SUPREME COURT OF QUEENSLAND

CITATION:	*Stephens & Anor v Paradise Ultrasound Specialists Pty Ltd & Anor* [2019] QSC 134
PARTIES:	**KATIA VANESSA CHANTAL STEPHENS** (first applicant) AND **SEBASTIEN ROBERT STEPHENS** (second applicant) **V** **PARADISE ULTRASOUND SPECIALISTS PTY LTD (ACN 141 062 660)** (first respondent) AND **DR HASHAYLAYA NAIDOO** (second respondent)
FILE NO/S:	SC No 11699 of 2018
DIVISION:	Trial Division
PROCEEDING:	Originating Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	31 May 2019
DELIVERED AT:	Brisbane
HEARING DATE:	1 April 2019; Final submissions received 30 April 2019
JUDGE:	Crow J
ORDER:	**1. The time for commencing court proceedings be extended pursuant to s 31 of the *Limitation of Actions Act* 1974 (Qld) to 8 October 2018.** **2. Costs in the cause.**
CATCHWORDS:	LIMITATION OF ACTIONS – LIMITATION OF PARTICULAR ACTIONS – OTHER CASES AND MATTERS - where the applicants attended at an ultrasound clinic in the early stages of the first applicant's pregnancy – where the respondents advised of a low risk of the embryo having chromosomal abnormalities – where the child was born with Down syndrome – where applicants allege medical negligence against the respondents – where the applicants

seek a declaration that s 11 of the *Limitation of Actions Act* 1974 (Qld) is not engaged with respect to the costs of raising the child – whether the claims for the costs of raising the child are damages 'in respect of' personal injury within the meaning of the s 11 of the *Limitation of Actions Act* 1974 (Qld) and are consequently time barred

LIMITATION OF ACTIONS – EXTENSION OR POSTPONEMENT OF LIMITATION PERIODS – EXTENSION OF TIME IN PERSONAL INJURIES MATTERS – KNOWLEDGE OF MATERIAL FACTS OF DECISIVE CHARACTER – KNOWLEDGE – GENERALLY - where the applicants attended at an ultrasound clinic in the early stages of the first applicant's pregnancy – where the respondents advised of a low risk of the embryo having chromosomal abnormalities – where the child was born with Down syndrome – where applicants allege medical negligence against the respondents – where applicants apply to extend the time limitation period pursuant to s 31 of the *Limitation of Actions Act* 1974 (Qld) – whether the opinion of an ultrasound specialist supporting a claim for negligence was within the means of knowledge of the applicants prior to 24 September 2017 – whether the applicants' claim should be extended

Limitation of Actions Act 1974 (Qld), s 11
Limitation of Actions Act 1958 (Vic), s S27B
Personal Injuries Proceedings Act 2002 (Qld), s 7, s 9A(9)(d)

Caven and Another v Women's and Children's Health (2007) 15 VR 447
Cattanach v Melchior (2003) 215 CLR 1
FJ v Commonwealth (2017) 55 VR 108
Partridge v Briggs (Unreported, Supreme Court of Victoria, Gobbo J, 2 June 1988)
Unsworth v Commissioner for Railways (1958) 101 CLR 73
Opperman v Opperman [1975] Qd R 345
Melchior v Cattanach & Anor [2001] QCA 246
Reeves v Thomas Borthwick & Sons (Australia) Pty Ltd [1995] QCA 339
Murray v Whiting [2002] QSC 257
Waller v James [2015] NSWCA 232
McFarlane v Tayside Health Board [2000] 2 AC 59
Rees v Darlington Memorial Hospital NHS Trust [2004] 1 AC 309
Montgomery v Lanarkshire Health Board [2015] AC 1430
Doughty v Martino Developments Pty Ltd (2010) 27 VR 499
Powers v Maher (1959) 103 CLR 478
Ferrier v WorkCover Queensland [2019] QSC 11
Sugden v Crawford [1989] 1 Qd R 683
Castlemaine Perkins Ltd v McPhee (1979) Qd R 469

NF v The State of Queensland [2005] QCA 110
Newman v State of Queensland [2009] QSC 125
Wolverson v Todman [2016] 2 Qd R 106
Neilson v Peters Ship Repair Pty Ltd [1983] 2 Qd R 419
Dasreef Pty Ltd v Hawchar (2011) 243 CLR 588
Ervin v Brisbane North Regional Health Authority [1994] QCA 424
Wood v Glaxo Australia Pty Ltd [1994] 2 Qd R 431
Davison v Queensland (2006) 226 CLR 234

COUNSEL: D J Higgs SC and R J Davis for the applicants
R J Douglas QC and M G Zerner for the first respondent
D L K Atkinson QC for the second respondent

SOLICITORS: Carroll & O'Dea Lawyers for the applicants
Thynne & Macartney for the first respondent
Avant Law for the second respondent

Background

[1] In 2014, Mrs Stephens, the first applicant, was studying for her Masters of Speech Pathology Degree when she fell pregnant with her first child. Mrs Stephens explained, that it was an extremely emotional time for her and Mr Stephens (the second applicant) because in 2014 they were both students, and whilst they wished for a family they both considered it necessary to complete their education prior to raising a family.

[2] Mrs and Mr Stephens were concerned about having a child however they were also concerned that if Mrs Stephens delayed too long in having any children there were higher prospects of their children developing a genetic abnormality such as Down syndrome. Despite the difficult circumstances Mrs Stephens continued with her pregnancy and on 20 August 2014 attended upon the first respondent for an ultrasound that "would determine whether the embryo was affected by chromosomal abnormalities".[1]

[3] Mr Stephens attended at the ultrasound with Mrs Stephens and it appeared that it was a thorough ultrasound, lasting approximately 30 to 45 minutes. The sonographer told Mrs and Mr Stephens that "[t]he nuchal translucency is a bit raised" but "[n]ot to worry, the final risk number is in the low range".[2] Naturally both of the future parents were relieved to hear that they need not worry about their baby.

[4] In 2014, Mr Stephens was a medical student and because of his medical training Mr Stephens asked the sonographer "[s]hould we do a maternal chromosomal blood test to double check for Down syndrome?" To which the sonographer replied "[t]here is a new blood test available; it costs about $500 and is sent to the US for analysis. However you are in the low risk range so you don't need to do that".[3]

---

1 Affidavit of Katia Stephens sworn 23 October 2018 paragraph 11.
2 Affidavit of Katia Stephens sworn 23 October 2018 paragraph 15
3 Affidavit of Katia Stephens sworn 23 October 2018 paragraph 16.

[5] The ultrasound images were sent to the second respondent Dr Naidoo who reported on 28 August 2014 "[i]n summary, the overall risk assessment shows low risk of chromosomal abnormality".[4]

[6] Mrs Stephens explained that on seeing these words she "was confident"[5] that she and Mr Stephens had made the right decision to keep the baby thereby avoiding the greater risk of genetic abnormalities which were statistically higher if there was a delay for some years in having a child. Absent such advice there were other procedures available in order to test for chromosomal abnormalities including a non-invasive prenatal test (NIPT) and an amniocentesis.

[7] Lily Stephens was born on 5 February 2015 with Down syndrome.

[8] By claim filed 24 September 2018, Mrs and Mr Stephens bring an action for wrongful birth and in addition Mrs Stephens brings an action for personal injury sustained by her in respect of the birth of Lily.

[9] Regardless of whether the time limitation period commences from the date of the 12 week ultrasound on the 21st of August 2014 or the provision of Dr Naidoo's report on the 25th of August 2014 or the birth of Lily on the 5th of February 2015 or the definitive diagnosis of Down syndrome on 12 February 2015, it is plain that the claim has been brought outside of a three year time limitation imposed by s 11 of the *Limitation of Actions Act* 1974 (Qld) ("the Act").

[10] In this application Mrs and Mr Stephens contend that their claims are not subject to the 3 year limitation period set out in s 11 of the Act. Alternatively, Mr and Mrs Stephens contend that if s 11 is engaged they are entitled to an order pursuant to s 31 of the Act extending the time for the commencement of proceedings to 11 November 2018.

Is s 11 of the Act engaged?

[11] In oral submissions[6] and by written submissions[7] the applicants applied to amend the originating application to seek a declaration that s 11 of the Act does not apply in respect of the claim for the costs of raising the child. The application to amend to seek that declaration is not opposed. Indeed, if it were the case that s 11 of the Act were not engaged, then the applicable limitation period would be six years pursuant to s 10(1)(a) of the Act and in that case the application, as filed, would be unnecessary.

[12] Section 11(1) of the Act provides:

> "**Actions in respect of personal injury**
>
> (1) Notwithstanding any other Act or law or rule of law, an action for damages for negligence, trespass, nuisance or breach of duty (whether the duty exists by virtue of a contract or a provision made by or under a statute or independently of a contract or such provision) in which damages claimed by the plaintiff consist of or include damages in

---

4 Affidavit of Katia Stephens sworn 23 October 2018 paragraph 19.
5 Affidavit of Katia Stephens sworn 23 October 2018 paragraph 20.
6 T1-77 - T1-78.
7 Paragraph 1.1 and 1.2 of the Applicants' Final Submission dated 10 April 2019.

