IN THE HIGH COURT OF AUSTRALIA
HOBART REGISTRY

No. H12 of 2015

ROBERT BADENACH — First Appellant

MURDOCH CLARKE SOLICITORS (A FIRM) — Second Appellant

BETWEEN: - and -

ROGER WAYNE CALVERT — Respondent

APPELLANTS' SUBMISSIONS

PART I: Suitability for publication

1. The appellants certify that this submission is in a form suitable for publication on the internet.

PART II: Issues

2. Whether a solicitor retained to draw a will owes to a testator a duty of care which extends to inquiries as to the existence of estranged children, advice about potential claims pursuant to the *Testator's Family Maintenance Act* 1912 (the TFM Act) and steps which might be taken to put assets beyond the reach of a claim pursuant to the TFM Act.

3. Whether a solicitor retained by a testator to draw a will owes a duty of care to a non-client beneficiary beyond *Hill –v- Van Erp (1997) 188 CLR 159*, coextensive with a duty to the testator, to make the inquiries and to give the advice set out at paragraph 2.

4. Whether a plaintiff, in a claim in negligence for economic loss governed by the *Civil Liability Act* 2002 (Tas), may be awarded damages for loss of opportunity where the opportunity depends upon the hypothetical decision-making of a third party, without proof on the balance of probabilities that the third party would have acted in a particular way.

PART III: *Judiciary Act* 1903, section 78B

5. The appellants have considered whether notice should be given pursuant to section 78B of the Judiciary Act and have formed the view that no notice is required.

Filed on behalf of: Appellants

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PART IV: Decisions below

6. The decisions below are unreported. The medium neutral citations are:

   6.1. *Calvert –v- Badenach [2014] TASSC 61,* Blow CJ;
   6.2. *Calvert –v- Badenach [2015] TASFC 8,* Tennent, Porter & Estcourt JJ.

PART V: Facts

7. Jeffrey Doddridge (the testator) was born on 20 May 1931. He married Gwen Grant and they had one child, Patrice Doddridge who was born in July 1969. The testator separated from and divorced Gwen Grant in 1973 and thereafter, in 1976, met Jane Calvert and commenced a de facto relationship with her. The respondent is the son of Jane Calvert. The respondent first met the testator in 1976. The testator did not have any other children.

8. Following the testator's separation from Gwen Grant, Patrice Doddridge resided with her mother and had no involvement with the testator save for one meeting. The testator made no attempt to contact his daughter or to have any form of relationship with her. He did not support her financially. Patrice Doddridge resided with her mother (who died in 2006) and thereafter lived alone. She did not marry[1].

9. Jane Calvert died in February 2006. The testator regarded the respondent as his son and enjoyed a close personal and business relationship with him. Each was successful in various business activities. In consequence of their success, the testator and the respondent were able to purchase two properties in Tasmania. In 1984 they purchased the property at 724 Nubeena Road Koonya as comprised in Certificate of Title volume 202221 folio 1 as tenants in common in equal shares[2]. The property comprised 3.75 hectares and had a residence erected on it. The testator resided at that property until his death.

10. In 1984 the testator and the respondent also purchased a property at Saltwater River Road Premaydena as comprised in Certificate of Title volume 25187 folios 4 & 5 as tenants in common in equal shares[3]. It comprised 22.15 hectares and was used for grazing.

11. The second appellant acted as the solicitor for the testator and the respondent in the conveyancing required to acquire each property.

12. On 30 May 1984 the testator made a will. The second appellant drew it. It gifted to the respondent his interest in the real estate, created a life interest in favour of Jane Calvert as to the residue and provided for a specific legacy in the sum of $10,000 for

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[1] The detailed circumstances of Patrice Doddridge and her lack of contact with the testator are set out in the decision of Evans J: *Doddridge –v- Badenach [2011] TASSC 34* at [2-20].
[2] Transcript 13-14.
[3] Transcript 13-14.

Patrice Doddridge. On 5 October 1984 the testator made another will and once again the second appellant acted as his solicitor. It gave his interest in each property to the respondent, created a life estate for the residue in favour of Jane Calvert and upon her death, for the residue to pass to the respondent. It made no reference to Patrice Doddridge.

13. On 26 March 2009 the testator attended upon the first appellant (then a partner of the second appellant) and gave instructions to prepare a new will. The testator disclosed the fact that he had terminal cancer. He instructed the first appellant that he wished all of his estate to go to the respondent. He told the first appellant that he wished to die at home. It is accepted that the appellant did not then expect to live for very long. He also instructed that a lease be drawn of a portion of the Nubeena property to Terry Williams and Dean Little for a period of 4 years commencing on 1 April 2009 at a yearly rental of $1. There is no evidence that the testator consulted the respondent about his intention to lease the property.

14. The will was drawn and was executed on 26 March 2009 in the presence of two witnesses, who were employees of the second appellant. It appointed the first appellant and Damian Francis Egan (another partner of the second appellant) as trustees and executors. The will gave the whole of the testator's estate to the respondent if he survived and if not to the children of the respondent in equal shares. The will complied with the formal requirements for execution and was valid. On 2 April 2009 the appellants sent to the testator a copy of the will as executed and a lease for execution. There is no evidence that the lease was executed. For this work the second appellant invoiced the testator in the sum of $440 inclusive of GST.

15. The testator died on 1 September 2009. Probate was granted of the will on 7 January 2010.

16. The net value of the estate of the testator was $641,221 comprising a one half interest in the Nubeena property (valued at $205,000), a one half interest in the Saltwater River Road property (valued at $325,000), four bank account deposits totaling $105,350 with the balance comprising a motor vehicle, a tractor and a half interest in cattle. After deducting liabilities, the net value of the estate was $612,448.

17. On 20 January 2010 Patrice Doddridge filed an application pursuant to the TFM Act. The respondent was named as a party to that proceeding and he contested it. The proceeding went to trial before Evans J, who on 8 July 2011 ordered that provision be made for the maintenance and support of Patrice Doddridge out of the estate of the testator in the sum of $200,000 and that the costs of the parties be paid out of the estate and be taxed on a solicitor and client basis[4]. The costs of Patrice Doddridge were allowed in the sum of $120,000 and of the respondent in the sum of $90,000. An amount of $25,000 was also paid to Patrice Doddridge for interest. In all the burden upon the estate by reason of the orders made by Evans J was $435,000.

18. In the exercise of his discretion, Evans J reasoned in part that:

[4] *Doddridge –v- Badenach [2011] TASSC 34.*

'He simply abandoned his daughter emotionally and physically, and made only one contribution to her maintenance. These are matters for which as between her and him, she bears no responsibility, and he bears full responsibility. ... It is a melancholy reality that insofar as her father failed to provide for her during her childhood, she was no drain on his resources and thereby assisted him to accumulate his estate.'[5]

19. The testator did not seek and the appellants did not give any advice about the effect which the TFM Act might have upon his intentions. The testator did not disclose the existence of his daughter to the first appellant when he gave instructions to draw the will. It is accepted that the second appellant had actual knowledge of the existence of the daughter (by reason of its authorship of the will of 30 May 1984). The appellants did not make any inquiry of the testator as to the existence of any persons who might have been within the class of persons entitled to bring a claim pursuant to the TFM Act[6]. The TFM Act does not contain notional estate provisions.

