SUPREME COURT OF QUEENSLAND

CITATION:	*Murray & Anor v Whiting & Ors* [2002] QSC 257
PARTIES:	**DARREN PAUL MURRAY** (first plaintiff) AND **EILEEN ROSE MURRAY** (second plaintiff) AND **JOHN LESLIE WHITING** (first defendant) AND **CHRISTOPHER ROBIN STRAKOSCH** (second defendant) AND **MICHAEL BERNARD SUTHERS** (third defendant) AND **VERNON JAMES HEAZLEWOOD** (fourth defendant) AND **PETER JAMES SUTHERLAND** (fifth defendant)
FILE NO:	3127 of 1999
DIVISION:	Trial
ORIGINATING COURT:	Supreme Court Brisbane
DELIVERED ON:	20 June 2002
DELIVERED AT:	Brisbane
HEARING DATE:	29 May 2002
JUDGE:	Chesterman J
ORDER:	**1. That paragraphs 16(a) and (b) of the statement of claim are struck out.** **2. That the application is otherwise dismissed.**
CATCHWORDS:	LIMITATION OF ACTIONS – APPLICATION OF STATUTES OF LIMITATION – Applicant sought order that plaintiffs' case be dismissed – Whether claim time-barred LIMITATION OF ACTIONS – TORT – NEGLIGENCE Unwanted pregnancy – Whether claims for personal injury and pure economic loss were distinct causes of action

Limitation of Actions Act 1974 s 11, s10
Uniform Civil Procedure Rule 293

Allen v Bloomsbury Health Authority 1993 1 All ER 651, cited
Bollen v Hickson [1980] Qd R 327, cited
Brunsden v Humphrey 1884 14 QBD 141, applied
Bryan v Maloney (1995) 182 CLR 609, cited
De Innocentis v Brisbane City Council [2000] 2 Qd R 349, cited
Linsley v Petrie [1998] 1 VR 427, cited
McFarlane v Tayside Health Board [2000] 2 AC 59, considered
Melchior v Cattanach [2001] QCA 246, applied
Sundbird Plaza Pty Ltd v Boheto Pty Ltd [1983] 1 Qd R 248, cited
Sutherland Shire Council v Heyman (1984–1985) 157 CLR 424, considered
Theseus Exploration NL v Foyster (1972) 126 CLR 507, cited
Wagon Mound (No 1), cited
Walkin v South Manchester Health Authority [1995] 1 WLR 1543, not followed
Wardley Australia Ltd v Western Australia (1992) 175 CLR 514, considered

COUNSEL: Mr D. H. Tait for the applicant
Ms E. de Luca for the respondent (self-represented)

SOLICITORS: Tress Cocks & Maddox for the applicant
Ms E. de Luca for the respondent (self-represented)

[1] **CHESTERMAN J:** The respondents (plaintiffs) are the parents of a child born on 11 April 1996. Their pleaded claim is that the first (male) respondent consulted and received treatment from the defendants (four of whom are the applicants) for a condition known as Kallmann's Syndrome which is a failure of the pituitary gland to produce stimulating hormones responsible for the production of testosterone and spermatozoa. The syndrome results in a lack of sexual development.

[2] The defendants are all medical practitioners who, at various times between 1986 and 1995, treated the first respondent for his condition. The applicants are the second to fifth defendants. The second defendant is an endocrinologist, the third defendant a specialist physician, the fourth defendant a specialist physician and pharmacologist and the fifth defendant a general practitioner.

[3] The first respondent was prescribed and received testosterone replacement therapy. As a result he was able to, and was advised he could, impregnate his de facto wife, the second respondent. The respondents allege that they each believed that without the hormone replacement therapy the first respondent would be sterile. The therapy was interrupted in 1995 during the course of which the second respondent fell pregnant. The likely date of conception would appear to be early July. The respondents claim that the defendants ought to have warned them of the possibility

that the first respondent may not be sterile despite the cessation of his treatment. Had they been given that advice they claim they would have avoided pregnancy by the use of contraceptives.

[4] The first respondent claims loss of income and expense incurred in maintaining the child. The second respondent claims pain and suffering during and because of pregnancy and child birth and, additionally, loss of income and expense in maintaining the child.

