HIGH COURT OF AUSTRALIA

FRENCH CJ,
KIEFEL, GAGELER, KEANE AND GORDON JJ

ROBERT BADENACH & ANOR APPELLANTS

AND

ROGER WAYNE CALVERT RESPONDENT

Badenach v Calvert
[2016] HCA 18
11 May 2016
H12/2015

ORDER

1. *Appeal allowed with costs.*

2. *Set aside the orders of the Full Court of the Supreme Court of Tasmania made on 24 July 2015, and in their place order that the appeal be dismissed with costs.*

On appeal from the Supreme Court of Tasmania

Representation

J Ruskin QC with S B McElwaine SC for the appellants (instructed by Shaun McElwaine Barrister & Solicitor)

K N Wilson QC with S S Monks for the respondent (instructed by Shine Lawyers)

CATCHWORDS

Badenach v Calvert

Negligence – Duty of care – Scope of duty of care – Where solicitor received instructions from testator to prepare a will – Where entirety of testator's estate was to pass to respondent – Where testator's daughter brought successful proceedings under *Testator's Family Maintenance Act* 1912 (Tas) ("TFM Act") for provision out of testator's estate – Whether duty of care owed by solicitor to testator extended to advising testator of possible steps to avoid exposing testator's estate to a claim under TFM Act.

Negligence – Duty of care – Existence of duty of care – Whether solicitor owed duty of care to intended beneficiary under testator's will – Whether *Hill v Van Erp* (1997) 188 CLR 159 applied – Whether interests of testator coincident with interests of intended beneficiary.

Negligence – Causation – Whether, but for solicitor's failure to give advice, respondent would have received entirety of testator's estate – Whether relevant loss is a loss of chance.

Words and phrases – "coincident", "duty of care", "interests of the intended beneficiary", "interests of the testator", "loss of a chance", "testamentary intention".

Civil Liability Act 2002 (Tas), s 13(1)(a).
Testator's Family Maintenance Act 1912 (Tas).

1 FRENCH CJ, KIEFEL AND KEANE JJ. The first appellant ("the solicitor") is a legal practitioner and was at all material times a partner of the second appellant, a law firm. The solicitor received instructions from Mr Jeffrey Doddridge ("the client") to prepare his will, by which the entirety of his estate was to pass to the respondent, Mr Roger Calvert. The respondent was not the client's son, but was treated by him as such. The respondent's mother had been the client's de facto partner for many years until her death. The client's principal assets were two properties which he owned as a tenant in common in equal shares with the respondent.

2 The client was 77 years old at the time he gave the instructions to draft the will described above, and he was terminally ill. He died later in the same year having executed a will drawn in accordance with his instructions. However, because of events which took place following the client's death, his testamentary intentions could not be carried into effect.

3 The client had previously been married and there was a daughter of that marriage for whom he made no provision in his will. Following his death, his daughter brought proceedings under the *Testator's Family Maintenance Act* 1912 (Tas) ("the TFM Act") and was successful in obtaining a court order that provision be made for her out of the client's estate[1]. The combined effect of that order and a further order – that the parties' costs be paid out of the estate and taxed on a solicitor and client basis – was to substantially deplete what was not in any event a large estate.

4 The respondent brought proceedings against the solicitor and the solicitor's firm in which the respondent claimed that the solicitor had been negligent in failing to advise the client of the possibility that his daughter might make a claim under the TFM Act and the options available to him to reduce or extinguish his estate so as to avoid such a claim. In particular, the respondent alleged that the solicitor failed to advise the client that he could avoid exposing his estate to a claim under the TFM Act either by converting his and the respondent's interests in the two properties to joint tenancies, so that those properties would pass to the respondent by survivorship, or by making inter vivos gifts to the respondent ("the inter vivos transactions"). The respondent alleged that these acts of negligence were breaches of the duty that the solicitor and the law firm owed to the respondent as the intended beneficiary of the client's estate.

5 The solicitor did not give evidence in the proceedings. His file notes relating to the preparation of the will were tendered by consent. They simply

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1 *Doddridge v Badenach* [2011] TASSC 34.

recorded the client's instructions to prepare a will leaving the client's whole estate to the respondent if the respondent survived the client, or to the respondent's children in equal shares if the respondent predeceased the client. There was no evidence touching upon the question of what the client might have done had he been apprised of the possibility that a claim under the TFM Act might be made against his estate.

6 There was no doubt that the solicitor could readily have ascertained the existence of the client's daughter. His firm had made two wills for the client in the past. The earlier of them contained a small legacy for the daughter. As the trial judge in the Supreme Court of Tasmania, Blow CJ, observed[2], the solicitor could have looked at that will or simply asked the client whether he had any children.

7 Blow CJ held[3] that the solicitor owed the client a duty to enquire as to the existence of any family members who could make a claim under the TFM Act. His Honour inferred that had the solicitor done so, the client would have disclosed the existence of his daughter and the solicitor would have advised the client of the risk to his estate of successful proceedings being brought under the TFM Act. That might have led the client to make further enquiries about whether anything could be done to protect the respondent against that risk. In that event, the solicitor would have been obliged to advise about the possibility that the properties could be held by the client and the respondent as joint tenants.

8 However, Blow CJ was not satisfied[4], on balance, that the solicitor's advice about a possible claim under the TFM Act would have triggered an enquiry by the client about how to protect the respondent's position. In the absence of such an enquiry the solicitor was not under a duty to volunteer advice about creating joint tenancies. In these circumstances, his Honour did not consider[5] that it was necessary to decide whether the solicitor owed the respondent, as intended beneficiary, any relevant duty.

9 The Full Court of the Supreme Court of Tasmania (Tennent, Porter and Estcourt JJ) allowed[6] the respondent's appeal. Their Honours did not consider

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2 *Calvert v Badenach* (2014) 11 ASTLR 536 at 538-539 [5]; [2014] TASSC 61.

3 *Calvert v Badenach* (2014) 11 ASTLR 536 at 543 [25].

4 *Calvert v Badenach* (2014) 11 ASTLR 536 at 543 [25].

5 *Calvert v Badenach* (2014) 11 ASTLR 536 at 545-546 [33].

6 *Calvert v Badenach* [2015] TASFC 8.

that the solicitor's duty to the client was as limited as that postulated by Blow CJ. In their Honours' view[7] it extended not only to a duty to enquire of the client whether he had any children, and to advise of the potential for a claim under the TFM Act and the impact such a claim might have upon his estate, but also to a duty to advise of the possible steps he could consider taking in order to avoid that impact occurring even if the client did not make any enquiry about those steps.