20. No evidence was adduced at trial as to the testator's knowledge of the personal or economic circumstances of his daughter when he gave instructions to draw the will.

21. The respondent, on 12 February 2014, commenced an action against the appellants. He claimed damages calculated by reference to the reduction in the value of the estate by reason of the orders made by Evans J. The action went to trial before Blow CJ on 17 & 18 September 2014. The respondent gave evidence and called expert opinion evidence from Mr Park, a solicitor experienced in estate matters. The first appellant did not give evidence and nor did any partner or employee of the second appellant. The parties agreed, for the purposes of the trial, upon a court book of documents which was tendered without objection. The court book included a copy of the file opened by the first appellant in consequence of the instruction given on 26 March 2009. The file included a handwritten note made by the first appellant which summarised his instructions.

22. On 24 November 2014 Blow CJ, upon the publication of reasons for judgment, entered judgment for the appellants and ordered the respondent to pay the costs of the action[7].

23. On 15 December 2014 the respondent filed a notice of appeal to the Full Court. On 24 July 2015 the Full Court allowed the appeal[8].

PART VI: Argument

24. The appellants contend that the Full Court erred in the following respects:

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[5] *Doddridge –v- Badenach [2011] TASSC 34* at [42].

[6] The Act defines the class of applicants at section 3A as a spouse, children, parents, a divorced spouse who was receiving or entitled to receive maintenance, or a person in a significant relationship within the meaning of the Relationships Act 2003.

[7] *Calvert –v- Badenach [2014] TASSC 61.*

[8] *Calvert –v- Badenach [2015] TASFC 8.*

24.1. In determining that the appellants owed to the testator an extended duty of care framed by reference to the facts alleged to give rise to the breach: grounds 2 and 3 of the Notice of Appeal;

24.2. In extending the duty of care owed by a solicitor to a beneficiary, hitherto recognised in *Hill v Van Erp* by imposition upon the solicitor of a duty to the non-client beneficiary coexistent with and the same as, the duty (and its scope) to advise the testator client. This novel duty gives rise to conflicts of interest, requires the solicitor to give advice to a non-client and is not limited to will making cases: grounds 4 and 6 of the Notice of Appeal;

24.3. In concluding that no public policy reason militated against the duty of care it formulated as owed to the testator and to the respondent: ground 5 of the Notice of Appeal; and

24.4. In determining that the respondent may be awarded damages for economic loss in a claim governed by sections 13 and 14 of the *Civil Liability Act* (Tas), based on a lost opportunity dependent upon the hypothetical decision-making of the testator, without proof by the respondent on the balance of probability that the testator would have acted in a particular way in order to protect the economic interests of the respondent: ground 7 of the Notice of Appeal.

25. The issues are discussed in order of the grounds of appeal.

The extended duty of care to the testator: grounds 2 and 3

26. Tennent J framed the duty as:

'A duty of care to the testator to, not only enquire of him whether he had any children, but also to advise him why that enquiry was being made, the potential for a TFM claim, the impact that could have on his express wishes, and of possible steps he could consider to avoid that impact.'[9]

27. Porter J initially framed the duty widely:

'A duty to intended beneficiaries to give proper effect to the testator's intentions.'[10]

28. But later framed the duty more specifically as:

'A duty... that extends to advice about the severance of joint tenancies.'[11]

29. Later he refined the duty further:

'A duty to enquire about the existence of family for whom no provision had been made, to advise of the possibility of claims under the Act, and, as a necessary concomitant to

[9] Reasons at [21].
[10] Reasons at [49].
[11] Reasons at [59].

that, advise as to what steps may be available to deal with assets before the testator's death in a way which would better fulfill the testator's intentions.'[12]

30. Estcourt J initially framed the duty specifically:

'The... duty extended to not only asking questions that might elicit the existence of a potential claimant under the TFM Act, but also to providing, basally at least, advice that possible mechanisms existed to minimise the estate available to meet any claim made.'[13]

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31. Later his Honour framed the duty more broadly as:

'Nothing more than one to take reasonable care to ensure that, as far as possible, the testator's testamentary wishes were carried into effect and not unnecessarily defeated.'[14]

32. The Full Court impermissibly conflated the duty and breach of duty questions. It selected the particular chain of circumstances in the case to create a duty to take care to prevent that chain of circumstances[15]. As Hayne J said in *CAL No 14 Pty Ltd –v- MAIB*[16]:

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'Because the duty relied on in this Court was framed so specifically, it merged the separate inquiries about duty of care and breach of duty. The merger that resulted carried with it the vice of retrospective over-specificity of breach... the duty alleged was framed by reference to the particular breach that was alleged and thus by reference to the course of the events that had happened. Because the breach assigned was not framed prospectively the duty, too, was framed retrospectively, by too specific reference to what had happened.'

30 33. Unlike *Hill –v- Van Erp*, there is no question in this case that the appellants drew, and caused to be executed a valid will which, but for the TFM application by the daughter, would have given effect to the testamentary intention of the testator. The respondent succeeded in the Full Court upon the broad proposition that the solicitors owed to the testator a duty of care to give proper effect to the testamentary intention which, in the circumstances of this case, required them to make enquiries and to give advice for the purpose of deflecting or defeating the operation of the TFM Act[17].

34. The formulation of the duty of care at this level of abstraction leaves *'unanswered the critical questions respecting the content of the term 'reasonable' and hence the content*

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[12] Reasons at [69].
[13] Reasons [116].
[14] Reasons [120].
[15] *Kuhl –v- Zurich Financial Services Australia Ltd (2011) 243 CLR 361* at [19], *Koehler –v- Ceravos (Australia) Ltd (2005) 222 CLR 44* at 53 [19], *CAL No 14 Pty Ltd –v- Motor Accidents Insurance Board (2009) 239 CLR 390* at [37] and [68] and *Stuart –v- Kirkland-Veenstra (2009) 237 CLR 251* at [85] and [127-128].
[16] *[2009] HCA 47 (2009) 239 CLR 390* at [68].
[17] Tennent J [21], [23], Porter J [59], [65], [69] and [72] and Estcourt J [111] and [116].

of the duty of care'[18] because it fails to resolve the content of the obligation of the applicants, in the event that inquiries were made, advice was given and instructions were received to adjust property rights *inter vivos*.

35. The Full Court did extend the nature and scope of the duty which was recognised in *Hill –v- Van Erp*; it did not simply apply a previously recognised duty to different facts. It is in the important different factual circumstances that the critical question whether a duty of care can be imposed, must be considered.[19]

36. *Hill –v- Van Erp* *'does not fully answer the question of how far the duty extends in relation to instructions regarding the assets of an estate.'*[20] The majority judgments in *Hill –v- Van Erp* do not reveal consensus on the question of why the duty was owed. Dawson J[21], Toohey J[22] and, in part, Gaudron J[23] relied upon proximity[24]. Brennan CJ applied general principles of the law of negligence by reference to a corresponding and not inconsistent duty owed to the testatrix[25]. Gaudron J (in part) and Gummow J identified the ability of the solicitor to control whether the beneficiary would receive the right which the testatrix intended[26]. The duty which this Court did recognise was not founded on a *Hedley Byrne* assumption of responsibility[27].