[5] The respondents commended their action by issuing a writ on 6 April 1999, five days short of the third anniversary of the child's birth.

[6] The applicants have applied pursuant to *UCPR* 293 for an order that the action be dismissed. It provides that:

> "(1) A defendant may, at any time after filing a notice of intention to defend, apply to the court under this part for judgment against a plaintiff.
>
> (2) If the court is satisfied –
>
> (a) the plaintiff has no real prospect of succeeding on all or a part of the . . . claim; and
>
> (b) there is no need for a trial of the claim or part of the claim; the court may give judgment for the defendant against the plaintiff for all or the part of the plaintiff's claim and may make any other order the court considers appropriate."

The argument is that the action was commenced more than three years after the respondents' causes of action accrued. The applicants plead that:

> " . . . the claim by the plaintiffs include a claim for personal injuries which is brought more than three years after the cause of action arose contrary to s 11 of the *Limitations of Actions Act* and the (applicants) plead the . . . Act in bar to the . . . claim."

Section 11 of the *Limitations of Actions Act* 1974 provides:

> "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 respect of personal injury to any person . . . shall not be brought after the expiration of three years from the date on which the cause of action arose."

By s 10 actions founded on simple contracts or on tort where the damages claimed do not consist of or include damages in respect of personal injury may not be brought after the expiration of six years from the date on which the cause of action arose.

[7] The applicants found their argument entirely upon *Walkin v South Manchester Health Authority* [1995] 1 WLR 1543 the essential facts of which are indistinguishable. The plaintiff, a married woman, underwent a sterilisation procedure after the birth of her third child. Five months later she fell pregnant and gave birth in September 1987. In June 1989 she issued a writ which was never

served, and therefore lapsed. In October 1991 a second writ was issued which claimed damages for economic loss caused by negligent treatment and advice resulting in an unwanted pregnancy and birth. The claim was framed as one for economic loss to overcome the difficulty that a three-year limitation period would apply to a claim in respect of personal injuries. The court, according to the headnote, found that:

> ". . . a claim for damages arising from a failed sterilisation operation which resulted in an unwanted pregnancy and the birth of a healthy child was a claim for "damages in respect of personal injuries" within the meaning of s 11(1) of the *Limitation Act* 1980 howsoever pleaded; that claims in such circumstances for prenatal pain and suffering and postnatal economic costs arose out of the same cause of action; that the unwanted conception, whether caused by negligent advice or negligence surgery, was a personal injury in the sense of an "impairment" within the meaning of . . . the Act which arose at the moment of conception . . ."

[8] It may be noted that the (Queensland) *Limitation of Actions Act* is relevantly identical to the English Act. It, too, defines personal injury to include "a disease and an impairment of a person's physical or mental condition".

[9] In his judgment Auld LJ said (1546):

> "Thus, the second writ, unlike the first, did not allege personal injury, and the statement of claim did not include a claim for damages in respect of any pain, suffering or inconvenience as a result of the operation or of the pregnancy or birth of the child. It was a claim for economic loss based on negligent treatment and advice resulting in an unwanted pregnancy and the birth of a healthy child."

The Lord Justice then reviewed the English authorities to that date and concluded with a reference to the judgment of Brooke J in *Allen v Bloomsbury Health Authority* [1993] 1 All ER 651 at 658:

> ". . . in the unique circumstances surrounding the breach of a doctor's duty to a pregnant woman . . . she should be entitled to recover damages for . . . two quite distinct foreseeable heads . . . the first, a claim for damages for personal injuries during the period leading up to the delivery of the child, . . . the second, a claim for the economic loss involved in the expense of losing paid employment and the obligation of having to pay for the upkeep and care of an unwanted child, is a totally different type of claim . . ."

[10] Rejecting this distinction Auld LJ said (1549):

> "In my view, claims in such circumstances for prenatal pain and suffering and postnatal economic costs arise out of the same cause of action. That appears to have been the view of Purchas LJ in *Emeh's* case [1985] QB 1012 at 1028 approving and adopting a passage from the majority judgment of the Supreme Court of Minnesota in *Sherlock v Stillwater Clinic* . . ."

In *Walkin* it did not matter to the outcome whether the cause of action arose on conception or birth (or sometime in between) but the court held that the unwanted

conception was an impairment of the type contemplated by the statutory definition so that it was a personal injury and the cause of action was complete on conception.