10 The members of the Full Court reasoned that the duty owed by the solicitor to the respondent as intended beneficiary cannot be less than that owed to the client under the terms of his retainer[8], or in tort[9]. The duty owed to the client was co-extensive with that owed to the respondent[10].

11 The Full Court also permitted[11] the respondent to redefine the loss he claimed to have suffered as a result of the solicitor's breach of duty. The loss now claimed was the loss of the prospect that the client may have taken steps to protect the respondent's position.

12 Porter J considered[12] that that loss occurred when the client was not given the chance to consider what steps, if any, he would take in anticipation of a claim under the TFM Act. His Honour described it as "the loss of an opportunity to avoid a detriment", to which reference had been made in *Sellars v Adelaide Petroleum NL*[13]. In his Honour's view, there was a more than negligible chance that the client would have taken action to circumvent a possible claim under the Act[14].

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7 *Calvert v Badenach* [2015] TASFC 8 at [21] per Tennent J, [69]-[72] per Porter J, [116] per Estcourt J.

8 *Calvert v Badenach* [2015] TASFC 8 at [22] per Tennent J.

9 *Calvert v Badenach* [2015] TASFC 8 at [117] per Estcourt J.

10 *Calvert v Badenach* [2015] TASFC 8 at [78] per Porter J, [117] per Estcourt J.

11 *Calvert v Badenach* [2015] TASFC 8 at [33]-[34] per Tennent J, [86], [97] per Porter J, [130], [140], [159] per Estcourt J.

12 *Calvert v Badenach* [2015] TASFC 8 at [93].

13 (1994) 179 CLR 332 at 364; [1994] HCA 4.

14 *Calvert v Badenach* [2015] TASFC 8 at [95].

13 Estcourt J did not consider[15] this to be a case where the loss of the opportunity was productive of damage. In his Honour's view this is a case where the loss of a chance is itself the damage. The respondent need only establish on the balance of probabilities that the chance – that is, that the client might have taken steps to protect the two properties from a claim under the TFM Act – existed. No more need be proved.

Hill v Van Erp

14 The respondent's case for damages resulting from a breach of a duty owed to him by the solicitor was said to be based upon the decision of this Court in *Hill v Van Erp*[16]. It may immediately be observed that the loss claimed in that case was not the loss of an opportunity or a chance. Compensation was claimed for the loss of the property which would have been transferred to the intended beneficiary but for the negligence of the solicitor acting for the testatrix[17]. What the beneficiary lost was no mere expectation, but rather a share in the testatrix's estate[18].

15 The solicitor, Mrs Hill, had in accordance with her client's ("the testatrix") instructions, prepared a will by which the testatrix's house property and contents were to be given to her son and to her friend Mrs Van Erp as tenants in common in equal shares. Mrs Van Erp was also to be given certain other items of personal property. However, when the will came to be signed and witnessed, the solicitor asked Mrs Van Erp's husband to sign as the second attesting witness. The consequence of this was that the disposition of property to Mrs Van Erp was rendered void by reason of s 15(1) of the *Succession Act* 1981 (Q). A similar default had given rise to liability in *Ross v Caunters*[19].

16 There could be no doubt that a solicitor owes a duty to his or her client in both contract and tort. The scope of a solicitor's duties with respect to the latter will usually be set by the terms of the retainer[20]. The question in *Hill v Van Erp*

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15 *Calvert v Badenach* [2015] TASFC 8 at [134], [141].

16 (1997) 188 CLR 159; [1997] HCA 9.

17 *Hill v Van Erp* (1997) 188 CLR 159 at 170 per Brennan CJ.

18 *Hill v Van Erp* (1997) 188 CLR 159 at 179 per Dawson J.

19 [1980] Ch 297.

20 *Hawkins v Clayton* (1988) 164 CLR 539 at 544-545; [1988] HCA 15.

was whether a duty in tort could also be said to be owed to an intended beneficiary.

17 The majority decision was not based upon the solicitor having assumed a particular responsibility[21] to the intended beneficiary. Three members of the majority expressly disavowed its relevance[22] and two placed only some reliance on it[23].

18 It must be conceded, as the appellants point out in the present proceedings, that the approaches taken by members of the majority to the question of whether a duty existed differed in some respects. Nevertheless it may be seen from most of the judgments that the duty found to be owed by the solicitor to Mrs Van Erp as the intended beneficiary had its source in the solicitor's obligations arising from the retainer between the solicitor and her client[24]. The solicitor was obliged to exercise care and skill in giving effect to her client's testamentary intentions. The interests of the testatrix and the intended beneficiary in those intentions being carried into effect were relevantly the same. Recognising a duty to the intended beneficiary would not involve any conflict with the duties owed by the solicitor to her client, the testatrix.

19 In *White v Jones*[25], Lord Goff of Chieveley said that the general rule that a solicitor owes a duty of care only to his or her client may be thought to present something of an obstacle to a remedy being provided to an intended beneficiary. The scope of the solicitor's duties will be set by the terms of the retainer with the client. The solicitor would be entitled to invoke that contract in defence of, or to limit, any claim by a disappointed beneficiary[26].

20 In *Hill v Van Erp*, Brennan CJ explained[27] that a solicitor's duty is generally considered to be owed solely to the client because the duty is to

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21 As considered in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465.

22 *Hill v Van Erp* (1997) 188 CLR 159 at 171 per Brennan CJ, 198 per Gaudron J, 231 per Gummow J.

23 *Hill v Van Erp* (1997) 188 CLR 159 at 184-185 per Dawson J, 190 per Toohey J.

24 *Hill v Van Erp* (1997) 188 CLR 159 at 167-168, 181-182, 187-188, 190, 234.

25 [1995] 2 AC 207 at 256-257.

26 *White v Jones* [1995] 2 AC 207 at 261.

27 *Hill v Van Erp* (1997) 188 CLR 159 at 167.

exercise professional knowledge and skill in the protection and advancement of the client's interests in the transaction in which the solicitor is retained. That duty cannot be compromised by a duty to a person whose interests are not coincident with those of the client, but in the case of a testator and an intended beneficiary under the testator's will the interests are coincident. So understood, the duty said to be owed by the solicitor to an intended beneficiary is something of an exception to the general rule. Nevertheless, in a practical sense it operates consistently with the duty to the client.

