SUPREME COURT OF QUEENSLAND

CITATION:	*Smeaton & Ors v Pattison* [2002] QSC 431
PARTIES:	**SIMON SMEATON** (first plaintiff) **BELINDA SMEATON** (second plaintiff) **PAUL SMEATON** (third plaintiff) **NATHAN SMEATON** (fourth plaintiff) **v** **JOSEPH JOHN PATTISON** (defendant)
FILE NO/S:	SC No 6074 of 2001
DIVISION:	Trial Division
PROCEEDING:	Claim
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	18 December 2002
DELIVERED AT:	Brisbane
HEARING DATE:	4, 5 December 2002
JUDGE:	Atkinson J
ORDER:	**Judgment is given for the plaintiffs in the sum of $232,322.82 together with interest**
CATCHWORDS:	TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – SPECIAL RELATIONSHIPS AND DUTIES – PROFESSIONAL PERSONS – where testator retained solicitor to prepare will leaving testator's half interest in joint tenancies to his children – where solicitor failed to advise that to sever the joint tenancy under s 59 of the *Land Titles Act* a transfer must be served on the other joint tenant – where intended beneficiaries were deprived of benefit under the will – whether conduct of solicitor was negligent TORTS – NEGLIGENCE – ESSENTIALS OF ACTION FOR NEGLIGENCE – DAMAGE – CAUSATION – OTHER CASES - where testator was reluctant to serve transfer of joint tenancy on his wife – where testator decided not to serve transfer after receiving negligent advice that the joint tenancy could be severed after his death – whether

testator would have served the transfer if properly advised – whether the negligent advice caused the loss to the plaintiff beneficiaries

Land Title Act 1994 (Qld), s 59
Evidence Act 1977 (Qld), s 18, s 101, s 102

Carr-Glynn v Frearsons [1999] Ch 326, followed
Corin v Patton (1990) 169 CLR 540, applied
Dickson v Creevey [2002] QCA 195, followed
Dobson v Morris (1986) 4 NSWLR 681, followed
Green v Chenoweth, unreported Queensland Court of Appeal, Appeal No 10998 of 1996, 11 November 1997, followed
Hawkins v Clayton (1988) 164 CLR 539, followed
Hill and Van Erp (1997) 188 CLR 159, applied
Hughes v National Trustees, Executor and Agency Co of Australasia Limited (1979) 143 CLR 134, followed
Johnson v Perez (1988) 166 CLR 351, applied
Malec v JC Hutton Pty Ltd (1990) 169 CLR 638, considered
Rosenberg v Percival (2001) 205 CLR 434, followed
White v Jones [1995] 2 AC 207, cited
Wright v Gibbons (1949) 78 CLR 313, followed

COUNSEL: K S Howe for the plaintiffs
R V Hanson QC for the defendant

SOLICITORS: Delaneys Lawyers for the plaintiffs
Clayton Utz for the defendant

[1] In March 1995, Peter Smeaton was 63 years old. He decided that he needed a new will. He therefore went to see a solicitor, Joseph Pattison, whom he knew personally and trusted. Mr Smeaton's eldest son, Simon, had been best man at Mr Pattison's wedding. In 1995, Mr Smeaton was married to Joanne Smeaton, his second wife.

[2] Mr Smeaton's first marriage, in 1955, was to Judith Smeaton. They had three children; Simon, born in 1957, Belinda, born on 6 October 1959, and Paul, born 8 November 1962. He and his first wife were divorced in 1965. In 1980, Mr Smeaton purchased a house at 134 Kingsford Smith Drive. He was and remained the sole owner of that property. Then in the early 1980s, he married his second wife, Joanne. Their child, Nathan, was born in 1985.

[3] Mr Smeaton contacted Mr Pattison because he wished his interest in properties he held jointly with Joanne Smeaton to pass to his children. Those properties were four investment properties that he had purchased as a joint tenant with his wife, Joanne Smeaton. Mr Pattison discussed with Mr Smeaton the likelihood that those properties were held in a joint tenancy, and that, "the law of survivorship then gave us some difficulties as to trying to achieve those wishes." The use of the word "difficulties" is an understatement. The difficulty of course is that an interest in a joint tenancy is unable to be disposed of by will. It is well established law that the interest of the deceased joint tenant passes directly to any surviving joint tenant,

notwithstanding any provision contained in a will. Any surviving joint tenant takes the interest of a deceased joint tenant immediately upon the death of that joint tenant by right of survivorship.[1] The only way for a joint tenant to dispose of his or her property subject to the joint tenancy by will is to sever the joint tenancy.