> respect of personal injury to any person or damages in respect of injury resulting from the death of any person shall not be brought after the expiration of 3 years from the date on which the cause of action arose." (my underlining)

[13] By paragraph 26.1.1 of the Statement of Claim, Mrs Stephens makes a claim for damages for personal injury. By paragraph 26.6 of the Statement of Claim, Mr Stephens does not make a claim for damages for personal injury. In paragraphs 26.1.1 and 26.12 Mrs and Mr Stephens bring a claim to recover past and future child rearing and maintenance costs, and an associated claim for future loss of earnings.

[14] The classification of a wrongful birth claim as a claim in respect of personal injury or as a claim for economic loss is somewhat controversial. The controversy was raised and carefully answered by Kaye J in *Caven and Another v Women's and Children's Health*.[8] As Kaye J points out (in paragraph 44) an analysis of the High Court's decision in *Cattanach v Melchior*[9] shows that two justices (Gleeson CJ and Callinan J) took the view that wrongful birth claims were properly characterised as claims for pure economic loss, two justices (Kirby J and Hayne J (in dissent)) took the view that such claims were not claims for pure economic loss and two justices (McHugh and Gummow JJ) expressly declined to provide a view as to whether the claim was one for pure economic loss. As Kaye J points out, Heydon J in his dissenting judgment did not express a view either way and so it is proper to conclude (as Kaye J did) at paragraph 45, that there was an "even split" of views in the High Court as to whether or not the claim for costs of care of the child comprised a claim for pure economic loss.

[15] I respectfully agree with Kaye J's careful analysis in *Caven* and in particular at paragraph 49 where he said:

> "One common theme emerges from the passages of the judgments of Kirby, McHugh, Gummow and Hayne JJ to which I have just referred. That theme centres on the unity of the interests of the husband and wife in the reproductive processes of the wife, which resulted in the birth of the child, in respect of whose care damages are sought. To describe the claim for costs of care of the child as a separate and distinct claim for pure economic loss is to ignore the essential and intimate relationship between, on the one hand, the pregnancy and childbirth undergone by a female plaintiff, and the costs in respect of which damages are sought. Equally, to ignore the relationship between the husband and the wife, and to describe the claim for damages as one of pure economic loss, is to ignore the source of the legal and moral obligations of both parties to provide for the care and maintenance of the child after his or her birth. It is these considerations which, I consider, lead Kirby J and Hayne J to regard the claim by Mr and Mrs Melchior as not one for pure economic loss, and which lead McHugh and Gummow JJ, in their joint judgment, to regard it as irrelevant whether or not the claim was for economic loss alone. Similarly, it is these considerations which markedly differentiate the claim by the plaintiffs for the cost of care of Jared, from the type of claims treated as claims for pure economic loss in cases such as *Perre v Apand Pty Ltd* and *Caltex Oil (Australia) Pty Ltd v The Dredge*

---

8 (2007) 15 VR 447.
9 (2003) 215 CLR 1.

> *Willemstad*. In cases such as those, the concern of the law, in imposing a duty of care on the alleged tortfeasor, is not to expose potential defendants "to a liability in an indeterminate amount for an indeterminate time to an indeterminate class": *Ultramares Corporation v Touche*. Here, by contrast, when the defendant performed the ultrasound on Ms Caven, its conduct directly and necessarily affected the continued pregnancy of Ms Caven, in which she and her husband, the second plaintiff, had an immediate and shared interest as potential parents. It was that status which, on birth, is and was the source of their joint legal and moral obligation for the cost of care of Jared, for which they now claim damages."

[16] In *Partridge v Briggs*[10] Gobbo J came to the same view as Kaye J, relying upon the High Court's decision in *Unsworth v Commissioner for Railways*[11] and *Opperman v Opperman*[12]. In *Unsworth* , Fullagar J at page 87 said:

> "But the prepositional phrase 'in respect of' is wider that (sic) the preposition "for", and the words are capable of referring to cases where the cause of action arises out of personal injury but the plaintiff is someone other than the person injured."

[17] In *Opperman,* Hanger CJ, at page 346, cited with approval that passage from the judgment of Fullagar J at *Unsworth v Commissioner for Railways*:

> "The words 'in respect of' have been held capable of referring to cases where the cause of action arises out of the personal injury but the plaintiff is someone other than the person injured: *Unsworth v. Commissioner for Railways* (1958) 101 C.L.R. 73, at pp. 87-88. In my opinion, this proposition provides a complete answer to the question for decision in this case. The plaintiff's allegation is that there has been 'personal injury to any person', i.e. to his wife; 'in respect of' this injury, he makes his claim for damages."

[18] *Unsworth* related to a Lord Campbell's Act claim, *Opperman* related to a claim for loss of consortium and servitium by a husband plaintiff in respect of personal injuries sustained in a motor vehicle accident by his wife due to the negligence of the defendant. The judgment of Gobbo J in *Partridge v Briggs* concerned an application by Mr Ronald Partridge, who claimed damages in respect of the wrongful birth of his child. After citing the reasons of Hangar CJ in *Opperman,* Gobbo J said of *Opperman's* case at page 4:

> "In my view, that decision, and the decision that is referred to in it, cover the present situation, and the applicant is here able to make out the first of the threshold prerequisites, that he has an action for damages for negligence where the damages claimed include damages in respect of personal injury to any person, even though that person is someone other than himself."

---

10 *Partridge v Briggs* (Unreported, Supreme Court of Victoria, Gobbo J, 2 June 1988).
11 (1958) 101 CLR 73, 87-88.
12 [1975] Qd R 345.

[19] As Fullagar J said in *Unsworth*, the prepositional phrase "in respect of" is wider than the preposition "for".[13] If s 11 of the Act had used the preposition "for" in lieu of the prepositional phrase "in respect of" there would be greater strength in the applicant's argument that s 11 of the Act is not engaged in claims for damages for wrongful birth because, particularly for the father of a child, his claim could not be "damages for personal injury to any person", as his claim is limited to financial claim to recover the past and future child-rearing and maintenance costs. However, s 11 of the Act specifically uses the wide prepositional phrase "in respect of". The essence of a wrongful birth claim is that, absent the negligent act, the mother would not have given birth to the child and the parents of the child would not be subject to the moral and financial burden of past and future child-rearing and maintenance costs. Whilst it is plain that the damages are not "for" personal injury to any person it is highly artificial to conclude the damages are not "in respect of" personal injury to any person. In the present case, Mrs Stephens has brought a claim in paragraph 26.1.1 of the statement of claim that she has in fact suffered personal injury in the form of her continuing pregnancy with and giving birth to her daughter Lily Stephens.

[20] In careful submissions senior counsel for the applicants correctly point out that the text of s 11(1) of the Act makes reference to the singular form of a "cause of action" and the time that such cause of action "arose". The applicant's submission that there are two causes of action in the present case is accepted. It is trite to record that the tort of negligence is complete only upon the suffering of damage and in a personal injury case that occurs at the time of the suffering of the personal injury. In respect of Mrs Stephens' personal injury case as is plead in paragraph 26.1.1(a) Mrs Stephens suffered from a personal injury by her "continued pregnancy after the time when, but for the breaches of duty alleged she would have terminated the pregnancy". Although it is not the subject of any specific evidence in the present application it is accepted that the applicant's case is that had the negligent acts not occurred there would have been a termination in or about September 2014. Thus in respect of the personal injury claim, Mrs Stephens case is that she suffered personal injury in or about September 2014 which represents the commencement of the time limitation in respect of her cause of action.

[21] The claims in respect of child rearing and maintenance costs are set out in s 26.11(c) as a loss of $200 per week commencing at the time of Lily's birth on 5 February 2015. Although Mrs Stephens' personal injury claim and Mr and Mrs Stephens wrongful birth claim are technically separate causes of action they are intimately factually related. In support of its argument the applicants refer to *Melchior v Cattanach & Anor*[14], *Murray v Whiting*[15], *Cattanach v Melchior*[16], *Waller v James*[17] and *FJ v The Commonwealth*. The applicants submit that *Caven* was wrongly decided or alternatively that the wording of the Victorian Act was relevantly different from s 11(1) of the Queensland Act such that it ought not to be followed.

[22] In *Melchior v Cattanach,* the Court of Appeal concluded that a claim for damages for childrearing costs was a discreet and separate cause of action from other claims made in

---

[13] *Unsworth v Commissioner for Railways* (1958) 101 CLR 73, 87.
[14] [2001] QCA 246.
[15] [2002] QSC 257.
[16] (2003) 215 CLR 1.
[17] [2015] NSWCA 232.

that case for loss of consortium and pain and suffering associated with child birth.[18] The applicants submit that the reasoning of the Court of Appeal must be considered in light of the High Court's decision in *Cattanach v Melchior*. Similarly the decision of Chesterman J in *Murray v Whiting* was decided in the time between the Court of Appeal's decision in *Melchior v Cattanach* which bound Chesterman J and the High Court's decision. Furthermore as Chesterman J lamented in paragraph 29, the respondent plaintiffs were self-represented and acknowledging the developing state of the law Chesterman J said:

> "It is, indeed, not certain that the High Court will recognise the recoverability of damages for maintaining the child. It is, in these circumstances, inappropriate to determine such an important question of law on a summary application. I should also point out that the application was very briefly, and unhelpfully, argued."

