SUPREME COURT OF QUEENSLAND

CITATION:	*Fitzalan v Wright* [2005] QSC 339
PARTIES:	**DEBRA MICHELLE FITZALAN and GEOFFREY FITZALAN** (Plaintiffs) v **THOMAS WRIGHT** (Defendant)
FILE NO/S:	372 of 2003
DIVISION:	Trial Division
PROCEEDING:	Claim
DELIVERED ON:	7 November 2005
DELIVERED AT:	Cairns
HEARING DATE:	9, 10 August 2005
JUDGE:	Jones J
ORDER:	**1. The defendant is not liable to pay damages to the plaintiffs.** **2. The plaintiffs' claim is dismissed.** **3. The plaintiffs should pay the defendant's costs of and incidental to the proceeding to be assessed on the standard basis, unless within 14 days from the date hereof submissions are made for a different order.**
CATCHWORDS:	TORTS – NEGLIGENCE – PROOF OF NEGLIGENCE – where plaintiffs consulted defendant gynaecologist and obstetrician to manage delivery of their child – where plaintiffs were especially concerned about having a child with birth defects – defendant gave certain advice to plaintiffs regarding pre-natal testing – plaintiff gave birth to a child with Downs syndrome and heart defect – whether defendant was negligent the giving of advice about pre-natal testing TRADE PRACTICES AND RELATED MATTERS – OTHER MATTERS – where engagement between plaintiffs and defendant was in trade or commerce – whether conduct of defendant in giving advice about pre-natal testing was misleading or deceptive – conduct of the defendant was not objectively misleading *Trade Practices Act* 1974 (Cth) *Wardley Australia Ltd v Western Australia* (1992) 175 CLR

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COUNSEL: Mr G Mullins for the plaintiff
Mr D Boddice SC and Mr D Morzone for the defendants

SOLICITORS: Quinn & Scattini for the plaintiff
Flower & Hart for the defendants

[1] The plaintiffs were married on 30 September 2000. They are the parents of Kelly Marie Fitzalan who was born on 1 November 2001. Soon after her birth Kelly Marie was diagnosed as having Down syndrome and cardiac defects. The plaintiffs commenced these proceedings to claim damages arising from the child having these conditions. The issue of liability to pay damages is to be determined as a preliminary question.

[2] The defendant is a specialist gynaecologist and obstetrician practising in Cairns. He obtained his specialist qualifications in the United Kingdom in 1982 and his Australian Fellowship in 1984. He has, since that year, maintained a specialist practice in which he delivers on average 200 babies each year.[1]

[3] Mrs Fitzalan consulted Dr Wright on 3 May 2001 ("the first consultation"). On 4 June 2001, Mrs Fitzalan attended the premises of Cairns Diagnostic Imaging where she underwent a First Trimester Ultrasound. Her next consultation with Dr Wright was on 8 June 2001 ("the second consultation"). On this occasion she was accompanied by her husband, Mr Fitzalan.

[4] The plaintiffs had a concern about parenting a child with defects including Down syndrome. It is accepted also that if made aware that the foetus was afflicted with such a condition Mrs Fitzalan, with the consent and support of her husband, would have terminated the pregnancy. It is accepted further that only an amniocentesis test would have revealed whether the foetus had Down syndrome.

[5] The plaintiffs claim that in the course of the two consultations Dr Wright, in breach of his duty of care and in breach of s 52 of the *Trade Practices Act* 1974 (Cth) ("TPA"), made certain statements by which the plaintiffs:-

> "1. Understood and believed that there would be no need to have an amniocentesis because the 18 week test would reveal any abnormalities;
> 2. Understood and believed that there would be no need to have an amniocentesis as the first test and the 18 week test would reveal any birth abnormalities and an amniocentesis would not provide any further, better or additional information."[2]

[6] Mrs Fitzalan claimed that, in reliance upon statements made during the consultations, she did not undergo an amniocentesis nor seek any alternative opinion as to the need for amniocentesis, and she continued with her pregnancy.