[4] Prior to 1994 in Queensland, there were three ways in which a joint tenant could sever the joint tenancy and so make his or her property available for disposition by will. The first was by alienating his or her interest in the property, the second was by mutual agreement, and the third was by a course of dealing sufficient to demonstrate that the interests of all were mutually treated as constituting a tenancy in common.[2] Absent alienation, a unilateral act, not communicated to the other joint tenant, was insufficient to sever a joint tenancy.

[5] In 1994, s 59 of the *Land Title Act* provided an additional simple means for a joint tenant to sever the joint tenancy unilaterally by registration of a transfer executed by the registered owner. Section 59 of *the Land Title Act* provided:

> "**Severing joint tenancy**
> **59**.(1) A registered owner of a lot subject to a joint tenancy may unilaterally sever the joint tenancy by registration of a transfer executed by the registered owner.
> (2) However, the registrar may register the instrument of transfer only if a registered owner satisfies the registrar that a copy of the instrument has been given to all other joint tenants.
> (3) On registration of the instrument of transfer, the registered owner becomes entitled as a tenant in common with the other registered owners.
> (4) If there are more than 2 joint tenants of the lot, the joint tenancy of the other registered owners is not affected."

[6] A joint tenant wishing to sever a joint tenancy pursuant s 59 of the *Land Title Act* must:

(1) Execute a transfer of the joint tenant's interest in the lot;
(2) Give a copy of transfer to all other joint tenants;
(3) Lodge the transfer and evidence of the giving of the copy with the registrar.

Upon registration of the transfer, the joint tenant then becomes a tenant in common. If a joint tenant dies prior to registration of the transfer, then the property immediately passes by survivorship to the surviving joint tenant or joint tenants.

[7] During the course of the initial telephone conversation where Mr Pattison took Mr Smeaton's instructions, he asked Mr Smeaton to bring the Certificates of Title with him so that he could verify the nature of the tenancy when Mr Smeaton came to sign

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1 *Wright v Gibbons* (1949) 78 CLR 313 at 323.

2 *Partriche v Powlet* (1740) 2 Atk 54 at 55; 26 ER 430 at 431; *Williams v Hensman* (1861) 1 J & H 546 at 557-558; 70 ER 862 at 867; *Corin v Patton* (1990) 169 CLR 540 at 546-547, 565-566, 584-585.

his will. The instructions given by Mr Smeaton over the telephone as to his will were that he wished the estate in the property which was held solely in his name at 134 Kingsford Smith Drive to be shared between his four children, with his wife, Joanne, to have the life tenancy over the property. With regard to the real estate that was held in both names, he wished his children to inherit his half of the interest in the property. He wished Mrs Smeaton to have the income from those properties until her death or re-marriage.

[8] Mr Pattison then drew up various documents to give effect to the instructions he had received. Mr Pattison drew up a will for Mr Smeaton. It appointed Paul Smeaton to be his executor. It then contained a number of devises.

[9] Clause 3(i) devised Mr Smeaton's residential property at 134 Kingsford Smith Drive, Hamilton ("the residence") to his four children to hold as tenants in common in equal shares and also provided for what was said to be a life tenancy to his wife Joanne Smeaton, "to continue to occupy the premises upon the land until such time as she shall die, remarry, or vacate the premises permanently … ".

[10] By clause 3(ii), he devised the half interest he might hold with his wife, Joanne Smeaton, in any other real estate to his four children as tenants in common provided that they should permit the lands and buildings thereon to be rented to generate income which should pass absolutely to his wife, Joanne Smeaton.

[11] This clause in the will had two problems; the first, which is not the subject of this litigation, was that it purported to fetter the fee simple which passed by will.[3] The second problem is the subject of this litigation. That is that, since Mr Smeaton held his half interest as joint tenant, he was unable to pass it by will.

