Case Note

Sex, lies and money: The High Court considers deceit and paternity fraud in *Magill v Magill*

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As in other jurisdictions, Australia has recently witnessed a novel action in deceit seeking damages for paternity fraud. Policy issues were not discussed until the matter reached the High Court, where all their Honours held that the plaintiff had not made out his case and a majority held that an action in deceit was not open in these circumstances in any event. Thus, the failure by a wife to disclose to her husband doubts she has as to the paternity of their children cannot now be the subject of an action in deceit. This note explores the varying reasons given by the majority and the limits of the decision. The note argues that, despite widespread criticism of the decision, including by members of the government, the position of the majority is justified and to be preferred to that of those judges who would allow an action on other facts.

Introduction

From kitchen tables to workplace corridors to talkback radio, everyone has been discussing the merits of the High Court's recent decision in *Magill v Magill*.[1] A man marries, has three children with his wife, only to discover after separation that the younger two were fathered by his wife's lover. The man sues his wife in deceit, but loses. The intuitive reaction, strongly put by Liberal backbenchers,[2] is to assume this is further evidence that the High Court has lost touch with community values. How could such a heinous lie by this woman not resound in damages for deceit?

Mr and Mrs Magill married in 1988. In the first four years of their marriage Mrs Magill gave birth to three children. In November 1992, a year after the birth of the last child, the couple separated. Mrs Magill applied for child support for all the children. While helping Mrs Magill through a period of illness, Mr Magill came to read Mrs Magill's diary, where she mentioned concerns about the paternity of their second child. After being confronted with this in August 1995, Mrs Magill disclosed that she had begun sleeping with another man just five months after the birth of their first child.[3] Her evidence was that she had unprotected sex with this man every few weeks until

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1 (2006) 231 ALR 277.

2 See media reports of the responses of Alby Schultz and Sophie Mirabella, eg, P Karvela, 'Push for fathers' right to DNA test', *The Australian*, 16 November 2006.

3 (2006) 231 ALR 277 at [65]–[66].

mid-1990, with the frequency declining after her second child was born.[4] In April 2000 DNA tests were conducted and in September of that year court orders ended Mr Magill's child support liability for the younger two children.

Mr Magill resolved the question of the overpayment of child support relatively easily, though judging by his recent unsuccessful attempt to sue the Child Support Agency for negligence and abuse of statutory power in relation to other matters,[5] it would seem he is not at ease generally with his treatment by that agency. The Child Support (Assessment) Act 1989 (Cth) s 143 allows payers of child support to apply for recovery of support from a payee where it is later established that no liability existed. Disestablishing paternity thus triggers a claim for repayment, though subs 143(3) makes it clear that the court's power is discretionary.[6] In Mr Magill's case, past child support assessments were changed so that his only liability was in respect of his biological child. However, because Mr Magill had fallen behind with his child support payments over two years, the net effect of the adjustment was merely to reduce his child support arrears.[7]

Mr Magill began his legal campaign against Mrs Magill in January 2001. He sued in deceit seeking damages of various kinds. Mr Magill claimed that his wife's fraudulent misrepresentations had caused him to suffer anxiety and depression. He further claimed that he had suffered economic loss, both in lost income caused by his psychological problems and in the time spent with, and money expended on, his wife and the two younger children prior to separation. Finally, he sought exemplary damages. The trial judge held that the tort of deceit applied in this case and awarded Mr Magill $70,000: '$30,000 for general pain and suffering; $35,000 for past economic loss; and $5,000 for future economic loss'.[8] Mrs Magill appealed successfully, the Court of Appeal of the Supreme Court of Victoria holding that Mr Magill had not made out the elements of the tort of deceit, in particular that of reliance by Mr Magill on Mrs Magill's representations.[9]

Legal issues in the High Court

Although this is the first Australian case of its kind, in both lower court decisions the application of deceit to the facts at hand was accepted with little question. When Mr Magill appealed to the High Court, Mrs Magill put the issue squarely at the forefront, in submitting that the 'Court of Appeal erred in concluding that the tort of deceit extended to claims for damages arising from false representations as to the paternity of children conceived and born during the course of a marriage'.[10] As it turns out, the narrow framing of this claim found particular favour with the High Court.

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4 Ibid, at [5].

5 *Magill v Commonwealth of Australia* [2006] VCC 1395 (unreported, Judge Anderson, 31 October 2006, CI0501722).

6 For further discussion of the use of that section, see L Young and S Shaw, '*Magill v Magill*: Families and Deceit' (2005) 19 *AJFL* 44 at 45.

7 (2006) 231 ALR 277 at [67].

8 Ibid, at [62].

9 *Magill v Magill* (2005) 33 Fam LR 193; Aust Torts Reports 81-783. For a discussion of this decision see Young and Shaw, above n 6.