37. Accordingly, the ratio of *Hill –v- Van Erp* is narrow; it is confined to the preparation of a will which gives effect to the testamentary intention and which complies with the statutory requirements for its making and execution. Conversely, the Full Court decision rests upon an extended duty of care which is not supported by any Australian[28], English[29], Canadian[30] or New Zealand case[31].

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[18] *Kuhl –v- Zurich Financial Services Australia Ltd & Anor [2011] HCA 11 (2011) 243 CLR 361* at [22] per French CJ and Gummow J. See also *Cole –v- South Tweed Heads Rugby Club [2004] HCA 29 (2004) 217 CLR 469* at [1] per Gleeson CJ.

[19] Eg. *Cal No 14 Pty Ltd v Motor Accidents Insurance Board (2009) 239 CLR 390* (a duty of care was not owed by a hotel in particular circumstances) and *Stuart v Kirkland-Veenstra (2009) 237 CLR 251* (a duty of care was not owed by police in particular circumstances).

[20] *Vagg –v- McPhee [2013] NSWCA 29 (2013) 85 NSWLR 154* at [52] per Tobias AJA, Ward JA agreeing.

[21] At 183.

[22] At 188-189.

[23] At 198.

[24] Which was subsequently displaced as a general test of duty: *Sullivan –v- Moody (2001) 207 CLR 562* at [49], the Court.

[25] At 170-171.

[26] Gaudron J at 198, Gummow J at 231-232 and 234. McHugh J also referred to the concept of control at 212. Cf. the appellants exercised no control in the instant case.

[27] Brennan CJ at 171, McHugh J at 204, 205-206 and 208, Gummow J at 220 and 231.

[28] *Miller –v- Cooney [2004] NSWCA 380* (solicitor not liable for failure to make further enquiries to ascertain whether the deceased was the registered proprietor of properties), *Vagg –v- McPhee [2013] NSWCA 29 (2013) 85 NSWLR 154* (no duty of care to an intended beneficiary where the testatrix held property upon a joint tenancy), *Queensland Art Gallery Board of Trustees –v- Henderson Trout [2000] QCA 93* (either no duty or no breach of duty where the testatrix died before the will was finalised).

[29] *Worby –v- Rosser [2000] PNLR 140* (no liability to residual beneficiaries under an original will, who were required to expend money to have set aside a subsequent will for lack of testamentary capacity), *Clarke –v- Bruce Lance & Co (a firm) [1988] 1 All.E.R. 364* (solicitor did not owe a duty to a beneficiary under a will, when acting for the testator in an *inter vivos* transaction which affected the value of the estate), *Cancer Research Campaign –v- Ernest Brown & Co [1998] PNLR 592* (no duty of care to charities to advise the testator about tax mitigation upon an inheritance).

[30] *Graham –v- Bonnycastle (2004) 243 DLR (4th) 617* (no duty owed by the solicitor in the taking of instructions for a new will, to the beneficiaries under a previous will).

[31] *Sutherland –v- Public Trustee [1980] 2 NZLR 536* (no duty to beneficiaries not nominated by the testator).

38. The duty for which the respondent contends requires that a solicitor, in discharge of a retainer to draw a simple will, must give specific advice which was not sought on matters of estate planning and upon the assumption that a qualified applicant may subsequently succeed in a TFM Act application. Necessarily it assumes that instructions to adjust property rights *inter vivos* will or may be given and in doing so further assumes that a client is willing and able to pay for the cost of implementing these steps to the benefit of a third party[32]. Issues were raised at trial relating to GST, CGT and stamp duty[33]. Blow CJ considered the GST and CGT consequences[34] and reasoned that *'if there had been a discussion between the solicitor and the testator as to the possible creation of joint tenancies, the taxation consequences should have been discussed',* referenced a possible inability of the appellants to provide *'immediate tax advice'* and that the testator might *'not have wanted to spend money'* in receiving taxation advice[35].

39. McHugh J (in dissent) drew attention to the cost consequences of expanded advice in *Hill –v- Van Erp*[36] as militating against the imposition of the duty found in that case. Although no cost evidence was given at trial, it is plainly the case that the appellants would have been entitled to charge the testator considerably more for expanded advice and the documenting of transactions, in accordance with the duty as formulated by the Full Court. Costs may include the cost of investigating the circumstances of the potential TFM applicant without which information the solicitor could scarcely give reasoned advice.

40. Each of the decisions in *Carr-Glynn –v- Frearsons (a firm)*[37], *Smeaton –v- Pattison*[38] and *Miller –v- Cooney*[39] are cases where the testator's intention could not be effectuated because the property in question was the subject of a joint tenancy and could not pass to the intended beneficiary. Accordingly the duty which was recognised to take steps to advise the testator to alter the joint tenancy is simply an example of the duty to effectuate the intentions of the testator. It is closely analogous to *'the task of effecting compliance with the formalities necessary to transfer property from a testator on death to an intended beneficiary.'*[40]

41. The framing of the duty of care and its content by the Full Court by reference to the events as they had occurred *'obscure[d] the difficulties in recognising the duty'*.[41] That formulation erroneously led the Court to the creation and imposition of an extended duty of care which it then transposed to a coextensive duty of care to the respondent. In this way the conflation error was material.

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[32] No evidence was led at trial as to the likely cost of giving the advice which the respondent contends ought to have been given or of implementing any steps, assuming that the solicitors were so instructed. For the work involved in preparing the will and the lease of the property, the second appellant charged the testator $440, inclusive of GST.

[33] T: 62-64 (CGT), 64-66 (GST). Ultimately, it was accepted at trial that ad valorem duty would not apply pursuant to the Duties Act 2001.

[34] Reasons [30-31].

[35] Reasons [32].

[36] *188 CLR 159* at 216.

[37] *[1999] 1 Ch 326.*

[38] *[2002] QSC 431; [2003] QCA 341.*

[39] *[2004] NSWCA 380.*

[40] *Hill –v- Van Erp*, Brennan CJ at 170.

[41] *CAL No 14 Pty Ltd v Motor Accidents Insurance Board* (2009) 239 CLR 390 at [37].

The co-extensive duty of care to the respondent: ground 4

42. In several respects the Full Court erroneously formulated the duty of care and its content.

43. The duty of care to the intended beneficiary recognised in *Hill –v- Van Erp* was a duty to exercise reasonable care to give effect to the testatrix's intention, in the preparation and execution of a will. The duty was predicated upon the basis that there was no conflict of interest between the solicitor and the client on the one hand and the intended beneficiary on the other.[42]

44. In the discharge of the retainer the applicants were obliged to avoid a conflict of interest or duty[43]. In the event that the first applicant had inquired as to the existence of possible claimants upon the estate of the testator and assuming that the testator answered that inquiry truthfully, then it was open to the first applicant to give a range of advice as to the options available including making amends with his daughter by a bequest in her favour[44].

45. On the duty formulated by the Full Court, the range of advice which the first applicant was required to give to the testator, would include advice inconsistent or inimical with the economic interests of the respondent.[45] Hence, the duty propounded by the Full Court would involve the applicants in conflicting duties – a duty to advise the testator to consider making a substantial bequest to the daughter, is inconsistent with the economic interests of the respondent which would be advanced by the creation of a joint tenancy so as to prevent the daughter from obtaining a bequest.