[12] The will was duly executed on 23 March 1995. Mr Pattison then had Mr Smeaton execute a number of other documents which he had prepared. Mr Smeaton executed a form of transfer of his interest in each of four investment properties, being Lot 4, BUP 4076, County of March, Parish of Weyba, Title Reference 16106221 (the "Noosa property"), Lot 4, BUP 440, County of Stanley, Parish of Toombul, Title Reference 18042241, Lot 6, BUP 5302, County of Stanley, Parish of Toombul, Title Reference 16443211, and Lot 2, BUP 190, County of Stanley, Parish of Toombul, Title Reference 14075193 (the "Brisbane units").

[13] Mr Pattison also prepared a declaration for Mr Smeaton to execute. Paragraph 1 of that declaration recited that Mr Smeaton was registered as proprietor and joint tenant with Joanne Smeaton in the Noosa property and the Brisbane units. Paragraph 2 said:

> "I declare that I have this day directed the Executor of my Estate **PAUL WILLIAM SMEATON** to cause to be delivered on my behalf subsequent to the date of my death, Notice to the said **JOANNE SMEATON** of my having executed an Instrument of

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3 See *Hall v Busst* (1960) 104 CLR 206.

> Transfer pursuant to Section 59 of the Land Title Act on this day whereby I unilaterally severed the joint tenancies held in the said lands with the said **JOANNE SMEATON** as and from the date hereof and to subsequently produce a Transfer to the Registrar of Titles, Brisbane."

In paragraph 3, he directed his executor to deliver the notice of severance and to provide to the Registrar of Titles the declaration as to the delivery of such notice of severance. Notifications of change of ownership for each of the properties was prepared.

[14] In addition, Mr Pattison prepared a draft letter from Peter Smeaton to his executor, Paul Smeaton, called "Notes to Executor". Mr Pattison said in evidence that he had never drafted such a letter before and he drafted it because the situation had caused him problems, "from an indemnity point of view", and he wanted to make sure that Mr Smeaton understood absolutely what the situation was. The notes to executor, however, do not make perfectly clear what the situation was. The true situation was that unless the joint tenancy was properly severed then the clause in the will purporting to leave to his children his interest in the freehold properties which were subject to a joint tenancy would be incapable of achieving that effect if Joanne Smeaton was alive at the time of his death.

[15] In the letter drafted by Mr Pattison, Mr Smeaton set out the effect of the advice that Mr Pattison understood he had given him. It provides:

> "I acknowledge that I have received advice from Joseph John Pattison 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." (emphasis added)

[16] The advice in that letter was quite incorrect. The method chosen of executing documents and not giving a copy to the other joint tenant was not capable of severing the joint tenancy under s 59 of the *Land Title Act*. It was inutile to speak of an application being made to the Supreme Court to seek rulings as no competent solicitor could have believed that a court would rule that a unilateral attempt to sever a joint tenancy without notice, in these circumstances, could possibly be valid. Accordingly, it was completely wrong to advise the client as it appears that Mr Pattison did that, "It may well be that the documents that [he was] now bringing into existence pursuant to Section 59 of the Land Title Act may be ruled as invalid."

[17] Mr Smeaton went on to say in the letter that at the time of writing the correspondence he was not prepared to present documents to Joanne Smeaton, nor to give her notice pursuant to s 59 and to proceed to sever the joint tenancy. He then went on to say, however, that he had made "the appropriate declaration" and had enclosed that with the documents with his will for Paul Smeaton to present to the Registrar of Titles. The declaration to which he referred was the declaration unilaterally declaring severance of the joint tenancy. That declaration was not appropriate to achieve that end for the reasons herein set out.

[18] On 25 November 2000, Peter Smeaton died. On 4 December 2000, Joanne Smeaton became the sole registered owner of the Noosa property and the two remaining Brisbane units. One of the Brisbane units had been sold in 1999.