21 Dawson J (with whom Toohey J agreed) also regarded[28] those interests as relevantly the same. Since serving the interests of the intended beneficiary involved no conflict with the performance of the contract as between the solicitor and client[29], there was no reason in principle why the relationship between the solicitor and the intended beneficiary could not give rise to a duty by the solicitor towards the beneficiary[30].

22 Three members of the majority in *Hill v Van Erp* identified the contractual obligation undertaken by the solicitor to carry out the client's instructions as important to the existence of a duty of care to the intended beneficiary. Brennan CJ[31] and Gummow J[32] identified the very purpose of the engagement of, and the instructions given to, the solicitor as being to ensure that the intended beneficiary's economic interests were advanced by the receipt of the intended benefit. Gaudron J[33] and Gummow J[34] pointed to the position of control in which the solicitor was placed over realising the testamentary intentions of the testatrix, by reason of the testatrix's instructions, as a significant factor supporting the duty of care in question.

23 A contractual relationship may create the occasion for and give rise to a tortious duty of care owed by one contracting party to the other and/or to a third

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28 *Hill v Van Erp* (1997) 188 CLR 159 at 185, 188.

29 *Hill v Van Erp* (1997) 188 CLR 159 at 187. See also at 236 per Gummow J.

30 *Hill v Van Erp* (1997) 188 CLR 159 at 182.

31 *Hill v Van Erp* (1997) 188 CLR 159 at 167.

32 *Hill v Van Erp* (1997) 188 CLR 159 at 234.

33 *Hill v Van Erp* (1997) 188 CLR 159 at 198.

34 *Hill v Van Erp* (1997) 188 CLR 159 at 234.

party. There are myriad examples across a variety of contractual relationships and it is not necessary to enumerate them here. The existence of a duty of care may be derived from the application of general principles to particular cases albeit the expression and application of those principles may evolve over time. A factor supporting such an application in favour of a third party may be that it serves the purpose of coherence in the law. Gummow J made that point in *Hill v Van Erp* in observing that[35]:

> "[A] coherent law of obligations ought not to leave ineffectual, in a practical sense, the undoubted responsibility … of the solicitor to the client."

24 Specifically referring to *Hawkins v Clayton*[36], his Honour pointed out that the application of a duty of care in that case to solicitors with custody of a will assisted realisation of the intention of the testatrix in making the will and the expectation of those whom the testatrix intended to receive her estate[37]. The recognition and enforcement by equity of a trust for the benefit of a contractual promise in favour of a third party discussed in *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd*[38] was offered as an analogous example[39].

The duty to the client in this case

25 Before comparing the duty, the status of the respondent and the interests of the client and the respondent with those in *Hill v Van Erp*, it is necessary to consider the factual foundation for the respondent's case and the duty to which it is said it gives rise.

26 It is necessary to bear in mind that the respondent's case is one of a failure to advise the client. As previously mentioned, the respondent contends that the solicitor had a duty to advise the client that he could avoid exposing his estate to a claim under the TFM Act by undertaking the inter vivos transactions. Regard must therefore be had not to what in fact occurred, but rather to what should have occurred. In order to determine whether the duty to advise the client in the terms

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35 *Hill v Van Erp* (1997) 188 CLR 159 at 224.

36 (1988) 164 CLR 539.

37 *Hill v Van Erp* (1997) 188 CLR 159 at 232.

38 (1988) 165 CLR 107; [1988] HCA 44.

39 *Hill v Van Erp* (1997) 188 CLR 159 at 224.

contended for arose, it is necessary to consider the events which would have taken place had the solicitor exercised the requisite professional skill and care.

27 On receiving the original instructions the solicitor would have observed that no provision had been made for any family member. Prudence would have dictated an enquiry about the client's family. That enquiry would have yielded information as to the existence of the daughter. It is not disputed that the solicitor would then have been obliged to advise the client that it was possible that a claim might be brought by her against the client's estate under the TFM Act. What is at issue on this appeal is whether more was required.

28 It would appear that the client was unlikely to have been able to provide the solicitor with information concerning the personal circumstances of his daughter. He had not had any contact with her (save for one chance encounter) since separating from her mother in 1973[40]. In these circumstances the solicitor would be obliged to inform the client that, absent further enquiries (with associated expense and delay), the solicitor could not provide advice as to whether the daughter would qualify under the TFM Act for provision out of the client's estate. The solicitor would further advise that it could not be known whether the daughter would in fact make a claim. Not all persons who are entitled to bring legal proceedings of this kind choose to do so.

29 The solicitor would then identify the options which would appear to be available to the client. The client could have further enquiries made concerning his daughter's circumstances, in order to assess the risk that she might make a claim and the extent to which she might be successful. He could have made provision for her in his will without that further information. He could have done nothing with regard to the daughter, maintained his original instructions, and allowed events to take their course after his death. The circumstance that it was in the respondent's interest to urge the client not to take some of these options is a significant factual difference between this case and *Hill v Van Erp*.

30 The duty which the solicitor is fulfilling by advising the client as to his options arises from his original retainer. It is a duty to ensure that the client gives consideration to the claims that might be made upon his estate before giving final instructions as to his testamentary dispositions.

31 Whilst advice about the possibility of a claim against his estate is clearly relevant in the context of the retainer, advice about how to avoid such a claim by inter vivos transactions with property interests is not. From the solicitor's

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40 *Doddridge v Badenach* [2011] TASSC 34 at [2].

perspective it could not be assumed that the client would need this latter advice. The respondent's case, understandably, is not put on the basis that the client, on hearing that a claim by the daughter was a mere possibility, would have instructed the solicitor that he wished to take all lawful steps to defeat such a claim. Such an approach is understandable because there is no way of knowing what the client's instructions would have been.

32 The respondent's case is that the solicitor should have volunteered this advice. However, it is difficult to see how the solicitor had a duty to do so merely because the solicitor has informed the client of the possibility that a claim could be made by the daughter but that, absent further information, he could not be any more certain about it occurring. It cannot be reasoned from the fact that the daughter later brought a claim that the solicitor should have appreciated that this was likely to occur. Even if he had done so, it is still difficult to see that the appreciation of this possibility would have warranted advice of this kind. Neither the solicitor nor the client could have known with any certainty whether the claim would be successful and, if so, the extent of the provision that might be made for the daughter from the client's estate.

