

JURISDICTION : DISTRICT COURT OF WESTERN AUSTRALIA
IN CIVIL

LOCATION : PERTH

CITATION : MACDONALD -v- GRAY [2005] WADC 251

CORAM : WISBEY DCJ

HEARD : 27, 28 JANUARY, 19 MAY, 24 AUGUST 2005

DELIVERED : 19 DECEMBER 2005

FILE NO/S : CIV 1788 of 2002

BETWEEN : RODNEY COLIN MACDONALD
Plaintiff

AND

KELLIE GRAY
Defendant

Catchwords:

Torts - Deceit - Negligent misstatement - Defendant wrongly asserting plaintiff responsible for her pregnancy - Claim for exemplary and general damages for psychological distress - Damages for economic loss

Legislation:

Nil

Result:

Judgment for plaintiff for \$8,498.74

Representation:

Counsel:

Plaintiff : Ms H Prince
Defendant : Mr I Marshall

Solicitors:

Plaintiff : Brian G Bennett & Co
Defendant : Mayberry Hammond & Co

Case(s) referred to in judgment(s):

Derry v Peek (1889) App Cas 337

Case(s) also cited:

Magill v Magill, unreported; County Court Victoria; delivered 22 November 2002

1 **WISBEY DCJ:** On 21 August 2001 at the Northam Regional Hospital the defendant gave birth to a child, Dylan Stafford Gray. She had informed the plaintiff that he was responsible for her pregnancy, maintaining following Dylan's birth that he was the father, and obtained an administrative assessment of child support requiring him to make periodical maintenance payments. By application filed in the Family Court of Western Australia in February 2002 the plaintiff sought an order for DNA parentage testing, and following testing an order was made on 27 May 2002 declaring that he was not Dylan's biological father. It is against that background that these proceedings were instituted.

2 In general terms the statement of claim alleges that the defendant wilfully deceived the plaintiff into believing, alternatively negligently misrepresented, that she was pregnant to him, and subsequently that he was Dylan's father, and as a result he suffered damage.

The evidence

3 The plaintiff was born in New Zealand on 8 May 1958 and migrated to Australia in 1981. In or about 1978 as a result of an ex-nuptial relationship with his present wife Catherine, he fathered a child Cade, but did not become aware of his paternity of Cade until about 1996 – 7 when Catherine brought the matter to his attention. Thereafter he had contact with Cade and Catherine, and it was decided that he and Catherine "were going to get back together and we proceeded to make plans for that". Catherine also had two daughters, and having taken into account their educational interests, it was decided that she would come to Australia to reside with the plaintiff in Kalgoorlie in December 2000. The plaintiff selected Kalgoorlie because he wished to become involved in mining to make enough money to set the family up. He contemplated that it would take three to four years to achieve the requisite degree of financial security, whereupon they would shift to Brisbane.

4 The plaintiff commenced work as an underground miner at Marvel Loch in June 1999, working a five day shift and a five night shift, followed by a five day break. He began spending time in Northam during his off-breaks, and met the defendant at his brother's girlfriend's house. They formed a relationship which included occupy the same bed from time to time, although initially there was no sexual relationship at the defendant's request as she was making adjustment from a previous broken relationship.

5 The plaintiff claimed that he informed the defendant about Catherine, and his plan to cohabit with her. He stated that he greeted Catherine when

she and her children arrived at Perth on 13 December 2000, and spent until 18 December with her before returning to Marvel Loch. The plaintiff stated that the defendant and he were in Kalgoorlie on 1 and 2 December setting up a house for Catherine. He had sexual intercourse with the defendant for the first time on 2 December. He returned on day shift at Marvel Loch on 3 December 2000.

6 The plaintiff stated that he kept in regular telephone contact with the defendant, and next saw her in Fremantle around 14 December 2000. She phoned him on 12 December 2000 to inform him that she was pregnant. He asked the defendant how she could know that she was pregnant such a short time after intercourse, and she responded "I know my own body" and indicated that she would have a pregnancy test.

