



## Cases and Comments

### *Magill v Magill*: Families and deceit

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#### Introduction

There is a long legal tradition of presuming paternity<sup>1</sup> regardless of any biological evidence of the fact. Of course, the common law presumption as to paternity is only the flip side of the legitimacy presumption, and it has been the latter that, in the past, attracted greater legal notice. The presumption of legitimacy arising from marriage<sup>2</sup> brought with it considerable advantage for the child concerned and certainty for the father, at least in regard to the disposition of his assets. With the modern erosion of the significance of legitimacy,<sup>3</sup> and the redefinition, and greater enforcement, of obligations of parents to support their children,<sup>4</sup> it is now paternity, rather than legitimacy, which is of paramount legal significance. One complex legal question which has arisen in recent years in relation to paternity is whether a man can use the tort of deceit to sue the mother of a child who has misled him as to paternity, where paternity is later disestablished.

This was the exact question in the recent decision of the Court of Appeal of the Supreme Court of Victoria, *Magill v Magill*.<sup>5</sup> Mens' rights groups claimed a great victory when Mr Magill was initially awarded \$70,000 in tortious damages against his estranged wife by a Victorian County Court judge in 2002.<sup>6</sup> Those same groups, and sympathetic journalists,<sup>7</sup> have expressed horror at the recent decision of the Victorian Supreme Court overturning that award, despite the Court expressly stating that it was a technical decision turning on the way the case was argued rather than a reflection of any general reluctance to award damages in such cases. Indeed, the Court was clear in saying that an action in deceit was not inappropriate in this type of situation.

In this casenote we consider the legislative framework in which decisions such as *Magill* sit, outline the *Magill* litigation and look at the English approach to this question. We then discuss some of the key issues raised by

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1 Maternity has not proved as historically problematic for obvious reasons.

2 Either at the time of conception or birth of the child.

3 Predominantly through the passage of equality of status legislation; see A Dickey, *Family Law*, 4th ed, LBC, Sydney, 2002, pp 290–6.

4 For example, see the child support legislation in both Australia and UK which adopt a formulaic approach to calculating child support and have created dedicated government agencies to administer the schemes with strong powers of enforcement.

5 [2005] VSCA 51 (17 March 2005).

6 22 November 2002, (03/0532).

7 See for example, J Albrechtson's, 'Mothers must tell the truth', *The Australian*, 23 March 2005. ([http://www.theaustralian.news.com.au/common/story\\_page/0,5744,12628394%5E32522,00.html](http://www.theaustralian.news.com.au/common/story_page/0,5744,12628394%5E32522,00.html)).

*Magill* and conclude it is not appropriate in this and like instances to adopt a tortious remedy designed to address dishonesty in commercial transactions.

### The legislative backdrop

Although there were no determinative legislative provisions in the *Magill* case, it is important to understand where the decision sits in relation to any relevant legislative provisions governing family relations in Australia. Mr Magill sought damages both for the emotional distress caused to him by the actions of Mrs Magill and also compensation for the money expended by him on the support of Mrs Magill and the two children in question during the time that they lived together.<sup>8</sup>

This action did not seek the recovery of any child support paid after the parties separated. Recovery of child support payments where paternity is later disestablished is covered by s 143 of the Child Support (Assessment) Act 1989 (Cth) (hereafter, the CSAA).<sup>9</sup> In *G v N*<sup>10</sup> the then Chief Federal Magistrate held this provision ‘provides a code for what is to happen in cases where a liable person turns out not to be the biological parent, and it is quite clear . . . a Court . . . can in its discretion order repayment to the person having made payments pursuant to an assessment’.<sup>11</sup> Notably recovery of child support under s 143 is not automatic, rather the ‘court may make such orders as it considers just and equitable for the purpose of adjusting or giving effect to the rights of the parties and the child concerned’: s 143(3).