[19] The defendant did not dispute in submissions that the advice given by him was wrong and was in breach of his duty of care both to the client and to the potential beneficiaries of the will.[4] The nature of a solicitor's duty to an intended beneficiary of a will was set out in the judgment of Brennan CJ in *Hill and Van Erp*[5] as follows:

> "Most testators seek the assistance of a solicitor to make their intentions effective. The very purpose of a testator's retaining of a solicitor is to ensure that the testator's instructions to make a testamentary gift to a beneficiary results in the beneficiary's taking that gift on the death of the testator. There is no reason to refrain from imposing on a solicitor who is contractually bound to the testator to perform with reasonable care the work for which he has been retained a duty of care in tort to those who may forseeably be damaged by carelessness in performing the work.
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> …
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> By accepting the testator's retainer, the solicitor enters upon the task of effecting compliance with the formalities necessary to transfer property from a testator on death to an intended beneficiary; it is foreseeable that, if reasonable care is not exercised in performing the task, the intended beneficiary will not take the property; the solicitor fails to exercise reasonable care whereby the formalities are not complied with; and the intended beneficiary thereby loses the property."

[20] The Court of Appeal in England in 1998 considered the duty a solicitor owed to a potential beneficiary under a will in similar circumstances to this case where the testator wished to leave a share in a property which she owned with another person. The solicitor, in that case, did not know whether or not the property was owned jointly or as tenants in common and did not take immediate steps to sever the joint

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4 See *Nocton v Lord Ashburton* [1914] AC 932 at 956; *Hawkins v Clayton* (1988) 164 CLR 539 at 575; *Henflex Pty Ltd v N S Hope and Associates* [1990] 2 Qd R 218; *Hill v Van Erp* (1997) 188 CLR 159; *Queensland Art Gallery Board of Trustees v Henderson Trout* [2000] QCA 93; cf. *White v Jones* [1995] 2 AC 207.

5 (1997) 188 CLR 159 at 167, 170.

tenancy. The testator died and the potential beneficiary was unable to take the testator's share in a property that was jointly owned. Chadwick LJ held:[6]

> "In my view, a competent solicitor, acting reasonably, would have advised the testatrix that, in order to be sure that her testamentary wishes should have effect, she should serve a notice of severance in conjunction with the execution of the will."

His Lordship further said that, "On a proper analysis, the service of a notice of severance was part of the will-making process."[7]

[21] Letters written by Mr Pattison to Paul Smeaton as executor on 27 November 2000 and to Simon Smeaton on 11 December 2000, after Mr Smeaton's death, show that Mr Pattison continued to labour under the misapprehension that it might be possible to sever the joint tenancy after the death of one of the two joint tenants. In the latter letter, he described the argument that the joint tenancy could be severed after the death of the joint tenant of having a "50/50 chance".

Causation

[22] Whilst accepting that his advice and actions were negligent, the defendant nevertheless submitted that he was not liable to the plaintiffs because if Mr Smeaton had been given the correct advice, it would not have altered his course of action. Even if he had known that mere execution of the transfers of his joint interest in the investment properties was ineffective to sever the joint tenancies, it is said that he would not have taken the further step of giving a copy of the transfers to his co-tenant, Joanne Smeaton, to effect the severance of the joint tenancies.

[23] The onus of proving that the admitted negligence of the solicitor caused the loss suffered by the beneficiaries lies on the plaintiffs.[8] They must show, on the balance of probabilities, that had Mr Smeaton been given the correct advice, he would have taken the further steps necessary to sever the joint tenancy, in particular, that he would have given or caused to be given to Joanne Smeaton, a copy of the transfers which he had executed. Unless that matter can be proved then the plaintiffs' loss was not caused by the defendant's negligence and therefore the defendant would not be liable for that loss.[9]

[24] As both counsel submitted, this is not an appropriate case in which to value the loss of chance, in the sense referred to in *Malec v JC Hutton Pty Ltd,*[10] that Mr Smeaton would have made a different decision if properly advised. As Pincus JA observed in *Green v Chenoweth*[11]*:*

> "The foundation of the Malec doctrine is the distinction between the proof of liability and proof of damages; as to the former, Malec does

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6 *Carr-Glynn v Frearsons* [1999] Ch 326 at 332.

7 *Carr-Glynn v Frearsons* [1999] Ch 326 at 336.

