SUPREME COURT OF QUEENSLAND

CITATION:	*Smeaton & Ors v Pattison* [2003] QCA 341
PARTIES:	**SIMON SMEATON** (first plaintiff/first respondent) **BELINDA SMEATON** (second plaintiff/second respondent) **PAUL SMEATON** (third plaintiff/third respondent) **NATHAN SMEATON BY HIS LITIGATION GUARDIAN JOANNE SMEATON** (fourth plaintiff/fourth respondent) **v** **JOSEPH JOHN PATTISON** (defendant/appellant)
FILE NO/S:	Appeal No 452 of 2003 SC No 6074 of 2001
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	8 August 2003
DELIVERED AT:	Brisbane
HEARING DATE:	1 August 2003
JUDGES:	de Jersey CJ, Williams JA and Mackenzie J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**Appeal dismissed with costs to be assessed**
CATCHWORDS:	TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – DAMAGE – CAUSATION – GENERALLY – where deceased sought to transfer property to children by will – where appellant negligently advised deceased that transfer could potentially be effected without involvement of deceased's second wife – where evidence that deceased may not have involved second wife even if properly advised – whether element of causation present EVIDENCE – ADMISSIBILITY AND RELEVANCE – OPINION EVIDENCE – IN GENERAL – where evidence that deceased may not have involved second wife even if properly advised – where evidence related to deceased's likely actions in specific circumstances – whether evidence

admissible

Land Title Act 1994 (Qld), s 59
Uniform Civil Procedure Rules 1999 (Qld), r 766(2)

Lowery v R [1974] AC 85, distinguished
R v Von Einem (1985) 38 SASR 207, distinguished

COUNSEL: R V Hanson QC for the appellant
K S Howe for the respondents

SOLICITORS: Clayton Utz for the appellant
Delaneys for the respondents

[1] **de JERSEY CJ**: The appellant, who is a solicitor, appeals against a judgment given against him in the amount of $232,322.82, as damages for negligence, together with interest. The respondents, who are the beneficiaries of the judgment, are the four children of Peter Smeaton, deceased – three children from his first marriage which was dissolved in 1965 and one from his second marriage.

[2] During his lifetime, the deceased acquired a house property as sole owner, and other properties held jointly with his second wife. He wished to ensure that by his will, his interest in the house property, and in the property held jointly, would pass to his children, subject to life interests in favour of his second wife. His second wife survived him.

[3] The admitted negligence of the appellant rested in his not directly and firmly advising the deceased that in order to sever the joint tenancies, the deceased necessarily must within his lifetime execute a transfer of his interest, give a copy of the instrument to his second wife, and secure its registration (s 59 *Land Title Act* 1994). (Other possible means of severance did not arise, as the case was run.) Instead, the appellant developed an elaborate strategy of declarations and other documents which contemplated notification to the deceased's second wife after the death of the deceased. The appellant erroneously believed that this had some prospect of effectuating the deceased's intention, and he negligently left the deceased under the impression that proceeding that way could possibly achieve what the deceased intended, whereas in law, it plainly could not. Relations between the deceased and his second wife were such that her acquiescence in transfers could not be assumed.

[4] The substantial issue agitated before the learned Judge was whether, had the deceased been correctly advised, he would have taken the steps necessary to sever the joint tenancies. Her Honour found, on the balance of probabilities, that he would have done so.

[5] The essential aspects of her Honour's approach may be drawn from the following extracts from her reasons for judgment:

> "Some factors make it less likely that he would have taken the steps without which the joint tenancy could not be severed, some make it more so. It is a matter of weighing those various factors to determine whether it is more likely, on balance, that Mr Smeaton would have done so rather than not have done so. …