There have been a number of decisions where repayment of child support has been ordered.<sup>12</sup> Interestingly, the duplicity of the mother in having kept to herself the possibility that the putative father may not, in fact, be the father, seems to have weighed heavily in the exercise of that discretion on one occasion, though the sum sought to be recovered was quite modest in that case.<sup>13</sup> Relying too heavily on this factor would seem problematic as by their very nature these cases are most likely to arise where there has been some level of deception. In another case, the Magistrate quite clearly considered the financial impact on the mother and child of ordering repayment of child support and took account in that context of a property settlement between the parties.<sup>14</sup>

While the Family Law Act 1975 (Cth) (hereafter, the FLA) ended criminal conversation, damages for adultery and enticement of a party to marriage,<sup>15</sup> s 119 of that Act provides that actions in tort and contract can still be brought between parties to a marriage. Perhaps the most obvious examples of the continued use of tort claims between married couples have been the various

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8 At [12].

9 As this section does not apply to child maintenance payments made under the Family Law Act 1975 (Cth) (hereafter, the FLA) an amendment to that Act has recently been proposed to provide a similar remedy: see Part 14 of Family Law Amendment Bill 2005.

10 [2002] FMCAfam 281; (2002) 171 FLR 1; (2003) FLC 93-160.

11 At [25].

12 See for example *DRP & AJL* [2004] FMCAfam 440, *Y v Y* [2001] FMCAfam 258 and *W v H* [2004] FMCAfam 67.

13 *DRP v AJL*, above n 12 at [67]–[70].

14 *Y v Y*, above n 12 at [33]–[35].

15 See the FLA, s 120.

claims for assault and battery heard at the same time as other matters are being resolved in the family courts.<sup>16</sup>

### The facts

The parties were married in April 1988. Mrs Magill bore three children, Arlon, Heath and Bonnie, over the following three years. After each child was born Mrs Magill filled out the requisite birth registration application naming herself as the mother of each child and naming Mr Magill as the father. Mr Magill in turn signed the forms in the belief that he was the biological parent of each child. The births were duly registered and each child took the surname of Magill.

In November 1992, when the youngest child Bonnie was one, the couple separated. Later that month Mrs Magill lodged an application under the CSAA and Mr Magill commenced making regular child support payments. With the exception of a period of some 12 to 14 months in 1997, Mr Magill made payments in support of all three children up until 1999.

In 1995 Mrs Magill was hospitalised for a nervous condition and Mr Magill cared for the children. While the children were in his care, Mr Magill discovered a diary in which Mrs Magill had recorded her doubts about the paternity of one of the children and her efforts to have the man she suspected was the father, a family friend, own up.<sup>17</sup> When confronted, Mrs Magill confessed to her husband that she had some doubts as the middle child Heath's paternity. She had an affair that commenced in 1989 and continued past the end of the marriage until 1995. Mrs Magill acknowledged that she had unprotected sex with her lover on a regular basis while married to and living with Mr Magill. She claimed that she initially thought that Mr Magill was Heath's biological father, but that in 1993 she saw a picture of her lover as a child, and the strong resemblance between to Heath raised a doubt in her mind.

Despite these revelations, Mr Magill continued to make child support payments for all three children. In 1999 Mrs Magill consented to DNA testing to resolve doubts as to Heath's paternity. The tests showed that neither Heath nor Bonnie were Mr Magill's offspring. In January 2001 Mr Magill commenced an action in the tort of deceit against Mrs Magill and the matter was heard before a single judge of the County Court of Victoria. Hanlon J gave his reserved oral reasons for decision on 22 November 2002, three days after the hearing ended.

Hanlon J found for Mr Magill and awarded him \$70,000 in damages, comprising:

- (i) \$30,000 for an unspecified portion of a psychiatric disability that Mr Magill had developed;
- (ii) \$10,000 for time he took off work after the birth of each child;

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<sup>16</sup> See for example *Kearney and Roucek* (1997) 21 Fam LR 537; FLC 92-745, *Kennon v Kennon* (1997) 139 FLR 118; 22 Fam LR 1; FLC 92-757 and *In the Marriage of Morgan* (1997) 138 FLR 393; 22 Fam LR 79; FLC 92-760. In the latter case the claims included defamation and intentional infliction of nervous shock.

<sup>17</sup> I Munro, 'Man sues former wife over children', *The Age*, 15 November 2002. (<http://www.theage.com.au/articles/2002/11/14/1037080847997.html>).