10 (2006) 231 ALR 277 at [84].

The High Court's decision to reject Mr Magill's appeal was unanimous, though the reasoning on various points differed to some extent. All six judges agreed that the elements of the tort of deceit are difficult to establish in cases such as this, and all held that the tort was not made out by Mr Magill. Deceit requires the plaintiff to establish the following: a false representation made by the defendant knowingly or recklessly, with the intention that the plaintiff will act on this representation and the plaintiff must in fact have relied on this inducement in acting so as to suffer loss.[11] Where a couple are married, or in a de facto marriage, and a situation such as the Magills' arises, unless the putative father has some doubts and directly questions paternity, it may often be hard to pinpoint direct representations on the issue. Although Mr Magill pleaded various written, oral and implied representations, the Court of Appeal had held that the only representations relied upon by the trial judge were the birth registration forms.[12] As in the Court of Appeal, not all the High Court justices accepted that Mrs Magill's presentation of these forms to her husband for his signature amounted to a direct representation as to paternity[13] and all acknowledged the deceit lay rather in the failure by Mrs Magill to disclose her sexual infidelity.

The question thus arose as to whether Mrs Magill's silence on this matter could suffice for a misrepresentation, that is, whether there was a duty of disclosure. As Gleeson CJ noted:

> [u]nderlying the legal remedy for deceit there is a duty of honesty . . . [However] the ethical content of the duty is never measured without regard to the context in which a party acts, and community standards do not require the imposition of legal consequences regardless of such context.[14]

None of their Honours held that a spouse has a legal or equitable obligation to disclose sexual infidelity,[15] with Gummow, Kirby and Crennan JJ in a joint judgment referring to a legal 'mantle of privacy over such conduct'.[16] This issue was given some prominence in the decision,[17] which is hardly surprising as allowing the operation of the tort in these circumstances would effectively compel disclosure of all (hetero)sexual infidelity, where there is even the smallest of doubts as to paternity.

A defendant must also be shown to have made the false statement knowingly or recklessly and to have intended to induce the defendant to act on that representation. These elements may present their own evidentiary difficulties. Since cases will only arise where the husband could also be the father, it is inevitable the mother will be in some doubt as to paternity.[18]

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11 See the 'uncontroversial modern statement of the elements' in A M Dugdale and M A Jones (Gen Eds), *Clerk & Lindsell on Torts*, 19th ed, Sweet & Maxwell, London, 2005, at [18-01], cited ibid, at [59] by Gummow, Kirby and Crennan JJ.

12 (2005) 33 Fam LR 193; Aust Torts Reports 81-783 at [17].

13 See (2006) 231 ALR 277 at [43] per Gleeson CJ, [148] per Hayne J.

14 Ibid, at [48].

15 Even Heydon J, who emphasised the broad obligation of honesty created by the tort of deceit, did not go this far: see ibid, at [213].

16 Ibid, at [130].

17 In particular, see ibid, at [156]–[158] per Hayne J.

18 For discussion of motivations for silence, see L Turney, 'Paternity Secrets: Why Women Don't Tell' (2005) 11 *J of Family Studies* 227.

Although Mrs Magill's fraudulent intent was not seriously challenged, Gleeson CJ found the evidence on Mrs Magill's state of mind unconvincing.[19] Mrs Magill's evidence was that her suspicions were raised when she saw a photo of her lover as a child, and her diary entries referred only to her *fears* as to paternity. Moreover, her concerns were related only to the second child; she maintained she believed that Mr Magill was the father of the last child. Further, whatever the mother's state of belief as to paternity, her actions of concealment may have been 'impelled by a congery [sic] of motives . . . [including] the welfare and status of . . . any children . . . a desire to avoid an irretrievable breakdown of the marriage . . . the avoidance of grief and distress . . . and avoiding the wife's own humiliation'.[20]

The real stumbling block in Mr Magill's case, however, was reliance; he had to show he relied on the alleged misrepresentations (the birth registration documents) in acting as he did. But Mr Magill's evidence as to why he thought he was the father of the children and why he supported them did not advance his cause and would be typical of these cases. He was married to their mother, attended their births and just assumed they were all his children; he had no reason not to think so.[21] For both the Court of Appeal and the High Court this did not prove reliance on the registration forms.