> The first matter of some significance is that he contacted a solicitor with the express intention of executing a new will in order to leave his share of the investment properties to his children. That this was the very purpose of giving instructions to the [appellant] demonstrates its importance to [the deceased]. This is cogent evidence of his state of mind and intention which was formed unaffected by the negligent advice subsequently given to him. …
>
> [The deceased] was very close to and proud of all of his children. …
>
> Mr Smeaton spoke to a number of people inside and outside his family about his desire to leave his share of the properties to his children and his confidence that what had been put in place by [the appellant] would achieve that objective. …
>
> Another factor to be taken into account in weighing whether Mr Smeaton would have been unwilling to give [his second wife] a copy of the transfers is the state of his marriage and what he perceived would be the consequences of his doing so. …
>
> The evidence of the relationship between Peter and Joanne Smeaton is ambivalent in its effect. On the one hand, it explains Mr Smeaton's reluctance to give copies of the transfers to his wife during his lifetime and therefore supports the view that he would have been unwilling to do so even if he had been given the correct advice. On the other hand, it explains his determination to leave his property to his children and therefore supports the view that he would have given copies of the transfers to his wife had he known that was the only way he could leave his share in the investment properties to his children.
>
> Certainly, it appears that Mr Smeaton told [the appellant] at the time he received advice about severing the joint tenancies that he was not prepared to serve the transfers on Joanne but his view was formed in reliance on incorrect advice that it may not be necessary to do so to effectively sever the joint tenancies. In those circumstances, his assertion of unwillingness can not be taken to be the state of mind or point of view in which he would have continued if he had been given correct advice. …
>
> On balance, I am satisfied that it is more likely than not, that had Mr Smeaton [been] correctly advised, he would have taken the steps [necessary] to sever the joint tenancies and so give effect to his testamentary intention."

[6] The first particular ground of appeal to be addressed contends that the learned Judge did not adequately deal with evidence of the appellant that when, after the present issue arose, he asked the deceased's long-standing friend Mr Neilson whether in his view the deceased would if necessary have delivered the transfer to his second wife, Mr Neilson replied emphatically in the negative. Mr Neilson gave evidence in the

case for the respondents, who were the plaintiffs. That conversation was put to Mr Neilson in cross-examination, and he said that he could not remember. When, as defendant, the appellant later gave evidence of the conversation, he was not challenged. Counsel for the respondents objected to the evidence, but her Honour did not then (or thereafter) rule on the objection.

[7] Her Honour observed in her reasons that the appellant's report of that conversation with Mr Neilson was "of but slight assistance" to the resolution of the issues. It was submitted, however, on appeal, that this evidence should have operated to defeat any claim of causation. The appellant also seeks the admission of additional evidence on appeal, under Rule 766(2) of the Uniform Civil Procedure Rules, of an admission made by Mr Neilson, subsequently to the trial, that he did, when giving evidence, recall the conversation, substantially in the terms put to him. (There is affidavit evidence in response from Mr Neilson denying the alleged admission.)

[8] Her Honour expressed the view that Mr Neilson's reluctance to express, while in the witness box, an opinion whether the deceased would have been likely to deliver the document to his wife, was understandable in view of his continuing friendship with Joanne Smeaton and the four children. That was a permissible observation.

[9] For present purposes, however, one needs to focus on the Judge's assessment that the view expressed on the evidence of the appellant, that the deceased would not have delivered the document, was of only slight assistance in the determination whether or not he would have done so. As I read her Honour's reasons, she appears to have proceeded on the basis Mr Neilson did say what the appellant attributed to him.

[10] It is not necessary to address the issue of the admissibility of the evidence from the appellant, because if its admissibility be assumed, the evidence could not have significantly affected the outcome. Recognising the character of the evidence, as the impression of a friend of the deceased as to how, in a hypothetical situation, the deceased may have been prepared to act, her Honour's assessment is seen to have been justified. While the witness's impression may have carried some weight, it would ordinarily in these circumstances have been minimal, affording little if any assistance in the context of objectively established circumstances from which the relevant inference could much more reliably be drawn if to be drawn at all. Even a very close friend could not be expected to appreciate and assess all the relevant nuances of the human mind to the point of expressing a reliable view on such an issue: to ask the friend to do so would invite speculation.

[11] In these circumstances, it is unnecessary to address the added ground of appeal as to the admission of fresh evidence, because as I have said the issue can be disposed of on the assumption that that was Mr Neilson's impression. I will say however that had the issue of the admissibility of Mr Neilson's subsequent statement actively arisen, I would have ruled inadmissible evidence going to Mr Neilson's opinion as to how the deceased would have conducted himself in that particular situation. It would have amounted to non-expert opinion evidence, and would not have concerned an "everyday matter" – such as a person's temperament or personality – upon which such evidence is sometimes admitted: see Cross on Evidence (Australian edition) para 29090 and *R v Von Einem* (1985) 38 SASR 207, 210. It went to a much more precise and confined issue, indeed the ultimate issue in the proceeding. As mentioned during argument, while a long-standing friend like Mr

Neilson may have been qualified by experience to offer a view about the deceased's temperament, or by observation a view as to the apparent state of the deceased's marriage, to ask him whether (in his view) the deceased would, if aware it was necessary to sever the joint tenancy, have served a transfer on his wife, is quite another matter: such a question would invite the witness, essentially by speculating, to offer "non-expert opinion" on the critical issue – a course plainly impermissible. (The admission of the evidence of personality upheld in *Lowery v R* [1974] AC 85 – to which we were referred – would not assist the appellant here, because other matters apart, that evidence was given by duly qualified expert psychologists.)