- (iii) \$25,000 for expenses (other than child support payments) incurred for the two children over the years before paternity was resolved, and;
- (iv) \$5000 for future loss of earnings.

### **The trial Judge's decision<sup>18</sup>**

Mr Magill alleged, in his Statement of Claim, that at some time before the birth of both Heath and Bonnie, his wife had expressed to him that she was pregnant and that he was the father of the unborn child. He pleaded that the representations were made with the knowledge that they were untrue or with the requisite degree of recklessness as to their truth so as to be considered fraudulent. He further pleaded that he relied on the representations and thereafter always believed himself to be the two children's father and did not question his liability to pay child support.

As interlocutory proceedings progressed, Mr Magill filed an Amended Statement of Claim. In that document he pleaded that the representations of his wife on which he relied were both statements she made to him and the completion by her of birth registration forms. In each form Mrs Magill named Mr Magill as the father of the newborn child, and each time she gave him the form to sign. Mr Magill also claimed that applying for and accepting child support after the separation was in itself a representation.

By the second day of the trial Hanlon J made it clear that he considered the registration forms, and Mrs Magill's treatment of them, to be plain assertions by her to the effect that Mr Magill was the father of both children<sup>19</sup> and he confirmed this in his final decision.<sup>20</sup> His Honour went on to find that Mrs Magill's evidence that she believed both children to be Mr Magill's — despite the fact that she was having an affair — was unreliable. Hanlon J considered Mrs Magill's representations as to paternity were, at the very least, reckless and he found she intended her husband to rely upon them. Finally, his Honour found that Mr Magill did rely upon his wife's representations in consenting to the children taking the name Magill.<sup>21</sup> Thus, he felt the tort was made out.<sup>22</sup>

It appears that his Honour did not address the question of whether Mrs Magill's ongoing conduct in continuing to allow her husband to believe that he had fathered the children during the marriage and through the subsequent years of maintenance payments consisted of either new or ongoing representations. Nor did he address the question of whether Mrs Magill's application for child support constituted a fresh fraudulent representation.

Mrs Magill appealed to the Supreme Court of Victoria. Her appeal was

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<sup>18</sup> As we did not have access to any transcripts for this trial we have had to rely on the appeal decision as our only source.

<sup>19</sup> At [21].

<sup>20</sup> At [25].

<sup>21</sup> At [38].

<sup>22</sup> *Ibid.*

funded, in part, by the Victorian Women's Legal Service.<sup>23</sup> Mr Magill received some financial support through an internet appeal for funds.<sup>24</sup>

### The Court of Appeal decision

Ormiston, Callaway and Eames, JJA handed down their decision on 17 March 2005. Ormiston, JA, who substantially agreed with Eames JA, began his short reasons by highlighting that the decision did not create any precedents as it was 'technical and dependent on fine matters of procedure'. He also observed (somewhat ironically given the overall tenor of this decision) that fraud is a serious matter which called for caution in findings.<sup>25</sup>

Callaway JA allowed the appeal on the basis that:

... that there was no evidence on which the learned judge could find that [Mrs Magill] intended [Mr Magill] to rely on the forms, except for the purpose of signing them and agreeing that the children should be registered with the family name of Magill, or that he did rely on them for any other purpose.<sup>26</sup>

His Honour clarified his findings by noting that, although the original matter was not pleaded so as to restrict the alleged representations to the birth registration documents, he considered those documents to be the only evidence that the judge in the first instance tested against the elements of deceit.<sup>27</sup> He also made it clear that had Mr Magill's solicitor filed and served a notice of contention in regard to the original findings the appeal may have had a different outcome.

Eames JA, in the leading judgment, revisited Mr Magill's Amended Statement of Claim in some detail. In relation to both children, this pleaded that the 'representations' Mr Magill relied upon were partly written, partly oral and partly implied.<sup>28</sup> The birth registration forms, which constituted the written representations, were in no way alleged to be the whole of the representation. In particular, and among various other claims, there was reference to Mrs Magill's application for child support as an implied representation as to paternity.<sup>29</sup> However, as His Honour went on to note, it was not clear precisely which representations were relied upon by the trial Judge in finding deceit made out.<sup>30</sup>

Not surprisingly, during the hearing of the appeal, counsel for Mr Magill contended it was clear the matter had been decided with reference to a far wider range of evidence than merely the birth registration forms.<sup>31</sup> In particular, counsel referred to the final submissions where the registration documents were listed as only one of eight separate pieces of evidence which

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23 See above n 7.