7 When the plaintiff saw the defendant in Fremantle on 13/14 December 2000, he was with Catherine. Their next meeting was at his single quarters at Marvel Loch on 18 December 2000 when the defendant arrived unexpectedly following an earlier phone call advising she had undertaken a pregnancy test and would bring the report. They opened the envelope containing the pregnancy test result, which was negative. The plaintiff stated that the defendant was quite shocked at the result. They had sexual intercourse that night, and the defendant left Marvel Loch the next morning.

8 The next time they met was 29 December 2000, approximately four days after the defendant had rung the plaintiff to advise that she had performed a home pregnancy test which was positive. The plaintiff had seen the defendant earlier that day in company with one Darren Quinn at Peter Junka's units in Kalgoorlie. Junka was a previous partner of the defendant. The plaintiff stated that as he had had an argument with Catherine that day, he stayed and had sex with the defendant that night.

9 On 31 December 2000 whilst at the Exchange Hotel Kalgoorlie with his brother and others, the plaintiff informed Catherine of the defendant's pregnancy. As a result of pressure from Catherine, the plaintiff asked the defendant to undertake a DNA paternity test to which she agreed, although questioning its necessity.

10 Dylan was born on 21 August 2001 by which time the plaintiff was working as an operator at the Fimiston Superpit. The plaintiff and Catherine travelled to Northam on 23 August to see Dylan, and whilst visiting the hospital the plaintiff again raised with the defendant the issue of DNA paternity testing. Thereafter the defendant took Dylan to

Kalgoorlie on several occasions so that the plaintiff could have contact with him, and the plaintiff made several visits to Northam. Access difficulties developed because the defendant did not want Dylan having contact with Catherine, or having the plaintiff's surname.

11 The plaintiff stated he had planned to leave Kalgoorlie and relocate in the Eastern States in about 2003/2004, but because of access difficulties due to the distance from Northam he decided to shift to Perth and advised the defendant of this plan in about November 2001. Having married Catherine in October 2001, he moved to Perth in December 2001 and sought employment, particularly truck driving. He was unable to obtain suitable employment and eventually purchased a courier business in June 2003.

12 Because of concern that he was not Dylan's biological father, the plaintiff contact family lawyers, Shann & Associates for advice in about October 2001. Prior to consulting that firm, and before Dylan's birth, he had written to a laboratory in Sydney to obtain details of the necessary procedure. The plaintiff stated that he had made a number of requests to the defendant, both before and after the birth, for DNA parentage testing.

13 On 1 February 2002 the plaintiff filed an application in the Family Court seeking (*inter alia*) DNA parentage testing, which was undertaken following a consent order. When the Court ordered DNA test results indicated that the plaintiff was not Dylan's father, the parties attended Court to get appropriate orders, and the plaintiff claimed that the defendant was accompanied by Darren Quinn.

14 The plaintiff agreed in cross-examination that the defendant consented to the Court order for DNA parentage testing. He agreed that he met the defendant at Sue Trappitt's house in Northam in September 2000 and that between that date and 2 December 2000 had regular personal and telephone contact with her. He confirmed that the first act of sexual intercourse between them took place at the Yelverton Hotel Kalgoorlie on Saturday 2 December 2000, and that the second occasion was on 18 December. He denied having sexual intercourse with her on 19, 20 or 21 December. He further denied that he had sexual intercourse with the defendant at Marvel Loch on 1 January 2001.

15 The plaintiff confirmed that Catherine was working at a retirement home in Kalgoorlie prior to shifting to Perth, and that at the date she resigned from that employment there was rumour that the retirement home was closing. He agreed that his obligation for child support was

assessed at \$947.67 per month as at 21 September 2001, \$468.83 per month as at 25 September 2001 and \$29.67 per month as at 12 December 2001 when he ceased work at the Superpit. Payments of \$21.67 per month continued until the Family Court order of 27 May 2002. All monies have been repaid by the defendant.

16 The plaintiff stated that it had been decided Catherine would be joining him in Australia approximately two years before she arrived, and that a decision was made during the year 2000 for her to arrive in Perth on 13 December 2000. He claimed that he at all times made it clear to the defendant that his intention was to live with and establish a long term relationship with Catherine. He denied telling the defendant that he wanted to have a child with her, and agreed that although he had no intention of any long term relationship, he was having unprotected sex with her.