[23] The applicant submits that "there is considerable authority that causes of action for the costs of child rearing of the sort brought by the Applicants are actions for pure economic loss".[19] That reference is made in respect of the New South Wales Court of Appeal decision in *Waller v James*.[20] The difficulty in accepting the applicant's submission is in respect of the phrase "of the sort brought by the Applicants". As stated above in the present case Mrs Stephens brings a claim for personal injury and Mr and Mrs Stephens bring a claim for the costs of childrearing and associated losses. The claims are very carefully set out in the pleadings.[21] *Waller v James* was not concerned with any time limitation in defence. There was no claim brought that the mother had suffered any personal injury the result of the continuation in the pregnancy of the affected child nor giving birth to the child (Keeden).

[24] Keeden was born on 10 August 2000 with a normal delivery and "no post natal problems whilst in hospital".[22] Keeden and his mother were discharged from hospital on 14 August 2009 and Keeden was observed to be perfectly healthy "making good progress" on his third postnatal day. Sadly, at approximately 1.08am on 15 August 2009, he was returned as an emergency case to the Westmead Children's Hospital. He was found to be suffering from an "extensive thrombosis in the cerebral venous sinus system" or in other words a Neonatal (or Perinatal) Stroke which left Keeden significantly disabled. Subsequent medical evidence established that Keeden was born with anti-thrombin deficiency (ATD) which he had genetically inherited from his father. The plaintiff's case which was rejected by the trial judge (and the finding unchallenged upon appeal) was that Keeden's ATD caused or materially contributed to the stroke.

[25] In *Waller,* the appellants' contended that "the respondent breached his contract and his common law duty of care in failing to inform them, or cause them to be informed, of the hereditary aspects of ATD". They argued "had they been so informed, they would have deferred undergoing the IVF procedures in October/November 1999 until the respondent had identified methods to ensure that only embryos not affected by the AT3 mutation would be transferred to the first appellant."[23] In *Waller* the appellants' case

---

18 *Melchior v Cattanach & Anor* [2001] QCA 246 at [6] and [140].
19 Applicants' Final Submissions dated 10 April 2019 paragraph 30.
20 [2015] NSWCA 232 in particular Beazley P at [113] – [119].
21 Paragraphs 26.1 and 26.1.1 and 26.1.2 of the Statement of Claim.
22 *Waller v James* [2015] NSWCA 232 at paragraph 48.
23 *Waller v James* [2015] NSWCA 232 at paragraph 5.

was that the harm that they suffered was not the birth of their child but that the appellants had not been properly advised to enable them to exercise their "right to plan their family". The damages claimed were for the cost of Keeden's future care as well as a claim by Keeden's mother for a chronic dysthymic disorder "caused by or resulting from Keeden's injuries and disabilities" and an additional "ongoing psychological injury caused by or resulting from Keeden's disabilities".

[26] Accordingly, in *Waller* the case was expressly framed as an economic loss case with subsequent consequential psychological injuries. That differs from the present case which is pleaded as a personal injury claim by Mrs Stephens and a chronologically later and closely related economic loss claim for the costs of rearing and maintaining Lily. Appropriately, with respect to the basis of the claim framed as a claim for economic loss Beazley P, with reference to *Melchior v Cattanach* and a series of subsequent Australian and English cases[24] concluded that the claim that was in fact "made for infringement of a right to plan a family"[25] was a claim for economic loss. Beazley P's analysis does not assist in the present case where the case is differently framed. Furthermore Beazley P's analysis of *Cattanach v Melchior*[26] in *Waller* accords with the analysis of Kaye J in *Caven.*

[27] The applicant's senior counsel relies upon the Victoria Supreme Court of Appeal's decision in *FJ v Commonwealth* as being a useful but nonbinding precedent. *FJ* differs because there was no claim for any type of physical or psychological injury caused by the pregnancy. *FJ* also relates to the construction of a federal statutory exclusion provision and not a limitation provision. Notwithstanding these limitations the Victorian Court of Appeal said in respect of *Caven*:

> "**Analysis**
>
> 75 The term 'injury' is so common that one would not instinctively consult a dictionary for its meaning. The ordinary meaning of 'injury' does not include pregnancy or childbirth. The *Shorter Oxford English Dictionary* defines 'injury' as 'hurt or loss caused to or sustained by a person or thing; harm, detriment, damage'. *The Oxford Companion to Medicine* describes an 'injury' as 'harm, hurt, damage or impairment; trauma'. Pregnancy may be unwanted and resented; it may involve pain and discomfort. It anticipates the pain and suffering in labour and, to focus on one side of the ledger, the vicissitudes often associated with motherhood. However, being the condition necessary for the existence of each of us, pregnancy or childbirth are not commonly thought of or described as 'injury'; each is an indispensable part of the human condition. While pregnancy will bring about physiological changes in a woman's body, in our view those changes are not a 'deviation' or 'disruption' from the normal physiology of a female body any more than the changes associated with puberty, or with aging, (neither of which is regarded as an injury), are a deviation or disruption from normal physiology. We do not accept that in

---

[24] *McFarlane v Tayside Health Board* [2000] 2 AC 59; *Rees v Darlington Memorial Hospital NHS Trust* [2004] 1 AC 309; *Montgomery v Lanarkshire Health Board* [2015] AC 1430.

[25] *Waller v James* [2015] NSWCA 232 at paragraph 133.

[26] *Waller v James* [2015] NSWCA 232 at paragraphs 102-112.

ordinary language a healthy pregnancy and childbirth are described as injuries.

76 But, in the present case, the question is not whether, in everyday language, pregnancy and childbirth may be described as injuries. It is whether they are understood at law as injuries. More particularly, the question is what did Parliament mean by the words it used in the Act? Parliament is able to stipulate (by its definition of the words and phrases it deploys) the meaning of the terms that it uses in a particular statute in ways that depart from the everyday meaning of those words if it chooses to do so. Even if Parliament has not stipulated the meaning of the terms it has used, it may be the case that, upon its proper construction, a word or phrase has been used in a statute in a way that departs from its ordinary sense.

77 In the present case, the question is not just whether pregnancy and childbirth are injuries within the meaning of the Act. It is more complicated. It is a question, within s 388, about the character of an 'action or other proceeding'. As noted, it is about a 'service injury' and not just an 'injury'. Further, the relevant inquiry is whether the present action is '*in respect of* … a service injury'. The connective 'in respect of' is capable of broadening considerably the class of proceedings to which the definition applies. If, under the Act, pregnancy and childbirth are injuries, the fact that a plaintiff has removed all particulars of pain and suffering from her pleading may not prevent her action from being, none the less, 'in respect of' an injury, and barred. Or, to take another example, in bringing a proceeding, the father of a child may find that his proceeding is barred by the Act because his proceeding is characterised as one 'in respect of' the mother's pregnancy.

…

113 Given that his task was to construe the *Limitation of Actions Act 1958*, it was unnecessary for Kaye J to express a view on the question whether a claim for the upkeep of a child was a claim for pure economic loss. In the event, Kaye J expressed his conclusion as follows:

> Nevertheless, in light of the submissions which have been made, and the views I have thus far expressed, it follows that I consider that that claim is not a claim for pure economic loss, but is a claim which has an integral and unique link with *the continued pregnancy of [the mother], and the birth of [the child], which are considered by law to constitute personal injury.*

114 Kaye J then addressed the question whether the claim for the cost and upkeep of a child 'relate to the personal injury' of the mother within the terms of s 27B of the Limitation of Actions Act 1958. He continued:

> However, the question for me is whether, in terms of s 27B of the [Limitation of Actions Act 1958], the damages claimed by the

> plaintiffs for the cost of care and upkeep of [the child] are damages 'that relate to the … personal injury' of [the mother], namely her continued pregnancy and the childbirth. In this sense, the ordinary English meaning of 'relate', is 'to bring into or establish association, connection, or relation … to have reference to'. The section does not define what type of relationship must exist between the cause of action for damages and the personal injury identified. None the less, for the reasons I have set out above, it is clear that there was an intimate and essential relationship between the damages sought by the plaintiffs for the cost of care of Jared and the personal injury (pregnancy and childbirth) of [the mother]. [The mother's] pregnancy, and, more relevantly, her continued pregnancy and childbirth, was both a product of, and a natural and integral feature of, the marital relationship between the two plaintiffs. So too is the joint obligation of the plaintiffs to care for and maintain the child born of that pregnancy. The relationship between [the mother's] pregnancy and the obligation of the plaintiffs to care for [the child] is, on any view, direct, proximate and substantial. It would be wholly artificial to characterise such a claim for damages as one which is 'unrelated' to the 'personal injury' of [the mother] constituted by her continued pregnancy and childbirth. It therefore follows that the damages claimed by the plaintiffs for the cost of care and upkeep of [the child] do 'relate to' the personal injury of [the mother] for the purposes of s 27B(i) of the [Limitation of Actions Act 1958].