46. Moreover, the duty as formulated required steps to be taken in the event that the testator instructed that the intended gift to the respondent be quarantined from the operation of the Act. The conversion to a joint tenancy could not have been unilaterally effected.[46]

47. If the solicitor owes to the beneficiary a duty of advice coextensive with the duty owed to the testator client, the solicitor should at least be obliged to tell the non-client beneficiary what the testator had decided, the risk to the beneficiary should he predecease, what documentation was necessary and that his consent was required. Further, the solicitor ought to advise the non-client beneficiary – at the very least - that conversion to a joint tenancy would necessarily deprive him of his testamentary

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[42] *Hill –v- Van Erp* at 167 per Brennan CJ, 199-200 per Gaudron J, 187 per Dawson J and 236 per Gummow J. *Vagg v McPhee [2013] NSWCA 29 (2013) 85 NSWLR 154* at [48] per Tobias AJA.

[43] *Breen –v- Williams (1996) 186 CLR 71* at 92-94 and 113.

[44] Which was accepted by Blow CJ at [23] and [32], by Porter J at [70] and by Estcourt J at [127-128].

[45] Wide ranging advice including a discussion about moral obligations in the light of the possible consequences of doing nothing which might produce quite different outcomes – eg Porter J [70].

[46] Each of the testator and the respondent would have been required to execute a transfer in registrable form to each other of their interests to be held as joint tenants. See the reasons of Blow CJ at [30].

freedom to deal with his interest in his property before the death of the testator.[47] If on the basis of that advice the beneficiary refused to convert the property to joint tenancy, the solicitor would then have given advice which may deprive his testator client of the ability to put the assets out of reach of a claim under the *TFM Act*.

48. The postulated coexistent duty to the non-client beneficiary could be discharged by providing advice to the testator which is detrimental to the interests of the beneficiary; conversely advice to the beneficiary which is detrimental to the interests of the testator.

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49. The limited coextensive duty owed to the beneficiary in *Hill –v- Van Erp* involved no conflict between testatrix and beneficiary, because it concerned the responsibility of the solicitor to effect compliance with the formalities necessary to transfer property from testatrix to an intended beneficiary, whose interests were clearly coincident.

50. Moreover, in *Hill*, the solicitor was in a position to control whether the beneficiary would have the right intended under the will. Control was identified by Gaudron J, Gummow J and McHugh J (in dissent) in *Hill*,[48] as an important underpinning factor in the duty. The applicants exercised no such control in the instant case.

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51. In this case the will as drawn and executed did give effect to the intentions of the testator. That effect was displaced by the successful TFM application brought by the estranged daughter. In the circumstances as they did occur, that is why the content of the duty formulated by the Full Court required the applicants to give advice to the testator, advice which was likely to conflict with the interests of the respondent. In each of *Carr-Glynn –v- Frearsons (a firm)*[49], *Smeaton –v- Pattison*[50] and *Miller –v- Cooney*[51], the change from a joint tenancy did not conflict with the interests of the beneficiary; such change being entirely consistent with the interests of each beneficiary so as to effectuate the testamentary intention.

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52. In this case, the respondent had a subsisting proprietary interest, with the testator, in the real estate the very subject of the will. Thus any advice given to the testator as to how to change the ownership of the property, could directly affect the respondent's interests and perhaps adversely: the interests of the testator and the respondent were not coincident.

No duty: public policy: ground 5

53. At trial, Blow CJ rejected the contention of the appellants that they did not have a duty
40 to the respondent to give advice to the testator to *'circumvent the provisions of the*

[47] Advice given by the solicitor in this regard will affect the beneficiaries of the non-client benefiary suggesting that the solicitor may owe a duty of care to those beneficiaries, creating the spectre of indeterminancy of liability.

[48] Gaudron J at 198: *'... what is significant is that Ms Hill was in a position of control over the testamentary wishes of her client and, thus, in a position to control whether Mrs Van Erp would have the right which the testatrix clearly intended her to have, namely, the right to have her estate properly administered in accordance with the terms of her will.'* Gummow J at 231-232 and 234; McHugh J at 212.

[49] *[1999] 1 Ch 326.*

[50] *[2002] QSC 431; [2003] QCA 341.*

[51] *[2004] NSWCA 380.*

TFM Act'[52]. He did so by reference to the decision of this Court in Barns –v- Barns[53] and the decision in that appeal[54]. His Honour reasoned, because it is not contrary to public policy for parties to enter into a deed which displaces family provision legislation[55], that, correspondingly, public policy did not prevent the imposition of a duty of care which required the appellants to give advice designed to frustrate a claim or to deplete the estate[56].

54. In the Full Court Tennent J did not address this point. Each of Porter J[57] and Estcourt J[58] agreed with Blow CJ.

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55. Unquestionably, the policy of the TFM Act which *'is of public, as well as private, importance'*[59] is to enable provision to be made for deserving family members whose interests are displaced by reason of the exercise of testamentary freedom[60].

56. A testator who chooses to be neither wise nor just does not breach any duty imposed by the TFM Act[61]; however, this freedom is subject to the overriding operation of the legislation[62].

57. The testator intended the respondent to take under his will, not pursuant to an *inter*
20 *vivos* transaction. His intention was always liable to be displaced by the operation of the TFM Act. Barns –v- Barns examples the limited operation of a family provision statute which, like the TFM Act, did not contain notional estate provisions.

58. The *inter vivos* transaction in Barns was not effective to displace the operation of the equivalent South Australian statute because the covenant by deed to dispose of the estate in a defined way after death was subject to the overriding operation of the Act[63]. It was not necessary for this Court to resolve whether the deed was void as being contrary to public policy, although Gleeson CJ reasoned, obiter, it was not[64]. That reasoning, which was relied upon in the Courts below, does not resolve the duty of
30 care and content of duty questions in this case for several reasons.

59. First, the question is not whether an *inter vivos* transaction, structured for the express purpose of avoiding the operation of the TFM Act, would have been void as contrary to public policy. The role which public policy, or the policy of the law[65], plays in the

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[52] Reasons at [26].
[53] (2003) *214 CLR 169.*
[54] *Barns –v- Barns (2001) 80 SASR 331.*
[55] Reasons at [29].
[56] Reasons [29].
[57] Full Court reasons [73-77] and [82].
[58] Full Court reasons [156].
[59] *Barns –v- Barns 214 CLR 169* at [34] per Gleeson CJ.
[60] *Barns –v- Barns 214 CLR 169* at [22] and [34], Gleeson CJ, *Lieberman –v- Morris (1945) 69 CLR 69* at 85-86, Rich J.
[61] *Lieberman –v- Morris (1945) 69 CLR 69* at 91, Williams J, citing *Dillon –v- Public Trustee of New Zealand (1941) AC 294* at 301 per Lord Simon.
[62] *Barns –v- Barns 214 CLR 169* at [42], [55-56], Gummow & Hayne JJ, *Hill –v- Van Erp 188 CLR 159* at 223-224, Gummow J and *Vigolo –v- Bostin [2005] HCA 11 (2005) 221 CLR 191* at [8], Gleeson CJ.
[63] Gleeson CJ at [34] and [38], with whom Kirby J agreed at [129] and [115] Gummow & Hayne JJ.
[64] At [36-39].
[65] *Cattanach –v- Melchoir [2003] HCA 38 (2003) 215 CLR 1* at [73] Hayne J.