33 The client's initial instructions regarding the preparation of his will, to benefit the respondent alone, would not have been sufficient to convey to the solicitor that the client would wish to take any lawful step to defeat any claim which was made by the daughter. At this point the solicitor was not to know what view the client might take of whether the daughter had a claim, moral or legal, upon him or his estate. This was the very question which the solicitor's advice would have raised for his consideration.

Causation

34 The respondent's case faces another hurdle. Even if it be accepted that the solicitor came under a duty to advise the client in the terms alleged, it cannot be concluded, on the balance of probabilities, what course of action the client would then have taken. In addition to the choices available to the client, there would have been other matters put to the client for his consideration including the risks concerning the irreversible nature of the inter vivos transactions, and the associated cost and delay.

35 Given these considerations, and the uncertainty that the daughter would make a claim, there is no reason to think that even if the client had been given the advice contended for, he would have been more likely to undertake transactions of this kind than, say, simply pursuing his original course of action, by which the respondent was to be the sole beneficiary under the client's will. But of course had that occurred, and the daughter later made a claim, it could not be said that the solicitor had caused the respondent loss.

36 Section 13(1)(a) of the *Civil Liability Act* 2002 (Tas) contains a requirement of factual causation. As with other statutory tests of this kind, it requires the application of a "but for" test of causation[41]. The respondent must prove, on the balance of probabilities, that but for the solicitor's failure to give the advice contended for, the respondent would have received the client's estate. The respondent has not discharged this onus of proof.

37 The respondent seeks to overcome problems of proof by redefining the loss occasioned by the alleged breach of duty as the loss of the chance that the client may have undertaken the inter vivos transactions. The chance could not be of a better testamentary disposition; none is identified as available.

38 It has been explained that to speak of loss as the loss of a "chance" distorts the question of causation[42]. It involves the application of a lesser standard of proof than is required by the law[43] and, it follows, by s 13(1)(a). It confuses the issue of the loss caused with the issue of assessing damages which are said to flow from that loss. In that assessment a chance may be evaluated.

39 The respondent's case on causation is not improved by seeking to equate the chance spoken of with an opportunity lost. It may be accepted that an opportunity which is lost may be compensable in tort[44]. But that is because the opportunity is itself of some value. An opportunity will be of value where there is a substantial, and not a merely speculative, prospect that a benefit will be acquired or a detriment avoided[45].

40 It remains necessary to prove, to the usual standard, that there was a substantial prospect of a beneficial outcome[46]. This requires evidence of what would have been done if the opportunity had been afforded. The respondent has not established that there is a substantial prospect that the client would have

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41 *Wallace v Kam* (2013) 250 CLR 375 at 383 [16]; [2013] HCA 19.

42 *Tabet v Gett* (2010) 240 CLR 537 at 586 [142]; [2010] HCA 12.

43 *Tabet v Gett* (2010) 240 CLR 537 at 562 [58], 564 [69], 575 [101], 587-589 [143]-[152].

44 *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332.

45 *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332 at 364.

46 *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332 at 355, 367-368.

chosen to undertake the inter vivos transactions. Therefore, the respondent has not proven that there was any loss of a valuable opportunity.

41 The onus of proving causation of loss is not discharged by a finding that there was more than a negligible chance that the outcome would be favourable, or even by a finding that there was a substantial chance of such an outcome. The onus is only discharged where a plaintiff can prove that it was more probable than not that they would have received a valuable opportunity. To the extent that the majority in *Allied Maples Group Ltd v Simmons & Simmons*[47] holds that proof of a substantial chance of a beneficial outcome is sufficient on the issue of causation of loss, as distinct from the assessment of damages, it is not consistent with authority in Australia and is contrary to the requirements of s 13(1)(a) of the *Civil Liability Act*.

Hill v Van Erp does not apply

42 Whatever be the position with respect to the duty which was owed to the client, it could not be one which extended to the respondent by analogy with *Hill v Van Erp*.

43 The duty recognised in *Hill v Van Erp* arose in circumstances where the interests of the testatrix and the intended beneficiary were aligned and where final testamentary instructions had been given to the solicitor. The solicitor's obligation was limited and well defined.

44 This case might, at least on a first impression, be thought to bear some similarity to *Hill v Van Erp*. The client's initial instructions disclosed an intention that the respondent receive the client's property interests under his will. The respondent has the status of an intended beneficiary. But there the similarity ends.

45 The duty for which the respondent contends is not the same as the more limited duty which was recognised in *Hill v Van Erp*, to give effect to a testamentary intention. It is one, more generally, to give advice as to the client's property interests and future estate.

46 The duty for which the respondent contends cannot be said to be owed to the respondent as an intended beneficiary. That is apparent from the nature of the advices and the point at which they should have been given. The advices which the respondent says should have been given in discharge of that duty

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47 [1995] 1 WLR 1602; [1995] 4 All ER 907.

would have rendered it unnecessary for the client to name the respondent as a beneficiary in his will.

47 The interests of the client and the respondent as parties to the proposed inter vivos transactions are not the same as those of a testator and intended beneficiary with respect to the execution of final testamentary intentions. The advices and warnings which the solicitor would need to give about such transactions would reflect that their interests are not coincident. For instance, at any point prior to completion of the creation of the joint tenancies or the gift, the client could change his mind despite any promise having been made to the respondent. This is not a circumstance which could arise where a solicitor was merely carrying into effect a testator's intentions as stated in his or her final will.

48 Nor could there be any question of the solicitor advising the respondent about all the matters relevant to his interests, such as the risk inherent in a joint tenancy of predeceasing the client. The solicitor's duty is one protective of the client and his interests alone.

49 So understood, the duty owed by the solicitor to the client is not different from that to which Brennan CJ referred in *Hill v Van Erp*. It is the duty generally understood to be owed by a solicitor solely to his or her client. *Hill v Van Erp* recognised circumstances in which the duty of care to a third party could and did arise. The circumstances which supported the existence of that duty of care are not present in this case.

Conclusion and orders

50 The appeal should be allowed with costs and the orders of the Full Court set aside. In lieu thereof it should be ordered that the appeal from the decision of Blow CJ be dismissed with costs.

51 GAGELER J. The facts and procedural history are within a narrow compass. It is convenient to focus immediately on their most salient features.

