of the letters. Most of the pen stops/lifts in the questioned signature are not obvious to the naked eye and, in the case of pen lifts, the placing of the pen back on the page at the point where it was lifted can be said to be quite precise...

Poor pen control in signatures of the elderly and/or infirm tends to manifest itself as obvious interruptions to the fluency of the writing. This is because the writer is unlikely to have the control or ability (nor presumably the need) to conceal the interruptions. Pen stops/lifts such as those observed in the questioned signature ... are inherently suspicious and are similar in nature to pen stops/lifts often observed in signatures that are the product of simulation.

Similar observations were made with respect to the questioned signature ... when compared with the specimen Doris Grabovaz signatures. I noted also that each of the letters 'a' in Grabovaz in the questioned signature are continuous pen strokes from the preceding letters 'r' and 'v', respectively, whereas the specimen signatures exhibit pen lifts between these letters ...

On the basis of my observations, I concluded that it is highly probable that each of the questioned signatures is the product of simulation. I concluded that there is no evidence to suggest that either of the questioned signatures ... were written by the writer of the specimen signatures and I consider the possibility highly unlikely.⁴²

The report was accompanied by enlarged images using a 'camera/microscope setup' to demonstrate the interruptions to the fluency of the questioned signature.

Juxtaposed to the expert's report was the evidence of one of the purported witnesses to the 2005 document,⁴³ a Mr Alexander Dover, a friend of Lina's husband. But the evidence of Ms Margaret Wong, the other attesting witness, a friend of Lina's, was contradictory. Ms Wong said that she had never met the deceased and that the paper was blank when she signed it.⁴⁴ She also said that Lina sought her help after Ms Grabovaz had died, even offering her money.⁴⁵ She declined to assist with proof of the will.⁴⁶ It was then argued that her evidence should be discounted: that she was an alcoholic, her memory was not good; that there had been a falling out.⁴⁷

Moreover, Lina said she saw nothing wrong in accepting her client's instructions to make provision for her in a will without disclosing that to the agency that employed her, despite clear contrary indications in the employment manual, leading Breerton J to remark that:

While I am acutely aware that Courts should be reluctant to assume that lay people understand the concepts of fiduciary obligations with which these Courts deal every day, I do not think it requires an equity lawyer to appreciate that a personal care nurse does not act with a high degree of ethics or morality in accepting other than token gifts from clients. I did not find her answers to some of the questions in this territory -- to the effect that 'we were told to keep her happy and to socialise with her' -- at all convincing an explanation. I think I must conclude that the evidence shows, having regard to her employment obligations and what members of the community would normally regard as proper conduct, that she was prepared to engage with and receive from her client benefits in flagrant breach of what she knew to be her obligations under her employment contract and what most members of the community would recognise as proper.⁴⁸

Breerton J lined up the competing evidence. On the one hand, in favour of the 2005 will, were the 'lay impression' that the deceased did in fact sign the document, as well as Dover's evidence of execution. On the other hand, against the 2005 will, stood the expert evidence that there was a high degree of probability that Ms Grabovaz's alleged signature was a simulation, and not genuine. In addition, there was Ms Wong's evidence and conflicts within Lina's own evidence.⁴⁹ Other circumstantial matters against the later will were:

the improbability that the deceased would change her will in favour of a stranger, only about three months after having made the

December 2004 will, with Ms Mulgrew attending on her only once a week, and in circumstances where another nurse is attending on her twice a week over the same period; and the circumstance, as I have found, that Ms Mulgrew has demonstrated that she was prepared to, in effect, exploit a client for her own benefit in circumstances in which her contractual obligations and ordinary standards of propriety dictated that that ought not be done, tends to show that she is prepared to engage in less than honest conduct.⁵⁰

The conclusion that Brereton J reached, however, was as practical as it was simple: 'it is unnecessary that I find affirmatively that there is a forgery; I am simply not satisfied that the signature on the questioned will is that of the deceased'.⁵¹ So it was unnecessary to consider the further question of knowledge and approval of the will, which would have been a serious matter in the circumstances of, in particular, the deceased's extreme age; her dependence on Lina; her limited contact with Lina prior to that date; the fact that Lina had filled out the will and selected both the attesting witnesses; and that the will made no provision for Ms Grabovaz's only surviving relative, Ms Brown, nor the Burnside family.⁵² Simply 'not satisfied' on the evidence was the answer. There was enough doubt around the instrument, even without a positive finding that the document was forged, for it not to be admitted to probate.

Forensic document examination can assist a party or the court weighing up the facts in the context of the onus of proof. As illustrated by *Grabovaz*, it may not be so much a case that there *was* a forgery, or that a forgery cannot be proved, but that the propounder, in the light of all the circumstances, has not overcome the onus; and the greater the doubt, the more onerous the onus, so to speak. In the next case, the issue of forgery was centre stage, and, with it, the forensic document examiner.

Estate of Pozniak; Morgan v Reuben⁵³

When Mrs Toni Pozniak died on 7 May 2003, leaving an estate in New South Wales valued at around \$2.8m, three documents were brought forward for consideration.⁵⁴ There were two main protagonists: her son, Mr Morgan, and her son-in-law, Mr Reuben.

The first document was a will of 30 May 1995, in which Reuben was appointed executor and substantial gifts were left to his family. The attesting witnesses appeared to be Peter Ryner, the solicitor who prepared the will, and his wife, Nadine.⁵⁵ The second document was a will of 10 January 1996 in which another solicitor, Mr Cordell, was appointed executor. In this document there were no gifts to Reuben. It was not disputed that the signature of Mrs Pozniak was genuine on this document and that this was a validly executed will. The third document purported to be a codicil to the 1995 will, dated 10 March 1997, which made a specific gift of property to one of Reuben's children in substitution for a gift of another specific property that had been left in that will. The codicil otherwise confirmed the 1995 will -- and made no mention whatsoever of the 1996 will. The attesting witnesses were the same as those on the 1995 will. But it was alleged that the signature of Mrs Pozniak was a forgery.