formulation of a duty of care in novel categories of case is essentially different. It is a relevant consideration in any decision whether to impose a duty of care[66], in the identification of the content of a duty of care[67]; it may negate the existence of a duty of care[68] and is an important touchstone in the maintenance of the overall coherence of the law[69]. In *Cattanach –v- Melchoir*[70] Hayne J undertook a comprehensive analysis of the role of public policy in the development of the law. With particular reference to succession to property he said:

'The legislation providing for testators' family maintenance further qualifies that general freedom of disposition. But in both contract and succession there is a discernable policy of the law which resort to public policy considerations would confine or modify.'[71]

60. The legislative purpose of the TFM Act is rooted in moral values designed to militate against an unjust exercise of testamentary capacity[72]. Thus, attainment of the legislative purpose by reference to the moral obligation of a testator *'arises from a familial relationship. That is one of the fundamental ideas upon which the structure of our society is based.'*[73] This is one of the reasons why it is not open to an eligible applicant to contract out of the right to make a claim[74]. If an eligible applicant is unable to contract out of the benefit of the TFM Act, then neither logic nor resort to basic principle supports the formulation of a duty of care to a third party which denies to an eligible applicant the benefit of the statute.

61. Secondly, reliance by the Full Court,[75] upon the observations of Gleeson CJ in *Barns*,[76] erroneously assumed that the public policy reasons which decided that the deed in *Barns* was not invalid, are the same policy reasons which dictate whether a duty of care should be imposed upon the solicitor in the circumstances of a case like this. The considerations are different. A decision by an individual to put assets beyond the reach of a TFM claim may not be declared void as contrary to public policy. That involves the exercise of an individual choice to produce a result. That circumstance is not to be equated with the formulation of a duty of care in favour of a non-client which obliged the solicitor to give advice to the testator to this end. The coextensive duty of care owed by the solicitor to testator and beneficiary as propounded by the Full Court, is incoherent with the TFM legislation. The claimed duty required the solicitor to give advice to the testator as to his moral obligations (to act as a wise and just testator) in accordance with the purpose of the legislation, but also advice as to

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[66] *Gala –v- Preston (1991) 172 CLR 243* at 253, Mason CJ, Deane, Gaudron & McHugh JJ, *Perre –v- Apand (1999) 198 CLR 180* at [269], Kirby J by reference to *Spring –v- Guardian Assurance Plc [1995] 2 AC 296* at 326 (Lord Lowry) and [402], Callinan J and *King –v- Philcox [2015] HCA 19 (2015) 89 ALJR 582* at [80], Nettle J.

[67] *Jaensch –v- Coffey (1984) 155 CLR 549* at 607, Deane J.

[68] *Cattanach –v- Melchoir (2003) 215 CLR 1* at [58], Hayne J.

[69] *Cattanach –v- Melchoir (2003) 215 CLR 1* at [70], McHugh & Gummow JJ by reference to Lord Millett in *McFarlane –v- Tayside Health Board [2000] 2 AC 59* at 108.

[70] *(2003) 215 CLR 1.*

[71] At [235].

[72] *Vigolo –v- Bostin (2005) 221 CLR 191* at [11], [24] & [25], Gleeson CJ.

[73] *Vigolo –v- Bostin (2005) 221 CLR 191* at [12] per Gleeson CJ.

[74] *Lieberman –v- Morris (1945) 69 CLR 69* and *Vigolo –v- Bostin (2005) 221 CLR 191* at [14], Gleeson CJ.

[75] [73]-[77] and [82] per Porter J and [156] per Estcourt J

[76] at [36]-[39]

how to avoid the very same moral obligation, contrary to the legislation by re-arranging property titles *inter vivos* to the advantage of the beneficiary. And that advice may well have required the solicitor to advise as to which course might be preferred. On any view, if the claimed duty *'did not clash directly with the [TFM legislation] ...'*[77] at the very least *'it [does] ... not sit well'*[78] with that legislation.

62. Thirdly, the retainer of the appellants did not expressly require them to give advice as to how the testator might avoid the operation of the TFM Act. Whether, in the circumstances, the appellants were, in discharge of the duty which they owed to their client, required to give advice which was not sought in order to avoid a risk of economic loss being sustained by the client's estate is not the issue[79]. The advice which the appellants might have given to the client in this case is not to be aligned with the advice which any duty owed to the respondent, required them to give. It was accepted below, that the appellants were entitled to give wide ranging advice to the testator, including as to the morality of his relationship with his daughter[80].

63. The duty as formulated by the Full Court pays no regard to the moral dimension of this case and fails to answer the essentially difficult question: why is it said, in the formulation of a duty of care, that the economic interests of the respondent are to be preferred to the economic and personal circumstances of the estranged daughter?

64. Fourthly, the testator did not engage the appellants to give advice as to how the TFM Act might be avoided, upon the assumption that he intended to act otherwise than as a wise and just testator. In *Sullivan –v- Moody*[81] the Court identified as one of the *'difficult problems in determining the existence and nature and scope, or duty of care'* the *'need to preserve the coherence of other legal principles, or of a statutory scheme which governs certain conduct or relationships. The relevant problem will then become the focus of attention in a judicial evaluation of the factors which tend for or against a conclusion, to be arrived at as a matter of principle.'*[82]

65. The duty as formulated operates inconsistently with the purpose of the legislative scheme. The question is not whether the scheme might be lawfully avoided by taking certain steps, but whether a new duty, formulated in favour of a non-client beneficiary, requires that advice be given to that end. The underlying policy purpose of the TFM Act, combined with the competing claims of the daughter and the respondent upon the estate, each point against the formulation of a duty of care which favours one class of non-client, at the expense of another.

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[77] *Cal No 14 Pty Ltd v Motor Accidents Insurance Board,* op cit [41]
[78] *Cal* [41]
[79] That is, an extended duty to advise of the type referred to in *Hawkins –v- Clayton (1988) 164 CLR 539* at 579-580, Deane J.
[80] Transcript 50-51, 52; Blow CJ reasons [23], Porter J, reasons [70], Estcourt J, reasons [127-128]. See further Brennan CJ: *Commercial Law and Morality (1989) 17 (1) MULR 100* at 105: *'In a case where the underlying moral purpose of the law on which advice is sought is not and perhaps cannot be perceived by the client unless the lawyer tells him, the commercial lawyer's duty cannot be restricted to legal advice... If he perceives that it is within the client's legal power to impair the rights of a third party whom the legislature has ineffectually tried to protect or to exercise that legal power in a way which is unjust, surely the moral dimension must be pointed out.'*
[81] *(2001) 207 CLR 562.*
[82] At [50].

66. Fifthly, an option which was open to the testator, if implemented, in accordance with the claim formulated by the respondent at trial, inevitably would have displaced the outcome provided for by the TFM Act. Once it is accepted, as it was below, that it was open to the appellants to give a range of advice to the testator then the question of *'conflicting professional responsibilities'*[83], arises. There is no public policy reason which supports the formulation of a duty of care which fails to resolve such conflict. Correspondingly, there is a substantial public policy reason to deny the formulation of a duty of care, the discharge of which inevitably places solicitors in a position of conflict between advancing the different interests of testator and non-client beneficiary, as well as the competing economic interests of non-clients. The facts of *Hill –v- Van Erp 'in a narrower compass'*[84] did not require resolution of this question.