[12] The next ground of appeal asserts that the learned Judge did not give adequate consideration to the evidence of two of the deceased's sons, Paul and Simon, that after being diagnosed as suffering from cancer, the deceased was aware that a problem with the will was subsisting. The appellant contends that with death imminent, the deceased could have been expected to deliver a notice to his wife to ensure severance of the joint tenancy, were he as determined to secure the transmission of his interest to his children as the respondents contended.

[13] But a careful examination of the particular evidence on which the appellant relies for this ground confirms that even at that stage, the deceased believed – to be gathered from the various statements he made – that the appellant's strategy could ensure the transmission of his interest in the properties to his children. This circumstance should not therefore have weighed against the conclusion to which her Honour came. The factual basis for this ground was simply not made out.

[14] The next challenge concerns the learned Judge's finding that when the deceased told the appellant he was not prepared to serve the document on his second wife, he was relying on "incorrect advice that it may not be necessary to do so effectively to sever the joint tenancy." The appellant points to his own evidence, that when the deceased made that statement, the appellant's then (correct) advice was that it would be necessary to serve his wife – which he was not prepared to do lest it imperil the marriage.

[15] That may be, but the point being made by her Honour in the relevant passage – which is included in the material extracted above from her reasons for judgment – was a continuing unpreparedness to serve his wife against the background of an assurance, engendered by the appellant's other plainly incorrect advice, that the relevant objective could possibly be achieved without service on her in the deceased's lifetime. As her Honour was saying, had the deceased been disabused of that misapprehension, the deceased may well have been prepared to take the step necessary to achieve the particular object about which he was passionate, regardless of the possible effect on his marriage.

[16] The next ground of appeal concerns a letter from the deceased to his executor, his son Paul, intended to be perused on death. In this letter, dated 23 March 1995, and drafted by the appellant, the deceased said:

> "I acknowledge that I have received advice from Joseph John Pattison [the appellant] that my executing documents now for production at the time of my death may not be seen as legally valid by the Registrar of Titles and it may be necessary for an application to be made to the Supreme Court to seek rulings on whether those

> documents can be presented and registered and my Will then administered.
>
> I have been advised by Joseph John Pattison that it may well be that the documents that I am now bringing into existence pursuant to Section 59 of the *Land Title Act* may be ruled as invalid. I state to you that it was always my desire that I be able to leave my one-half interest in any real estate to my children and not that it pass entirely to Joanne Smeaton."

The deceased died five and a half years later, on 25 November 2000. The appellant submits that the deceased's preparedness to sign a letter in those terms evidenced preparedness "to take his chances with a strategy he knew may not work."

[17] But the issue is whether he would have served the document had he been told, as should have occurred, that the strategy definitely would not work. The circumstance that the deceased signed that letter, five and a half years before his death, where he continued thereafter to express the belief that, in view of the strategy set in place by the appellant, the transfers could be effective, should not have operated decisively, or significantly, against her Honour's drawing the requisite conclusion as to causation.

[18] The remaining grounds of appeal are more generally cast, asserting that the learned Judge should not, on the balance of probabilities, have found that the deceased would, had he been properly advised, have served the transfer on his wife. Her Honour accurately expressed the standard of proof and the requisite process of reasoning. The circumstances on which her Honour relied, apparent from the earlier extract from her reasons for judgment, did in my view provide adequate justification for her reasonably drawing the necessary inference in favour of service. The drawing of that inference was supported by a sufficient evidentiary base.

[19] Counsel for the appellant submitted this court is in as good a position as her Honour's to determine the outcome. That cannot be fully accepted. One question, for example, dependent on an assessment of demeanour, was the strength of the deceased's determination to benefit his children, to be drawn in large part from the children's evidence of statements the deceased made to them and as to the apparent state of the deceased's marriage. Due allowance must on appeal be made for the learned Judge's advantage of that character, although it may be accepted questions of credibility as such certainly did not loom large at the trial.

[20] In my view the appeal should be dismissed, with costs to be assessed.

[21] **WILLIAMS JA:** I have had the advantage of reading the reasons for judgment of the Chief Justice wherein the necessary background facts are set out. I agree with his conclusions, but wish to add some brief observations on two aspects of the matter.