8 See *Hill-Douglas & Anor v Beverley* [1998] QCA 435, Appeal No 2829 of 1998, 18 December 1998, at [54].

9 See *Johnson v Perez* (1988) 166 CLR 351 at 363; *Dickson v Creevey* [2002] QCA 195, Appeal No 9230 of 2001, 6 June 2002, at [12]-[13].

10 (1990) 169 CLR 638.

11 *Green v Chenoweth*, unreported Queensland Court of Appeal, Appeal No 10998 of 1996, 11 November 1997.

> not affect the well established position that facts must be proved on the balance of probabilities".

[25] McPherson JA agreed, saying that in his opinion, notwithstanding the High Court's decision in *Malec v JC Hutton Pty Ltd*, "a plaintiff in an action for damages for negligence continues to be bound to establish that the defendant's negligent act or omission caused the injury complained of, or at least materially contributed to it".[12]

[26] 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. As McHugh J observed in *Rosenberg v Percival*[13] this is a subjective test. It is a question of whether Mr Smeaton would have given a copy of the transfer to Mrs Smeaton before his death had he known, contrary to the advice negligently given, that it was necessary to do to sever the joint tenancy pursuant to s 59 of the *Land Title Act.* Since Mr Smeaton was, necessarily, deceased when the matter came to be determined, that conclusion can only be drawn by inference from his actions and intentions during his lifetime. Evidence of statements made during his lifetime are admissible to show his subjective attitude or beliefs, in other words, his state of mind. They are not evidence of any objective facts.[14]

[27] 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 defendant demonstrates its importance to him. This is cogent evidence of his state of mind and intention which was formed unaffected by the negligent advice subsequently given to him. The decision I am required to make is whether his desire to leave the property to his children would have overcome his unwillingness to give the notices of transfer to Mrs Smeaton before his death had he known it was necessary to do so to achieve that end.

[28] There is no doubt that he was very close to and proud of all of his children. This might not serve to distinguish him from most parents and their natural affection for their children, but in Mr Smeaton's case, his good relationship with each of the three children of his first marriage had survived the breakdown of that marriage and his divorce from their mother. He was equally fond of his son, Nathan, from his second marriage. His friend, Tony Nielson, gave evidence that he was very close to each of his four children.

[29] Mr Smeaton's eldest son, Simon, was a seafarer, now aged 45, who saw his father for a few hours virtually every day whenever he was in Brisbane. Mr Smeaton was particularly close to his daughter, Belinda, whom he saw every day of the week.

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12 Ibid.

13 (2001) 205 CLR 434 at 443.

14 *Lloyd v Powell Duffryn Steam Coal Company Limited* [1914] AC 783 at 751-752*; Hughes v National Trustees, Executor and Agency Co of Australasia Limited* (1979) 143 CLR 134 at 137, 149, 159; *Dobson v Morris* (1986) 4 NSWLR 681 at 681, 683.

They also had morning tea together every Friday which was the day of the week when she did not work.

[30] 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 Mr Pattison would achieve that objective. He told his friend of many years, Tony Nielson, two or three times during 1999 and 2000 that he was very happy that by what he referred to as his last Will and Testament, he had left his half of the assets to the children of both marriages and that they would be the beneficiaries of his assets in property. He also said to Mr Nielson that his wife, Joanne, would be looked after by payment of rents to her. He told Mr Nielson that his residence, which as Mr Nielson knew was solely owned by Mr Smeaton, was to be left to his four children, with Joanne Smeaton having the right to live there until she died or remarried. Mr Nielson had nothing to gain from this litigation. He was the only witness who was not a party to the litigation.

[31] Mr Smeaton told his son, Paul, in 1999 that he was to be the executor of his will. Paul Smeaton has a responsible position at work, being the general manager of the corporate projects division of Suncorp Metway, but was nevertheless honoured to be appointed executor in spite of the fact that he was not a solicitor or the eldest child. Mr Smeaton explained his will to Paul. He told Paul that he wanted to look after everyone. He wanted to leave the residence to all of his children but for his wife to have a life tenancy so she had somewhere to live. He wanted his share of the assets he owned with Joanne to go to his children with his wife to receive the rental so that she had an income. He said that, given all the hard work he had put into acquiring those assets, he wanted them to remain in the Smeaton family and go to his children. As against that, it appears that one of the Brisbane units had been sold in August 1999 and proceeds put in a joint bank account held by Peter and Joanne Smeaton.