The contest boiled down to this: Morgan sought a grant of letters of administration with the will annexed of the 1996 will, Cordell having renounced his right to seek a grant; Reuben sought a grant of probate in solemn form of the 1995 will and 1997 codicil.⁵⁶ The proceedings focused on forgery: whether, on the documents propounded by Reuben, the signatures of Mrs Pozniak were in fact forged. If they were not forgeries, then Reuben's documents would win the day.⁵⁷

(a) The expert evidence

Paul Westwood, another leading Australian document examiner,⁵⁸ was called by Morgan. He was provided with several undisputed signatures of Mrs Pozniak as exemplars, one of which was dated a day after the alleged codicil, therefore giving a good contemporaneous benchmark signature; similarly there was another genuine signature made only 3 months after the purported will of 1995. As noted above, indentifying contemporaneous signatures is particularly important as people age and handwriting changes over time. The process undertaken by Westwood was described, as follows, by Palmer J:

The genuine signatures and the disputed signatures were examined by Mr Westwood macroscopically and microscopically in order to study their structures, forms and dynamic qualities taking account of such features as direction of stroke, the presence and nature of pen stops and pen lifts, pen pressure, relative size and height, proportions, special relationships, baseline alignment and slope. Similarities and differences were recorded.⁵⁹

From his own observations, Palmer J commented that the disputed signatures differed 'markedly' from the genuine signatures, as they were 'hesitant and shaky, the letters being awkwardly formed', in contrast to the genuine signatures which were 'fluent and confident'. Westwood corroborated these observations:

Each of the questioned signatures on [the 1995 will] was written using a fluid ink writing instrument such as a felt tip pen. The nature of fluid ink is such that it is readily absorbed into paper and when a fluid ink writing instrument rests in the one spot on a document for any length of time, the ink will continue to flow or 'bleed' into the paper. This creates a large spot of ink on the page. Each of the questioned signatures on [the 1995 will] exhibit a number of such ink bleeds. These observations are very strong evidence of the pen stopping and possibly lifting from the paper in multiple locations throughout the signature.

The questioned signature on [the 1997 codicil] was written using a ballpoint pen. In contrast to the fluid ink writing instruments described above, ballpoint pens use a viscous or paste-like ink that remains on the surface of the paper. While such pens do not create ink bleeds when they rest in the one spot on a document for any length of time, microscope examination of the ink line will detect evidence of interruptions in the ink line such as pen stops and pen lifts. The questioned signature on [the 1997 codicil] exhibits a number of such interruptions to the fluency.

In addition to evidence of pen stops and pen lifts throughout each of the questioned signatures, they each exhibit parts where the pen has moved reasonably slowly on the paper producing a 'shaky' appearance of the ink line. In stark contrast, other parts of the signatures exhibit evidence of fluent and continuous pen movement. The number and nature of the pen lifts, pen stops and fluctuations in fluency in each of the questioned signatures is inherently suspicious ...

In addition to the differences noted above in respect of dynamic qualities, we also observed a number of other structure and form differences between each of the questioned signatures and the Pozniak specimens [in the formations of the letters 'M', 'T', 'P', 'o', 'z' and 'a'].

...

We found no evidence to suggest that any of the questioned signatures were written by the writer of the Pozniak specimens. On the basis of the number and nature of the fundamental and consistent differences observed between the questioned signatures and the Pozniak specimens, we concluded that it is highly unlikely that any of the questioned signatures were written by the writer of the specimen signatures attributed to Toni Pozniak. That is to say, it is highly probable that each of the questioned signatures was written by some person other than the late Mrs Pozniak, in an attempt to simulate the style of Mrs Pozniak's signature.⁶⁰

The evidence went further as other proffered documents were subjected to examination. There was a Power of Attorney dated 25 June 1992, supposedly signed by Mrs Pozniak, again in favour of Reuben and witnessed by Ryner, who also certified under s 163F(2) of the Conveyancing Act 1919 (NSW) that he had explained the effect of the Power of Attorney to Mrs Pozniak before it was signed by her. Moreover there was a file note containing handwritten notes of what Ryner said were instructions given to him by Mrs Pozniak with respect to an earlier will, supposedly signed by her in confirmation of his instructions, as well as being signed by Mrs Ryner.

Westwood concluded that the signature on the Power of Attorney was forged. He also concluded that the signatures on both the Power of Attorney and the file note were by the same person 'attempting to simulate the style of Mrs Pozniak's

signature'.⁶¹ Ryner also confessed under cross-examination:

after a great deal of evasion, that he had not witnessed the signature of Mrs Pozniak on the Power of Attorney, that the certificate under s 163F(2) which he had given was false, that he had made a false declaration verifying the Power of Attorney, and that the purported signature of Mrs Pozniak on the Power of Attorney was a forgery.⁶²

Not surprisingly, Palmer J found this most alarming.

Westwood was also asked to consider Mrs Ryner's signatures, as she was supposedly an attesting witness to the 1995 will, the 1997 codicil and the file note of instructions. Once more both 'the untrained eye' of Palmer J and the expert eye of Westwood concluded that, while all of the disputed signatures of Mrs Ryner were similar to each other, they were very different from her undisputed signatures.⁶³ One is reminded of the warning that Westwood and his co-authors provide in relation to the preparation that may be taken in probate cases to set up a forgery as genuine.⁶⁴

The file note was also surrounded with suspicion. It was not just the signatures that provided clues. There were impressions of another document on the piece of paper -- another avenue for the skilled eye of the expert document examiner. The resulting conclusion was that it was impossible for the file note to have been written when it was claimed; rather it was written some time after 19 May 2003 -- *after* Mrs Pozniak had died. In other words, it was 'deliberately fabricated'.⁶⁵

There was no other expert witness besides Westwood, and his evidence remained 'essentially unchallenged';⁶⁶ and yet, Mr and Mrs Ryner 'repeatedly and unequivocally' insisted in their cross-examination that they were both present and saw Mrs Pozniak sign the 1995 will and the 1997 codicil, and that all of Mrs Pozniak's signatures, and Mrs Ryner's, were genuine.⁶⁷ So there was a direct conflict between the direct testimony and the expert evidence. What weight, then, was to be given to the expert evidence? Palmer J commented that:

Expert evidence is, in the end, only an opinion. It is a very grave matter indeed to find as a fact that a solicitor has falsely attested the execution of a will. It is even graver to make that finding on the basis that the solicitor has perjured himself in this Court, particularly when, as here, the solicitor vehemently and earnestly protests his innocence of any wrongdoing and is supported by the evidence of another witness. The standard of proof required to make such findings, while not the criminal standard, must be fairly close to it.⁶⁸

The expert evidence therefore had to be placed in the mix with other oral testimony as well as the need to weigh up the credibility of that testimony after its presentation and cross-examination. It may have been possible to decide, as Brereton J did in *Grabovaz*, that the relevant document had not satisfied the requisite onus of proof, but, having weighed up all the evidence, Palmer J concluded that the disputed signatures of Mrs Pozniak and Mrs Ryner were all forgeries and that Ryner had given false evidence.⁶⁹ The consequences, as he said, were grave:

Because my findings as to Mr Ryner bear on his fitness to continue to practise as a solicitor, a copy of this judgment will be forwarded to the Law Society of New South Wales and the exhibits, other than the 1996 Will, will be retained by the Court until further order.⁷⁰

This was perhaps the most extreme conclusion that could be reached. Most cases are resolved on the issue of doubt as against the onus of proof, as in *Grabovaz*. But in *Pozniak* the judge held that forgery was, indeed, proved. In other cases there is so much doubt, however, that it virtually amounts to a finding of forgery.