17 He stated that when the defendant visited the Goldfields he would see her at Marvel Loch, the Yelverton Hotel Kalgoorlie, and at Peter Junka's unit. He claimed that sexual intercourse between them occurred on only three occasions. He agreed that whilst working at Marvel Loch he had frequent lengthy phone calls with the defendant. She was a close friend with whom he wanted to have sex.

18 The plaintiff was adamant that the defendant told him on 12 December 2000 that she was pregnant, and that he did not learn of her pregnancy for the first time on 28/29 December. He denied that he was delighted to learn of the pregnancy. He agreed that he only had contact with Dylan on four or five occasions.

19 In re-examination the plaintiff stated that he was devastated when he discovered that Dylan was not his biological child, became very emotional, and increased smoking and drinking.

Suzanne Jane Trappitt

20 Ms Trappitt at all relevant times resided in Northam and knew both the plaintiff and the defendant. She met the defendant about the beginning of 1999, and knew the plaintiff because she had a relationship with his brother. She also knew and was friendly with Darren Quinn, and introduced the defendant to him about the beginning of the year 2000. Ms Trappitt stated that the defendant's residence was only about a minute's drive from her residence.

21 She recalled visiting Kalgoorlie over the Christmas/New Year period 2000/2001, and whilst there saw the defendant who was staying at Peter Junka's units. Darren Quinn was also staying at the units.

22 Ms Trappitt has coached juniors basketball in Northam, and was doing so in the period immediately after Dylan's birth. The defendant's other children played basketball, and the defendant and the father of the children would attend and watch them play. Darren Quinn was also a regular visitor.

23 Ms Trappitt conceded she was no longer friendly with the defendant, their friendship having commenced to wain in about December 2000. She claimed that she had frequently seen Darren Quinn at the defendant's house before then. She disputed that she introduced the defendant to Darren Quinn as late as November 2000. Her recollection was that Darren Quinn's car was often at the defendant's residence during the night over the latter half of 2000.

Catherine Margaret Macdonald (Catherine)

24 Catherine confirmed that when she was a teenager she had a relationship of sorts with the plaintiff, became pregnant to him, and gave birth to a son Cade. She did not advise the plaintiff of her pregnancy and/or of the existence of Cade until shortly before Cade's 17th birthday. They then renewed contact, and agreed to commence cohabitation in Kalgoorlie where they planned to stay for two to three years to make some money. These plans were discussed a considerable time prior to her arrival in Western Australia on 13 December 2000.

25 Shortly after arriving in Kalgoorlie, Catherine commenced work in an aged care centre where she remained until resigning in December 2001 to relocate to Perth. Apart from Cade, she had daughters who were at that time aged 17 and 14. She stated that on 31 December 2000 whilst at the Exchange Hotel Kalgoorlie she was informed that the plaintiff had sexual intercourse with the defendant who claimed she was pregnant to him. She stated that she met the defendant in Fremantle shortly after arriving in Perth, and saw her again at her house in Kalgoorlie on 30 December 2000 with Darren Quinn. She appeared anxious to volunteer the information about Quinn's presence.

26 Catherine rang the defendant on 2 January 2001 to advise that she knew about her association with the plaintiff, and that she was pregnant. The defendant informed her that she was eight weeks pregnant, which information was queried by Catherine who claimed she should have been

no more than four or five weeks pregnant if she had had sex with the plaintiff for the first time on 2 December 2000, Catherine stated that the defendant came around to her house in Kalgoorlie when she was about seven or eight months pregnant. Catherine questioned the plaintiff as to how he could be confident that he was responsible for the defendant's pregnancy, and it would appear that as a result of her urging the plaintiff consulted a lawyer in Kalgoorlie and was advised that it was not possible to arrange DNA paternity testing until the birth of the child.

27 Catherine stated that when she first arrived in Kalgoorlie the plaintiff was working at Marvel Loch, but changed to the Superpit in July 2001. Upon learning that the defendant had given birth, she and the plaintiff travelled to Northam so that the plaintiff could see Dylan. She stated that towards the end of 2001 the plaintiff consulted a lawyer with a view to getting an access order. She agreed that both before and after Dylan's birth there were discussions concerning DNA parentage testing.