[7] The critical issues in the case are essentially factual. What was the sum of the information given by the defendant to the plaintiffs at the two consultations? Was

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1 Transcript 153/40

2 Para 7 Further Amended Statement of Claim – 28 February 2005

this information consonant with the terms of advice and level of pre-natal testing expected of a specialist practitioner in the circumstances? The answers to these questions necessarily turn upon findings of credibility of the parties.

Background

[8] Mrs Fitzalan was born on 13 July 1970. She was almost 31 years of age when she fell pregnant, in mid-March 2001. She and her husband, who is a helicopter pilot, had worked together in the aviation industry in various parts of Australia. Whilst working in Western Australia they befriended another couple whose son was afflicted with Batton's Disease, a serious and fatal genetic abnormality. They had watched the boy's progressive physical and mental deterioration until his death at the age of eight. They had other friends who had babies with Down syndrome. Their experience of watching parents coping with the difficulties associated with these conditions as well as Mr Fitzalan's childhood memories of his mother's psychiatric condition led them to seek reassurance about the health of their baby to be. They had been advised by various friends to be sure to have an amniocentesis test during pregnancy.

[9] Mrs Fitzalan sought from her general practitioner a referral to a specialist. The referral letter makes reference to her wanting "to discuss testing for Down syndrome and other abnormalities".[3] Mrs Fitzalan initially consulted Dr Miller, obstetrician, on 24 April 2001. This was an urgent appointment because she was suffering from cramps. Dr Miller's examination (which included a vaginal probe ultrasound) confirmed that the pregnancy was viable and that the foetus was safe. Dr. Miller gave evidence that he advised her of a continuing risk which might need urgent treatment either with him or at the Accident and Emergency section of the Base Hospital. Mrs Fitzalan returned for further examination on 26 April 2001, where her pelvic examination revealed no abnormality but she was still cramping. An appointment was made for a return visit in two week's time.

[10] Mrs Fitzalan did not keep that appointment with Dr Miller but instead sought a referral to Dr Wright. On 2 May 2001 she consulted a general practitioner in connection with her cramps. On 3 May 2001 she sought a letter from a different general practitioner, Dr Ahmed, whose letter expressed her request for Dr Wright "to manage her delivery".[4]

The first consultation

[11] As gleaned from the evidence of both Mrs Fitzalan and Dr Wright, there is basic agreement as to the format of the first consultation. A personal history was taken, followed by an abdominal ultrasound test and a discussion which was preceded by Dr Wright producing some typewritten sheets (the "handouts"). Ordinarily there are three documents, the first of which is entitled "*Obstetric Handout*" (ex 6) which contains general information, contact details for hospitals and laboratories and general instructions. The second is entitled "*First Trimester Ultrasound*" (ex 7) which was authored on behalf of the Cairns Diagnostic Imaging practice. The third is entitled "*Ultrasound Detection of Abnormalities in Pregnancy* (ex 10) which was authored by Dr Wright in the latter half of year 2000. According to Dr Wright, the

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3 Ex 4

4 Ex 11

second and third documents are usually stapled together and presented to a patient as one. Mrs Fitzalan said that she did not receive the third document.

[12] As to the history-taking there were some minor differences between Mrs Fitzalan's recollection of what was said and what Dr Wright contemporaneously recorded in his clinical notes. For example, Mrs Fitzalan could not recall telling him of an earlier pregnancy which was terminated. She also recalled the expected date of confinement was 16 December whereas the recorded date was 20 December. Given that Mrs Fitzalan made no notes of the conversation and had no reason to recall these details, I accept as accurate the information which was recorded in the clinical notes.