Estate of Finlow; Boland v Morton⁷¹

On 30 July 2002 Phyllis Catherine Finlow died, aged 91. Her two children, Michael Boland and Rhana Morton, survived her. Letters of administration were granted to Mrs Rhana Morton in November 2002, on the basis that Mrs Finlow died intestate. In December, Michael sought to have the grant revoked and in February sought an order for probate of a will dated 20 May 1990.⁷² The twist in the narrative is that the original will was not available; rather copies

of it were propounded.⁷³ The application was resisted, it being alleged that the copies were forgeries.⁷⁴ Three were produced: two by Boland and the third by an apparent attesting witness, Stephan Marshall. Rhana Morton alleged that Marshall and Boland were colluding to produce false documents and to give false evidence.⁷⁵ The 1990 will was a typed document that appointed Boland sole executor, gave directions as to Mrs Finlow's cremation, left all her estate to him if her husband predeceased her, and stated that she left nothing to her daughter Rhana whom she had 'disowned'. The attesting witnesses were Mrs Finlow's husband and Marshall.

Although expert opinion of document examiners was called, it was inconclusive. White J had to scrutinise whatever other information was to hand, including Mrs Finlow's diaries, her address book and telex. The only corroborating evidence of Marshall's statements was from Michael Boland.

(a) Credibility of witnesses

In weighing up credibility, at times the court has to make some hard judgments about the reliability of the evidence -- and the witnesses giving it. Here, White J considered it 'quite remarkable' that neither Stephen Marshall nor Michael Boland 'professed any difficulty of recalling their precise movements' and other details of events some 14 years previously, and that 'their recollections should coincide on matters of detail which has been omitted from their affidavits'.⁷⁶ It led him to be cautious before accepting their evidence. White J also thought it surprising that there was no record of making a will in Mrs Finlow's diary, given her habits:

Had she made a will it is likely she would have referred to it in her diary. She recorded other events of less moment, such as sending and receiving letters, visiting the doctor and framing photographs.⁷⁷

And what about the typewriter?⁷⁸ Rhana Morton said that her mother did not type and she had never seen a typewriter at her mother's house.⁷⁹ Michael Boland said otherwise,⁸⁰ although even his daughter, Samantha, who had stayed with her grandmother on occasions, said she had never seen a typewriter.⁸¹ But she was not available to be cross-examined.

White J found the provision about cremation a significant one, given that there was clear evidence that Mrs Finlow wished to be buried. She was a devout Catholic and had said to a friend, who gave evidence, that under no circumstances did she wish to be cremated and that she wanted to be buried at a particular cemetery where a number of her paternal family members were buried.⁸² In this context, the clause in the alleged will was 'suspicious' and cast significant doubt on its genuineness.

The story of the placement of the will and the photocopying also did not add up. The original was supposedly placed in a document folder at the bottom of a freezer chest where Mrs Finlow allegedly kept important papers. Evidence about the use of the freezer and what was or was not in it was adduced.⁸³ Further, none of it was consistent with Mrs Finlow's using it for safe custody of papers -- like the alleged will.

Then there was evidence that Mrs Finlow and her husband contacted the Salvation Army in 1991, after the alleged will had been made, enquiring about making a will.⁸⁴ This was particularly significant. White J thought it odd that if Mrs Finlow knew how to make a will, as she had allegedly typed one just the year before, she would need to speak to the Salvation Army or anyone else about how to do it. Perhaps she had learned that by having her husband witness the alleged will, which he supposedly had done on the 1990 will, this would have invalidated his gift and she wanted to cure this. But, as White J continued:

if that were so, I would expect her to have taken a step to ensure that she made an effective gift to her husband by making a will which he did not attest. However one looks at it, the Finlows' request to the Salvation Army for information on how to make a will in August 1991, is inconsistent with the plaintiff's and Mr Marshall's versions of events in May 1990.⁸⁵

At a later date the Finlows also contacted a friend who was a solicitor and discussed with him about making a will; and yet they said nothing about having made a will already, nor about changing it. White J thought this doubly odd: 'I think it is unlikely that she would omit to mention the fact that she had made a will.'⁸⁶

Despite all of these circumstances, unless there was evidence to show that the copies were forgeries, White J doubted whether there would be sufficient ground to reject the sworn evidence of Michael Boland and Stephan Marshall. But there was a further question to be considered: whether, in the absence of the production of the original will, it could be presumed that the original was destroyed by Mrs Finlow with the intention of revoking it.⁸⁷ The rule in such cases is that, if a known will is missing at the testator's death and it was last traced to the possession of the testator, the will is presumed to have been destroyed by the testator with the intention of revoking it.⁸⁸ The presumption can be rebutted by a range of facts and circumstances.

Explaining the absence of the will in this case there was a long story of events: a burglary at the house, even an allegation that Rhana and her husband had destroyed the will.⁸⁹ Having reviewed the evidence, including that of a nursing sister,⁹⁰ White J concluded that the evidence of Michael Boland and Stephen Marshall was a fabrication, the only motive for which was 'to provide an explanation as to why the original will was not found after [Mrs Finlow's admission to hospital], so as to rebut a presumption that it had been destroyed with the intention that it be revoked'.⁹¹ Once this 'elaborate story' was rejected, their credibility was seriously undermined.

All of the evidence pointed to the manufacture of the copies of the alleged will *after* the death of the deceased. One example was the handling of the funeral arrangements. Under the alleged will, Michael Boland, as executor, would have had the responsibility of seeing to his mother's alleged wishes with respect to cremation. And yet he was in dispute with his sister about whether their mother should be buried or cremated. The body remained embalmed while they fought it out. And yet not once during this period did Boland refer to the will. 'His omission to do so', stated White J, 'was inexplicable'.⁹² Nor did Boland object when his sister sought, and obtained, a grant of letters of administration on the basis that their mother died intestate. At no time did he assert that he had been made executor of his mother's estate.

In 2002 the plaintiff himself approached a document examiner to look at the copy document he possessed. This fact in itself White J found strange -- odd, again. Why did Boland need to have his document assessed by a document examiner before even revealing its existence?:

If his story is to be believed, he must have known it was genuine. It was his best evidence that his mother desired to be cremated. It gave him the right to decide how his mother's body should be disposed of.⁹³

His conduct, in other words, was 'inconsistent with the case he puts forward'.⁹⁴

(b) Expert evidence

The first document examiner, Dr Walton, could find no evidence of forgery:

- (a) the signatures on the copy will of P C Finlow, L Finlow and Stephan Marshall bore a close structural similarity to other specimen signatures with which she was provided;
- (b) the typing on the purported will is consistent with the typeface of an Olivetti Lettera 22 portable typewriter which, she was instructed, was the kind of typewriter which had been owned and used by Mrs Finlow;
- (c) the typing used a layout and demonstrated a skill similar to that of another typed document signed by the testator, being Mrs Finlow's letter dated 12 March 1979 addressed to Olga and Ted; and
- (d) there was no suggestion of a shadow around the signed names that would suggest they were affixed to the original purported will document by glue or paste.⁹⁵