28 Catherine stated that after Dylan's birth, the defendant gave her contact phone numbers, including the cell phone numbers of Peter Junka and Darren Quinn. She stated that they moved to Perth in December 2001 so that the plaintiff could more easily access Dylan in Northam. She was advised by the plaintiff's solicitor that the plaintiff was not Dylan's father, and stated that the plaintiff was devastated when she told him. She agreed that that information was provided on or about 25 March 2002.

29 In cross-examination Catherine admitted that she had been suspicious from the very beginning that the plaintiff was responsible for the pregnancy, and raised her concerns with him. She stated that the plaintiff consulted a lawyer in Kalgoorlie about DNA parentage testing only to appease her, as he was confident that he was the father. She agreed that in January 2002 the plaintiff's solicitors wrote to the defendant requesting DNA parentage testing. The impression she gave was that having relocated to Perth from Kalgoorlie, purchased a business, enrolled her youngest daughter at TAFE, and made new friends, they abandoned their intention to go to Brisbane.

Kellie Gray

30 Mrs Gray who was born on 25 September 1966, has three children, Nicole Junka born 7 September 1991, Camden Junka born 22 April 1993 and Dylan born 21 August 2001. She stated that she had been in a de facto relationship with Peter Junka, the father of her two elder children, from about 1990 to 1997. Thereafter she had a short relationship with a police officer. She met the plaintiff at a party at Sue Trappitt's place in

Northam in September 2000 when she was living at 72 Throssell Street, Northam. They formed a friendship and she would see him when he visited Northam, or when she travelled to Marvel Loch and stayed with him overnight. She stated they got on really well.

31 The defendant stated that she loved the plaintiff, believing the feeling was mutual, and sexual intercourse between them first occurred on 1 and 2 December at the Yelverton Hotel. She agreed that they had sexual intercourse at Marvel Loch on 18 December 2000, and at the units in Kalgoorlie on 29 December 2000, but asserted that there were other occasions, and that they had sexual intercourse on at least seven or eight occasions, mostly at the plaintiff's quarters at Marvel Loch.

32 She stated that she was introduced to Darren Quinn at Sue Trappitt's house, and that he had non-consensual sex with her on about 9 or 10 December at that house.

33 She confirmed that she had a serum pregnancy test, and having received the test result on 18 December, travelled to Marvel Loch so that she and the plaintiff could read the test results. When they found out it was negative the plaintiff was very disappointed, although she was pleased, believing that it demonstrated she had not become pregnant as a result of the sexual encounter with Darren Quinn. She had sex with the plaintiff that night and the following morning. She denied having informed the plaintiff on 12 December 2000 that she was pregnant.

34 Before Catherine arrived in Western Australia the defendant helped the plaintiff set up a home for her. She stated that she was aware that Cade was the plaintiff's son, and said that the plaintiff told her he first became aware of Cade's existence when Cade was 3. She stated that she and the plaintiff discussed having children together.

35 The defendant stated that she drove her car to Kalgoorlie on 29 December 2000, picked the plaintiff up from a restaurant, and informed him that the home pregnancy test kit which she had purchased revealed she was pregnant. The plaintiff was extremely excited about the pregnancy, stayed the night with her, and they had sexual intercourse.

36 The defendant stated that she attended the Kalgoorlie Races on New Year's Eve with her friend Katrina and several of Katrina's friends. The plaintiff went separately with Catherine, his brother, and Sue Trappitt. During the race meeting the plaintiff gave her the key to his unit at Marvel Loch. On 1 January 2001 the defendant drove to Marvel Loch to see the plaintiff who was very off-handish, advising her that his future was with

Catherine. She asked him to consider the position, and in the result he rang her several days later to confirm that he proposed living with Catherine. She indicated that she had an ultrasound in February 2001 arranged at a time so that the plaintiff could attend with her.

37 The defendant recalled a telephone conversation with the plaintiff prior to Dylan's birth when he raised the issue of DNA parentage testing because he thought the dates did not match, and she confirmed that she was agreeable. Her recollection was that this conversation took place when she was several months pregnant. She also agreed that she appeared at the Family Court and consented to an order for DNA parentage testing.