It will be noticed that the premises of the reasoning of Kaye J appear to be:

(a) in the present case, the mother had claimed damages for the pain and suffering associated with her continued pregnancy and the birth of her child and the parents had claimed damages for the anxiety, depression, nervous shock and psychological suffering;

(b) damages awarded in comparable cases comprised 'compensation for pain and suffering and loss of enjoyment of life, medical expenses, and interruption to employment during the period of the pregnancy';

(c) such damages bear 'a striking similarity to damages awarded to an injured plaintiff in a personal injury case';

(d) there is an 'essential and intimate relationship between, on the one hand, the pregnancy and childbirth undergone by a female plaintiff, and the costs in respect of which damages are sought';

(e) the relationship between the mother's pregnancy and the obligation to care for her child was 'direct, proximate and substantial'.

All of which led to the conclusion that a claim for the economic costs of raising a child was one that 'related to' the 'personal injury' constituted by the continued pregnancy and childbirth.

…

131 The closest any judgment gets to a holding that pregnancy and childbirth are injuries is the judgment of Kaye J in *Caven*. However, that judgment was not dealing with the Act and the definitions in it; it was dealing with other legislation. It was, moreover, dealing with a case where the applicant for an extension of time was claiming damages for the pain and discomfort of pregnancy and childbirth and associated anxiety, depression, nervous shock and psychological suffering. Finally, different expansive constructional techniques apply to a beneficent legislative provision such as an extension of time provision in a Limitation of Actions Act from those that apply to a provision that bars common law remedies." (footnotes omitted and my underlining)

[28] It is submitted by the applicants that the use of the words "relate to" in s 27B of the *Limitation of Actions Act* 1958 (Vic) is wider than the phrase "in respect of" in the Queensland legislation as the former contemplates a *mere relationship* whereas the latter requires much more than that, it requires personal injury to *be an integral part of the cause of action*.[27] I do not accept that submission.

[29] In *Doughty v Martino Developments Pty Ltd*[28] Nettle JA (as his Honour then was) wrote at paragraph 6 that the language "in respect of" is one which "has the widest possible meaning of any expression intended to convey some connexion or relation between two subject-matters" citing High Court authority to that effect.[29] Adopting as I do the analysis of Nettle JA and what is required by s 11(1) of the Act, the use of the phrase "in respect of" is "some [connection] or relation between two subject-matters".

[30] I conclude that the claims of Mr and Mrs Stephens are claims that include damages in respect of personal injury to any person and accordingly fall within the time limitation period of three years provided by s 11(1) of the Act. As senior counsel for the first respondent points out in addition to ordinary or direct personal injury claims, claims for loss of dependency and for loss of consortium have been found to be the subject of the three year time limitation period in the predecessor of s 11 of the Act.[30]

Section 31 of the Act – Time Extension

[31] Recently in *Ferrier v WorkCover Queensland*[31] I set out the five steps which are ordinarily raised for the consideration of an application to extend the time limitation period pursuant to s 31 of the Act. In the present application four of the five steps are either relatively or completely uncontroversial. They are steps 1, 2, 4 and 5.

[32] As to step 1, the *material fact* relied upon by the applicants is the receipt of the expert opinion of Dr Nicole Woodrow, an ultrasound specialist who provided a report supportive of a claim for negligence dated 12 November 2017. Dr Woodrow's opinion is a relevant fact within the definition in s 31(a)(i) of the Act, that is, the fact of the

---

27 Applicants' Final Submission dated 10 April 2019 at paragraph 48.2.
28 (2010) 27 VR 499.
29 *Powers v Maher* (1959) 103 CLR 478, 485 per Kitto J.
30 *Opperman v Opperman* [1975] Qd R 345.
31 [2019] QSC 11.

occurrence of negligence for breach of duty upon which the action is founded depends upon expert opinion as provided by Dr Woodrow.

[33] As to step 2, it is readily conceded[32] that Dr Woodrow's opinion is *of a decisive character* as the opinion at the very least, enhances the applicants' prospect of succeeding from a possibility to a real likelihood such that it can be concluded that the newly acquired information makes it sufficient to justify for the first time the bringing of an action, thus satisfying the test in *Sugden v Crawford.*[33]

[34] Step 4 is established as there is evidence to *establish a right of action* contained in Dr Woodrow's opinion.

[35] As to step 5, there can be no suggestion of, and there is no *prejudice* as the first notification of a potential claim was sent to the defendants on 12 February 2016.

[36] The controversy in the present application is step 3, that is, whether the material fact of a decisive character was within the *means of knowledge* of the applicants prior to 24 September 2017 (the relevant time being one year preceding the filing of the claim on 24 September 2018).

[37] Senior counsel for the first respondent submits[34] that once means of knowledge of the requisite fact – here supporting medical opinion as to breach – was obtained, the requisite "means of knowledge" was gained. It did not matter whether the fact was communicated orally or in writing as long as it was clear and logical. I accept that submission. Certainly Dr Woodrow's written opinion of 12 November 2017 is clear and logical. The delay in obtaining a clear and logical written or oral opinion from Dr Woodrow requires explanation.

[38] The objective and subjective nature of the step 3 inquiry has been the subject of much judicial guidance. In *Castlemaine Perkins Ltd v McPhee*[35] the court emphasised that in determining whether a fact was within the means of knowledge of an applicant the court is concerned with "what reasonable steps had been taken" being an objective test but undertaken subjectively, that is with regard to the background and understanding of the applicants.

[39] In *NF v The State of Queensland*[36] Keane JA, (as he then was), said:

> "[29] It is to be emphasized that s 30(1)(c) does not contemplate a state of knowledge of material facts attainable in the abstract, either by the exercise of "all reasonable steps", or by the efforts of a reasonable person. It speaks of a state of knowledge attainable by an actual person who has taken all reasonable steps. The actual person postulated by s 30(1)(c) as the person who has taken all reasonable steps, is the particular person who has suffered particular personal injuries. Whether an applicant for an extension of time has taken all

---

[32] Submissions of First Respondent paragraph 63.
[33] *Sugden v Crawford* [1989] 1 Qd R 683; See also the judgment of Macrossan J in *Moriarty v Sunbeam Corporation Limited* [1988] 2 Qd R 325.
[34] Submissions of First Respondent paragraph 68.
[35] (1979) Qd R 469.
[36] [2005] QCA 110 at [29].

> reasonable steps to find out a fact can only be answered by reference to what can reasonably be expected from the actual person in the circumstances of the applicant. It seems to me that, if that person has taken all the reasonable steps that she is able to take to find out the fact, and has not found it out, that fact is not within her means of knowledge for the purpose of s 30(1)(c) of the Act. This view is supported by the text of s 30(1)(c)(ii) which is, as I have said, in marked contrast to s 30(1)(b). The authorities do not afford conclusive support for this view; but they do not foreclose its acceptance, and it may be noted that in *Young v The Commissioner of Fire Service* Williams J, as his Honour then was, accepted that a psychiatric condition which prevents an applicant from appreciating the nature and significance of the injury he has suffered was relevant for the purposes of s 30(1)(c)(ii). I note that it appears that this decision was not cited to McGill DCJ in *Hopkins*." (footnotes omitted)

[40] The state of knowledge pursuant to s 30(1)(c) requires an applicant "taking reasonable steps to find out the fact" but the test is usually applied by reference to the inquiries which the person could, and should, have made, whether of the person's solicitors or otherwise.[37]

[41] In *Wolverson v Todman*[38] the Court said:

> "[63] Ms Wolverson engaged a solicitor to investigate the possibility of making a claim for damages in May 2010. The solicitor continued to act for her during all material times. As was appropriate for him to do, his Honour analysed the events that ensued, mindful of two principles which had been articulated by McPherson J in *Neilson v Peters Ship Repair Pty Ltd*. One is that, as a matter of statutory construction, where a solicitor is engaged, the person whose knowledge is relevant for s 31(2) purposes is the client, not the solicitor. The other is one that offers practical guidance. It is that '[p]lacing the matter in the hands of apparently competent solicitors with adequate instructions including information relevant to the cause of action would ordinarily amount to taking all reasonable steps to ascertain the relevant facts, provided that the plaintiff did his best to ensure that the solicitors did not languish in the prosecution of the action'." (footnotes omitted)

[42] It is helpful to have reference to the facts in *Neilson v Peters Ship Repair Pty Ltd*[39] in order to fully comprehend the reasons of McPherson J and Thomas J. In that case a dispute with respect to the extension of time related to the identity of the third defendant. The plaintiff was injured in a shipping accident on 5 April 1977 and a writ was issued against the first and second defendants on 3 April 1980. It had been alleged by the plaintiff that he suffered an injury whilst working on the ship "Bogong" whilst in the dry dock however the solicitors for the second defendant discovered that "Bogong" was not in fact in the dry dock on that date but rather it was another ship also owned by the second defendant "Gerringong". The solicitors for the plaintiff became aware of

---

37 See *Newman v State of Queensland* [2009] QSC 125 at [40].
38 [2016] 2 Qd R 106, 63.
39 *Neilson v Peters Ship Repair Pty Ltd* [1983] 2 Qd R 419.

that fact on 30 July 1980 and thereafter made "numerous attempts"[40] to contact the plaintiff, Mr Neilson. However, Mr Neilson had absented himself from his home for a period of four and a half months until 11 December 1980 when the important information concerning the identity of the ship was able to be passed on by the Mr Neilson's solicitors to Mr Neilson. It is in this regard that McPherson J said at page 431:

> "Placing the matter in the hands of apparently competent solicitors with adequate instructions including information relevant to the cause of action would ordinarily amount to taking all reasonable steps to ascertain the relevant facts, provided that the plaintiff did his best to ensure that the solicitors did not languish in the prosecution of the action. In the present case the plaintiff had no reason to suspect that any further facts were required in order to enable his solicitors to pursue his claim. He was not aware of the demise charter or of the identity of the charterer. In these circumstances I do not think that he can reasonably have been expected to make inquiries or to take other steps to ascertain facts the existence and significance of which he was ignorant. Nor do I consider it in the circumstances unreasonable for him to have absented himself from his residence for a period of some four and a half months at a time when, having given his instructions, he had no reason to suspect that during that period his solicitors might wish to inform him of facts of that character. That being so, it follows that material facts of a decisive character were not within the means of knowledge of the plaintiff at any time before December 11, 1982."