Dr Walton's opinion was that the photocopied versions of the will were most probably derived from a genuine will of Phyllis Finlow.⁹⁶

Rhana Morton had not questioned the signatures of her parents, but was of the view that the signatures were 'cut and pasted' from other documents and then the photocopies produced, although Dr Walton could not find evidence to support this argument, as indicated in para (d) above. The second document examiner, Chris Anderson, indicated that it would be hard to prove that it was a cut and paste document including original signatures. In other words, with care,

there may be no evidence of a cut and paste:

It is rare to find evidence of different toner densities or image degradation from one area to another area on the document that can be objectively evaluated and demonstrated. Evidence of a manipulation is either obviously present or there is nothing. Hence, examining the image, which just comprises of few toner particles under magnification is generally of no assistance.⁹⁷

In cross-examination Dr Walton admitted 'that it was possible by the use of things such as correcting fluids to eliminate any shadowing that may occur where there is a "cut and paste" manipulation'.⁹⁸ On balance, White J was unable to rule out either the possibility that the copies were genuine, or that they were not.⁹⁹

As to the conclusion about the document being made on a particular typewriter, this was not in issue. The argument was whether Mrs Finlow ever had or used such a typewriter, the only evidence in support of this being that of Stephen Marshall and Michael Boland. As to the similarity with the typed letter of March 1979, White J did not give this much weight:

There was little reasoning in support of the third conclusion. Nor was there any investigation of the provenance of the document addressed to Olga and Ted. In relation to the third matter Dr Walton said that the appearance of the letter indicated that the typist had considerable typing experience and was able to produce neatly typed documents. Indentations on the letter were said to be the same as those on the will consisting of four typewritten spaces. For the most part the paragraphs were both indented and double spaced between paragraphs as on the will. This is a slender basis on which to conclude that the same person typed the documents.

Further, the letter addressed to Olga and Ted contains what appears to be a number of typing mistakes. In the first line of the letter the numbers 12 are out of alignment. They are not out of alignment elsewhere in the letter. In the second line, the typist has omitted the second 's' in 'address'. In a number of places the spacing between letters is uneven. The typist has omitted the full stop at the end of the first paragraph. The typist has apparently omitted the letter 'n' in 'autumn' in the first line of the third paragraph. The full stop at the end of the fourth paragraph is omitted. There is no spacing between the third and fourth paragraphs. The typist has appeared to have omitted the word 'I' on the fourth line of the fifth paragraph such that it was filled in by hand. I do not think that any conclusion as to the genuineness of the copy document can be drawn by a comparison with the letter addressed to Olga and Ted.¹⁰⁰

There was also a question about the provenance of the letters -- another important aspect of proof, and context, for the opinion of the document examiners' reports:

One of the letters was fully typed except for the words 'cheerio Phyllis and Les'. This was the copy given to Dr Walton. Another was a photocopy of the letter with the postscript in what appears to be Mrs Finlow's handwriting. This was not given to Dr Walton. If Mrs Finlow was at work, as an accomplished typist, typing the document on a typewriter, why would she first write out in hand the postscript? An odd thing about the typing of the postscript is that whereas Mrs Finlow wrote the words 'backlog was catching up' the typist has typed 'backlag was catching up'. In the handwritten postscript there is a small tail on the 'o' in 'log' which could be mistaken for an 'a', although it is unlikely to have been so mistaken by Mrs Finlow if she were typing the postscript herself. There is evidence, if evidence were needed, that the letters 'o' and 'a' are widely separated on a typewriter so that the typing of the word 'lag' instead of 'log' could not have been a mistake by Mrs Finlow. It is possible that it was a misreading by another typist of her words. These matters were not explored in cross-examination. Nor were they considered by Dr Walton in her report, as Dr Walton was only given the completed letter. It suffices to say that I do not regard the claimed similarities in the typing of the will and the letter addressed to 'Olga and Ted' as indicating that the copy will is a genuine document.

Further experts were appointed to give an opinion as to the age of the paper. If the documents were genuine, they would have been produced in 1990. If they were not, they would have been produced in 2002. Once again the reports were inconclusive.¹⁰¹

(c) Weighing the evidence

White J had to fall back upon the onus of proof; and on the basis of all the evidence -- much of which he rejected -- he concluded that he was *not satisfied* that Mrs Finlow executed a will in May 1990, or at all, in terms of the copy document that Michael Boland sought to propound.¹⁰² Alternately, if she did in fact prepare the will as alleged, he concluded that it was probable she destroyed the will when she approached the Salvation Army about making a will.¹⁰³

The evidence not adding up is probably the gentle way of putting these matters, remembering it is not about finding forgery but the *weight of doubt* in the context of the relevant onus. *Finlow* is a good example of the painstaking assessment of things that, bit by bit, did not 'add up'. It also reveals that the document examiner is not always able to give an answer. The expert's conclusion is a matter of scientific deduction and this, in turn, must be placed in the context of the overall problem of the onus of proof. An example where the expert evidence did not hold sway is seen in the next case.

***Lynch v Michael*¹⁰⁴**

Norma Michael died on 22 October 1995, aged 78. Her only asset of substantial value was her house, in Revesby New South Wales, valued at \$210,000. Mrs Michael's daughter, Mrs Lynch, propounded in solemn form a document allegedly signed by her mother on 17 October 1995. Mrs Michael had made at least two earlier wills, most recently one signed on 27 July 1995 prepared for her by the Public Trustee and witnessed at her house by two officers of the Public Trustee. Probate in common form of that will had been obtained, unopposed. Mrs Michael's daughter now sought to revoke this grant and have the later will accepted as the last will of her mother.¹⁰⁵

(a) The competing wills

The July 1995 will gave all Mrs Michael's property to her grandson, Darren Michael. The 17 October will was handwritten by Mrs Lynch on a printed will form. It appointed her as executor, gave all furniture and household effects to Darren, a legacy of \$20,000 to Mrs Michael's brother and divided the residuary estate equally among four people: her two sons, Mrs Lynch and Darren.¹⁰⁶

Bryson J considered both documents were 'entirely credible' schemes of disposition and that neither was 'in any way inofficious or an unlikely form for her testamentary dispositions to take'.¹⁰⁷ Both documents were 'rational on their face' in terms of Proposition 8 as set out in the principles summarised in *Re Eger*.¹⁰⁸ The less rational, in other words, the more suspicious the will may be, and the tougher the task of overcoming the burden that lies on its propounder.