Finally, Mr Magill needed to characterise and quantify the damages he sought and show a causal link between the deceit and the claimed damage. It appears there was little clarification as to precisely how the pecuniary losses claimed were quantified.[22] As for the causal link, Gleeson CJ found the evidence did not establish that the psychiatric injury flowed directly from Mr Magill altering his position in reliance on a misrepresentation.[23] Heydon J applauded the fact that counsel did not direct much attention to this issue, as he considered the case 'an entirely unsatisfactory vehicle for deciding what heads of damage may be recovered'.[24]

Even though Mr Magill did not make out his case, all their Honours addressed the wife's question as to the general application of deceit to paternity fraud. As noted above, the wife made her claim in very limited terms, referring only to the paternity of children conceived and born within marriage. Their Honours limited their holdings to this point, so that this decision does not bar an action in deceit by a man against a mother where they have not cohabited. In any event, in such cases the financial consequences are more likely to be by way of payment of child support, which as we have seen can be adjusted. It would be possible for support to be paid without the involvement of child support or court-ordered maintenance, in which case it would seem that an action in deceit might be the only avenue for recovery. More interesting, however, is the application of this decision to de facto marriages and this is considered below.

The members of the High Court were in less agreement on the wife's submission that deceit could not lie in this case, though all rejected her related

19 (2006) 231 ALR 277 at [44].
20 Ibid, at [132] per Gummow, Kirby and Crennan JJ.
21 Ibid, at [10] per Gleeson CJ, [168] per Heydon J.
22 See ibid, at [46] per Gleeson CJ.
23 Ibid.
24 Ibid, at [167] n 160.

submissions as to the Family Law Act 1975 (Cth) ss 119 and 120.[25] Those sections abolish spousal immunity in tort and actions for, among other things, damages for adultery. The wife relied on these sections in support of her main claim that the tort of deceit was not available as between the parties to a marriage and the Commonwealth Attorney-General intervened opposing the wife's position. Short shrift was made of the argument that the abolition of spousal immunity in tort effected by s 119 was not intended to cover this situation as it would not have been in the contemplation of the drafters and so s 119 should be read down in this regard. Their Honours held that the import of s 119 was perfectly clear,[26] with Gummow, Kirby and Crennan JJ noting the mere fact that there was no immunity from deceit actions between spouses did not determine that one must be available.[27] The wife's central case in relation to s 120 was that to allow actions for deceit in cases such as this would be in effect to allow the awarding of damages for adultery. All their Honours accepted the position of the husband and the Attorney-General that s 120 was aimed at abolishing old causes of action and did not preclude the current action.[28] However, Gummow, Kirby and Crennan JJ thought that the terms of s 120 supported the general argument that allowing deceit here was inconsistent with the 'overall thrust, theoretical basis, and general legislative purpose' of modern Australian family law legislation.[29]

As to the main point, the joint judgment accepted the wife's submission on the non-application of deceit to paternity fraud between married couples, Gleeson CJ and Hayne J held that in this case the tort of deceit was not applicable, but might arise in other factual situations, and Heydon J alone held that there was no bar to the use of deceit in intimate relationships. The joint judgment propounded two reasons why the wife's submission should be accepted. First, their Honours held that the common law should not 'proceed on a divergent course' from that of the statutory scheme laid down in the Commonwealth family and child support laws.[30] These laws eschew any inquiry into fault, provide machinery for paternity testing and allow recovery of child support and child maintenance where paternity is disestablished after separation.[31] In relation to the latter point, their Honours noted that the legislature had in effect covered the field in respect of the question of 'economic loss caused by a wife to a husband, after the breakdown of their marriage, in circumstances such as those arising here'.[32] Secondly, they held that the tort of deceit — founded as it was on notions of bargaining transactions — was not an appropriate vehicle for assessing 'conduct which constitutes a breach of promise of sexual fidelity and any consequential false representation about paternity, occurring within a continuing sexual

25 For a summary of those submissions, see ibid, at [174]–[178] per Heydon J.
26 Ibid, at [26]–[28] per Gleeson CJ, [95] per Gummow, Kirby and Crennan JJ, [137] per Hayne J, [180] per Heydon J.
27 Ibid, at [95].
28 Ibid, at [29] per Gleeson CJ, [102] per Gummow, Kirby and Crennan JJ, [137] per Hayne J, [181]–[185] per Heydon J.
29 Ibid, at [102].
30 Ibid, at [87].
31 Note the provision, similar to the Child Support (Assessment) Act 1989 (Cth) s 143, for recovery of child maintenance in the Family Law Act 1975 (Cth) s 66X.
32 (2006) 231 ALR 277 at [110].

relationship, which is personal, private and intimate'.[33] While their Honours accepted the husband's contention that deceit involved a 'perfectly general principle', they considered it would be rare for it to apply outside a commercial setting and to involve mainly pecuniary loss.[34]