24 See <http://www.dnab4upay.com.au/> for Mr Magill's website and [http://www.kittennews.com/kn\\_extras/l\\_magill.htm](http://www.kittennews.com/kn_extras/l_magill.htm) for an example of his appeal for funds being promoted by a men's organisation.

25 At [1].

26 At [2].

27 At [3].

28 At [16].

29 Ibid.

30 At [20].

31 At [28].

proved the representations had been made.<sup>32</sup> Eames JA rejected this argument. He held the trial Judge found only the registration forms to have been representations and that the further evidence was used to show that the representations were fraudulent rather than amounting to separate or even ongoing representations as to paternity.<sup>33</sup>

At this point, Eames JA paused to discuss the important question of whether an action in deceit was a reasonable vehicle for dealing with alleged paternity fraud. Noting that there was no statutory bar to such an action,<sup>34</sup> he said:

Whilst there may be good reason to discourage traumatic litigation such as has arisen in this case it is not the function of this Court to apply social considerations so as to deny a party a remedy which is otherwise open to him or her.<sup>35</sup>

Having made clear his view that the Court should not intervene on public policy grounds, his Honour moved to the question of what Mr Magill had relied upon the forms to do. In the latter context he noted Mr Magill's evidence was that, in accepting the children as his own, he had relied on his belief he was the children's father, rather than on the registration forms.<sup>36</sup> For that reason his Honour found that Mr Magill's alleged damage was not linked to any reliance on the forms. His Honour felt that at most Mr Magill had relied on the forms with respect to the two children bearing his name. He therefore did not consider that either the claimed financial expenditure or the psychiatric illness could be linked to the representations made by Mrs Magill in the birth registration forms.<sup>37</sup>

Thus, in the view of Eames JA, the tort was not made out. His Honour went on to say that even if Mr Magill had established reliance, 'the claim would founder on the rocks of causation'.<sup>38</sup> However, his Honour made it abundantly clear that had the claim been made out on grounds more general than merely the birth registration forms (and had Mr Magill filed a notice of contention) the outcome may well have been different.<sup>39</sup>

His Honour then proceeded to look more closely at causation, remoteness and the measure of damages. Mrs Magill had argued that any loss suffered by her ex husband could not be described as flowing from any representations, but rather from the disclosure of her infidelity and the truth about the two children's paternity.<sup>40</sup> His Honour responded that the deceit alleged need not be the sole cause of the damage<sup>41</sup> and an assessment could be made as to what part of the damage flowed from the representation.

Eames JA also considered the trial Judge's damages award, after first noting that adultery itself did not sound in damages.<sup>42</sup> His Honour accepted the trial Judge's first instance finding that:

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32 At [29].

33 At [32].

34 The FLA, s 119.

35 At [47].

36 At [82].

37 At [83].

38 At [84].

39 At [84].

40 At [88].

41 At [89].

42 At [93]–[105].

... the alleged fraudulent misrepresentation of the paternity of the children was a noticeable factor in [Mr Magill's] psychiatric condition, but certainly the initial marriage break-up has probably always been slightly the major factor leading to the current situation.<sup>43</sup>

Nor did his Honour take issue with the trial Judge's view that the damages awarded for expenses incurred in relation to the children was not in effect a refund of child support but rather related to additional financial support that Mr Magill had provided.<sup>44</sup> It appears that no submissions were made at trial as to any offsetting of damages against any benefit Mr Magill may have derived from his wife or the parenting of the two children. However, Eames JA pointed to *Cattenach v Melchior*<sup>45</sup> and noted that such submissions may not have found favour had they indeed been made.<sup>46</sup>

So in summary, although the appeal was successful on technical grounds, there was no statement in favour of using public policy to limit the application of deceit as a remedy in cases such as *Magill*. Indeed, the resort to the pretence that public policy should play no part in their decision making suggests there was no significant discomfit for the judges in making this decision.