[11] The decision in *Walkin* predated *McFarlane v Tayside Health Board* [2000] 2 AC 59 which seems to call into question the principle underlying the earlier judgment. The case was not concerned with limitation periods but with the recoverability of damages for an unwanted pregnancy. However the judgments indicate that the distinction drawn by Brooke J, but disapproved in *Walkin*, may be valid. The House of Lords held that the head of damage in respect of maintaining a child whose conception and delivery was the product of medical negligence is "pure" economic loss. This result, and the means by which it was reached raises the distinct possibility, even the likelihood, that damages for such a loss make it a cause of action distinct from the one in respect of personal injuries.

[12] Lord Slynn seems to have regarded the claim for damages in respect of the pregnancy and birth as one for personal injury. He said (74):

> "It does not seem to me to be necessary to consider the events of an unwanted conception and birth in terms of 'harm' or 'injury' in its ordinary sense of the words. They were unwanted and known by the health board to be unwanted events. The object of the vasectomy was to prevent them happening. It seems to me that in consequence the wife, if there was negligence, is entitled by way of general damages to be compensated for the pain and discomfort and inconvenience of the unwanted pregnancy and birth and she is also entitled to special damages associated with both – extra medical expenses, clothes . . . and equipment . . ."

He then turned to the "real question" which was "liability for economic loss", (75, 76), and said:

> " . . . The question is not simply one of the quantification of damages, it is one of liability, of the extent of the duty of care which his owed to the husband and wife . . . The doctor undertakes a duty of care in regard to the prevention of pregnancy: it does not follow that the duty includes also avoiding the costs of rearing the child . . ."

[13] Lord Steyn referred approvingly to an article by Angus Stewart QC, *"Damages for the Birth of a Child"* which drew attention to the distinction, overlooked in the earlier cases, between economic loss consequential on personal injury (pregnancy) as opposed to pure economic loss. His Lordship said (79):

> " . . . the father's part of the claim for the cost of bringing up the unwanted child is undoubtedly a claim for pure economic loss. Realistically, despite the pregnancy and childbirth, the mother's part of the claim is also for pure economic loss. In any event, in respect of the claim for the costs of bringing up the unwanted child, it would be absurd to distinguish between the claims of the father and the mother."

At 81 his Lordship accepted that pain, suffering and inconvenience associated with pregnancy and childbirth amounted to personal injury.

[14] Lord Hope (86) said:

> "The mother's claim can be described in simple terms as one for the loss, injury and damage which she has suffered as a result of a harmful event . . . caused by the defenders' negligence. . . . The harmful event was the child's conception. . . . It was the very thing which she had been told would not happen to her . . . The fact is that pregnancy and childbirth involve changes to the body which may cause, in varying degrees, discomfort, inconvenience, distress and pain. Solatium is due for the pain and suffering . . . experienced during that period."

[15] With respect to the claim for the costs of maintaining the child his Lordship said (89):

> "This is a claim for economic loss. The (father) does not claim that he suffered any physical or mental injury. The loss which falls to be considered under this head is the cost of rearing a normal, healthy child.

The claim was rejected by reference to the principles which limit the recoverability of damages for economic loss set out in *Caparo Industries Plc v Dickman* [1990] 2 AC 605. See the judgment at 95.

[16] Lord Clyde at 99 declared that the parents' claim was "for a wrongful conception".

He went on to discuss "the nature of the two claims made in the present case". He said (100):

> "As I have already noted, one of the claims for solatium was the further element of financial loss, while the other, the joint claim, is a claim purely for a financial loss."

At 102 his Lordship thought that the pregnancy and delivery, giving rise to pain, discomfort and inconvenience, was a "clear example of pain and suffering" justifying an award of damages. However (105-6) he classified the claim for maintenance of the child as one "for an economic loss following upon allegedly negligent advice. In such a context (he) would consider it appropriate to have regard to the extent of the liability which the defenders could reasonably have thought they were undertaking. . . . Even if a sufficient causal connection exists the costs of maintaining the child go far beyond any liability which . . . the defenders could reasonably have thought they were undertaking".