52 Mr Doddridge, the Testator, did not retain Mr Badenach, the Solicitor, to give general estate planning advice. The Testator retained the Solicitor specifically to prepare a will giving the whole of his estate to Mr Calvert. The Solicitor in fact prepared a will, and the will he prepared was effective in law to do just that: to give the whole of the Testator's estate to Mr Calvert. For preparing the will, the Solicitor charged the Testator the appropriately modest sum of $440.

53 When taking instructions from the Testator for the preparation of the will, the Solicitor did not ask whether the Testator had family and, not learning from asking that question that the Testator had a daughter, did not warn the Testator of the risk that his daughter might make a statutory claim for maintenance against his estate. The primary judge held that those omissions amounted to a breach of the duty of care which the Solicitor owed in contract and in tort to the Testator in the performance of the retainer to prepare the will. The primary judge held that neither of those omissions amounted to a breach of the duty of care which the Solicitor owed in tort to Mr Calvert as the Testator's intended beneficiary.

54 The Full Court disagreed. The Full Court held that the Solicitor breached the duty of care which the Solicitor owed to the Testator not only by omitting to warn the Testator of the risk that his daughter might make a statutory claim for maintenance against the estate but also by omitting to go on to advise the Testator that he could transfer some or all of his property during his lifetime so as to avoid exposing his estate to such a claim. Those same omissions, the Full Court held, also breached the duty of care which the Solicitor owed to Mr Calvert. Mr Calvert's compensable damage, according to the Full Court, was his loss of the chance that the Testator (properly advised) might have chosen to transfer some or all of his property during his lifetime in order to avoid exposing his estate to the statutory claim for maintenance which (as events transpired) his daughter did end up making after his death.

55 Together with other members of this Court, I would allow the appeal from the judgment of the Full Court and would make consequential orders having the effect of reinstating the primary judge's dismissal of Mr Calvert's action in tort.

56 The central flaw in the reasoning of the Full Court, in my opinion, was to treat the scope of the duty of care which the Solicitor owed to Mr Calvert as co-extensive with the scope of the duty of care which the Solicitor owed to the Testator. The scope of the Solicitor's undoubted duty of care to Mr Calvert was certainly encompassed within the scope of the duty of care which the Solicitor owed to the Testator. In a critical respect, however, it was narrower.

57 Subject to statutory or contractual exclusion, modification or expansion, the duty of care which a solicitor owes to a client is a comprehensive duty which arises in contract by force of the retainer and in tort by virtue of entering into the performance of the retainer[48]. The duty is to exercise that degree of care and skill to be expected of a member of the profession having expertise appropriate to the undertaking of the function specified in the retainer[49]. Performance of that duty might well require the solicitor not only to undertake the precise function specified in the retainer but to provide the client with advice on appurtenant legal risks[50]. Whether or not performance of that duty might require the solicitor to take some further action for the protection of the client's interests beyond the function specified in the retainer is a question on which differences of view have emerged[51]. That question was not addressed in argument, and need not be determined in this appeal.

58 The duty of care which a solicitor who is retained to prepare a will owes to a person whom the testator intends to be a beneficiary is more narrowly sourced and more narrowly confined. The duty arises solely in tort by virtue of specific action that is required of the solicitor in performing the retainer[52]. The duty plainly cannot extend to requiring the solicitor to take reasonable care for future and contingent interests of every prospective beneficiary when undertaking every action that might be expected of a solicitor in the performance of the solicitor's duty to the testator. If the tortious duty of care were to extend that far, it would have the potential to get in the way of performance of the solicitor's contractual duty to the testator. Extended to multiple prospective beneficiaries, it would be crippling.

59 The solicitor's duty of care is instead limited to a person whom the testator actually intends to benefit from the will and is confined to requiring the solicitor to take reasonable care to benefit that person in the manner and to the extent

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48 Cf *Astley v Austrust Ltd* (1999) 197 CLR 1 at 22-23 [47]-[48]; [1999] HCA 6; *Voli v Inglewood Shire Council* (1963) 110 CLR 74 at 84-85; [1963] HCA 15.

49 *Heydon v NRMA Ltd* (2000) 51 NSWLR 1 at 53-54 [147], 117 [362]; *Rogers v Whitaker* (1992) 175 CLR 479 at 483; [1992] HCA 58.

50 *Heydon v NRMA Ltd* (2000) 51 NSWLR 1 at 53-54 [147]; *Rogers v Whitaker* (1992) 175 CLR 479 at 483.

51 Eg *Hawkins v Clayton* (1988) 164 CLR 539 at 544-545, 579-580; [1988] HCA 15; *Kowalczuk v Accom Finance Pty Ltd* (2008) 77 NSWLR 205 at 263-270 [267]-[294]; *Doolan v Renkon Pty Ltd* (2011) 21 Tas R 156 at 166-168 [30]-[39]; *Takla v Nasr* [2013] NSWCA 435 at [68].

52 *Hill v Van Erp* (1997) 188 CLR 159 at 167, 182-183, 185, 234; [1997] HCA 9.

identified in the testator's instructions. The testator's instructions are critical. The existence of those instructions compels the solicitor to act for the benefit of the intended beneficiary to the extent necessary to give effect to them. The instructions define the intended benefit, absence of which constitutes the damage which is the gist of the cause of action in negligence[53]. The instructions expose the intended beneficiary to carelessness on the part of the solicitor in giving effect to those instructions against which the intended beneficiary cannot protect. The instructions thereby give rise to a position of vulnerability on the part of the intended beneficiary of a kind which has been recognised to be ordinarily necessary to justify the imposition of tortious liability for damage comprised of purely economic loss[54]. Confined to taking reasonable care to benefit the intended beneficiary in the manner and to the extent identified in the testator's instructions, the solicitor's tortious duty to that beneficiary is coherent with the solicitor's contractual and tortious duty to the client, thereby allowing the two to co-exist[55]. The duty is coherent because it admits of no possibility of conflict: the interests of the client and the interests of the beneficiary necessarily coincide completely[56].

60 Those are the multiple interlocking considerations which underlie the operative statement of principle by Brennan CJ in *Hill v Van Erp*, a case in which the negligent omission of the solicitor was to ensure that the will was properly executed[57]:

> "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 foreseeably be damaged by carelessness in performing the work. The terms of the retainer determine the work to be done by the solicitor and the scope of the duty in tort as well as in contract. A breach of the retainer by failing to use reasonable care in carrying the client's instructions into effect is also a breach of the solicitor's duty to an intended beneficiary who thereby suffers foreseeable loss."