[13] The significant conflict between the two participants' accounts arises as to what was said at the post-examination discussion. Mrs Fitzalan relies upon her unaided recollections of the discussion, which only had relevance some six months later. In the meantime, she had other discussions with other doctors, midwives and, no doubt, friends. On the other hand Dr Wright's position was that he did recall Mrs Fitzalan coming to see him and has a "broad memory of what occurred" but not of the specific words.[5] He gave evidence that he has a standard practice for these sorts of consultations, which include an explanation of the contents of the handouts - thus the discussion was guided by the format of these documents. The credibility of the conflicting evidence has to be determined against that background.

[14] Mrs Fitzalan consistently claims that the words used by Dr Wright which caused her to have the beliefs referred to in para 5 above were -

> In her evidence-in-chief:-
> "he then said that he would send me for a nuchal translucency ultrasound test, which would measure the back of the neck and if it was 3 mm or greater, then that was an indication that there was something wrong or the child may have Down syndrome because the test was for Down syndrome. And if the test results came back 1 mm or less, then that was an indication that the pregnancy was O.K."[6]

In cross-examination this topic was visited on four occasions on which the following is typical of the responses elicited:-

> "Yes, he said that he was going to send me for a nuchal fold translucency ultrasound and that it would show if there was Down syndrome because the fluid on the back of the neck is different and if it was 3 mm or greater, that was an indication that the baby had Down syndrome, and if it was 1 mm or less then that would mean that the pregnancy is OK."[7]

The other occasions are to similar effect and need not be set out in full.[8]

[15] Mrs Fitzalan denied that there was any discussion as to the nature of Down syndrome or of it being caused by the presence of an extra chromosome. She

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5 Transcript 156/10
6 Transcript 36/50-36/5
7 Transcript 69/25
8 Transcript 70/28, 74/40 and 76/50

denied also that there was any discussion about the risk of chromosomal problem increasing with the mother's age, but that she did recall that her own risk of having a Down syndrome baby was put at 1 in 890.[9]

[16] It was these alleged statements, together with the further statements that "the ultrasounds were the latest and greatest technology from the UK"[10] and that "if your child had spina bifida or Down syndrome…it would show on the ultrasound"[11] Mrs Fitzalan claimed led her to the belief that "the ultrasound replaced the amniocentesis, I didn't have to have an amniocentesis but I could have this painless test and I thought I was the luckiest woman in the world because with today's technology I could have a painless test and it would show if there was a problem."[12]

[17] At the first consultation Mrs Fitzalan recalled that there was a discussion about having an amniocentesis. She originally denied that there was any discussion about the risk of miscarriage upon undertaking such a test,[13] but later expressed it in more detail that she didn't believe that there was any such discussion. I must say that it is difficult to conceive of any doctor discussing the topic of amniocentesis without mentioning this very significant risk factor.

[18] I accept Dr Wright's evidence that his practice was to use the "Ultrasound Detection" handout (ex 10) as a guide to his discussion on pre-natal testing. The question is whether he did so on this occasion. Submissions on behalf of the plaintiffs refer to some uncertainty as to when the document was first created and the manner in which it was preserved. The plaintiffs contend that if Dr Wright did not hand over the document he may not have had the discussion. Mrs Fitzalan claimed that she had maintained all the documents she was given and handed them on to her solicitor. Despite her care there is always the prospect that the document was misplaced. More significantly, a comparison of the terms of ex 10 with the topics of the discussion identified by Mrs Fitzalan indicates that the absence of the handout would have been noticed by Dr Wright when he came to deal with those topics. I find that it is more probable than not in those circumstances that ex 10 was attached to the "Ultrasound" handout (ex 7) and given to Mrs Fitzalan