[17] At 109 Lord Millett agreed that:

> ". . . the claim for the costs of bringing up Catherine is a claim in respect of economic loss, and that claims in delict for pure economic loss are with good reason more tightly controlled than in claims in respect of physical loss."

Earlier, (107) Lord Millett accepted that the mother had a cause of action for personal injury which accrued at conception which "was an invasion of her bodily integrity and threatened further damage both physical and financial".

[18] The result in *McFarlane* was that the mother's claim for pain, suffering and the inconvenience of pregnancy and childbirth were recoverable as damages for personal injury, but that the claim for the costs of caring for a healthy normal child was one for pure economic loss and was not recoverable. The Court of Appeal of

this court in *Melchior v Cattanach* [2001] QCA 246 declined to follow the House of Lords and held that the second category of loss was recoverable as damages for negligence against a doctor who negligently performed an operation to render a female plaintiff sterile. Importantly, however, for present purposes the court accepted that the claim in respect of maintaining the child was one for pure economic loss.

[19] McMurdo P said (para 6):

> "As Thomas JA points out . . . (the) claim is for economic loss and is discrete from Mrs Melchior's claim for damages for personal injury."

Davies JA said (para 77):

> "I agree with Thomas JA and with the House of Lords in McFarlane . . . that the respondents' claim for maintenance of Jordan is a claim for purely economic loss."

Thomas JA (who dissented in the result and would have followed *McFarlane*) said (para 143, 144):

> "The third component of the judgment is in respect of a claim by the mother and father for pure economic loss in relation to the bringing up of a child who would not have been born but for the negligent failure of the gynaecologist to give certain advice. . . . It is desirable that the essential nature of the cause of action be identified, even though the distinction between claims for damages for personal injuries and claims for pure economic loss does not appear to have loomed large in many of the cases that have dealt with such claims. This is not a claim for personal injury or damage to tangible property. It might of course be argued that such a claim may be included in a mother's claim for damages personal injury, but no such argument would be available in relation to a father's claim. The present claim as brought and is allowed is a joint one. It is difficult to think the different considerations should attach to the right to bring and maintain such a claim according to whether it is brought on behalf of the mother or of the father . . ."

[20] It is, I think, a corollary of the categorisation of the cost of maintaining an unwanted child as economic loss that a claim for such loss is a separate and distinct cause of action to a claim for personal injuries constituted by the unwanted pregnancy, even though the same act of medical negligence may have caused both.

[21] Economic loss in the present context is "mere" economic loss or "pure" economic loss when it is distinct from and not consequent upon ordinary physical injury to person or property – *Bryan v Maloney* (1995) 182 CLR 609 at 617. It is, according to Stephen J in *Caltex Oil (Australia) Pty Ltd v The Dredge "Willemstad"* (1975-1976) 136 CLR 529 at 572 "financial loss without physical injury".

[22] It has been clear since *Brunsden v Humphrey* (1884) 14 QBD 141 that the same negligent act causing both property damage and personal injury gives rise to two separate causes of action. It has always been accepted that different limitation periods apply to the separate causes of action. The court in *Walkin* avoided the consequence that the different items of loss gave rise to different causes of action by pointing to criticism of *Brunsden* ([1995] 1 WLR 1547-8) and by reliance upon

what Purchas LJ had said in *Emeh's* case which had, in turn, accepted the proposition in *Sherlock* that there was in reality only one cause of action, wrongful conception.

[23] Despite some criticism *Brunsden* is well established as part of Australian jurisprudence. The criticism was examined by the Supreme Court of Victoria in *Linsley v Petrie* [1998] 1 VR 427, especially in the judgment of Hayne JA at 436, which reaffirmed the authority of *Brunsden*. See also *Bollen v Hickson* [1980] Qd R 327. In *Linsley* (434) Hayne JA said:

> "I take leave to doubt that the English decisions to which I have referred (one of which was *Walkin*) establish that *Brunsden v Humphrey* is no longer good law in England . . ."

[24] The support which the court in *Walkin* found in *Emeh's* case for its conclusion appears to be misplaced. Lord Hope said ([2000] 2 AC 91-2):

> "In *Emeh* . . . Purchas LJ quoted with approval . . . from *Sherlock* . . . there are three reasons for doubting, with great respect, Purchas LJ's reliance on these cases in reaching the view which he did in *Emeh's* case. . . . but the third and more significant point is that . . . the passage which Purchas LJ quoted from *Sherlock* . . . has been received in UK jurisprudence almost by accident. It does not really deserve the status which has been accorded to it in the English and Scottish authorities . . . Two of the members of the court . . . dissented in that case, pointing to earlier authority in the same state to the (contrary) effect . . ."