### **The English Position: *P v B (Paternity: Damages for Deceit)***

The issue of deceit as a remedy for fraudulent misrepresentations made in personal relationships has been raised in varying factual situations in other jurisdictions. To date decisions have favoured allowing deceit actions between cohabiting couples.<sup>47</sup>

The only reported decision on the matter in the UK is *P v B*.<sup>48</sup> Stanley Burnton J was asked to decide, as a preliminary issue, whether the tort of deceit applies as between cohabiting couples. In this instance the claimant belatedly discovered he was not the father of the child of the woman with whom he had been cohabiting at the time of the child's conception and birth. Relying on the tort of deceit, he sought £90,000 in damages for the past support of the child and mother and general damages for 'indignity, mental suffering/distress, humiliation'.<sup>49</sup> Finding for the claimant on this point, Stanley Burnton J held that while such proceedings were not appropriate as a mechanism for disestablishing paternity,<sup>50</sup> there was no good legal or policy reason why actions for damages in deceit should not apply to cohabiting couples. Indeed, '[t]he law should encourage honesty between cohabiting

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43 At [94].

44 At [100].

45 (2003) 215 CLR 1; 197 ALR 131; 77 ALJR 1312.

46 At [103].

47 This was most recently evidenced by a French case that received publicity after a man was awarded modest damages against his former wife and her lover for costs he incurred raising the lover's child. Interestingly, the man was also awarded a small amount for moral and psychological damage suffered by the man as a result of being deprived of his supposed fatherhood. See the report of the decision at <http://www.timesonline.co.uk/article/0,,3-1595494,00.html>.

48 [2001] Fam Law 422; 1 Fam Law R 1041.

49 At [2].

50 At [15].

couples rather than condone dishonesty'.<sup>51</sup> Counsel for the mother had included in his policy submissions against liability, the inevitable floodgates claim. A little surprisingly, Stanley Burnton J said this argument 'is not one which should prevent a remedy from being available in cases where it is needed'.<sup>52</sup>

Stanley Burnton J did, however, have sympathy for two arguments advanced by counsel for the mother. The first was that any damages awarded in such a case would not factor in the benefits obtained by the claimant from the companionship of the child and its mother and the second was that it would be "distasteful and morally offensive" to regard the sums spent on the maintenance of the woman and the child as a loss of the entire monetary value of those sums . . .'.<sup>53</sup> However, it was held the solution was not to rule out deceit as a remedy in such cases, but rather to consider these matters when determining the 'nature of the intention required to establish liability for deceit and by scrutiny of the damages recoverable in such a case'.<sup>54</sup> This case did not proceed to a trial of those issues, however.

In reaching his decision, Stanley Burnton J referred to Canadian and US authority. While the latter were not held to be of any particular assistance, his Honour noted a number of recent US decisions<sup>55</sup> affirming the availability of an action in deceit between husband and wife. Two Canadian authorities<sup>56</sup> were considered in more detail, on the basis that they showed the inequity that would arise were this tort not to be available to cohabiting couples. Both cases involved married men fraudulently misrepresenting that they were single to induce women into going through a marriage ceremony with them.

### Pandora's box

Cases from around the common law world show it is difficult to argue that the tort of deceit does not, as a matter of law, apply to misrepresentations about paternity.<sup>57</sup> It is fairly easy to construct scenarios in which the elements of that tort can be made out. However, given the special treatment families often receive under the law, the question here is whether the application of the law of deceit should be modified as between spouses in these, or indeed other, circumstances. Not only is there is no good reason not to consider this question from a public policy point of view, the degree of media attention *Magill* received evidences the public interest in addressing this issue.

Let us then consider some of the possible consequences if the law were left as it presently stands. Stanley Burnton J, in *P v B*, said that it was desirable that spouses be encouraged to tell the truth and he presumably felt the

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51 At [26].

52 At [34].

53 At [36].

54 At [41].

55 In addition to the cases mentioned in this casenote, see P Roberts, 'Truth and Consequences: Part III. Who Pays When Paternity is Disestablished?' (2003–2004) 37 *Fam L Q* 69 at 77.