67. For all of these reasons the duty of care and its content as formulated by the Full Court is an unprincipled extension of the duty which was recognised in *Hill –v- Van Erp* and, on public policy grounds, should be rejected.

Inconsistency and incoherence: ground 6

68. For the reasons referred to in paragraphs [59-66] above, the coextensive duty propounded by the Full Court is incoherent with the TFM legislation. It imposes a duty on the solicitor to give coextensive advice concerning the moral obligation of the testator consistent with the purpose of the statute together with advice inconsistent with the purpose of the statute, namely how to by-pass its reach so as to advance the economic interests of the non-client beneficiary.

69. The professional responsibility of the applicants required them to maintain the confidentiality of the communication between them and the testator. The purpose of legal professional privilege is to foster free, frank and open discussion between a lawyer and his/her client.[85] For the reasons referred to in paragraph [47] above, the solicitor would be required to reveal the nature and extent of privileged advice given to the testator.

70. Moreover, in order to determine whether the solicitor had discharged his coextensive duty of care to the beneficiary if this fact was in dispute, the solicitor would need to be in a position to disclose to the beneficiary and if necessary to the court, the confidential and privileged advice he had given the testator.

71. Thus the scope of the duty as framed by the Full Court is incoherent with the principles and purpose of legal professional privilege.[86]

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[83] *NSW –v- Fahy (2007) 232 CLR 486* at [250] per Crennan J.
[84] *Hill –v- Van Erp, 188 CLR 159* at 235 per Gummow J.
[85] *Grant –v- Downs (1976) 135 CLR 674* at 685, *Baker –v- Campbell (1983) 153 CLR 52* at 128, *Carter –v- Northmore Hale Davey & Leake (1995) 183 CLR 121* at 145 and *Attorney-General (NT) –v- Maurice (1986) 161 CLR 475* at 487.
[86] *Tame –v- NSW (2002) 211 CLR 317* at [26], Gleeson CJ, and [57], Gaudron J, *Harriton –v- Stephens (2006) 226 CLR 52* at [249], Crennan J, *Miller –v- Miller (2011) 242 CLR 446* at [73-74], the Court *CAL No. 14 Pty Ltd v Motor Accidents Insurance Board (op cit)* [39-41], Gummow, Heydon and Crennan JJ the Court and *Hunter & New England Local Health District –v- McKenna [2014] HCA 44, (2014) 253 CLR 270* at [29].

72. The framing of the duty by the Full Court in this case must limit the range of advice which the solicitor is able to give to the testator if the solicitor must have regard to the economic interests of the non-client beneficiary. This is inconsistent with the professional responsibility which the solicitor owes to his/her client. The interests of the testator and the beneficiary are not coincident.[87] The postulated coexistent duty to the respondent is incompatible and conflictual with a duty to advise the testator in the terms formulated by the Full Court.[88] And the difficulties are compounded in the case of multiple beneficiaries.

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73. The decision in *Hill –v- Van Erp* did not impose any duty to give advice to a beneficiary. McHugh J, albeit in dissent with respect to the question of duty to the beneficiary, reasoned that such a duty would impermissibly lead to the need in the solicitor to have an affirmative duty to advise non-client beneficiaries. For the reasons given by McHugh J, such extension of the duty is unprincipled[89].

74. The postulated coextensive duty embracing advice owed to the non-client respondent is inconsistent with established principle which is that a solicitor owes a duty of care to his/her client with respect to provision of advice but not to a non-client.[90] Moreover,
20 the coextensive duty to the respondent does not appear to be confined to will cases; a point emphasised by McHugh J in *Hill –v- Van Erp*[91] and by Lord Mustill in *White –v- Jones*[92]. Gummow J in *Hill –v- Van Erp* was careful to not state a broader principle beyond the facts of the case[93].

75. Finally, the Full Court established a duty inconsistent with the principle that a solicitor may not act for different clients in the same transaction if it gives rise to a conflict of interest.[94]

Causation: ground 7

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76. Blow CJ at first instance dismissed the claim because he was not satisfied on the balance of probabilities that the testator would have joined in the creation of a joint

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[87] *Hill –v- Van Erp* at 167, per Brennan CJ.

[88] *Sullivan –v- Moody (2001) 207 CLR 562* at [50] and [60], the Court. *NSW –v- Fahy (2007) 232 CLR 486* at [250], Crennan J.

[89] At 212: *'Moreover, if the solicitor owes a duty of care to the beneficiary, it would seem to follow that the solicitor has an affirmative duty to warn or advise the beneficiary as well as the testator in cases like the present. If the solicitor owes a duty to the beneficiary, he or she must do all that is reasonable to protect the interests of the beneficiary and there must be some situations at least where reasonable care requires the solicitor to warn or advise the beneficiary. But the history of the law of negligence points against such an obligation.'*

[90] *Hill –v- Van Erp* at 207 and 214, per McHugh J, *White –v- Jones [1995] 2 AC 207* at 283 and 291 per Lord Mustill (dissenting), 251 per Lord Keith (dissenting) and 262 and 256 per Lord Goff, *Carey –v- Freehills [2013] FCA 954, (2013) 303 ALR 445* at [310-312], Kenny J and *Graham –v- Bonnycastle (2004) 243 DLR (4th) 617* at [29] McFadyen JA (Alberta Court of Appeal).

[91] *188 CLR 159* at 213.

[92] *[1995] 2 AC 207* at 291.

[93] *188 CLR 159* at 235.

[94] Specifically in Tasmania Rule 12 of the Rules of Practice 1994, applies. A practitioner may act for more than one party to a transaction but must not accept instructions unless satisfied that he or she does so with the full knowledge and consent of each party and that the practitioner may subsequently be prevented from disclosing the full knowledge which the practitioner has.

tenancy or implemented any other steps to *'deplete his estate and frustrate a possible claim'* under the Act[95].

77. In the Full Court the respondent re-characterised his claim as one for damages for loss of opportunity. Tennent J failed to deal with causation in that context.

78. Porter J held that *'damages for loss of a chance are available as an alternative when the* financial *loss itself cannot be proved on the balance of probabilities, but only if the loss of the chance in itself has a value.'*[96] He concluded that the respondent's loss of opportunity occurred when the testator was deprived of the chance to consider the steps available[97]. On this point his Honour reasoned that *'there is a more than negligible chance'* that the testator would have taken alternative action[98].

79. Estcourt J characterised the case as one *'where the loss of chance is the damage itself'*, which did not require proof *'on the balance of probabilities that the chance existed'*[99]. His Honour regarded the suggestion that the testator would have acted *'in a particular way [as] speculation or conjecture.'*[100]

80. The contract cases relied upon[101] do not support either conclusion for the reasons explained in Tabet –v- Gett[102].

81. The respondent's case for loss of opportunity depends on the hypothetical decision-making of a third party, assuming that advice was given as to mechanisms which might be implemented to frustrate or defeat a claim pursuant to the TFM Act. It also depends on decision-making by him, assuming that the testator was prepared to create joint tenancies.