38 She stated that the plaintiff saw Dylan on four occasions.

39 So far as Darren Quinn is concerned, the defendant stated that she had contact with him and his family on several occasions when he tried to make some apology for his behaviour, but only had sexual intercourse with him on one occasion. She denied that he attended the Family Court with her.

40 In cross-examination the defendant maintained that she did not know Quinn prior to December 2000, notwithstanding the production of photographs which depicted Darren Quinn, his father and herself at a barbecue (Exhibit 14). She agreed that her home telephone number at Northam was 9621-1939 and her mobile number 040 892 5173. She also agreed that the plaintiff's phone number at Marvel Loch was 9040-4105. She agreed that she spoke to the plaintiff for 180 minutes on 12 December 2000, but denied that she then informed him she was pregnant.

41 She agreed that Darren Quinn's parents lived in Cunderdin, that their phone number was 9635-1321, and that Darren Quinn had a mobile phone number 042 895 9227. She denied that Darren Quinn had on occasion stayed over at her home, but agreed that after February 2001 she called him on at least 147 occasions. When it was put to her that around about New Year's Eve 2000 she had driven to Kalgoorlie with him, she stated that she went in her vehicle and Quinn followed with Sue Trappitt in another vehicle. She denied that Quinn stayed at the units she was managing in Kalgoorlie, but agreed that he damaged one of the flats.

42 The defendant stated that during 2001 she associated with Darren Quinn's father and stepmother, and had contact with Darren Quinn through counselling services. She was shown her diary wherein she had written next to the date 3 December 2001 the word "raped" which notation

she agreed related to the Quinn incident, although she still maintained that incident occurred on or about 9 or 10 December.

43 She agreed that the scan undertaken on 25 January 2001 suggested a seven week three day gestation period, but stated that did not cause her to then calculate the date of conception. She agreed that the likely date would have been somewhere between 4 and 10 December.

44 When asked whether she visited Peter Junka's place with Darren Quinn in December 2000 the defendant responded "I can't recall", but a little later in cross-examination agreed that it was possible. She had noted in her diary on 9 April 2001 that she was 18 weeks pregnant, but again did not do a calculation to identify the likely date of conception.

45 When pressed concerning her contact with Darren Quinn, the defendant stated:

"I didn't have to deal with one man here. I had to deal with two. One that attacked me and one that left me high and dry when I was pregnant – and brought some other woman over with three kids and now I honestly believe on my father's death bed that they both did it deliberately because they couldn't have any more kids of their own and they couldn't bring up kids for themselves."

46 The defendant's diary for 2001 contained numerous references to Darren Quinn including his address and telephone number.

47 The defendant agreed that she initially told her solicitors, in connection with these proceedings, that she had been raped by an unknown person, and that it was many months before she named Darren Quinn.

48 Darren Quinn endorsed a note to the defendant in her diary on 6 January 2002 expressing his love for her, and the defendant was unable to provide an appropriate explanation as to how that happened. The defendant agreed that she had several lengthy telephone discussions with Darren Quinn shortly after Dylan's birth, but stated that it had nothing to do with Dylan and she was simply "working on what had happened". She agreed that as at December 2000 what she had been told by the plaintiff suggested that he may have had fertility problems.

49 The defendant stated that she underwent the serum blood pregnancy test on 18 December to exclude the possibility that she had become

pregnant to Darren Quinn, and if it had been positive she would have informed the plaintiff of the Quinn incident. She agreed that the period 10 to 12 December was in the middle of her menstrual cycle.

50 As a result of their instructions, the defendant's solicitors advised Dr Yovich that she had been raped on 4 December 2000.

51 She agreed that in about October/November 2001 the plaintiff was requesting her to undergo DNA parentage testing and claimed that she had no problem with so doing but because it was the plaintiff's idea felt that it was up to him to arrange it.

52 In cross-examination the defendant suggested that the photograph taken at the barbecue which depicted (*inter alia*) herself and Darren Quinn, was taken in October/November 2000.

John Yovich

53 Dr Yovich is the medical director of the Pivet Medical Centre and a specialist in reproductive medicine. The defendant consulted him on 12 August 2003 in connection with this case, and he saw her on several other occasions. His reports of 6 and 26 May 2003, 13 August 2003 and 1 December 2004(2) were received in evidence (Exhibit 8.1 to 8.5).