[43] Thomas J said at pages 439 and 440:

> "Section 31(d)(ii) of the Act requires the court to determine the date when the relevant material facts came within the means of knowledge of the applicant (*Castlemaine Perkins Limited v. McPhee* [1979] Qd.R. 469). A fact is outside a person's means of knowledge only if 'so far as the fact is capable of being ascertained by him, he has before that time taken all reasonable steps to ascertain the fact' (s. 30(d)(ii)). Now when an applicant has a solicitor acting for him, and the solicitor comes into possession of the material fact, a nice point will rise as to when that fact comes within the means of knowledge of the applicant. This will always involve a question of fact, to be answered according to notions of what are in the circumstances 'reasonable steps to ascertain the fact'. *Castlemaine Perkins Limited v. McPhee* (*supra*) holds that the test is objective having regard to the background and situation of the applicant. The appellant placed reliance upon the following statement of Lucas J. in a passage cited with approval in *Castlemaine Perkins Limited v. McPhee* (*supra*):
>
> > 'The question is whether a man of that background can be expected to do anything more than consult a solicitor, keep in touch with him and act according to the advice which the solicitor gives him from time to time …'

---

[40] *Neilson v Peters Ship Repair Pty Ltd* [1983] 2 Qd R 419, 427.

> It may be observed that His Honour was there stating maximum expectations against a particular background. I do not think that there is any general expectation that every applicant must at all times remain in diligent contact with his solicitor, especially when he has no reason to expect an emergency. On the other hand, a client who renders himself incommunicado for lengthy periods will find it difficult to establish that he has taken all reasonable steps under s. 30(d)(ii). That was the fate of the applicant in *Re Sihvola* [1979] Qd.R. 458 where he made not a single enquiry of his legal adviser over a period of two and three-quarter years. It would be unwise to attempt to lay down any particular expectations as to the regularity of contact that may be expected between solicitor and client. But it may be said of s. 30(d)(ii) that not many 'steps to ascertain the fact' can reasonably be expected of a client when he is in ignorance of the need to ascertain it."

[44] As Thomas J points out in *Neilson* an applicant who merely retains a solicitor and does nothing else, not even make a single enquiry of his legal adviser for a period of two and three quarter years could hardly be supposed to have taken "all reasonable steps" to ascertain relevant facts. On the other hand, as *Neilson's* case demonstrates where an applicant has no reason to expect that there is an emergency and a competent solicitor is retained, it may not be unreasonable to fail to return the numerous enquiries of that solicitor for a period of four and a half months. As Thomas J has said, it is unwise to attempt to lay down any particular expectations as to regularity of contact that may be expected between a solicitor and client. It all depends upon the facts and in particular whether the applicant or applicants had given their solicitor all relevant information in their possession.

[45] In the present case the applicants are both highly educated and intelligent people. Mrs Stephens has a Master's Degree in Speech Pathology and a Master's Degree in Italian obtained whilst studying in France. At the time of the 12 week scan on 21 August 2014 Mrs Stephens was a student.

[46] Mr Stephens received a Bachelor of Biomedical Science from Griffith University in 2004 and then completed a PHD in Molecular Biology at Griffith University in 2010. Mr Stephens then attended at Harvard for a Postdoctoral Fellowship in the field of molecular biology. Mr Stephens then returned to Australia and undertook a medical degree. Mr Stephens was a medical student at the time of the 21 August 2014 scan and remained a medical student when Lily was born in February 2015. In late 2015, Mr Stephens completed his medical degree.

[47] Although he did not then have medical qualifications Mr Stephens personally considered that there had been medical negligence in respect of the ultrasound taken on 21 August 2014 and its subsequent reporting. Mrs and Mr Stephens however did not have any legal qualifications, and knew and accepted advice that they needed a solicitor in order to guide them and that they had no case absent supportive expert medical opinion.

[48] After Lily was born on 5 February 2015 she was placed in intensive care and fed through a nasogastric tube. Lily remained as an inpatient in intensive care for two weeks and Mrs Stephens slept in her room each night. Mr Stephens, a student in the final year of his medical degree, was faced with the situation where he and his student

wife were attempting to care for a gravely ill child with Down syndrome. From the outset, and even though it was a most difficult time for the Stephens family attempts were made to obtain legal assistance.

[49] On or about 12 February 2015, Mr Stephens sought and received advice from Shine Lawyers. Mr Stephens was told by Shine Lawyers that "[they] had no prospects of succeeding in a claim regarding Lily".

[50] Mr Stephens then contacted Smith's Lawyers in Brisbane on 15 February 2015 and spoke to the principal of that firm. As a result an appointment was made for 16 February 2015 at 8.00pm to meet with Smith's Lawyers. On 16 February, Smith's Lawyers sent to Mr and Mrs Stephens their standard client agreement with terms and conditions. At 3.00pm on 16 February 2015 Smith Lawyers sent another email to Mr and Mrs Stephens informing that a Mr Englhofer and his associate Nicole would be visiting to provide advice as to whether they had a claim.

[51] At 8.00pm on 16 February 2015 two employees of Smith's Lawyers attended at Mr and Mrs Stephens' unit at Southport. Of this meeting Mr Stephens deposed that, "[o]ne person identified himself as an agent of Smith's Lawyers and told me he had no legal background. The other person, a young female, identified herself as a legal trainee. I was a little confused as to why the firm did not send a lawyer to speak to us."[41] Despite the email stating that Mr and Mrs Stephens were to obtain advice as to whether they had a claim, what occurred was that Mr and Mrs Stephens felt they were placed under great pressure to sign the costs agreement with no legal advice being provided. Mr Stephens deposes that what was made clear during the meeting is that there would be "tremendous costs".

[52] Mr and Mrs Stephens did not sign the costs agreement and felt uncomfortable in retaining lawyers who had sent non-lawyers to meet their clients at the first meeting. Within the first months of Lily's life, the principal Mr Greg Smith did telephone Mr Stephens, where there was a five to ten minute conversation of which Mr Stephens said he had difficulty understanding the legal language being used by Mr Smith. Mr Stephens "felt disappointed with the whole legal process". There is no suggestion that Shine Lawyers or Smith Lawyers provided any advice on any time limitation issue.

[53] Mr Stephens then contacted a friend of his from school who was then an entertainment lawyer and asked him to obtain the name of a reputable medical negligence lawyer. Mr Stephens' colleague Mr Walkden-Brown recommended Ms Wendy Nixson of McInnes Wilson Lawyers who was a solicitor who specialised in medical negligence cases.

[54] Mr Stephens did contact Ms Nixson and an appointment was promptly made for 17 February 2015. In his affidavit Mr Stephens deposed[42] that he could no longer remember why he did not attend the appointment on 17 February 2015 however in evidence he said:[43]

> "On the 17th of February the appointment was meant to be due, but unfortunately we didn't attend that appointment because Lily was still in the

---

41 Affidavit of Sebastien Stephens affirmed 23 October 2018 paragraph 31.
42 Affidavit of Sebastien Stephens affirmed 23 October 2018 at paragraph 38.
43 T1-17/27-30

intensive care unit at the time. She was due for release two or three days after that."

[55] I accept Mr Stephens' evidence in this regard as it appears to be reasonable for Mr and Mrs Stephens not to attend that early consultation with Ms Nixson because their child Lily was still in the intensive care unit. Whilst that most adequately explains the failure to attend that appointment that of itself does not explain the lack of inaction soon thereafter. In this regard a fair question, asked by senior counsel for the first respondent:[44]

> "MR DOUGLAS QC: What was to stop you after Lily came out of intensive care to making another appointment with Ms Nixson?
>
> MR STEPHENS: To give you an example, I'd just sat the surgical primary exam and I'll get to the point. That took three months of my life. In that three months I did not speak to my wife, or hardly, I did not see my three month old at the time that was conceived. That is the dedication that is required to become a doctor. So in that time I needed that dedication to become a doctor. I needed to study I need to make sure that I passed … that takes an immense amount of time."