82. For several reasons, the approach of each of Porter and Estcourt JJ is wrong in principle.

83. First, section 13 of the Civil Liability Act 2002 requires the *'but for'* test to be satisfied[103]. This provision separates for consideration the questions of factual causation and scope of liability[104]. The respondent was required to prove that if the appellants had made inquiry of the testator about any other family members and if that inquiry had initiated a discussion about the TFM Act, then on the balance of probabilities, the testator would have instructed that some other step be taken to his advantage[105]. Blow CJ concluded on the facts that the respondent failed to discharge

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[95] Reasons at [32-33].
[96] Reasons [87].
[97] Reasons at [93].
[98] Reasons at [95].
[99] Reasons [134].
[100] Reasons at [131].
[101] Molinara –v- Perre Bros Lock 4 Pty Ltd *(2014) 121 SASR 61* (Porter J at [87]) and Olympic Holdings –v- Lochel *[2004] WASC 61* (Estcourt J at [136]).
[102] *(2010) 240 CLR 537* at [47], per Gummow ACJ and [124] per Kiefel J.
[103] Strong –v- Woolworths Ltd *[2012] HCA 5 (2012) 246 CLR 182* at [18].
[104] Adeels Palace Pty Ltd –v- Moubarak *(2009) 239 CLR 420* at [43], Wallace –v- Kam *[2012] NSWCA 82* at [4], Allsop P.
[105] Sellars –v- Adelaide Petroleum NL *(1994) 179 CLR 332* at 367 and 368, Brennan J. See further Tabet –v- Gett *[2010] HCA 12 (2010) 240 CLR 537* at [124] and [136], Kiefel J.

his onus on these matters. In doing so his Honour reasoned correctly: the evidence was insufficient to establish an hypothesis favourable to the respondent[106].

84. Porter J mentioned section 13 of the Civil Liability Act 2002 in his judgment[107]. He did not, however, adopt the required but for test in resolving the causation question. The respondent was required to establish on the balance of probability that the negligence of the applicants caused the damage complained of[108]. The Full Court, impermissibly, speculated upon the causation question, the outcome of which depended upon decision-making by the testator in a claim of a breach of duty owed to the respondent.

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85. Secondly, the speculative test of lost of opportunity did not satisfy the requirement that the breach was a necessary condition of the occurrence of the harm.[109] The respondent failed to demonstrate that it was more probable than not that the testator would have made a decision that steps be implemented, wholly or partially, to defeat or limit any claim by his daughter.

86. Thirdly, the respondent did not have the benefit of a contract, the performance of which would have provided him a commercial opportunity or advantage[110]. For this reason it was wrong to characterise *'loss of (the) chance as the damage itself.'*[111] The
20 respondent did not have an identifiable commercial interest to begin with, the loss of which *'may readily be seen to be of value itself.'*[112]

87. Accordingly, the respondent was required to establish on the balance of probabilities not only what he would have done, if asked, about an *inter vivos* rearrangement of the property of the testator[113] but also that there was a substantial prospect of a better outcome in his favour[114]. In this case the respondent could only establish a substantial prospect of a better outcome by evidence that the testator would have proceeded differently. This hypothesis required proof on the balance of probabilities[115]. The alternative methodology identified by Porter J is contrary to this principle. The
30 characterisation of the loss of chance by Estcourt J as the damage itself is likewise unprincipled.

88. In *Tabet –v- Gett*[116] this Court did not sanction a lesser standard of proof on the causation question in a medical negligence claim for loss of the chance of a better

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[106] *Sellars –v- Adelaide Petroleum NL* at 367, Brennan J.
[107] At [95].
[108] *Smeaton & Ors –v- Pattison [2002] QSC 431* at [22-26]. The causation reasoning was upheld on appeal: *Smeaton –v- Pattison [2003] QCA 341* at [4-19].
[109] *Adeels v Palace Pty Ltd v Moubrabak (2009) 239 CLR 420* [53] French CJ, Gummow, Hayne, Heydon and Crennan JJ.
[110] *Sellars –v- Adelaide Petroleum NL (1994) 179 CLR 332* at 349, Mason CJ, Dawson, Toohey & Gaudron JJ and *Tabet –v- Gett (2010) 240 CLR 537* at [47], [50] Gummow ACJ and [124], Kiefel J.
[111] Estcourt J at [134].
[112] *Tabet –v- Gett* at [124] per Kiefel J. See, further, *Tabet –v- Gett* at [50], Gummow ACJ, *Sellars –v- Adelaide Petroleum NL* at 349, and 355, Mason CJ, Dawson, Toohey and Gaudron JJ and 359, 362 and 364, Brennan J.
[113] *Sellars –v- Adelaide Petroleum NL* at 353, Mason CJ, Dawson, Toohey & Gaudron JJ. See, further, *Allied Maples Group Ltd –v- Simmons & Simmons [1995] 1 WLR 1602* at 1622, Millett LJ.
[114] *Sellars –v- Adelaide Petroleum NL* at 355, joint reasons and 368, Brennan J.
[115] *Sellars –v- Adelaide Petroleum NL* at 355, joint reasons and 368, Brennan J. See also *Tabet –v- Gett 240 CLR 537* at [136], Kiefel J.
[116] *[2010] HCA 12 (2010) 240 CLR 537.*

outcome[117]. The proof of damage and damages questions must not be conflated: the primary obligation of a plaintiff in cases like the present is to *'first establish the fact of the loss, for example by reference to the fact that it had a commercial interest of value which is no longer available to be pursued because of the defendant's negligence.'*[118] The respondent failed to discharge this onus as found by Blow CJ.

89. The reasoning of each of Porter and Estcourt JJ on the hypothetical causation question is similar to the English approach in *Allied Maples Group Ltd –v- Simmons & Simmons*[119] where Stuart-Smith LJ[120] rejected a submission that a plaintiff must prove that a third party would have acted in a particular way to confer a benefit or to avoid a risk[121]. Instead, his Lordship determined it sufficient for a plaintiff to prove the existence of *'a substantial chance rather than a speculative one, the evaluation of the substantial chance being a question of quantification of damages.'*[122]

90. However, even on that approach a plaintiff must establish more than a speculative chance of a better outcome depending upon the range of hypothetical decision-making of a third party[123].

91. There are two references in decisions of this Court[124] to the *Allied Maples* case, each contained in a footnote which references the principles in *Malec v JC Hutton Pty Ltd.*[125] *Malec* is a case concerned with measure of damages in the context of the uncertainty of future events, primary causation having been established on the balance of probabilities. The decision has been referred to at intermediate appeal court level in Australia[126]. Properly understood, *Allied Maples* has not been applied in this country as sanctioning a lesser standard of proof in cases which involve the hypothetical decision-making of a third party. Conversely, this is the consequence of the reasoning of the Full Court.