The problem was that Darren thought that the signature on the second will was not his grandmother's and that it had been forged. But, as Bryson J explained, Darren did not have to prove forgery; rather, Mrs Lynch bore the onus of proof of her claim for probate, and the standard of proof was the balance of probabilities.¹⁰⁹

(b) The evidence of witnesses

Mrs Lynch and the attesting witnesses gave evidence of the preparation and execution of the will. Their evidence 'substantially coincided'. There was also no indication of a close association between them before the events, which Bryson J considered significant in lending weight to the credibility of the account of the witnesses:

When I attempt to assess the probabilities of their evidence being wholly untrue it seems to me quite significant that they are associated only in these ways and are not shown to be otherwise associated together, to have known each other well or in [a] way to have formed a closely associated group before they were assembled out of the people who could be gathered together with a few inquiries on the afternoon of 17 October. These circumstances make it very unlikely that they joined together to concoct a false case about the events of that day, and adhered to it throughout the intervening period and while giving their evidence. If there had been any close association among them, then the matter would appear differently, particularly in view of what they said in evidence about what the association among them truly was.¹¹⁰

The independence and disinterestedness of the witnesses was a crucial fact and lent great weight to its reliability -- in contrast to the evidence in *Pozniak* considered above. Against the evidence, thus presented, was that of the forensic document examiner.

(c) The expert evidence

Chris Anderson gave evidence for Darren that, on his assessment, the 17 October will was not signed by Mrs Michael. As exemplars of her handwriting he was given an undisputed signature, the signature on the July 1995 will, a number of bank withdrawal forms and several letters which were treated as specimens. A second report considered a much larger

body of specimen writings. As noted by Bryson J:

Mr Anderson's evidence included detailed exposition of what he observed on examination of magnifications of the writing, and of what he saw as anomalies in pen movements and formation shapes of letters.

Mr Anderson referred to some matters as indicia of forgery, namely:

- (a) a slowness and deliberation in the writing;
- (b) pen lifts in places where pen lifts would not be expected to occur;
- (c) blunt line endings or beginnings;
- (d) lack of fluency in the writing;
- (e) tremor or hesitation in the writing;
- (f) subtle patching or retouching of strokes.

He illustrated these indicia with macro-prints of aspects of the signature which he interpreted as pen lifts and signs of patching or retouching. He also pointed to some aspects of the formation of spacing of letters and of the handwriting which in his interpretation showed significant differences between the specimens on the withdrawal slip and the disputed handwriting on the alleged will.

In his supplementary report, which was prepared after seeing a large number of further documents he expressed his conclusion somewhat more firmly than before. He gave his observation that the specimen writings exhibit evidence of a deteriorating writing ability, where the writer is having difficulty in maintaining fluency, being able to write along the baseline and being able to form letters legibly. In contrast, he said that the questioned writings, while slow and deliberate, are legibly formed with a constant writing pressure; there is no evidence of deteriorated writing.¹¹¹

While Bryson J treated this evidence 'with respect', he expressed concern about the reliability of the particular samples and also the conclusion with respect to the presentation of the signature. Of the samples, he said that:

The evidence which would establish that the specimen writings in fact were those of Mrs Norma Michael was presented in a very disorderly and jumbled fashion, and it was obvious from the course of the hearing that the need to show by evidence that the specimen writings were really written by Mrs Norma Michael had not been addressed or indeed understood by those representing the first defendant until the hearing was in progress. My procedural decisions allowing admission of such evidence were made at the expense to some extent of the quality of the procedural justice available to the plaintiff and those representing her to deal with the genuineness of the documents. Proof that the specimen documents are those of Mrs Norma Michael depends entirely on the credit of the first defendant, whose evidence was that he found the withdrawal forms in Mrs Norma Michael's bedroom on or about the day after she died, and that he found the other specimen documents in her bedroom at about the same time or at a later stage when he made another search; by that stage some of them had been gathered up in a box and stored elsewhere in the house. The events relating to collection of documents and the times at which they were collected have not been proved in a full or even in a clear way. There is no clear evidence that they are hers from anyone who knew her handwriting well. There are some anomalies about the letters, and many of them could well be, as evidence (which appeared to me to be speculative) suggested, letters which Mrs Norma Michael wrote out directed to family members but did not actually send, so that they express her feelings but are not communications. Others however could credibly be copies which she retained of letters which she had sent. Their contents relate to family matters and from their subject and style could have been composed by Mrs Norma Michael.¹¹²

Bryson J's concern was with the exemplars. The way they were produced by Darren Michael troubled Bryson J: 'most of the specimen writings put forward were not proved in any full or clear way to be the writings of the testatrix, except by the evidence of [Darren] about where he found them'.¹¹³ Hence there were 'aspects of uncertainty even about the specimen writings' that were used as the basis of Anderson's conclusions.¹¹⁴ Moreover there were also factors adverse to Darren's own position and his credibility. First he had on several occasions been convicted of offences of dishonesty, and the day after his grandmother's death he used a withdrawal form signed by her to withdraw money from one of her bank accounts.¹¹⁵ And with respect to the appearance of Mrs Michael's signature, Bryson J concluded:

Given her declining state of health ... it does not seem surprising to me that there should be small anomalies in the penmanship and

in the marks which she made when examined with microscopic detail.¹¹⁶ ...

Detail by detail, the particular aspects of the handwriting to which he referred do not strike me as giving strong support to the conclusion that the questioned writing was forged; overall the anomalies to which he referred appear to me to be very minor and to be consistent with the situation of a person in very poor health taking studied care to sign an important document in a deliberate and careful way and on an unusually solemn occasion.¹¹⁷

Bryson J then had to weigh up Anderson's evidence against the unimpeached evidence of the three witnesses who fully described the execution of the will on 17 October 1995 by Mrs Michael. He concluded in favour of granting probate in solemn form of the document propounded by Mrs Lynch, holding that the signature was genuine. In addition, he directed Darren to pay Mrs Lynch's costs out of the share of the assets of Mrs Michael that was to pass to him under the will.

In some cases the document examination may not only focus on handwriting but also on the physical state of the document, as in the next case.

The will in the tin box -- *Williams v Public Trustee of New South Wales (No 2)*¹¹⁸

'The plaintiff has been fighting her mother and two brothers for many years, first over control of the assets of her grandmother and then over control of the assets of her grand-uncle'. So opened the narration of facts by Palmer J. The proceedings concerned the validity of several wills of Allan Gleeson who died on 20 June 2003 at the age of 82 years. The battle was very bitter -- and it included an allegation of forgery.

(a) The competing wills

The Public Trustee obtained probate of a will dated 4 August 1997. The plaintiff, Ms Williams, was Allan's great-niece. She alleged that on 30 November 2003, some 5 months after Allan's death, she found an informal document dated 24 August 1997 that left the whole of his estate to her. In the alternative, she sought revocation of the grant to the Public Trustee on the ground that her great-uncle lacked capacity and a grant of probate of an earlier will, dated 17 August 1995, which also had left everything to her. (If she succeeded in the claim of lack of capacity, this would also have excluded the informal document.) The first question to be considered, therefore, was whether Allan had signed the document of 24 August 1997.