[56] Mr Stephens further explained in his affidavit[45] that their family circumstances was that Lily was quite young and that Mrs Stephens was not only caring for Lily alone but also attempting to study and work. Mr Stephens explained:

> "I wanted to focus at that stage on Lily's health, completion of my medical degree and for Katia to find a permanent position. Given my initial experience with Smiths and Shine, I was not confident that a claim would be available to us.
>
> I also had to prepare for an overseas university placement. I went overseas to Boston in mid 2015, as I had to complete an elective to finish my medical degree. I worked at Harvard Dental School of Medicine under the supervision of Professor Roland Baron. I returned to Australia after about 6 weeks. Katia remained in Australia with Lily during that time."

[57] Mr Stephens explained that he completed his medical training in late 2015. From October to December 2015[46], he constructed a document titled 'Statement of facts - Re: Lily Stephens'[47] after having undertaken research and then contacted Ms Nixson in late November 2015. Mr Stephens' efforts in contacting Ms Nixson resulted in Ms Nixson sending a letter on 30 November 2015 advising Mr and Mrs Stephens that at that stage McInnes Wilson "are not acting for you in the matter and will not undertake any work on your behalf". The letter also provided general advice that any claim should be brought before 5 February 2018. This letter suggested that Mr and Mrs Stephens 'had

---

44 T1-19/11-19.
45 Affidavit of Sebastien Stephens affirmed 23 October 2018 at paragraphs 39 to 41.
46 T1-10/32-33.
47 Exhibit SRS-1 page 457 to 466 of Working Bundle 2.

no reason to expect an emergency' in respect of the potential claim, nor any need for any proceedings to be brought for a further 2 years and 2 months.

[58] Mr Stephens responded to the letter by contacting Ms Nixson on 8 December 2015, and a conference was arranged to occur at Southport on 21 December 2015. At that conference Ms Nixson properly advised Mr and Mrs Stephens that she could not provide any advice upon the claim without obtaining evidence from a radiologist and also a paediatric specialist. Mr and Mrs Stephens signed McInnes Wilson's costs agreement and the process of investigating the claim and obtaining information commenced. During the process, on 12 February 2016, McInnes Wilson advised Mr and Mrs Stephens that "court proceedings must be issued before 21 August 2017".

[59] That process was interrupted on 28 April 2016 when Ms Nixson went on maternity leave and another solicitor, Ms Eager, was allocated the file within McInnes Wilson. The letter from McInnes Wilson lawyers advised that Ms Eager was not only a principal of the firm but also a very experienced personal injury lawyer and importantly reassured Mr and Mrs Stephens "that this will not affect the progress of [their] claim in any way."[48]

[60] From Mr and Mrs Stephens' perspective they had been placed in the hands of a solicitor who had been recommended by another solicitor as having expertise in medical negligence and that that solicitor was a principal of the firm McInnes Wilson. On Ms Nixson's absence on maternity leave, Mr and Mrs Stephens were placed in the hands of another very experienced personal injury lawyer and principal of the firm, Ms Eager. From Mr and Mrs Stephens' perspective, (and in reality), Mr and Mrs Stephens were in good hands and had no need to concern themselves with the progress of the claim, let alone to "expect an emergency". As Mrs Stephens said in her evidence[49] she accepted Ms Nixson's advice that specialists' reports were being obtained and that such an expert independent view was necessary in order to progress the claim. Mrs Stephens did not contact Ms Eager nor email her during the period from April 2016 to late 2016 as she was "mainly concerned with Lily's health".[50] Mrs Stephens stated that she had "always made myself available and answered as quickly as I could when I was contacted but I kind of let him take the lead with that".[51] In that period (between April and November 2016) Mrs Stephens swore that she "assumed that the lawyers were working on my claim."[52] I consider that a reasonable assumption and I accept Mrs Stephens evidence.

[61] On 30 November 2016, Mrs Stephens received a letter from Mr Chris McMahon of McInnes Wilson informing Mrs Stephens that he was now running the file and that there was a final draft of a letter being sent to a specialist radiologist, Dr Siles. On 22 December 2016, Mrs Stephens received a letter from Ms Natoli, a senior associate with McInnes Wilson requesting Medicare patient history and Mrs Stephens deposes that she did contact Medicare and obtain those documents. Mrs Stephens had already signed the necessary request on 7 December 2016 and forwarded it to Medicare on that same date.[53]

---

48 Exhibit KVCS-8 to the Affidavit of Katia Stephens sworn 23 October 2018.
49 T1-65.
50 T1-67/5.
51 T1-67/19-20.
52 Affidavit of Katia Stephens sworn 23 October 2018 at paragraph 42.
53 Letter to Associate to Justice Crow attaching email and Medicare form tendered 18 April 2019.

[62] Ms Nixson returned from maternity leave and on 15 March 2017 emailed Mr and Mrs Stephens frankly admitting "[u]nfortunately your case advanced little in my absence on maternity leave. However since my return I have finalised a detailed letter of instruction … to Dr Siles for his consideration. I am yet to secure a date to speak with him".

[63] Thereafter on 12 April 2017, Mr and Mrs Stephens received an email from Ms Nixson regarding her discussions with Dr Charles Siles and indicating that Dr Siles had not yet reviewed the ultrasound imaging with the amount of precision required for a truly informed discussion.[54] On 10 May 2017, Mr and Mrs Stephens received an email from Ms Nixson attaching a letter which concluded that Dr Siles was not supportive of any claim in negligence. As Mrs Stephens deposes[55] as a result of that communication she considered that their claim could not proceed. The same email reminded Mr and Mrs Stephens that they "may be running out of time to make a claim".

[64] As at 10 May 2017 it is important to note that Mr and Mrs Stephens had received the advice from Shine Lawyers that they did not have a claim, had not received assistance from Smith's Lawyers, had retained a firm of high reputation, McInnes Wilson, who had specialist medical negligence lawyers obtain expert advice from Dr Siles and had again been advised they did not have a claim. In accordance with the costs agreement McInnes Wilson did not render any fees to Mr and Mrs Stephens for their considerable work. Mr and Mrs Stephens both depose that they were disappointed in the advice. At that point it would not have been unreasonable to have taken no further steps to investigate a claim. However Mr and Mrs Stephens still wanted to explore the possibility of a claim.

[65] Mr Stephens decided to take the scans to Professor David Ellwood, a specialist at the Gold Coast University Hospital. Mr Stephens had an association with Professor Ellwood as he was one of his students at the Gold Coast University Hospital. Professor Ellwood met with Mr Stephens on 23 May 2017 and reviewed the radiology images in Mr Stephens' presence. It is also important to note that Mr Stephens acted rapidly in contacting Professor Ellwood. As Mr Stephens said:[56]

> "And I think, also, I'd contacted David Ellwood – Professor David Ellwood on the day that we received that email from Ms Wendy Nixson. So I take in light that I was aware of the August deadline – which I'll call always the August deadline – and that I acted as fast as I can to contact someone that I thought could guide me further. That person is Dr Ellwood. And he pointed me in the direction of Mr Madden, which I contacted within days of meeting Dr Ellwood."

[66] Although telling Mr Stephens that he did not wish to become involved in the case, Professor Ellwood reviewed the ultrasounds and informed Mr Stephens that he had a "suspicion or suggestion that [they] had a case". As to the effect of that advice I accept the evidence of Mr Stephens:[57]

---

54 Exhibit SRS-14 to the Affidavit of Sebastien Stephens affirmed 23 October 2018.
55 Affidavit of Katia Stephens sworn 23 October 2018 at paragraph 47.
56 T1-41/3-10.
57 T1-40/44 - T1-41/2

"MR DOUGLAS QC: All right. Is it correct to say that as a result of your consultation or meeting with Professor Ellwood, you believed you had a good case that was worth proceeding with?

MR STEPHENS: I wouldn't take it quite that far. I would say that at the end of the conversation – the meeting that I had with Professor David Ellwood … I was under the understanding that we had a case that should be put forward to a lawyer so it would be investigated further. And that's what we did."

[67] In paragraph 61 of his affidavit affirmed 23 October 2018, Mr Stephens said that during the meeting with Professor Ellwood, Professor Ellwood said to him words to the following effect:

> "The images might enable you to say that the reporting was negligent, but I don't think it is appropriate for me to become involved as given that we have a professional relationship and you were one of my students. I know some lawyers who work in this area, let me make some enquiries for you." (my underlining)

[68] In *Reeves v Thomas Borthwick & Sons (Australia) Pty Ltd*[58] the Court (Fitzgerald P, McPherson JA, and Moynihan J) said at pages 5 and 6, in allowing an appeal against an order extending time:

> "Knowing that Dr White considered that the present disabled condition of the plaintiff's back was 'possibly' caused by the 1991 incident would not lead a reasonable person to regard it as showing that an action on any right of action which the plaintiff might possess would have a reasonable prospect of success. It would, on the contrary, lead or tend to the conclusion that the plaintiff's prospect of success in an action against the defendant was, on the material presented in support of the application, slender."

[69] Oral or written advice from an expert such as Professor Ellwood that it "might" enable an argument of negligence is an insufficient oral opinion to support a conclusion that Mr and Mrs Stephens at that point had a worthwhile case.