[19] There are other differences in the two accounts of the first consultation. Dr Wright, by way of illustration, and possibly for dramatic effect, used a toy to highlight the personal and psychological effects of termination of pregnancy and particularly distinguishing between early termination of an unwanted pregnancy and late termination of a wanted one. Mrs Fitzalan said this demonstration arose in the context of her asking about amniocentesis and was asked about her preparedness to undergo a termination if the test was positive. She denied that the throwing of the toy was in the context of distinguishing between early and late termination and expressed her shock at the way in which the toy was used. She regarded the actions as being "eccentric" behaviour on the part of the doctor.[14] In my view, the behaviour of a doctor in the terms described by Mrs Fitzalan would not be merely eccentric but would indeed be nonsensical. The description of the illustration given by Dr Wright does fulfil the purpose of the doctor ensuring that his patient

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9 Transcript 71/15
10 Transcript 40/20
11 Transcript 40/25
12 Transcript 40/30
13 Transcript 72/50
14 Transcript 35/38, See also 77/20-78/20

understood the psychological effects of termination if delayed, and perhaps to gauge the strength of the patient's resolve to follow that course.

[20] Arrangements were then made for Mrs Fitzalan to undergo the first trimester ultrasound test and for her return consultation with Dr Wright. The date for this consultation was fixed for 8 June 2000 so as to permit Mr Fitzalan to attend. The arrangement for the ultrasound and the return visit was consistent with the terms of the two handouts (ex 6 and 7) which Mrs Fitzalan acknowledged she had received.

[21] At this second consultation Dr Wright read over and explained the ultrasound report (ex 8). This report I note gave the expected date of confinement as 16 December 2001 which might explain Mrs Fitzalan's confusion about receiving this information from Dr Wright. Of significance is the reported reduction in the risk level from 1 in 596 to 1 in 1250. This result led to a discussion about whether the amniocentesis procedure should be undertaken.

[22] Mrs Fitzalan's recall of the discussion centred upon her husband still being concerned about excluding abnormalities which concern he personally expressed to Dr Wright.[15] The doctor's response was said to be –

> "Geoff, due to Debbie's age, and no family history, and the ultrasound tests coming back negative, there was no need to have an amniocentesis. Your baby was fine."[16]

[23] Mr Fitzalan's recall was that Dr Wright said –

> "Well, look, this is a new procedure. UK researchers have developed this procedure where they measure the thickness of the baby's neck and it would show up the abnormalities, and your test has come back negative, so you've got nothing to worry about."[17]

And further the discussion included -

> "No testing will pick up all the abnormalities…You don't need [an amniocentesis] because your test has come back negative…I have never seen a negative test come back from these scans with a positive outcome."[18]

[24] Significantly Mr Fitzalan recalled Dr Wright as saying "look, we'll arrange an 18 week scan and we'll pick up any other abnormalities at an 18 week scan. If we find something wrong then we'll talk about it then."[19]

[25] When cross-examined, Mr Fitzalan's recollection was expressed in the following terms:-

> "Your test has come back negative. Your risks are reduced. Your baby's fine. You have nothing to worry about."[20]

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15 Transcript 43/32
16 Transcript 43/40
17 Transcript 121/45
18 Transcript 122/5-15
19 Transcript 122/30
20 Transcript 127/20

Mr Fitzalan did not recall any discussion which included the actual figures by which the risk had been reduced but he did at least recall that discussion included the comment of risk being reduced.

[26] Dr Wright recalls discussing the ultrasound report (ex 8). Furthermore, the marking in the margin of the tendered report indicated that the actual results were discussed. Based on that report and the history given, Dr Wright recalled saying:-

> "…on the statistics an amniocentesis is not recommended, that there was a greater chance of harming a normal baby than finding a baby with an abnormality."[21]

He recalled also making reference to the actual figures by which the risk was reduced.