[32] In about July 2000, four months before his death, Mr Smeaton spoke to his sons, Simon and Paul, at a lunch at Brothers Rugby Union Club about what he had done with his will. He told them that his residence would be left to his four children with Joanne Smeaton having the right to reside in it. His half of the other properties that he owned with Joanne were to go to his children with Joanne receiving the rents from the properties. He told them that he had seen Mr Pattison, whom they all referred to as Spot or Spottie, for this purpose. Mr Smeaton told Simon and Paul that there were some issues with the joint tenancy but that "Spottie … had sorted it out and … that was it."

[33] Simon Smeaton said his father had mentioned many times before he died that his half share in the properties was to be divided between his children. He was definite, and even passionate, about it. Paul Smeaton also emphasised how important this matter appeared to be to his father.

[34] Another factor to be taken into account in weighing whether Mr Smeaton would have been unwilling to give Joanne Smeaton a copy of the transfers is the state of his marriage and what he perceived would be the consequences of his doing so. Mr Nielson's perception based on his conversations with Mr Smeaton was that, while there were some martial difficulties, they were no more unhappy than many married

couples. He never talked to Mr Nielson about any prospect or fear of separation or divorce.

[35] Mr Pattison said that he telephoned Mr Nielson in July 2002 just prior to the dates when this matter was originally scheduled to be heard. Mr Pattison asked Mr Nielson whether in his opinion Mr Smeaton would have delivered the transfer to Joanne Smeaton. Mr Nielson said that there was "no way in the world" he would ever have done that. Mr Nielson told Mr Pattison that he would not be prepared to express that view as evidence. Mr Pattison assured him that he would not call him as a witness to give that evidence. As he had indicated, Mr Nielson declined to give that opinion in the witness box when cross-examined by Mr Hanson QC on behalf of Mr Pattison. He said he could recall that Mr Pattison had rung him but he could not remember the exact details of the conversation. His reluctance to express that opinion in the witness box was understandable. He remained friendly with Joanne Smeaton and the four children, and more importantly, he said that the subject was never raised by Mr Smeaton and he could not answer something that was never raised with him. The report of the conversation with Mr Nielson by Mr Pattison is of but slight assistance in the resolution of the issues to be decided in this case.[15]

[36] Simon Smeaton said the marriage between his father and Joanne Smeaton was rocky and that they basically lead separate lives but there was never any suggestion of separation or divorce. He said his father was pleased that Mr Pattison had sorted out any problems with the joint tenancies because he wanted to avoid any "grief" with Joanne. Paul Smeaton also observed that the relationship between his father and Joanne Smeaton was strained. She became very upset after Mr Smeaton's death and left Mr Smeaton's ashes on Paul Smeaton's doorstep. The relationship between Mrs Smeaton and Paul Smeaton deteriorated markedly after Mr Smeaton's death because of the conflict over the disposition of his property which included Mr Pattison's placing a caveat over the Noosa property and the Brisbane units on behalf of the executor.

[37] 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.

[38] Certainly, it appears that Mr Smeaton told Mr Pattison 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. It is of course for the purpose of obtaining correct advice that people consult solicitors so that they know what they may have to do to achieve a desired outcome.

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[15] Notwithstanding the effect of ss 18, 101 and 102 of the *Evidence Act* 1977 (Qld).

[39] 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. The solicitor's negligent advice was, therefore, the cause of the loss to the plaintiff beneficiaries.

Quantum of damages

[40] The valuation of the interest that Mr Smeaton had in the properties in dispute at the date of death was agreed at $256,250. The defendant contended that commission and other sale expenses should be deducted from that figure. Evidence was given that Mr Smeaton's children had no present intention of selling the properties, but it appears likely that the properties would have been sold to enable each of the beneficiaries to realise the assets of the estate. It is therefore appropriate to deduct the likely cost of commission and other sale expenses. The value of Mr Smeaton's share of the properties once those expenses have been deducted is $232,322.82.

[41] Judgment should be given for the plaintiffs in the sum of $232,322.82 together with interest. I shall hear submissions as to costs.