[22] In addition to the passages quoted in the reasons for judgment of the Chief Justice the letter to the executor dated 23 March 1995, and signed by the deceased, contained the following statement:

> "At the time of my writing this correspondence I am not prepared to present documents to Joanne Smeaton nor am I prepared to give to

> her Notice pursuant to Section 59 and to proceed to sever the joint tenancy".

[23] In my view it is clear that the deceased understood that serving notice on his wife was a condition precedent to severing the relevant joint tenancies, but he was not willing to do so because of what he saw as probable undesirable consequences for the relationship. That put the appellant, his solicitor, in a very difficult position. It was eminently appropriate for the solicitor to prepare the necessary documentation and advise the deceased that, should circumstances change, the documents should be served on his wife and then lodged for registration.

[24] The admitted negligence lay in not positively advising the deceased that if the steps required by s 59 of the *Land Title Act* 1994 were not complied with prior to his death the joint tenancies would not be severed. But the fact that the solicitor was negligent in failing to give that advice did not automatically mean that the sons of the deceased, who would have benefited from a severing of the joint tenancies, were automatically entitled to damages.

[25] The critical issue at trial was whether or not the evidence supported the conclusion that the failure to sever the joint tenancies was caused by the negligent advice rather than by the deceased's decision not to serve the documents on his wife. On appeal it was submitted that the learned trial judge erred in concentrating too much on the issue of negligence, and in failing to give sufficient consideration to the issue of causation. Specifically it was said that she failed to give sufficient weight to the acknowledgements made by the deceased in the letter of 23 March 1995.

[26] The Chief Justice has quoted in his reasons the relevant passages from the reasons for judgment at first instance. The issue was, in my view, finally balanced and minds could well have differed as to the appropriate inference to draw. However, the inference drawn by the learned trial judge was open on the evidence and I am not persuaded that an appellate court should depart from that finding.

[27] The only other ground of substance in the appeal related to the admission of fresh evidence. Neilson, a family friend, was called to give evidence, inter alia, about the general relationship between the deceased, his second wife, and his four sons. In the course of cross-examination it was put to him that in a telephone conversation after the death of the deceased the appellant asked him: "Would Peter ever have given Joanne the documents to sever the joint tenancies?" Neilson replied that whilst he could recall one telephone conversation he could not honestly remember that question being asked. It was put to him that his response was: "No way, never. He wouldn't have brought that down around his head." Again he responded by saying that he could not remember that issue being discussed. He was then asked: ". . . do you think Peter Smeaton would have been prepared, during his life time, to give his wife notice that he was severing the joint tenancies?" To that he replied: "That subject was never raised by Peter so I can't answer something that was never raised with me."

[28] In my view that last question was inadmissible, but no objection was taken to it. Non-expert opinion evidence is admissible as to the character or general disposition of a person and as to whether a particular standard of behaviour has been breached. But authorities such as *Lowery v R* [1974] AC 85 and *R v Von Einem* (1985) 38 SASR 207 do not support the admissibility of opinion evidence as to how a

particular person may have reacted given a specific set of circumstances. Evidence could be led of conduct of the deceased, and statements made by him, from which the court could have been asked to draw an inference as to whether he would have, in any circumstances, given the requisite notice to his wife, but no witness could give a direct answer to a question framed in the terms in issue here. Indeed the response of Neilson was the only proper response anyone could make to such a question.

[29] Further, there was in my view no denial by Neilson that he had in the telephone conversation given the answer put to him. He simply said that he had no honest recollection. In those circumstances there was no proper basis for asking the appellant to give in evidence his recollection of the content of that telephone conversation. That was clearly a collateral issue, and the provisions of the *Evidence Act* 1997 relating to proof of a prior inconsistent statement were not applicable. Though the question was asked and answered over a vague objection, that evidence was not given any weight by the learned trial judge in her reasons.

[30] It follows that the alleged fresh evidence (evidence that subsequent to the trial Neilson admitted that he gave false evidence in denying making the statement put to him) would not be admissible on any basis. The end result of admitting the fresh evidence could only be that there was evidence before the court of a statement made which then had to be rejected because it amounted to inadmissible opinion evidence – it was a statement of pure conjecture totally unsupported by evidence.

[31] In the circumstances I agree that the appeal should be dismissed with costs to be assessed.

[32] **MACKENZIE J:** The issues discussed by the Chief Justice and Williams JA are those that are critical to the conclusion that the appeal should be dismissed. I agree that for those reasons the order proposed by the Chief Justice should be made.