[27] The risk figures which were discussed were those set out in the actual terms of the ultrasound report. These figures were then to be compared with the miscarriage of 1 in 200 identified in the Obstetric Handout (ex 6). Dr Wright also said he tended not to use the terms "positive" or "negative" because these terms implied absolutes and were not appropriate to risk assessment.[22]

[28] The plaintiffs' separate recollections are not in my view consistent with the advice that was likely to be given by a medical practitioner in those circumstances. Their recollections of the terms of the discussion are inconsistent with the written terms in the handouts. These written terms are (inter alia) as follows:-

From ex 7 –

> "First trimester ultrasound is a non-invasive procedure that can determine whether there is an **increased risk** of a chromosomal abnormality, regardless of maternal age."
>
> "***Ultrasound does not exclude all abnormalities and cannot guarantee a normal baby.*** However, with a first trimester ultrasound, incorporating a nuchal translucency measurement, the ***risk level*** of problems can be determined. The risk level will be explained to you by your referring Obstetrician or General Practitioner once they have received the ultrasound report.[23]

From ex 10

> "The detection of Down syndrome (Trisomy 21) remains difficult and although there are some indicators on a scan of eighteen weeks, it is by no means foolproof. Many babies that have Down syndrome appear normal at eighteen weeks. However, most of the babies with some of the indicators for Trisomy 21 are in fact normal.
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> An amniocentesis remains the only certain way to detect Down syndrome, but this carries a small risk of miscarriage and is not recommended for young healthy mothers.[24]

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21 Transcript 169/35

22 Transcript 205/10

23 Ex 7. The emphasis is not mine but appears in the exhibits before the court.

24 Ex 10

[29] Even if the information were restricted to that contained in ex 7 the plaintiffs would know that ultrasound was useful only for determining the level of risk. I find it highly unlikely that Dr Wright would give advice contrary to the terms of the document which he authored and which he discussed routinely with other expectant mothers. The evidence of Dr Wright, based though it is on partial recollection and his routine practice, is more consistent with common sense and proper explanation than are the combined recollections of the plaintiffs.

[30] It was accepted by both plaintiffs that no demand was made at the second consultation for Mrs Fitzalan to undergo the amniocentesis.[25] This leads me to conclude also that the second consultation finished on the note that further discussion would take place at the next consultation which was anticipated by Dr Wright to occur four weeks later. The plaintiffs' case had thus to rely upon the request for the amniocentesis procedure in the first consultation and the alleged failure to advise in the second consultation that despite the favourable ultrascan result that amniocentesis was the only certain way to determine the presence of Down syndrome.[26] My finding that the plaintiffs had received ex 10 means that they had this information.

[31] I find that when the second consultation concluded it did so with Dr Wright expecting he would have the ongoing care of Mrs Fitzalan during the pregnancy consistent with the terms of the referral letter. He expected that there would be further opportunities to discuss other pre-natal testing and, if desired, termination. He had no reason to think that the plaintiffs had made their decision on whatever opinion or recommendation he had expressed to that date.

[32] There is conflict between the parties as to whether an appointment was made for the third consultation at the conclusion of the second. Mrs Fitzalan's recollection is they left Dr Wright's rooms without either the date for the next appointment nor a referral for the 18 week ultrasound scan. An appointment was in fact made for 16 July 2001 for the purpose, according to Mrs Fitzalan, of obtaining her referral. I regard as highly unlikely that a busy obstetrician could meet the required standards for periodic review as envisaged in the handouts by leaving the making of appointments to the whim of the patient. I am satisfied that at the conclusion of the second consultation, in keeping with his practice, Dr Wright directed his staff to make the next appointment.

[33] In the end result Mrs Fitzalan cancelled the appointment the day before it was to be held. The ostensible reason for so doing was that she did not want again to wait for an hour and a half, as had happened in one of the earlier consultations. This cancellation so far as the plaintiffs were concerned signalled the end of the retainer of Dr Wright to care for Mrs Fitzalan during her pregnancy, although they wished to have Dr Wright available if she had problems. That intention was not however conveyed to Dr Wright. He learnt of this change only when advised by letter from Dr Scherman dated 7 August 2001 (ex 15) to the effect that Mrs Fitzalan had chosen to see the midwives for the rest of her pregnancy. Whilst nothing particularly turns on the history of Mrs Fitzalan's treatment after the second consultation, I do note that she did consult different general practitioners and particularly sought referral for the 18 week scan from a Dr Meehan, even though that doctor was never