Ms Williams had lived with her grandmother who lived next door to Allan (he was married to the grandmother's sister). She said that after Allan's wife died she gave him 'substantial assistance, cleaning his house, doing laundry and providing meals'.¹¹⁹ In May 1997, Allan executed a power of attorney in Ms Williams' favour. Pursuant to this, she sold his house, purchased another one in her own name and that of her partner and moved into it with their respective children together with Allan, who occupied what was described as only a 'granny flat' in the otherwise large residence.¹²⁰ A deed of trust was executed at the same time, acknowledging that they held the property on trust for Allan.

At this stage Ms Williams was expecting to inherit all of Allan's estate when he died. He was also very much where she could keep an eye on him. But on 3 August 1997 he did not return home from bingo. She was worried. She feared that her brother had come to collect him and taken him back with him. She was worried, not so much it seems about the welfare of her grand-uncle, but rather that her brother and her mother 'might influence [him] to do something with his assets or estate'. She called the police, hoping 'to intervene to interrupt whatever might be happening', suggesting that he may have been being held against his will.¹²¹ What this all suggested to Palmer J was that the plaintiff:

was prepared to go to considerable lengths to prevent her mother and brothers from having any influence over the financial affairs of the deceased. It shows also that the plaintiff is prepared to be somewhat less than frank in her evidence.¹²²

Allan was in fact at her mother's house and had gone to the Public Trustee at Gosford wanting to make a new will. He

also had with him a certificate from a doctor as to his competence. The will was prepared professionally and there was sufficient independent evidence of what occurred to support a finding that Allan possessed the requisite capacity when he executed this will. Notwithstanding evidence of medical experts called on behalf of the plaintiff, Palmer J considered that 'the evidence of the Public Trustee officers as to what the deceased said and did on 4 August 1997 is the most reliable guide to his testamentary capacity'.¹²³

(b) The evidence

Although it was suggested that the testator's signature was a forgery, once more the question was not whether it was, in fact, a forgery, but whether the plaintiff had satisfied the burden of proving that the document was indeed the last will of the deceased.

The will was allegedly found 'in unusual circumstances'. The signatures of the witnesses were also illegible, so that they could not be identified. The document left everything to the plaintiff thereby revoking the inconsistent will made only 20 days previously with the assistance of the Public Trustee:

All of these circumstances excite suspicion so that the court must be vigilant in requiring the plaintiff to prove to the court's comfortable satisfaction that the document was actually signed by the deceased. If the plaintiff does not meet this standard of proof, the document will not be granted probate even though the court is not prepared to make a positive finding of forgery.¹²⁴

Two forensic document examiners reviewed the signature. They disagreed in their assessment of whether it was the signature of the deceased. Palmer J also examined the signature for himself. The outcome was ambivalent:

In short, I could not conclude that the disputed signature is genuine, or is not genuine, by reference to the expert evidence alone. However, it would be unreal and wrong to form any such conclusion by reference only to expert handwriting evidence. Such evidence is only one part of the whole body of evidence bearing upon the authenticity of the document. As it happens, in the present case the most important evidence is that relating to the condition in which the document was found.¹²⁵

It boiled down to whether the document could have been found as alleged, namely, *folded* and placed in a tin box in the garage, as it was presented in evidence 'without bearing any signs of folding'.¹²⁶

Ms Williams and the expert witnesses were asked to demonstrate in the witness box how an A4 piece of paper could be placed in the box with its other contents with the lid closed and without showing any discernible creasing or folding. They couldn't do it.¹²⁷ This finding, together with other concerns Palmer J had in relation to Ms Williams' evidence, led him to conclude that he was not satisfied that she had proved that the 24 August will was executed by Allan.¹²⁸

The lessons

The moral of this tale is a simple one: if you try to invest in your future fortunes by forging signatures on wills, you are likely to be caught out -- or at least fail in your endeavours to pass a document off as a legitimate will. There are many probate challenges over the years that demonstrate, on the one hand, a weighty respect for elderly testators -- even the right to be quite dotty in one's old age -- but also a wariness and careful scrutiny when testators make wills and schemes of disposition that are quite out of the range of what might be expected in that person's position. The idea of a will benefiting 'strangers' to the exclusion of logical heirs -- the 'inofficious will' in old language -- has always raised certain alarm bells.¹²⁹ And while the court in its probate jurisdiction is reluctant to point the finger and say, as a finding of fact, that a document or signature has been forged, it may comfortably *almost* reach such a finding via the route of the onus of proof in contested probate matters and 'fail to be satisfied' that the propounder has proved the validity of the will or document in question. The problem then is not a 'problem of proving forgery', but rather a problem of proving the will -- conceptually a different matter entirely.

Appendix -- Examples of Writing Styles

Psalm 40. Expectans expectans.

While long I did wth patient Constancie
 the pleasure of my God attend
 he did himself to me ward bend
 & harkned how, & why that I did crye.
 And mee from pitt bemixed
 from dungeon he retir'd
 where I in horror laie
 setting my foot upon; a stedfast rocky stone,
 & my weak stumps did staid.

So in my mouth, he did a song affoord
 new song unto our God of praise,
 wth many soving hearts shall raise
 to feare with trust, & trust wth feare the Lord.
 O he indeed is blessed
 whose trust is so address'd,
 who bends not wandering eyes
 to great mens Peacock pride.
 Nor ever turnes aside
 to follow after lies.

My God, thy wondrous works how manifold
 what man thy thoughts can count to thee?
 A faine of them would speaking be,
 but they are more then can be told. Thou

A template writing guide for cursive script:¹³¹





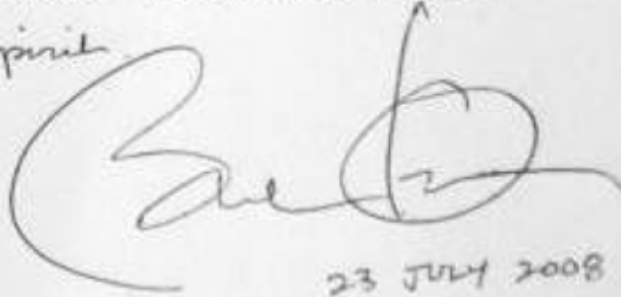
Sept 26/94

My dear Father

Arrived at Twer-ton
yesterday & found your letter
awaiting my arrival. I then
made straight for my customer
so that I could spend an
hour or so at St Peters Church
which I did up to within 10
minutes of service being held
when I had to clear out, but
at any rate I have traced the
registers back as far as 1733
& overleaf you will find
a copy of as many Penjtons
as I happened to come
across. I have only noticed

Example of Barack Obama's (b 1961) handwriting, showing the joined-up style of modified cursive:¹³³

I am grateful to Yad Vashem and all of those responsible for this remarkable institution. At a time of great peril and promise, war and strife, we are blessed to have such a powerful reminder of man's potential for great evil, but also our capacity to rise up from tragedy and remake our world. Let our children come here, and know this history, so that they can add their voices to proclaim "never again." And may we remember those who perished, not only as victims, but also as individuals who hoped and loved and dreamed like us, and who have become symbols of the human spirit.