92. Notwithstanding Porter J's description of the respondent's loss which did not require proof *'that an opportunity would have been taken up'*,[127] his Honour, in the context of an observation about section 13(3) of the *Civil Liability Act* appeared to draw an inference on the balance of probabilities that the testator when informed of the need

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[117] Gummow ACJ at [58], Hayne & Bell JJ at [65-69], Heydon J at [94], Crennan J at [101] and Kiefel J at [124].
[118] *Tabet –v- Gett 240 CLR 537* at [137] per Kiefel J.
[119] (1995) 1 WLR 1602.
[120] Hobhouse LJ agreeing, Millett LJ dissenting.
[121] At 1611. Cf *Martin Boston & Co (a firm) –v- Roberts & Ors [1996] PNLR 45* at 54-55.
[122] At 1611. Further, at 1614 he also said *'but, in my judgment, the plaintiff must prove as a matter of causation that he has a real or substantial chance as opposed to a speculative one. If he succeeds in doing so, the evaluation of the chance is part of the assessment of the quantum of damage, the range lying somewhere between something that just qualifies as real or substantial on the one hand and near certainty on the other.'*
[123] Stuart-Smith LJ at 1614. See also Hobhouse LJ at 1621 and Millett LJ at 1623 and 1625.
[124] *Chappel –v- Hart (1998) 195 CLR 232* at 262, footnote 119, Gummow J and 275, footnote 193, Kirby J; *Rosenberg –v- Percival (2001) 205 CLR 434* at 502, footnote 212, Callinan J. In each instance each reference is concerned with the damages evaluation issue.
[125] (1990) 169 CLR 638
[126] *Nigam –v- Harm (No 2) [2011] WASCA 221* at [197-201], Murphy JA, *La Trobe Capital & Mortgage Corporation Ltd –v- Hay Property Consultants Pty Ltd [2011] FCAFC 4* at [89], Finkelstein J and *Crown Insurance Services Pty Ltd –v- National Mutual Life Association of Australasia Ltd [2005] VSCA 218* at [9-13], Warren CJ, Buchanan JA and Byrne AJA.
[127] At [93].

to create a joint tenancy, would have done so, when informed of the reason.[128] But that inference was never open for the reasons given by Blow CJ[129] and Estcourt J.[130] Once it is accepted that the respondent's claim was entirely speculative[131], it follows that he failed to discharge his balance of probability causation obligation. The reasoning of the Full Court is inconsistent with the statutory provisions and the binding authority of this Court.

93. Further, there is a clear policy reason for disallowing a lesser standard of causation in the context of this kind of case: in every case the critical evidence of the testator derives from a witness who is dead, so that the prospect of securing a result based on some degree of certainty is likely to be remote. This is to be contrasted with most medical negligence cases where the question of informed consent can be answered by the living plaintiff.

PART VII: Applicable provisions

94. See annexure A.

PART VIII: Orders sought

95. If the appeal succeeds then the appellants seek the following orders:

95.1. Appeal allowed with costs;
95.2. Judgment and orders of the Full Court made on 24 July 2015 be set aside and in lieu thereof, it be ordered that the appeal to that Court be dismissed with costs.

PART IX: Estimate of time

96. The appellants' counsel estimate that the presentation of the appellants' oral argument will take 2 hours.

Dated: 30 November 2015

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9225 7245

SHAUN MCELWAINE SC
LAUNCESTON
6334 5884

[128] [95].
[129] At [32].
[130] At [126]-[128].
[131] As determined by Blow CJ, reasons [33] and accepted by Estcourt J in the Full Court, reasons at [131].

IN THE HIGH COURT OF AUSTRALIA
HOBART REGISTRY

No. H12 of 2015

ROBERT BADENACH — First Appellant

MURDOCH CLARKE SOLICITORS (A FIRM) — Second Appellant

BETWEEN: - and -

ROGER WAYNE CALVERT — Respondent

ANNEXURE A

SCHEDULE OF RELEVANT LEGISLATION
REPRODUCED AS AT 26 MARCH 2009

Testators Family Maintenance Act 1912

3. Claims for maintenance against estate of deceased person

(1) If a person dies, whether testate or intestate, and in terms of his will or as a result of his intestacy any person by whom or on whose behalf application for provision out of his estate may be made under this Act is left without adequate provision for his proper maintenance and support thereafter, the Court or a judge may, in its or his discretion, on application made by or on behalf of the last-mentioned person, order that such provision as the Court or judge, having regard to all the circumstances of the case, thinks proper shall be made out of the estate of the deceased person for all or any of the persons by whom or on whose behalf such an application may be made, and may make such other order in the matter, including an order as to costs, as the Court or judge thinks fit.

3A. Persons entitled to claim under this Act

An application under subsection (1) of section three for provision out of the estate of a deceased person may be made by or on behalf of all or any of the following persons, that is to say:

(a) The spouse of the deceased person;

(b) The children of the deceased person;

(c) The parents of the deceased person, if the deceased person dies without leaving a spouse or any children;

(d) A person whose marriage to the deceased person has been dissolved or annulled and who at the date of the death of the deceased person was receiving or entitled to receive maintenance from the deceased person whether pursuant to an order of a court, or to an agreement or otherwise; and

(e) A person whose significant relationship, within the meaning of the *Relationships Act 2003*, with the deceased person had ceased before the date of the death of the deceased

person and who was receiving or entitled to receive maintenance from the deceased person whether pursuant to an order of a court or to an agreement or otherwise.

Civil Liability Act 2002

13. General principles

(1) Prerequisites for a decision that a breach of duty caused particular harm are as follows:

(a) the breach of duty was a necessary element of the occurrence of the harm ("factual causation");

(b) it is appropriate for the scope of the liability of the person in breach to extend to the harm so caused ("scope of liability").

(2) In deciding in an exceptional case, in accordance with established principles, whether a breach of duty, being a breach of duty that is established but which can not be established as satisfying subsection (1)(a), should be taken as satisfying subsection (1)(a), the court is to consider (among other relevant things) whether or not and why responsibility for the harm should be imposed on the party in breach.

(3) If it is relevant to deciding factual causation to decide what the person who suffered harm would have done if the person who was in breach of the duty had not been so in breach –

(a) the matter is to be decided subjectively in the light of all relevant circumstances, subject to paragraph (b); and

(b) any statement made by the person after suffering the harm about what he or she would have done is inadmissible except to the extent (if any) that the statement is against his or her interest.

(4) For the purpose of deciding the scope of liability, the court is to consider (among other relevant things) whether or not and why responsibility for the harm should be imposed on the party who was in breach of the duty.

14. Onus of proof

In deciding liability for breach of a duty, the plaintiff always bears the onus of proving, on the balance of probabilities, any fact on which the plaintiff wishes to rely relevant to the issue of causation.

Rules of Practice 1994[132]

12. Acting for more than one party

(1) A practitioner may act for more than one party to any proceedings or transaction.

(2) A practitioner must not accept instructions from more than one party to any proceedings or transaction unless the practitioner is satisfied on reasonable grounds that –

(a) each of the parties is aware that the practitioner intends to act for another party or parties; and

(b) each of the parties is aware that as a result of acting for more than one party –

(i) the practitioner may be prevented from disclosing to any one of those parties the full knowledge that the practitioner has of matters relevant to the proceedings or transaction; and

[132] Continued in force because the commencement of section 661 of the Legal Profession Act 2007, is unproclaimed.

(ii) the practitioner may be prevented from giving advice to any one of those parties if that advice is contrary to the interest of any other party; and

(iii) the practitioner must cease to act for all parties if the practitioner determines that he or she is not able to continue to act for all parties without acting in a manner contrary to the interests of one or more of those parties; and

(c) each of the parties, with full knowledge of the matters referred to in paragraph (b), has consented to the practitioner acting for more than one party.

(3) A practitioner who is acting for more than one party to any proceedings or transaction must immediately cease to act for all parties if that practitioner determines that he or she is not able to continue to act for all parties without acting in a manner contrary to the interests of one or more of those parties.