56 See generally K O'Donovan, *Sexual Divisions in Law*, Weidenfeld & Nicolson, London, 1985.

57 Note the FLA s 69W(1) permits the making of an order requiring parentage testing, where the parentage of a child the subject of proceedings is in doubt. Under subsection (2) the father's spouse would need to be a party to those proceedings to seek the order.



operation of deceit in this sphere would help achieve this. Many children are not biologically related to their mothers' spouses. There will be a myriad of situations that can have led to such an outcome, ranging from rape, to one night stands, to long term relationships with lovers. In all such situations there is now effectively a legal obligation for a woman to advise her spouse of the possibility that he is not the biological parent of the child in question. But the mother will not necessarily know the truth as to paternity (indeed this must very often be the case as the spouse would invariably know if there was *no* possibility of him being the biological father). Should the mother tell her spouse of this possibility without knowing the truth, given the devastating effects this might have on their relationship and on any children they have, even if the father turns out to be the parent? Or should she steal some of her spouse's DNA, have the test, and then tell him if necessary? Perhaps DNA tests could be made legally compulsory at the time of birth. It is hard to see how any of these options would promote the welfare of the families involved.

Stanley Burnton J went on to say that he did not think:

that liability for deceit is an undesirable interference by the law in the domestic relations of a man and a woman. Actions for deceit between couples will in practice be commenced only when their relationship has broken down. An action for deceit will not cause the breakdown of the relationship: more likely the breakdown in the relationship will be the consequence of the fraud.<sup>58</sup>

It is hard to reconcile this with his view that deceit should be an aid to truthfulness between spouses. If liability in deceit provides an incentive to mothers to disclose infidelity it thereby interferes in the domestic relationship of the couple by jeopardising that very relationship.

Further, if spouses are to be generally liable in relation to lies surrounding conception, what of the cases where a parent (male or female, though more easily the latter) has lied about the use of contraception? Discussion of this topic has generally centred on whether child support obligations can be avoided on this basis. Given that they cannot, imagine the loss claimable by a parent who has relied on a lie as to contraception in engaging in intercourse and now has a child to support until they turn 18. One might argue that this parent could have taken their own precautions, and probably should have if they wanted to ensure they were not to become a parent. However, precisely the same argument applies in the *Magill* case — any parent who wants to ensure they do not support someone else's child could have an early DNA test.

Another issue is whether the present legal position is fair as between spouses. If wives are to be held accountable to their partners for their lies as to fidelity and paternity, why should husbands not be held to the same standards? Consider the male spouse who fathers a child to a woman other than his spouse. Even if a DNA test were carried out for that child, the female spouse would not necessarily know about it, let alone be able to force such a test.<sup>59</sup> (Perhaps our compulsory DNA test at birth could incorporate mandatory notice to any spouse of the father!). This situation is unlike that of the Mr Magills of this world, who both know of the child and can check the paternity of their children. And were a female spouse to find out her male

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<sup>58</sup> At [29].

<sup>59</sup> CSAA s 117.

partner was the father of someone else's child, would she be able to sue him for deceit, based on any loss she might have suffered as a result of this fact (for example, where he has provided support to the other child, which money could have instead benefited the female spouse and their children)? Perhaps the question has not arisen precisely because of the difficulties in establishing deceit in such a case. If the father mentions nothing to his wife of this other child, what representations has he made to her? How would this spouse both act to her detriment (for example by staying with the father) and suffer loss (given that she may well be worse off if she left)? And yet this case and *Magill* both involve lies about fidelity and paternity which have financial and emotional consequences for the families involved.