23 JULY 2008

September 8

Dear Richard,

Thank you so much for your good letter. We have got a nanny for the babies so can leave here with easy heart. We plan to take the train to Holyhead Tuesday night, cross to Dublin by night, say hello to Jack Sweeney & come by rail to Galway Wednesday eveningish. Shall tell as soon as we arrive. We would love to stay in your cottage. I don't know when I have looked so forward to anything.

Warmest good wishes,

Sylvia

Example of Virginia Woolf's (1882-1941) handwriting-- under cursive influence, but incorporating elements of a

Tuesday.

Dearest.

I feel certain that I am going mad again. I feel we can't go through another or three terrible times. And I want to love this time. I begin to hear voices, & can't concentrate.

So I am doing what seems the best thing to do. You have given me the greatest possible happiness. You have been in every way all that anyone could be. I don't think two people would have been happier till this terrible disease came. I can't fight it any longer, I know that I am

spoiling your life that we had one you could wish. And you will I know. You see I can't even write this properly. I can't read. What I want to say is that I owe all the happiness of my life to you. You have been entirely patient with me - incredibly kind. I want to say that - everybody knows it. If anybody could

Travel document of Virginia Woolf showing signature:¹³⁶



* Commissioner, Australian Law Reform Commission (ALRC) and Professor of Law, Macquarie University. This article is based upon a keynote address for the Australian College of Legal Medicine, Melbourne, 7 October 2008. The views expressed in this article are those of the author and not the ALRC.

^ Professor of Management, Graduate School of Management, Macquarie University.

1 The early background of wills formalities prior to 1837 is described, eg, in Sir W Holdsworth, *History of English Law*, vol v, Sweet & Maxwell, London, pp 536-9; vol vi, pp 384-5; vol xv, pp 172-3. The intermediate step towards simpler formalities, and a greater emphasis on writing, was taken in the *Statute of Frauds 1677*, 29 C II c 3: see Holdsworth, vol vi, p 384-5 for a description of the different requirements for validity for wills of realty and personalty.

2 *Hobbs v Knight* (1838) 1 Curt 768; 163 ER 267 (*Hobbs*).

3 *Ibid*, at Curt 777.

4 For a summary of the dispensing powers see R F Croucher and P Vines, *Succession -- Families, Property and Death*, 3rd ed, LexisNexis, Chatswood, 2009, at [8.13]ff. Cases which have involved the absence of the testator's signature include: *In the Estate of Blakely (decd)* (1983) 32 SASR 473; *In the Estate of Williams (decd)* (1984) 36 SASR 423; *In the Estate of Vauk (decd)* (1986) 41 SASR 242; *In the Estate of Stewart*, (unreported, NSW SC, Cohen J, 12 April 1996, BC9601164); *Re Polyak Estate*; *Amy v Permanent Trustee* [1999]NSWSC 862; BC9905576.

5 A detailed consideration of the history of handwriting identification evidence in the United States is given by J Mnookin, 'Comment: Scripting Expertise: The History of Handwriting Identification Evidence and the Judicial Construction of Reliability' (2001) 87 *Virginia L Rev* 1723.

6 C Anderson, 'Counterfeit, Forged and Altered Documents -- Discovering the dodgy, showing up the sham' (1994) (July) *Law Society Jnl* 48. See also P D Westwood, S J Strach and M H Novotny, 'Document Examination' in I R Freckelton and Hugh Selby (Eds), *Expert*

Evidence, Thomsons, Pyrmont, 1999- , vol 5, Ch 95, at [95.90].

7 *Lattouf v Sassen* [1968] 3 NSW 577.

8 See Westwood et al, above n 6, at [95.400]ff for a description of the different techniques.

9 J D Heydon, *Cross on Evidence*, 7th ed, LexisNexis, Chatswood, 2004, at [39095]-[39115].

10 (1837) 5 Ad & E 703 at 740; 111 ER 1331 at 1345 (*Mudd v Suckermore*).

11 For example, on the basis of 'specialised knowledge' based on experience, and as an exception to the rule that evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed: Evidence Act 1995 (NSW) ss 76, 79.

12 Heydon, above n 9 at [39105]. *Duke v Duke* (1975) 12 SASR 106 at 108 per Sangster J.

13 *Ibid*.

14 (1836) 5 Ad & E 703 at 730; 111 ER 1331 at 1342. See also *Gawne v Gawne* [1979] 2 NSWLR 449; *Daley v R* [1979] Tas R 75.

15 Westwood et al, above n 6, at [95.120].

16 Anderson, above n 6.

17 *Ibid*, at 51.

18 Westwood et al, above n 6, at [95.280]-[95.285].

19 Anderson, above n 6, at 49.

20 And then there are the much older writing styles where the double 'ss' was rendered like an 'f', and even before that where an 's' appeared as 'f'-- that proved problematic to many an unsuspecting lesson reader in church! See the example in the appendix.

21 A template for cursive style and a letter written in this style are included in the appendix.

22 The example of Barack Obama's handwriting in the appendix is an illustration of a modified cursive style. The example of Sylvia Plath's handwriting is more like printing than the 'joined up' style of the modified cursive. The final example, of Virginia Woolf's handwriting, though written at the time when cursive style was dominant, shows a distinctively 'modern' feel to it, closer to that of Obama's handwriting.

23 Anderson, above n 6, at 50.

24 *Ibid*.

25 Anderson, above n 6, at 50.

26 Westwood et al, above n 6, at [95.260].

27 *Ibid*, at [95.160].

28 [1974] 2 NSWLR 174 at 178-9.

29 For a study of will contests in Florida involving document examiners, see P A Bicks and H F Russell, 'Real Property, Probate and Trust Law: The Use of Forensic Document Examiners in Florida Will Contests' (1997) 71(October) *Florida Bar Jnl* 48.

30 [2007] NSWSC 550; BC200705870 (*Grabovaz*).

31 *Ibid*, at [2].

32 *Ibid*, at [6]-[7] sets out the events surrounding the execution of the 2004 will.

33 *Ibid*, at [8]-[9] sets out the events surrounding the execution of the 2005 will.

34 *Ibid*, at [12].

35 Unreported, NSW SC, Powell J, 4 February 1985, BC8500997 (*Re Eger*) (citations omitted). Powell J, when Probate Judge, said proudly that he was creating, as it were, 'Powell's Principles of Probate' as he took every available opportunity to provide summaries of the law with respect to many matters that came before him. They have become a first point of reference in many areas. One such example is his summary of relevant factors in determining the existence of a de facto relationship in *Roy v Sturgeon* (1986) 11 NSWLR 454 at 458; 11 Fam LR 271; (1986) DFC 95-031, which have now been included in legislation in a number of jurisdictions.

36 *Grabrovaz* [2007] NSWSC 550; BC200705870 at [13].