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[25] See e.g. Transcript 94/40

[26] Transcript 210/5

intended to supervise the pregnancy, nor intended to provide any relevant advice. By reason of Mrs Fitzalan's of moving from one doctor to another simply as a matter of convenience or in the search for reassurance, it seems to me, the plaintiffs have denied themselves the opportunity of receiving measured advice based upon the periodic pre-natal testing and reviews.

[34] The plaintiffs' credibility must be gauged against the fact that the evidence which they adduced failed to match the pleadings upon which they rely. For example, in the Further Amended Statement of Claim the plaintiffs alleged they were advised "that if the female plaintiff had an amniocentesis she had a far greater chance at losing a healthy baby than she had of having a baby with Down syndrome." In evidence both plaintiffs denied there was any such discussion.[27] Also neither plaintiff gave evidence of any conversations from which would establish the beliefs referred to in para 5 above. For example, when Mr Fitzalan was asked what the doctor said, he answered –

> "Well, he said, 'no testing will pick up all abnormalities", and I wanted to do the best test I could to pick up, in my own words, the most amount of abnormalities that was available on the system. I asked him, "Why didn't we have an amniocentesis", and he said, "You don't need one of those because your test has come back negative." He appeared to get frustrated with my questioning him all the time. And then he said to me, "I have never seen a negative test come back from these scans with a positive outcome." Well, I didn't know what to believe then because I've – all I've ever heard so far was amniocentesis. I – I get told now there's – this new scan is available, and he assured me that the baby was fine, was the words he used, and he said to me that he's never seen one of these tests with a negative result with a positive – in other words – the baby with a disability. We then discussed – because I was adamant about amniocentesis – he then discussed termination. You know, he said, "If you do find something wrong with the child with an amniocentesis are you prepared to terminate?", and I then said, "Well, I wouldn't be here asking for one of those things if we didn't have that on our mind anyway." In fact, we both said that – both Debra and I both said we'd terminate.
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> MR MULLINS: All right. Well, now ---? – And then he said, "Look, we'll arrange an 18 week scan and we'll pick up any other abnormalities at an 18 week scan. If we find something wrong then we'll talk about it then", and that was basically the whole conversation."[28]

[35] That conversation - even if its terms were accepted coupled with the other information contained in the handouts could not be said to have induced a belief that the 18 week scan would reveal the abnormalities so as to obviate the necessity for an amniocentesis. Having regard to my earlier finding that the terms of the conversation dealt rather with the risk assessment than with positive or negative outcome and I take the view that the allegation has not been made out.

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27 Transcript 88/1-10; 127/45-128/1; 128/35; 129/20

28 Transcript 122/5-33

[36] I am satisfied that there was no unequivocal request that the amniocentesis procedure be undertaken but rather an agreement to defer the further consideration of that option to a subsequent consultation.

[37] Various points were argued on either side going to the issue of credibility. In addition to those points against the plaintiffs' credibility there is a suggestion that their evidence differed on critical aspects, particularly the point as to whether there was intended to be future appointments at which pre-natal testing would be discussed.

[38] Against Dr Wright, it is alleged that his recall had changed on such matters as the presence of Mr Fitzalan at the second consultation and whether a further appointment was made at its conclusion. Reference was also made to the likelihood of his having been distracted by personal and financial issues at the time of the consultations.

[39] I am satisfied that on the critical issue of what were the terms of the advice on the conclusions to be drawn from the ultrasound testing I should accept the evidence of Dr Wright. For the reasons mentioned above the plaintiffs' recollection about the use of terms such as, "positive" and "negative" outcomes would be out of place in the discussion. I find that the actual words unambiguously related to the assessment of risk. The assessment of risk was reviewable after further testing. I am satisfied that Dr Wright would have undertaken the amniocentesis procedure once he was satisfied that the comparative risks were determined and were understood by the plaintiff and that they had time to deliberate upon the choices.