Moreover, although the child support legislation permits recovery of child support payments where paternity is later disestablished, parents who fail to receive appropriate levels of child support after separation due to the lies of the paying parents could not hope to be compensated for their losses even could they later prove the truth. Deceit would be unlikely to help them. Again, how would a parent receiving child support (or not as the case may be) be able to show they had acted to their financial detriment based on the lies of the paying parents? Showing they had struggled would not suffice. When child maintenance was handled through the family courts, there was even a reluctance to collect old arrears on the basis that the needs of the child had since been met. While the Child Support Agency now attempts to collect all arrears, however old, when a review of an assessment is sought, parents need to show special reasons why any change to an assessment should be backdated.<sup>60</sup> Proof of deceit might amount to a special case but in assessing what change if any ought to be made to a past assessment, the decision maker would have to go through the three step process set out in the CSAA for changing an assessment of child support and factor in the overall financial situation of all concerned including the capacity of the payer to meet any retrospective change to child support.<sup>61</sup> This puts payee parents — most of whom are women — at a severe legal disadvantage as compared to fathers challenging paternity,<sup>62</sup> whether via deceit or s 143 of the CSAA. One wonders why a lie like that of Mrs Magill — which may well have been intended to keep the family together — should be granted a legal advantage over a lie which might be designed to deprive a mother and child(ren) of child support to which they would otherwise have been entitled.

This leads us to the next question, which is why deceit should not apply to all lies spouses tell, not just those that involve the birth of a child. For example, many spouses would say that were they told of any infidelity by their spouse, they would end the relationship. No doubt partly because of this, many spouses lie about fidelity, or lie by omission. One can easily imagine a circumstance in which a parent could argue a compensable loss arising out of such a lie (including suffering emotionally from learning of the infidelity).

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60 Of course payers seeking retrospective changes for reasons other than disestablishing paternity face the same hurdles.

61 At [34].

62 D MacNamara, 'The Tort of Deceit and Family Law: Some Recent Developments' (2001) 9 *ISLR* 2-3. (<http://www.islr.ie/Reviews/2001/deceit.php>).

Indeed, given decisions like *Magill*, why are we not compensating would-be-mothers who have been lied to about their spouses' intentions as to fatherhood and thereby deprived of having children? Take Mrs Unlucky, a traditional woman with no shortage of suitors, who married in her early thirties. She made it very clear before her marriage that a key priority for her was having children and her husband-to-be said he shared this dream. After many years of trying Mrs Unlucky discovers that her spouse had a vasectomy before she even met him. The couple eventually separate, but the alarm on Mrs Unlucky's biological clock is sounding and her age is no advantage to repartnering. What loss has Mrs Unlucky suffered in missing out on motherhood?

The idea that deceit might be used more widely was obviously on the mind of Stanley Burnton J, when he said:

I suspect that the matrimonial legislation assumes that most spouses do not deceive each other in order to obtain the other's property; and that such fraud is in fact the exception and will not prove the rule. Be that as it may, the floodgates argument is not one which should prevent a remedy from being available in cases where it is needed.<sup>63</sup>

While it has been suggested that the floodgates will not be opened in any event due to the difficulties inherent in establishing deceit,<sup>64</sup> there is some irony in making this comment in a tortious context. For example, claims for both nervous shock and pure economic loss have seen their naturally broad applications constrained based in part on the fear of opening the litigation floodgates. However, we would argue that the concern about an action in deceit being generally available in this domestic context is not *how many* such cases will arise, but rather whether these are cases which *ought* to be resolved using rules designed primarily for commercial situations. Stanley Burnton J says a remedy is needed in this context. Even if that is true, the question is what remedy.

One very good reason why family laws are specially crafted and dispensed in specialist courts is that many cases involve children. Decisions such as *Magill* (which will always involve children) have the potential to cause even further harm to the children involved. A damages award in tort does not factor in the impact on the child of requiring the mother to make such a payment. We have no doubt Mr Magill suffered great emotional distress. But we suspect it wasn't all that easy for the children either. Naturally, the decision does not tell us much of the mother's financial situation, but an outcome requiring a mother to pay costs together with a compensation award could force that parent to sell their home. The children moreover see the person they no doubt psychologically consider to be their father in essence punishing their mother for her deception in a way that could seriously adversely affect them and which at its core must make them question their relationship with the man they see as their father.

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<sup>63</sup> *P v B*, above n 48 at [34]. That this statement seems to assume lies as to paternity within marriage are aimed at obtaining financial advantage may tell us more about this judge than it does about the appropriate operation of the tort of deceit. In any event, the motivation for a lie would seem to be a red herring in the context of deceit.

<sup>64</sup> See for example the discussion by MacNamara, above n 62, at pp 13–15.