[25] A cause of action for negligently caused economic loss is different to and distinct from a cause of action for negligently caused personal injuries, just as it is from negligently caused property damage. This is clear from the judgments in *McFarlane* where the claim for the maintenance of the child was rejected by reference to the particular principles governing liability for economic loss. It is not to the point that in this country a different set of principles is applicable for determining whether there is liability for such loss. The point is that the content and scope of the duty to avoid inflicting economic loss is different to the content and scope of the duty to avoid causing physical injury or material damage. As Brennan J explained in *Sutherland Shire Council v Heyman* (1984–1985) 157 CLR 424 at 487:

> ". . . a postulated duty of care must be stated in reference to the kind of damage that a plaintiff has suffered and in reference to the plaintiff or a class of which the plaintiff is a member . . . It is impermissible to postulate a duty of care to avoid one kind of damage – say personal injury – and, finding the defendant guilty of failing to discharge their duty, to hold him liable for the damage actually suffered that is of another and independent kind – say economic loss. Not only may the respective duties differ . . . the duties may be owed to different persons . . ."

His Honour quoted the Privy Council in *Wagon Mound (No 1)*:

> "It is not the act but the consequences on which tortious liability is founded. It is vain to isolate the liability from its context and to say that B is or is not liable, and then to ask for what damage he is liable. For his liability is in respect of that damage and no other."

[26] If I may quote from *De Innocentis v Brisbane City Council* [2000] 2 Qd R 349 at 354:

> "A cause of action is 'every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to a judgment of the court'; see *Read v Brown* 1888 22 QBD 128 at 131. According to Wilson J in *Do Carmo v Ford Excavations Pty Ltd* (1984) 154 CLR 234 at 245:
> "In an action for negligence, it consists of the wrongful act or omission and the consequent damage." "

The nature of the damage suffered helps to define a cause of action. Different kinds of loss, different sorts of *damnum*, can give rise to different causes of action, with different duties and standards of care.

[27] The plaintiffs' claims do give rise to different causes of action. Both plaintiffs allege facts, which if proved, will give rise to a right to damages for the economic loss incurred in raising their child. The facts necessary to establish that cause of action do not include a personal injury to either plaintiff. It is no part of the cause of action that the plaintiff suffered any injury, pain or impairment. The cause of action is not in respect of personal injury. Section 11 of the *Limitation Act* is no bar to the claim for economic loss. The relevant time limit is six years.

[28] It is a bar to the second plaintiff's claim for the pain and inconvenience of pregnancy and childbirth. The opinions in *McFarlane* are to the effect that that cause of action arose on conception. Accordingly the applicants have made out their claim for judgment only with respect to the second respondent's claim for pain associated with pregnancy and childbirth.

[29] Even if the matter was not as clear as they think it is I would exercise the discretion given by *UCPR* 293 to refuse the application on the ground that there is a substantial question of law to be determined and it is more appropriate that the point be decided at trial rather than summarily. See *Theseus Exploration NL v Foyster* (1972) 126 CLR 507 and *Sundbird Plaza Pty Ltd v Boheto Pty Ltd* [1983] 1 Qd R 248 at 255. I note that in *Wardley Australia Ltd v Western Australia* (1992) 175 CLR 514 at 533 the High Court thought it undesirable except in the plainest of cases that limitation questions should be decided in interlocutory proceedings. Moreover the law in relation to these types of claims is still developing. Thomas JA pointed out in *Melchior* that little attention has so far been given to the question of limitation periods relevant to these claims. 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. I express no criticism of the respondents who were represented by the second respondent in person. They are at present unable to afford legal representation and could offer no assistance by way of argument. The applicants focussed entirely upon *Walkin*, ignoring the implications flowing from the acceptance of the principle in *Brunsden* and the classification of the major claim as one for economic loss. I have been obliged to determine the application without help.

[30] I order that paragraph 16(a) and (b) of the statement of claim be struck out. Otherwise I dismiss the application.