54 The report dated 6 May 2003 makes reference to the serum pregnancy test performed on 18 December 2000, and ultrasound reports undertaken at Northam Regional Hospital on 21 January 2001 and 27 February 2001.

55 Dr Yovich reported that the ultrasound results suggested a last menstrual period of around 5 December 2000 indicating that the ovulation was likely to have occurred on 19 December 2000. He reported:

"In an ideal situation where the female is highly fertile, semen deposited within the vagina anywhere between day 7 to day 14 of the female's menstrual/ovulatory cycle can lead to the generation of a pregnancy."

56 It was very unlikely that the defendant became pregnant from semen deposited in her vagina after 21 December 2000.

57 In addressing the negative pregnancy test carried out on 18 December 2000 the report states:

"I can add the information that the embryo resulting after fertilisation, begins to secrete detectable amounts of the pregnancy hormone BhCG by day 10 of its life and this coincides with day 24 of the woman's menstrual cycle ie about 27 December 2000 for your client. However, there are many errors at this phase and it has become our custom at Pivot to defer testing until day 31 of the conception cycle."

58 The report suggests that it is unsafe to rely on pregnancy hormone testing without clinical examination and corroborative ultrasound findings.

59 In his report of 26 May 2003 Dr Yovich stated that the most likely time of sexual intercourse leading to pregnancy was between 16 and 21 December 2000 although reasonably common extension meant it was possible the period was 14 December to 24 December 2000. The report makes the concession that the defendant's fertile period could have been from 12 December to 24 December.

60 The report of 13 August 2003 followed Dr Yovich's consultation with the defendant on 12 August 2003. In summary the report sets out that:

1. The defendant's last menstrual period prior to pregnancy was 24 November.
2. The episode of "non-consensual" intercourse with Darren Quinn occurred around the defendant's mid-cycle when she was at her most fertile stage.
3. Dylan's gestation period appeared to be at least 38 weeks.

61 During his evidence Dr Yovich estimated that Dylan was born somewhere between 38 and 41 weeks post-conception. He stated that the history obtained from the defendant was that she had sexual intercourse with the plaintiff on 2 December 2000, 18, 19, 20 and possibly 21 December 2000 and 28 December 2000. He stated that all the investigations that had been undertaken pointed to an ovulation date around 17/18 December and the person who had intercourse closest to that time was likely to be the father of her child. However, bearing in mind that it was accepted that Darren Quinn was the father of the child, Dr Yovich concluded that ovulation was probably around 12 December.

62 He agreed that if the defendant had sexual intercourse with the plaintiff on 2 and 18 December and intercourse with Darren Quinn on the 9 or 10 December it was not possible to predict who caused the pregnancy. He stated that a female can conceive at any time from the first day of her period onwards although his clinical experience was that to result in pregnancy sperm deposition would be expected within seven days of ovulation.

Findings of fact

63 An understanding of the nature of the relationship between the parties is fundamental to a determination of the issues that arise for resolution in this litigation.

64 The plaintiff's stated position is that they were good friends engaging in casual sexual encounters without commitment, and that the defendant knew at all times that it was his intention to bring Catherine and her children out from New Zealand and form a permanent relationship with her.

65 The defendant on the other hand contends that the plaintiff had led her to believe they had a future together, and had discussed the prospects of having children.

66 I accept the defendant's evidence relating to their relationship, and the probabilities support it. It is unlikely that a 34 year old mother of two young children, having been in a previous unsatisfactory relationship, would be involved in the degree of social interaction that occurred, including unprotected sex, if the relationship was just platonic. The more so if she was aware that her paramour was merely biding time preparatory to a more committed relationship with another woman.

67 Ironic though it is, that which concerns the plaintiff is in part at least the product of his deception.

68 I formed the impression from the plaintiff's demeanour, particularly that displayed by him during the "Today Tonight" interview (Exhibit 7) that personal facts, including embarrassment, have perhaps coloured his recollection of events.