Even if one ignored the impact of deceit as a remedy on the children involved, other problems present themselves in relying on tort to recover damages in such situations. As was acknowledged in *Magill* and *P v B*, these (and analogous) cases pose extremely difficult questions when one is trying to assess damages. Take a male spouse who discovers, after years raising — with this wife — his only child, that he is not the biological father. Imagine he is having ongoing contact with the child in question due to the parental bond existing between them and that the biological father is not playing any role in the child's life. Let us call this man Mr Lucky. Due to the mother's deceit, Mr Lucky has been given the opportunity to be a father, which relationship, with all its attendant benefits, might last a lifetime. Had the mother disclosed the truth about the child's paternity from the start, Mr Lucky might well have chosen to end the relationship. Would he have been better off if he had? Did Mr Lucky really act to his detriment in taking on this parental role, whatever the circumstances? From a damages perspective, how can one balance the benefits he derived from his support of his wife and this child against the costs he incurred in that support?

These questions might, for some, resonate with the issues discussed by the High Court in the case of *Cattanach v Melchior*.<sup>65</sup> That case involved an action in negligence against a doctor for a failed sterilisation procedure that resulted in the birth of a child to the female patient. By a four to three majority, the High Court upheld the trial Judge's decision to award the parents damages compensating for the cost of raising the child. A central issue in *Cattanach* was whether the birth of a healthy child should be the subject of a damages award. Considerable time was spent by the Court considering the public policy issues inherent in such cases. Ultimately, the majority thought that damages should be available to the parents, which is to say that public policy did not militate against liability. However, there are stark differences between *Cattanach* and cases like *Magill*. First, the negligence in *Cattanach* arose in the context of a commercial, arms length transaction — one between a professional doctor and his patient. Second, and because of that relationship, the defendant in *Cattanach* was insured against negligence. Third, the decision in *Cattanach* does not interfere unreasonably or in a discriminatory way with family life, rather it upholds the decisions that the Melchior family had made and supported them in being able to continue as a family. Finally, if the defendant in *Cattanach* had not acted negligently, there would have been no question of the parents incurring the costs of raising another child — there would not have been a child. Conversely, it is not a given that if a mother were immediately to disclose doubt as to paternity, her spouse would cease to provide any further support for her or the child in question. Thus, while both cases involve considerations as to the benefits gained from parenting as compared to the costs involved, the context of the cases is entirely different — and context is everything when considering an issue from a public policy perspective.

Although it may be true to say, as was emphasised in *Magill*, that there is no technical legal barrier to applying deceit to spousal lies, when one starts to tease out what this would really mean the difficulties with allowing this

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65 Above n 45.

remedy become all too obvious. In particular, decision makers are faced with nearly impossible tasks when determining reliance and assessing damages and issues of public policy loom large. It seems extraordinary that an issue of such obvious complexity was treated by the Court of Appeal as one that involved no matters of principle worthy of considered discussion. One has to wonder, however, whether the highly technical loophole relied upon in overturning the original decision provided their Honours with a convenient mechanism for avoiding this rather hot topic.

### Conclusion

No one would disagree that honesty is a positive attribute of *any* relationship. It is also fair to say that the law of tort can be a useful tool in encouraging socially responsible behaviour. We would argue, however, that these are not sufficient reasons for allowing deceit as a cause of action in cases of paternity fraud. Just as in many other areas of family law, special considerations apply which demand a remedy — if that is what is wanted — crafted to take account of the overall situation of the family. To do otherwise is not only to privilege some domestic lies over others, but also to ignore the complexities inherent in addressing the concerns raised by parents such as Mr Magill.

It might be argued that it is arbitrary to allow some torts to operate within marriage — such as assault and battery — and to disallow the operation of others. However, tort law itself has long recognised that depending on the context, some situations might be appropriate for the operation of a tort and others not. We have argued in this casenote that there are good reasons why deceit is not an appropriate remedy for lies as to fidelity within families. Very different arguments may apply in other contexts, and sound arguments have been advanced, for example, for allowing the operation of assault and battery within the domestic sphere. If judges are not prepared to discuss the policy issues, as was done at length in *Cattanach* for example, then legislative intervention will be required. Given the heated environment in which this debate is taking place, the sooner the better.