[40] The 18 week ultrasound scan was undertaken by Mrs Fitzalan when she was approximately 20 weeks pregnant. It gave a normal result. That outcome falls to be assessed against the written information contained in ex 10 that the test "is by no means foolproof". The sum of the information, verbal and written, given to the plaintiffs was consistent with the best practice as described in the reports of Dr McLaren[29] and Dr Keeping.[30]

[41] The plaintiffs argue that at the first consultation when amniocentesis was squarely raised, Dr Wright ought then to have made the distinction between amniocentesis and nuchal-translucency screening so far as the certainty of testing was concerned. The plaintiffs contend that the failure to make this distinction, then led to their interpreting that nuchal-translucency testing had replaced amniocentesis. I do not accept that submission, particularly having found that the plaintiffs were given ex 10. Further, that submission is contrary to my finding that discussion about undergoing amniocentesis remained open and was expected to be discussed at the next appointment which w as cancelled by Mrs Fitzalan.

[42] Given those findings of fact I do not accept that there was any conduct on the part of Dr Wright which would have led the first plaintiff reasonably to understand and believe that there was no need of an amniocentesis because the 18 week scan would reveal any abnormalities or that an amniocentesis would not provide any further better or additional information than the information obtained from the 12 week and 18 week ultrasound scans. Accordingly I am satisfied that there has been no breach by Dr Wright of the duty imposed on him at common law.

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29 Ex 1

30 Ex 2

Misleading and deceptive conduct

[43] Dr Wright acknowledges that the engagement between Mrs Fitzalan and himself falls within "trade and commerce" under the *Fair Trading Act* 1989. Section 38 provides:-

> "38. **Misleading or deceptive conduct – TPA s 52**
>
> (1) A person shall not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.
>
> (2) Nothing in this division shall be taken as limiting by implication the generality of subsection (1).

[44] This section requires a determination of whether, objectively determined, the conduct was misleading or deceptive. Further, in order to recover damages, a claimant must prove that the loss or damage claimed to have been suffered was "by" conduct in breach of the Act. In *Wardley Australia Ltd v Western Australia*[31] Mason CJ said (at 515):-

> "The statutory cause of action arises when the plaintiff suffers loss or damage 'by' contravening conduct of another person. 'By' is a curious word to use. One might have expected 'by means of', 'by reason of', 'in consequence of' or 'as a result of'. But the word clearly expresses the notion of causation without defining or elucidating it. In this situation s 82(1) should be understood as taking up the common law practical or common sense concept of causation recently discussed by this court in *March v Stramare (E and MH) Pty Ltd*[32] except in so far as that concept is modified or supplemented expressly or impliedly by the provisions of the Act."

[45] The question arises then whether Mrs Fitzalan was induced by and relied upon the advices of Dr Wright and the results of the first and second ultrascan tests causing her not to undergo an amniocentesis or to seek an alternative opinion as to indications for an amniocentesis. For the reasons set out above I am satisfied that the conduct of Dr Wright, tested objectively, was not in any sense misleading. Neither the ultrasound scan results nor the advice given by Dr Wright suggested there was no need for amniocentesis; rather the note upon which the plaintiffs and Dr Wright parted was that there would be further discussion before a decision was taken whether to submit to amniocentesis. In those circumstances the plaintiffs have not made out a claim under the *Fair Trading Act*.

Orders

1. On the preliminary question, I order that the defendant is not liable to pay damages to the plaintiffs.
2. The plaintiffs' claim is dismissed.
3. The plaintiffs pay the defendant's costs of and incidental to the proceeding unless within 14 days from the date hereof submissions are made for a different order.

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31 (1992) 175 CLR 514

32 (1991) 171 CLR 506