69 The defendant impressed me as being naive, guileless and gullible, with a rather simplistic perceptive capacity. Her evidence set out at par 45 hereof is demonstrative of my assessment of her. I also consider that she was an unreliable historian, as demonstrated by her statement to Catherine

on 2 January 2002 that she was eight weeks pregnant. Her inconsistent statements concerning the sexual encounter with Darren Quinn is another example. It is not possible to determine the precise nature of that encounter, but I am satisfied that she did not have an ongoing romantic relationship with him. Her ongoing association with him and his family following the sexual encounter, if it was non-consensual, is bizarre, but consistent with her personality type.

70 The plaintiff carries the burden of establishing the cause of action on the balance of probabilities, and the view I have formed as to his credibility on the issue of the nature of the relationship is relevant in this regard.

Deception

71 The principles relating to the test of deceptive conduct were set out in the speech of Lord Herschell in *Derry v Peek* (1889) App Cas 337 at 374:

"I think the authorities establish the following propositions: First, in order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shewn that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth. And this probably covers the whole ground, for one who knowingly alleges that which is false, has obviously no such honest belief. Thirdly, if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made."

72 His Lordship went on to say at p 375:

"In my opinion making a false statement through want of care falls far short of, and is a very different thing from, fraud, and the same may be said of a false representation honestly believed though on insufficient grounds. ... fraud is essential to found an action of deceit, and that it cannot be maintained where the acts proved cannot properly be so termed."

73 At the time of conception the defendant clearly held the belief that there were real prospects of a permanent relationship with the plaintiff. I accept her evidence that although she had sexual intercourse with Darren Quinn on or about 10 December 2000 (or whenever it occurred) the negative pregnancy test on 18 December 2000 in her mind satisfactorily excluded him as being responsible for her pregnancy. The fact that she was having sex with the plaintiff, and had a strong emotional attachment to him, enabled her to conclude or accept that he was the father of her unborn child. Although someone of more acute perception or reasoning capacity may not have so concluded, I am satisfied that her belief was honestly held. The plaintiff has failed to persuade me to the required degree that the defendant's behaviour was fraudulent.

Negligent misstatement

74 Because of the special relationship that existed between the parties as sexual partners, there was a duty of care on the defendant not to advise the plaintiff that he was responsible for her pregnancy if the position could be otherwise. A false assertion, particularly if maintained over a period of time, had the capacity to result in foreseeable damage.

75 Although, as I have found, the defendant genuinely believe that the plaintiff was responsible for her pregnancy, a reasonable person in her position ought to have concluded that the position might be otherwise. She had a duty to advise the plaintiff of the Quinn encounter, and of the possibility that he might not be the father of her unborn child. In all the circumstances upon Dylan's birth she should have undertaken appropriate verification of paternity. In failing to do so she was negligent.

76 The plaintiff is not contributorily negligent.

Damages

77 The plaintiff has failed to establish any compensable psychiatric or psychological consequences caused by the misrepresentation as to paternity. I am not satisfied that he formed an emotional bond with Dylan such as to cause him compensable distress when he discovered the true position. His contact with Dylan was very limited. His continuing desire for DNA parentage certification does not set easily with a genuine paternal regard, and his statement in the "Today, Tonight" interview:

"Most men want to know the truth and why wouldn't you. If your paying child support, going through trying to get contact

with the child, and all through that at the back of your mind you've got the suspicion that perhaps that's not my child."

is eloquent of his state of mind.

78 The plaintiff claims damages for loss of earnings as a consequence of relocating in Perth. I am not satisfied on the evidence that the move was for access purposes, particularly as it occurred at the time when there were clear difficulties concerning contact, and when the plaintiff held the suspicion noted above. Further, it is not a reasonably foreseeable loss. It is also to be observed that the plaintiff has remained in Perth subsequent to learning of the true situation.

79 The claim for \$473.98 being the travel and accommodation expenses incurred on 23 August 2001 covering the visit to see Dylan in hospital, is properly recoverable.

80 There is also a claim for \$8,024.76 being the legal costs incurred by the plaintiff relating to the Family Court proceedings. I am satisfied that the proceedings were a necessary consequence of the defendant's misstatement and the legal costs associated therewith are recovered by the plaintiff.

81 In the result the plaintiff is entitled to judgment against the defendant in the sum of \$8,498.74.