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53 *Hill v Van Erp* (1997) 188 CLR 159 at 167-168, 197.

54 Cf *Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515 at 530-531 [23]; [2004] HCA 16.

55 Cf *Sullivan v Moody* (2001) 207 CLR 562 at 579-580 [50], 582 [60]; [2001] HCA 59.

56 *Hill v Van Erp* (1997) 188 CLR 159 at 167, 185, 187.

57 *Hill v Van Erp* (1997) 188 CLR 159 at 167-168.

61 Taking reasonable care in carrying the testator's instructions into effect might on occasions require a solicitor retained to prepare a will to do more than merely draft and ensure the proper execution of that will. An example is where taking steps to sever a joint tenancy is integral to carrying into effect a testator's intention that specified property be given by the will such that the taking of those steps can properly be seen to form part of the will-making process[58].

62 Unless there is some further factor affecting the relationship of the parties, however, a solicitor retained to prepare a will can have no duty to a person whom the testator intends to benefit other than to act in the manner and to the extent identified in the testator's instructions. That is because, outside the scope of the testator's instructions: there can be no requirement for the solicitor to act for the benefit of the person; there can be no damage to the person if the solicitor fails to act for that person's benefit; there can be no relevant vulnerability on the part of the person to the action or inaction of the solicitor; and there can be no necessary coincidence between the person's interests and those of the client. Where the testator's instructions stop, so does the solicitor's duty of care to the intended beneficiary.

63 Confinement of the solicitor's tortious duty to an intended beneficiary to the taking of reasonable care in carrying the client's instructions into effect admits of the possibility that the solicitor may act carelessly in relation to the testator and yet incur no liability to any beneficiary. That possibility does not lead to the moral dilemma and systemic embarrassment of a scenario in which "[t]he only person who has a valid claim has suffered no loss, and the only person who has suffered a loss has no valid claim"[59]. Beyond the scope of the instructions which identify the manner in which and extent to which the testator intends to benefit a person, that person suffers no relevant loss at the hands of the careless solicitor. The confinement of the solicitor's duty to the intended beneficiary therefore does not run counter to the "impulse to do practical justice" which historically drove its recognition[60].

64 Having been retained by the Testator specifically to prepare a will giving the whole of his estate to Mr Calvert, the Solicitor came under a duty of care to Mr Calvert to ensure that Mr Calvert was given a legally effective testamentary gift of the Testator's estate. That was all, because that was all that was relevantly required of the Solicitor in order to carry out the Testator's instructions.

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58 Eg *Vagg v McPhee* (2013) 85 NSWLR 154 at 159 [20]; *Smeaton v Pattison* [2002] QSC 431; *Carr-Glynn v Frearsons (a firm)* [1999] Ch 326 at 335-336.

59 *Ross v Caunters* [1980] Ch 297 at 303.

60 Cf *Gartside v Sheffield, Young & Ellis* [1983] NZLR 37 at 43; *White v Jones* [1995] 2 AC 207 at 259, 262, 268; *Hill v Van Erp* (1997) 188 CLR 159 at 168.

65 That is not to say that the Solicitor's duty of care to the Testator may not have been wider. There is in that respect no difficulty in the conclusion of the primary judge that the exercise of that degree of care and skill to be expected of a solicitor undertaking the function of preparing the Testator's will required the Solicitor to ask the Testator whether he had family and, on learning from asking that question that he had a daughter, to warn the Testator of the risk that his daughter might make a statutory claim against his estate. The conclusion was founded on expert evidence of an experienced solicitor, which the primary judge accepted.

66 There is more difficulty in the conclusion of the Full Court that the exercise of the same degree of care and skill extended so far as to require the Solicitor to advise the Testator that he could transfer some or all of his property during his lifetime so as to avoid exposing his estate to such a claim. That seems a lot to expect for the price of a will, and the expert evidence accepted by the primary judge did not go that far. The correctness of that further conclusion of the Full Court does not need to be determined. Even if they constituted breaches of the duty of care which the Solicitor owed to the Testator, the omissions of the Solicitor add nothing of themselves to the claim made against the Solicitor by Mr Calvert.

67 The omission of the Solicitor to warn the Testator of the risk that his daughter might make a statutory claim, and to advise him that he could transfer some or all of his property during his lifetime so as to avoid exposure to such a claim, did not constitute omissions on the part of the Solicitor to take steps which were integral to carrying into effect the Testator's instructions that his estate be given by the will to Mr Calvert. The omissions were not from action which formed part of what was required of the Solicitor to effect the testamentary transmission of the estate to Mr Calvert. Whether or not they fell within the scope of the duty of care which the Solicitor owed to the Testator, they were not within the scope of the duty of care which the Solicitor owed to Mr Calvert.

68 In the absence of further instructions from the Testator, which would necessarily have expanded the scope of the retainer, I do not think it possible to conclude that there was any omission of the Solicitor within the scope of the duty of care which the Solicitor owed to Mr Calvert. The impossibility does not lie in the absence of evidence sufficient to form a conclusion of fact about the content of any instructions the Testator would have given had the Solicitor advised him of the relevant risk to his estate and of the options available to him to avoid that risk. The impossibility lies in the absence of instructions from the Testator requiring the Solicitor to take some further action for the benefit of Mr Calvert beyond the drafting and execution of the will.

69 The problem for Mr Calvert is not a difficulty of establishing a causal link between a breach of a duty of care and damage. His claim does not get to that point. The problem is at an anterior stage in the analysis. It stems from the

absence of a fact necessary to establish a duty of care of the requisite scope and to give rise to the existence of damage: an expansion in the scope of the Testator's instructions – a new or enlarged retainer.

70 For these reasons, I agree with the orders proposed by French CJ, Kiefel and Keane JJ.

71 GORDON J. The first appellant, a solicitor and a partner of the second appellant, was retained by Jeffrey Doddridge ("the testator") to draw a will under which the entirety of his estate was to pass to the respondent, Mr Roger Calvert ("Mr Calvert"). A will was drawn and executed in accordance with the testator's instructions.

72 Following the testator's death, his daughter from a previous relationship filed an application pursuant to the *Testator's Family Maintenance Act* 1912 (Tas) ("the TFM Act"). No provision had been made for his daughter in the testator's will. Mr Calvert was a respondent in that proceeding. The daughter's application was successful[61].