37 *Ibid*, at [26]. In *Briginshaw v Briginshaw* (1938) 60 CLR 336, at 362-3; [1938] ALR 334; (1938) 12 ALJR 100; BC3800027 Sir Owen Dixon commented with respect to the civil onus of proof (on the balance of probabilities):

But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal ... the nature of the issue necessarily affects the process by which reasonable satisfaction is attained.

38 *Grabrovaz* [2007] NSWSC 550; BC200705870 at [31].

39 Novotny is one of the co-authors of Westwood et al, above n 6. She was called as a handwriting expert for June Burnside and her evidence is noted in *Grabrovaz* [2007]NSWSC 550; BC200705870 at [33].

40 *Grabrovaz* [2007] NSWSC 550; BC200705870 at [31].

41 *Ibid*, at [32]. Without the expert's report, the pen stops and pen lifts identified in the report, and its accompanying enlarged images, were 'not so evident' to 'the untrained eye': at [34].

42 *Ibid*, at [33].

43 *Ibid*, at [8] identifies the witnesses and their relationship to the defendant. Further information about the relationship between Wong and Lina is provided at [40].

44 *Ibid*, at [9], [40].

45 *Ibid*, at [41].

46 *Ibid*, at [42].

47 *Ibid*, at [44].

48 *Ibid*, at [47].

49 *Ibid*, at [48]-[52]. There were also concerns raised about Dover's signature: at [53].

50 *Ibid*, at [59].

51 *Ibid*, at [60].

52 *Ibid*, at [61].

53 [2005] NSWSC 766; BC200505706 (*Pozniak*).

54 The sequence of documents is set out at [2005]NSWSC 766; BC200505706, at [5]-[8].

55 Although it was alleged that Nadine's signature was forged: see *Pozniak* [2005] NSWSC 766; BC200505706 at [28]-[30].

56 *Pozniak* [2005] NSWSC 766; BC200505706 at [9].

57 *Ibid*, at [10].

58 And co-author of Westwood et al, above n 6.

59 *Pozniak* [2005] NSWSC 766; BC200505706 at [14].

60 Westwood, above n 6, at [12]-[23].

61 [2005] NSWSC 766; BC200505706 at [19].

62 *Ibid*, at [21].

63 *Ibid*, at [28]-[30].

64 See above n 27.

65 *Pozniak* [2005] NSWSC 766; BC200505706 at [52]-[54].

66 *Ibid*, at [32].

67 *Ibid*, at [33].

68 *Ibid*, at [34].

69 *Ibid*, at [104]-[106]. Letters of administration of the estate of Mrs Pozniak with the 1996 will annexed were granted to Mr Morgan: at [109].

70 *Ibid*, at [114].

71 [2004] NSWSC 1173; BC200409026 (*Finlow*).

72 *Ibid*, at [2].

73 *Ibid*, at [4].

74 *Ibid*.

75 *Ibid*.

76 *Ibid*, at [25].

77 *Ibid*, at [27]. Mrs Finlow's habits in relation to her diaries is noted at [11]-[14].

78 *Ibid*, at [28]-[31].

79 *Ibid*, at [28].

80 *Ibid*.

81 *Ibid*, at [30].

82 *Ibid*, at [34].

83 *Ibid*, at [39]-[40].

84 *Ibid*, at [41]-[42].

85 *Ibid*, at [42].

86 *Ibid*, at [45].

87 *Ibid*, at [46].

88 *Welch v Phillips* (1836) 1 Moo PC 299; 12 ER 828; *McCauley v McCauley* (1910) 10 CLR 434 at 438; 16 ALR 619; [1910] HCA 16;

BC1000028.

89 *Finlow* [2004] NSWSC 1173; BC200409026 at [50]-[57].

90 *Ibid.*, at [59]-[64].

91 *Ibid.*, at [80].

92 *Ibid.*, at [97].

93 *Ibid.*, at [108].

94 *Ibid.*, at [116].

95 *Ibid.*, at [117].

96 *Ibid.*, at [118].

97 *Ibid.*, at [124].

98 *Ibid.*, at [125].

99 *Ibid.*, at [127].

100 *Ibid.*, at [121]-[122].

101 *Ibid.*, at [128].

102 *Ibid.*, at [132]-[137].

103 *Ibid.*, at [137].

104 [1999] NSWSC 13; BC9900125 (*Lynch v Michael*).

105 *Ibid.*, at [3].

106 *Ibid.*, at [5], sets out the details of both documents.

107 *Ibid.*, at [6].

108 Above n 35.

109 *Lynch v Michael* [1999] NSWSC 13; BC9900125 at [8].

110 *Ibid.*, at [12].

111 *Ibid.*, at [16]-[20].

112 *Ibid.*, at [15].

113 *Ibid.*, at [24].

114 *Ibid.*, at [26].

115 *Ibid.*, at [31].

116 *Ibid.*, at [16].

117 *Ibid.*, at [22].

118 [2007] NSWSC 974; BC200707533 (*Williams*).

119 Ibid, at [11].

120 Ibid, at [15]-[19].

121 Ibid, at [46].

122 Ibid, at [47].

123 Ibid, at [117].

124 Ibid, at [61].

125 Ibid, at [66].

126 Ibid, at [70].

127 Ibid, at [72]-[75].

128 Ibid, at [82].

129 See, eg, *Wintle v Nye* [1959] 1 All ER 552; [1959] 1 WLR 284.

130 Sidney Psalms, Trinity College Library, Cambridge, MS R.3.16, at <<http://www.english.cam.ac.uk/eres/ehoc/manuscripts/tr316-78/>>(accessed 19 June 2009). For a description of English handwriting styles 1500-1700, see <<http://www.english.cam.ac.uk/eres/ehoc/index.html>>(accessed 19 June 2009).

131 <<http://en.wikipedia.org/wiki/File:Cursive.svg>>(accessed 19 June 2009).

132 <<http://upload.wikimedia.org/wikipedia/commons/5/5d/Letter.posted.in.1894.arp.jpg>>(accessed 19 June 2009).

133 Letter of Barack Obama: <<http://www.graphicinsight.co.za/obama.jpg>>(accessed 19 June 2009).

134 Letter of Sylvia Plath: <<http://www.graphology.it/wp-content/uploads/handwriting042.jpg>> (accessed 19 June 2009). See discussion at <http://www.graphology.it/sociology/the_great/plath_claudel_woolf/sylvia_plath/analysis_plaths>(accessed 19 June 2009).

135 Letter of Virginia Woolf: <http://www.graphology.it/wp-content/uploads/handwriting_044.jpg> (accessed 19 June 2009). See analysis at <http://www.graphology.it/sociology/the_great/plath_claudel_woolf/virginia_woolf/woolf_analysis>(accessed 19 June 2009).

136 <<http://bloggingwoolf.files.wordpress.com/2008/10/exvirginiawoolf1.jpg>>(accessed 19 June 2009).