[70] As to Mr Stephens' reaction to Professor Ellwood's assistance[59] I accept Mr Stephens' evidence that on hearing Dr Ellwood's opinion he actually formed the understanding that "we had a case that should be put forward to a lawyer so it could be investigated further". That there may be a difference between short oral advice provided by a medical expert and a written opinion of a medical expert is neither unexpected nor controversial. As Heydon J explained in *Dasreef Pty Ltd v Hawchar*[60] a "bare ipse dixit" is not even admissible because it is a primary requirement for the admission of expert evidence that it be logically reasoned. The discipline of committing expert

---

58 [1995] QCA 339

59 T1-40 l 45 - T1-41 l 2.

60 (2011) 243 CLR 588, 624

opinion to writing importantly exposes the reasoning which may be assessed by a judge or jury.

[71] An example of the difficulty posed by the reliance on oral opinion is *Ervin v Brisbane North Regional Health Authority*[61] where a Dr Sonnabend, Sydney based orthopaedic surgeon, described surgery on the appellant's knee as a "botch job".

[72] In particular, as Davies JA pointed out (on page 9) the solicitor for the applicant sought clarification from Dr Sonnabend concerning his opinions as to whether there was "incompetence" on the part of the operating doctor to which Dr Sonnabend replied after receipt of the solicitor's letter "[i]n your words, I believe that you are 'wasting your time seeking a report from me'. Please find your cheque enclosed." As Davies JA said at paragraph 10, "[l]ooked at it in the light of these, it is more likely, in my view, that he was saying no more than that there had been an error made in the performance of the operation." As Davies JA reflected, unexplained the advice of a "botch job" strongly infers negligence.

[73] In the present case Professor Ellwood's advice that there "might" be negligence is insufficient to constitute a material fact of a decisive character. Professor Ellwood's comment did no more than call for further inquiry and must also be interpreted in the background of Dr Siles' contrary view. In my view, following receipt of Professor Ellwood's comments it cannot be concluded that Mr and Mrs Stephens had a worthwhile case.

[74] On 27 May 2017, Mr Stephens received an email from Professor Ellwood recommending Bill Madden of Carroll & O'Dea Lawyers in Sydney. Two days later, on 29 May 2017, Mr Stephens contacted Mr Madden. Importantly, Mr Stephens made full disclosure to Mr Madden including the fact that they had investigated the matter with an expert Dr Siles who was not supportive of any claim. Mr Madden acted quickly and obtained some documents relating to the claim and correctly advised Mr and Mrs Stephens by email of 13 June 2017 that it was necessary to obtain "a new expert opinion".

[75] From 13 June 2017 onwards there was regular correspondence between Mr Madden of Carroll & O'Dea Lawyers and Mr and Mrs Stephens. This resulted in obtaining the report of Dr Nicole Woodrow on 12 November 2017.[62] Attempts had been made at to obtain an opinion or report at an earlier time. A series of emails from 17 August 2017[63] establish that, Dr Woodrow required payment for her review of materials and initial advices. Again given the background of the case as discussed below, it was not unreasonable for Carroll & O'Dea to require Mr and Mrs Stephens to make that payment. Again not unreasonably, Mr Stephens asked for an estimate of fees in order to "decide whether this is financially feasible". Arrangements having been entered into, Dr Woodrow indicated a willingness to review the images. A telephone conference occurred between Dr Woodrow and Mr Madden prior to 1.18pm on 31 August 2017 with Mr Madden's email concerning the conference stating as follows:[64]

---

61 [1994] QCA 424.
62 Exhibit SRS-18 to the Affidavit of Sebastien Stephens affirmed 23 October 2018.
63 Pages 472 and 473 of Working Bundle.
64 Pages 476 to 477 of the Working Bundle.

> "I will send [a] letter shortly with a detailed report on Dr Woodrow's comments. There is a little more work to be done before she provides a final opinion. In the meantime could you clarify the following for me please …" (There were a series of eight definitive questions asked).

[76] Mr Stephens answered those questions promptly by return email at 2.08pm on 31 August 2017. In his letter of 1 September 2017, Mr Madden set out the position of Dr Woodrow which was, at that stage, most indefinite as, again, further information was required.

[77] In particular, Dr Woodrow called for the worksheet of the sonographer because the images that were available at the time showed a correct result "anywhere between 3.3 and 3.9mm".[65] Importantly, if the Nuchal Translucency setting was 3.3mm "and the nasal bone was set as 'unable to detect' the reassuring blood results would have seen a risk result of less than 1:300 which is the accepted limit … [i]n relation to the later fetal morphology scans, the images are of very good quality and show no abnormalities". Mr Madden added, "I would like to speak to Dr Woodrow again once I have your answers to the questions set out in my email dated 31 August 2017 …" Mr Madden followed that up with further correspondence of 4 September 2017[66] stating "[t]he next step is to get the sonographer's worksheet and the images in their native format. I wrote to Avant on Friday making those requests. Once I have their reply I will contact you again". On 19 September 2017 having received the worksheets Mr Madden again wrote to Mr and Stephens:[67]

> "Attached is a worksheet document for the 12 week scan, which I don't think we had before. The lawyer for the ultrasound clinic have sent the better images. I will pass those on to Dr Woodrow with this worksheet and try to speak to her again, hopefully before the end of the week."

[78] Mr Madden followed that up with a further email of 20 September 2017[68] recording "Dr Woodrow is not available until Monday 9 October 2017 … The delay is a little frustrating, but there's not much we can do about it". Finally, after the conference on 9 October 2017 Mr Madden wrote to Mr Stephens summarising Dr Woodrow's opinion[69] and made reference to the newly provided images showing different results. Relevantly, Dr Woodrow's said that "there are three measurements of 3.5mm or more. The clearest image shows a 4.1mm measurement … Even leaving aside the nasal bone issue, CVS or amniocentesis should have been offered given the 3.5mm + results … The sonographer should have reported 3.5mm + … The radiologist should have noted the deficiency in the image chosen for the 2.8mm and either used the other images or asked for a repeat scan".

[79] In my view, the oral expert evidence provided by Dr Woodrow to Mr Madden on 9 October 2017 and as recorded in Mr Madden's email of that date constitute a sufficiently clear and logical opinion enhancing the applicants' prospects of success from a possibility to a real likelihood of success.

---

65 Page 479 of the Working Bundle.
66 Page 482 of the Working Bundle.
67 Page 483 of the Working Bundle.
68 Page 484 of the Working Bundle.
69 Page 485 of the Working Bundle.

[80] Dr Woodrow's report dated 12 November 2017 records that Dr Woodrow is an experienced obstetrician and gynaecologist with specialisation in the area of ultrasound diagnosis related to obstetrics and gynaecology. Dr Woodrow was the Director of Ultrasound Services at the Royal Women's Hospital in Melbourne from 2009 to 2014 and carries numerous other qualifications. Dr Woodrow concluded after a detailed and careful analysis of the available information that:

> "[T]he radiology report and the selected NT measurements are unacceptable for risk assessment for trisomy 21 or other chromosomal disorders … Reasonable practice in Australia in 2014 would have been to recognise and then report the high-risk result in a radiology report with an alert to the referring doctor. Following on, the pregnant women would have been informed of the high risk, received genetic counselling and been offered an invasive procedure for the diagnosis of chromosomal abnormalities … If the pregnant woman had chosen a diagnostic test, then trisomy 21 would have been diagnosed and she would have been counselled about her reproductive options, including a termination of pregnancy."

[81] Prior to Dr Woodrow's oral opinion and report, Mr and Mrs Stephens had received legal advice based on Dr Siles opinion. With respect to the advice of McInnes Wilson lawyers based upon Dr Siles' failure to support the claim, Mr Stephens deposed that after he received Dr Siles' opinion he was upset and confused and "simply could not believe that he could not be supportive".[70] Mrs Stephens deposed that she was not confident that the opinion of Dr Siles was correct.[71] Yet it was the opinion of a highly qualified expert medical practitioner reporting to Ms Nixson who was an expert in medical malpractice.

[82] In the timeline, as described above, there are two periods of time where little had occurred to progress the potential claims. The first is between 17 February 2015, when Mr and Mrs Stephens failed to attend an appointment with Ms Nixson of McInnes Wilson and late November 2015, when further contact was made with Ms Nixson. During that period however a great deal was occurring within the lives of Mr and Mrs Stephens. They had the care of their infant, the emotional strain of what had occurred to them, Mr Stephens' meritorious commitment towards the obtaining of his medical degree to support his family and Mrs Stephens own undoubtedly extremely difficult circumstances of having to care for her first baby who suffered from Down syndrome whilst she was a student and attempting to obtain work placement.

[83] After being told by a large law firm Shine Lawyers that they did not have a case and after having sought a second opinion from Smith's Lawyers without success, and given the personal circumstances of Mr and Mrs Stephens I cannot conclude that they have acted unreasonably by failing to pursue further contact with McInnes Wilson lawyers between 17 February 2015 and late November 2015. There is not any evidence to suggest that Shine Lawyers or Smith's Lawyers advised of a time limitation or need to act urgently.