73 Mr Calvert sued the appellants in negligence. The questions to be determined in this appeal are as follows. Did the appellants owe a duty of care to Mr Calvert? If so, what was the duty and was it breached? And if a relevant duty was breached, did Mr Calvert suffer loss that was caused by that breach?

74 The appellants owed a duty of care to the testator to use reasonable care in the preparation of his will. The appellants breached that duty. However, the appellants did not owe and could not have owed a duty of care to Mr Calvert because, at the relevant time, it cannot be said that the interests of the testator and Mr Calvert were the same, consistent or coincident. As the appellants did not owe any duty of care to Mr Calvert, there could be no breach.

75 Even if a duty was owed to Mr Calvert and that duty had been breached, Mr Calvert failed to adduce any evidence, let alone persuasive evidence, that was sufficient to establish what the testator would have done if the appellants had not breached the duty that they owed. Mr Calvert did not prove that it was more probable than not that, had the appellants discharged their duty of care, he would have received the entirety (or at least a greater portion than he did) of the testator's estate.

76 The appeal must be allowed with costs.

77 The facts of the matter are set out in the reasons of other members of the Court and need not be repeated except to the extent necessary to explain my reasons.

Duty of care owed to the testator – scope and content

78 Before considering the scope and content of any duty owed by the appellants to Mr Calvert, it is necessary to consider the scope and content of the duty owed by the appellants to the testator.

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61 *Doddridge v Badenach* [2011] TASSC 34.

79 When formulating a duty of care, its scope and its content "must neither be so broad as to be devoid of meaningful content, nor so narrow as to obscure the issues required for consideration"[62]. Moreover, the scope of the duty of care is not to be determined retrospectively by looking at questions of breach of duty – that is, by asking first what could have been done to prevent the loss or damage[63]. They are separate inquiries, which must not be conflated[64].

80 Contrary to Mr Calvert's contention, the duty owed by the appellants to the testator was not a duty to advise the testator that he could avoid exposing his estate to a claim under the TFM Act by taking precise steps. That formulation of the duty 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"[65].

81 The terms of the solicitor's retainer determine the work to be done and therefore the scope and content of the duty in contract and in tort[66]. Where a solicitor accepts a retainer to prepare a will, the solicitor owes a duty of care to the client to use reasonable care in the preparation of his or her will[67].

82 The appellants owed a duty of care to the testator to use reasonable care in the preparation of the will. It is then necessary to turn to the separate question of whether, in the circumstances of this case, the appellants owed the same duty to Mr Calvert.

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62 *Kuhl v Zurich Financial Services Australia Ltd* (2011) 243 CLR 361 at 371 [20]-[21]; [2011] HCA 11 (footnote omitted).

63 *Kuhl* (2011) 243 CLR 361 at 370 [19].

64 *CAL No 14 Pty Ltd v Motor Accidents Insurance Board* (2009) 239 CLR 390 at 418 [68]; [2009] HCA 47.

65 *CAL No 14 Pty Ltd* (2009) 239 CLR 390 at 418 [68].

66 See *Hawkins v Clayton* (1988) 164 CLR 539; [1988] HCA 15; *Hill v Van Erp* (1997) 188 CLR 159 at 167, 172-173, 181, 210, 232; [1997] HCA 9; *Astley v Austrust Ltd* (1999) 197 CLR 1 at 20-23 [44]-[48]; [1999] HCA 6.

67 *Hill v Van Erp* (1997) 188 CLR 159 at 167; *Kuhl* (2011) 243 CLR 361 at 371 [22].

Duty of care owed to Mr Calvert?

83 The duty of care owed by a solicitor to a testator in tort *may* extend to an intended beneficiary[68]. Such an extension is an exception to the general rule that a solicitor owes a duty only to his or her client. If the duty does so extend, its scope and content remain the same as for the client. As Brennan CJ stated in *Hill v Van Erp*[69]:

> "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 foreseeably be damaged by carelessness in performing the work. The terms of the retainer determine the work to be done by the solicitor and the scope of the duty in tort as well as in contract."

84 However, *Hill v Van Erp* is not authority for the proposition that a solicitor instructed to prepare a will always owes a duty of care to an intended beneficiary. The facts of that case were particular, and the duty of care to the intended beneficiary found to exist was limited. In that case, a will was properly drawn but, in executing the will, the relevant formalities were not complied with. The negligence arose on the execution of the will.

85 Importantly, at the time of the breach of duty in *Hill v Van Erp*, the testator's wishes had been expressed and reflected in the will. All that remained to be done was to give effect to those wishes by proper execution of the will. A majority of the Court held that, in those circumstances, the solicitor owed a duty of care to the third party, being an "intended beneficiary" of the will. Critically, the majority considered it important that the interests of the testator and the third party were the same, consistent or coincident[70]. They were the same, consistent or coincident because the client's testamentary wishes were formalised in a properly drawn will, the terms of which conferred an identified testamentary gift upon the third party. If the will as drawn was properly executed, it was certain that the third party would receive that gift. It was therefore in both of their interests that the will as drawn was properly executed. In those circumstances, the third party was properly described as an "intended

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68 *Hill v Van Erp* (1997) 188 CLR 159 at 167, 183-185, 188, 199, 234.

69 (1997) 188 CLR 159 at 167-168.

70 *Hill v Van Erp* (1997) 188 CLR 159 at 167, 187, 188, 196-197, 236.

beneficiary". In *Hill v Van Erp*, the duty owed to the intended beneficiary could not have arisen at a point in time *before* the interests of the testator and the intended beneficiary were the same, consistent or coincident.

86 Did the appellants' duty to use reasonable care in the preparation of the testator's will extend to Mr Calvert and was that duty breached? The answer to both questions is no. It is necessary to ask whether, at the time the appellants breached the duty they owed to the testator, the testator's and Mr Calvert's interests were the same, consistent or coincident. To answer that question, the alleged breach must be identified.

87 The appellants owed a duty of care to the testator to use reasonable care in the preparation of the will. In Tasmania, where a person owes a duty to take reasonable care, the breach of duty must be considered against s 11 of the *Civil Liability Act* 2002 (Tas) ("the CL Act"). Under that section, before a breach of a duty can be established, certain conditions must be satisfied.

88 They are satisfied in this case. There was a "foreseeable", and "not insignificant", risk that the testator or Mr Calvert would suffer "harm"[71] if the appellants did not use reasonable care in the preparation of the will[72].

89 "[I]n the circumstances, a reasonable person in the position of" the appellants would have "taken precautions" to avoid the risk[73]. A reasonable solicitor in the position of the appellants would have observed that the testator's instructions made no provision for any family member and then would have made an inquiry about the testator's family. The appellants did neither of those things. The appellants failed to use reasonable care in the preparation of the will. That was a breach of the duty which the appellants owed the testator.

90 But at the time of that alleged breach, Mr Calvert's interests were not the same as, consistent with or coincident with the testator's. The will had not been drawn. It cannot be said with any certainty what the testator would have done had the appellants made inquiries about whether he had any family members. The testator may have made a different decision about Mr Calvert's testamentary gift that would have been detrimental to Mr Calvert's interests.

91 It follows that because the interests of the testator and Mr Calvert were not the same, consistent or coincident at the time of the alleged breach, the appellants

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71 "[H]arm" is defined to mean "harm of any kind", including "pure economic loss": s 9 of the CL Act.

72 s 11(1)(a) and (b) of the CL Act.

73 s 11(1)(c) of the CL Act.

did not owe Mr Calvert a duty of care, because if they had, it would not have been the same as, consistent with or coincident with the duty of care they owed to the testator. Mr Calvert was not an "intended beneficiary" in the same way as the third party was in *Hill v Van Erp*.

Causation

92 But even if the appellants owed Mr Calvert a duty of care and that duty was breached (which I do not accept), did that breach cause Mr Calvert loss or damage? To answer that question, the loss or damage must first be identified.

93 Before Blow CJ the loss or damage was calculated by reference to the reduction in the value of the estate by reason of the Orders made in the TFM Act proceeding[74]. Before both the Full Court[75] and this Court, the loss was defined by reference to the testator's loss of an opportunity to arrange his affairs differently.

94 Regardless of how the relevant loss is defined, s 13(1)(a) of the CL Act imposes a requirement of "factual causation" for a negligence claim to be successful – whether "the breach of duty was a necessary element of the occurrence of the harm". Section 14 provides that "[i]n 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". Section 14 reflects the "general standard of proof" discussed in *Tabet v Gett*[76].

95 Those provisions require Mr Calvert to prove, on the balance of probabilities, that but for the appellants' breach of duty, he would have received the entirety (or at least a greater portion) of the testator's estate. That "inquiry directs attention to all the circumstances"[77] at the time the appellants were retained and failed to undertake the work, the preparation of the will, with reasonable care.

96 Mr Calvert could not establish, on the balance of probabilities, what the testator would have done if the appellants had observed that the testator's instructions made no provision for any family member and then made an inquiry

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74 *Calvert v Badenach* (2014) 11 ASTLR 536; [2014] TASSC 61.

75 *Calvert v Badenach* [2015] TASFC 8 at [33]-[34], [86], [97], [140].

76 (2010) 240 CLR 537 at 585 [136]; [2010] HCA 12 citing *Sellars v Adelaide Petroleum NL* (1994) 179 CLR 332 at 355, 367; [1994] HCA 4.

77 *Tabet v Gett* (2010) 240 CLR 537 at 586 [140].

of the testator about his family. That conclusion is compelled by, at least, the following facts and matters. First, given the lack of contact between the testator and his daughter, the testator was unlikely to have been able to provide the solicitor with any information concerning his daughter and her circumstances. Second, and most importantly, the possible responses of the testator to being told that his daughter could make a claim under the TFM Act are as diverse as they are numerous. They include the possibility of the testator instructing the appellants to make further inquiries about his daughter so that a potential claim under the TFM Act might be considered; the testator deciding to make provision for his daughter with or without the benefit of that additional information; the testator instructing the appellants to do nothing; or the appellants advising the testator to create a joint tenancy in respect of the properties. That list is by no means exhaustive.

97 Mr Calvert was required to adduce evidence of what would have been done by the testator if the appellants had observed that the testator's instructions made no provision for any family member and then made an inquiry of the testator about his family. He did not do that. There was no evidence, let alone persuasive evidence, that was sufficient to establish what the testator would have done if the appellants had not breached the duty that they owed[78]. Mr Calvert did not prove what steps (if any) the testator would have taken had the appellants discharged the duty of care they owed to the testator, or that by reason of the testator having taken those steps, he would have received the entirety (or at least a greater portion) of the testator's estate. In short, Mr Calvert did not establish that the appellants' negligence caused his loss.

98 It is for that reason that issues of the sufficiency or value of the "opportunity" purportedly lost do not arise for consideration – the first and necessary step of proving, on the balance of probabilities, a causal relationship between the tortious conduct and the purported "loss of opportunity", before any assessment of the amount of the loss[79], was absent. This can be directly contrasted with the position in *Sellars v Adelaide Petroleum NL*[80]. There, it was found, on the balance of probabilities, that the contract would have been entered into but for the impugned conduct[81]. Here, Mr Calvert could not prove, on the balance of probabilities, what the testator would have done had there not been a breach of duty (assuming such a duty existed). In particular, Mr Calvert could

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78 cf *Smeaton v Pattison* [2002] QSC 431 at [39] upheld on appeal in *Smeaton v Pattison* [2003] QCA 341 at [18], [26], [32].

79 *Sellars* (1994) 179 CLR 332 at 364.

80 (1994) 179 CLR 332.

81 *Sellars* (1994) 179 CLR 332 at 346-347, 356, 368.

not prove, on the balance of probabilities, that the testator would have taken steps necessary for him to have acquired a better outcome than in fact happened, such as receiving the entirety (or at least a greater portion) of the testator's estate[82].

99 In finding that Mr Calvert was required to prove on the balance of probabilities what the testator would have done, the views expressed by the majority in *Allied Maples Group Ltd v Simmons & Simmons*[83] about the requirements of proof of causation where loss depends on the actions of a third party may be put aside. Those views are not consistent with ss 13(1)(a) and 14 of the CL Act or authority in Australia[84].

Orders

100 I agree with the orders proposed by French CJ, Kiefel and Keane JJ.

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82 *Sellars* (1994) 179 CLR 332 at 367-368.

83 [1995] 1 WLR 1602 at 1611, 1614; [1995] 4 All ER 907 at 915-916, 919.

84 See *Sellars* (1994) 179 CLR 332 at 355, 367-368.