[84] The second period of relative inaction occurred between 28 April 2016 and November 2016 when Ms Nixson was on maternity leave. In that period, Mr and Mrs Stephens

---

[70] Affidavit of Sebastien Stephens affirmed 23 October 2018 at paragraph 58.
[71] Affidavit of Sebastien Stephens affirmed 23 October 2018 at paragraph 49.

were able to be contacted but did not contact McInnes Wilson Lawyers. As set out in paragraph 60 above, McInnes Wilson Lawyers made it plain that they were continuing in the proper investigation of the claim during that period. I cannot conclude that Mr and Mrs Stephens' failure to check on their reputable lawyers during that period and in circumstances where those lawyers had advised Mr and Mrs Stephens their claim was ongoing, represents unreasonable inaction on behalf of Mr and Mrs Stephens. As McPherson J (as his Honour then was) said in *Neilson v Peters Ship Repair Pty Ltd*[72] the applicants "had no reason to suspect that any further facts were required in order to enable his solicitors to pursue his claim". Mr and Mrs Stephens had no reason in either period to suspect anything was "amiss". [73]

[85] In *Wood v Glaxo Australia Pty Ltd*[74] Mrs Wood underwent a myelogram in 1972 using the oil based agent myodil containing iophendylate. Mrs Wood then developed adhesive arachnoiditis. Mrs Wood did not bring any case in negligence against the radiologist who performed the procedure, as the use of iophendylate by local and overseas profession in 1972 was a widely accepted practice. Rather Mrs Wood sought to bring an action in negligence against Glaxo, the manufacturer of the product. In his judgment Macrossan CJ said at:

> "Although many years went by between her myelogram in 1972 and the date when the writ was issued in 1990, the appellant and her advisors were in the interval far from inactive. They had a difficult case to investigate and the prospects and risks had to be weighed and assessed. They succeeded finally in gathering a good deal of material to support her claim. The question remains whether, in the circumstances which have been established and within the limits of what the legislation permits, they have shown a sufficient case justifying the making of an order for the necessary extension of the limitation period.
>
> Any order for extension would involve the appellant's showing that it was not until after the commencement of the year immediately preceding the issue of the writ in March 1990 that she first had means of knowledge of at least one material fact of a decisive character and that, apart from the effect of the limitation period, there was evidence to establish her right of action. These are the twin requirements and effect of s. 31(2) of the Act."

[86] Macrossan CJ said at page 437:

> "The statutory scheme constituted by ss 30 and 31 seems to assume that an applicant either may or may not at some earlier time have knowledge of particular matters which are in the category of material facts but he is nevertheless not excluded from the possibility of obtaining an extension of the limitation period if he is not yet (and even if he had made reasonable enquiries and taken advice would not yet be) in possession of some one or more material facts of a decisive character. When some critical knowledge or constructive knowledge of facts is belatedly gained which puts him over the borderline into a position where for the first time he has reasonable

---

72 *Neilson v Peters Ship Repair Pty Ltd* [1983] 2 Qd R 419, 431.
73 *Neilson v Peters Ship Repair Pty Ltd* [1983] 2 Qd R 419, 440..
74 [1994] 2 Qd R 431.

prospects and should in his own interests commence his proceedings he may be entitled to his extension: *Berg v Kruger Enterprises* [1990] 2 Qd R 301, *Sugden v Crawford* [1989] 1 Qd R at 686 and *Moriarty v Sunbeam Corporation Limited* [1998] 2 Qd R 325.

An inclusive definition of material facts is given in s. 30 but in the present case that does seem to be productive of difficulties. As the appellant and her solicitors continued to direct efforts of putting together a case against the respondent they would have been concerned with the following issues: the causative connection, if any, between the substance introduced in the course of the myelogram and the appellant's subsequent medical condition (this would include the need to make a precise identification of that medical condition); the identification of the substance used as a product distributed by the respondent and produced for distribution by its affiliates; and the culpability, if any, of the respondent for the distribution of myodil for use in myelograms in 1972 under the conditions in which it did distribute it. Although s 30(a)(i) and (iii) refers to certain considerations relevant in the present case as 'facts' that epithet is appropriate only in the sense of ultimate facts. Considered as facts they are essentially issues for proof by a prospective plaintiff and they will be capable of proof, if at all, through the medium of evidence which he is able to collect. The body of evidence which a plaintiff collects or, as it may be put in terms of the expressions used in s 30, his assemblage of 'material facts', will only constitute a 'decisive' collection when an appropriately advised reasonable man in his position is possessed or would, if he had enquired in appropriate fashion, be possessed of what he would regard as reasonable and worthwhile litigation prospects. The policy detectable in this legislation does not suggest that a potential plaintiff with the limitation period running against him must necessarily always commence his proceedings when he has no more than a hint of the existence of a necessary link in his chain of proof but, of course, if being at that point he delays he will do so at his peril because he will only subsequently save himself if he can persuade a judge that he did not know enough or would not, even if he had undertaken appropriate enquiries, have known enough to justify commencing proceedings at an earlier time."

[87] As set out above Mr and Mrs Stephens had sought to retain three different firms of solicitors prior to the engagement of Carroll & O'Dea lawyers. Two of those firms, Shine Lawyers and McInnes Wilson had advised Mr and Mrs Stephens that they did not have a case. In particular in respect of the third firm of solicitors McInnes Wilson it is important to acknowledge that Mr and Mrs Stephens' potential claim had been thoroughly investigated by an expert in medical malpractice, Ms Nixson, whom had sought independent expert advice from Dr Siles. Ms Nixson's advice to Mr and Mrs Stephens based on Dr Siles' report that Mr and Mrs Stephens did not have a case was correct.

[88] As at 10 May 2017, Mr and Mrs Stephens had far less "than the hint" of the existence of "a viable claim". They had sound legal advice, based on the then medical evidence that they had no claim. Ms Nixson's earlier advice to Mr and Mrs Stephens, namely, that it was essential that they had expert medical opinions supporting the claim was undoubtedly correct. That expert medical opinion came into existence on 9 October 2017 in the form of the oral opinion of Dr Nicole Woodrow. It is plain in the present

case, that it is Dr Woodrow's oral opinion that puts Mr and Mrs Stephens "over the borderline" into the position where for the first time (they had) reasonable prospects and could only then form the view that it was in their own interests to commence the proceedings. I conclude that an appropriately advised reasonable person could not have considered that he or she had a worthwhile case until the receipt of Dr Woodrow's oral advice on 9 October 2017.

[89] The respondents argue that had Dr Woodrow's advice been sought at an earlier occasion it can be inferred that the same advice would have been provided. That may be logically accepted as a valid proposition however in order for that to be accepted it must be concluded that Mr and Mrs Stephens had failed to make enquiry "in an appropriate fashion". In my view it cannot be concluded that Mr and Mrs Stephens failed to take reasonable steps by not retaining Dr Woodrow at any earlier occasion. It is recalled that Mr and Mrs Stephens had retained McInnes Wilson lawyers from 21 December 2015 who had thoroughly investigated their claim including the obtaining of a report from the expert radiologist Dr Siles. That took considerable time and given the difficult issue involved that report was not finalised, it would seem, until immediately prior to the advice from McInnes Wilson of 10 May 2017. In that period when Mr and Mrs Stephens were advised by a specialist in medical malpractice litigation, Ms Nixson, who had retained an appropriately qualified radiology specialist, Dr Siles it can hardly be suggested it was reasonable for Mr and Mrs Stephens to seek a second expert medical opinion.

[90] Following the receipt of the advice of McInnes Wilson of 10 May 2017 as set out above Mr Stephens sought guidance from Professor Ellwood, and was referred to Mr Bill Madden of Carroll & O'Dea Lawyers. As Mr Madden fully appreciated, at that point Mr and Mrs Stephens did not have a case and it was absolutely necessary to obtain "a new expert opinion". It then took a little under five months to obtain that second expert opinion from Dr Woodrow. I cannot accept that in that five month period Mr and Mrs Stephens acted unreasonably in not obtaining an opinion from Dr Woodrow at an earlier point in time.

[91] I conclude that the material fact of a decisive character was not within the means of knowledge of Mr and Mrs Stephens until 9 October 2017 being the date of receipt of Dr Woodrow's oral advice to Mr Madden.

PIPA argument

[92] On behalf of Mr and Mrs Stephens it is argued that the combination of s 7 of the *Personal Injuries Proceedings Act* 2002 (Qld) ('PIPA') imposing as it does substantive requirements that impede the commencement of a personal injury action unless and until the provisions of Chapter 2 Part 1 of the Act are complied with, in combination with s 9A(9)(d) being the requirement to provide in support a written report from a medical specialist "materially increases the threshold as to what facts, in medical negligence cases at least, are sufficient to be of a 'decisive character' under s 30(1)(b)."

[93] Properly construed s 7(1) of PIPA does nothing more than deem a number of provisions including the provisions of Chapter 2 Part 1 as provisions of substantive law as opposed to procedural law. Section 7(1) will have the effect of applying the Chapter 2 Part 1 provisions to actions regardless of whether they are commenced in Queensland or

another State as the provisions are substantive as opposed to procedural.[75] Section 7 does not provide an impediment to or in combination with s 9A(9)(d) materially increase the threshold of what is required in medical negligence cases as to facts which may be of "decisive character". Such a conclusion is, as pointed out by senior counsel for the first respondent, consistent with *Davison v Queensland*.[76]

[94] I order that the time for commencing court proceedings be extended pursuant to s 31 of the Act to 8 October 2018.

---

[75] *John Pfeiffer Pty Ltd v Rogerson* (2003) 203 CLR 503.
[76] (2006) 226 CLR 234.