Gleeson CJ was somewhat less direct. He was clear that deceit could apply between married couples and did not accept there were 'rigidly defined zones of exclusion'. However, he considered that this particular situation was an 'unsuitable environment' in which to 'construct legal rights and obligations'. In reaching this conclusion he noted that a finding otherwise may be inconsistent with public policy (he referred to the no-fault family law scheme) and 'with the subjective contemplation of the parties'.[35] This latter point resonates with the thrust of Hayne J's reasoning, which centred on an analogy with the legal treatment of family contracts. Mr Magill needed to establish that the parties intended legal consequences to flow from their representations. Only in those limited cases would deceit apply within a family. His Honour noted, however, that representations as to medical matters did not fall in the same category, for example misrepresentations about transmissible diseases.[36] The interesting aspect to this approach is that it allows for a more nuanced way of determining when deceit will apply in domestic situations. Many of the anomalies cited by Heydon J, which helped lead him to the opposite conclusion on the more general question to that of the majority, might well be addressed by this principle. Further, it fits well with the long standing Australian tradition of not allowing fraudulent misrepresentation to vitiate consent to marry. Saying 'yes' to marrying the person standing at the altar is intended by the parties to create legal consequences, but what is promised leading up to that point is not, so that the marriage cannot be avoided on that basis, no matter how gross the misrepresentation.

Heydon J alone had few qualms about the general application of deceit in paternity fraud cases. Noting that tort actions are generally available to spouses (eg, motor vehicle negligence claims, assault and battery),[37] his Honour thought that good reason was needed to create an anomaly for deceit. He perceived no such good reason. His Honour referred to early authoritative judicial statements characterising this tort as reflecting the view that 'honesty . . . [is] a duty of universal obligation'[38] and pointed out that these statements admitted of no exceptions. Against this background, Heydon J said that each of the wife's submissions on the point failed.[39] However, as his Honour noted, there was no possibility at the time those statements were made of spouses suing each other in tort.[40] It is difficult to accept that these early statements were intended to encompass situations that were legally outside the operation of the tort — there was no need to draw an exemption for matters already exempted. Spouses were already treated differently. If judges in those days

33 Ibid, at [88].
34 Ibid, at [117].
35 Ibid, at [49].
36 Ibid, at [140].
37 Ibid, at [197].
38 *Nocton v Lord Ashburton* [1914] AC 932 at 954 per Viscount Haldane LC.
39 (2006) 231 ALR 277 at [207]–[208].
40 Ibid, at [207].

had turned their minds to the current issue, the fact of the spousal immunity surely makes it more likely they would have adopted a different approach to married couples. Thus, it is submitted that this alone is a questionable basis for refusing the various arguments as to the proper application of the tort, particularly bearing in mind the incremental nature of the development of tort law, which is often much influenced by current standards and public policy.

In dealing with the wife's submissions as to the harm of allowing the operation of deceit here, Heydon J picked up on a point made in the only English decision[41] on the matter, to the effect that it is the wife's affair and subsequent lies which cause the damage, not allowing the husband to sue. However, this ignores the 'obligation of honesty' his Honour said the tort demands — regardless of the possible consequences the wife would have to disclose her affair if there were *any* doubt whatsoever as to paternity. His Honour assumed no damage because he assumed that these families are already under threat. But that may not be the case, such as where the wife has a single extra-marital sexual encounter or perhaps is raped. Allowing the operation of deceit may neither decrease extra-marital sex nor increase disclosure rates. However, if the parties do end up separating it would present another opportunity for families to head to court, though in an environment not sensitive to the special relationship of family members. At a time when the federal government is working especially hard to keep separated parents out of court, it is hard to see the benefits (to anyone) of allowing families such as the Magills to go down this road. Heydon J provided a long list of factual situations involving paternity fraud where he considered deceit would lie, ranging from lies to induce marriage to lies inducing grandparents to contribute to a child's education.[42] By analogy, his Honour argued, these examples brought in the Magill situation; they are, however, a sad indicator of where litigation of this kind might lead (and a number of the scenarios could be dealt with under existing provisions in any event).

The inappropriateness of deceit as a remedy in this case is further highlighted by Heydon J's response to the wife's submissions on damages. His Honour said that cases such as *Cattanach v Melchior*[43] (in which damages were awarded for the cost of raising a healthy child against a doctor who had failed to warn that a sterilisation might be ineffective) have ended arguments focusing on the negative effects of decisions on children as a bar to bringing tort actions. That case involved a patient suing a doctor for negligence in advising in relation to a medical procedure; here Mr Magill was suing the mother of his child in respect of their half-siblings. The very inability in tort to consider the impact of this decision on the wider family is arguably good reason for not allowing the action to proceed.

As mentioned above, the High Court's decision was limited to married couples. However, some obiter comments were made about its application to other relationships. Hayne J made it clear his decision was not intended to preclude the same outcome in 'other domestic relationships'[44] and Gummow,

41 *P v B* [2001] 1 FLR 1041 at 1047 per Stanley Burnton J.
42 (2006) 231 ALR 277 at [222]–[228].
43 (2003) 215 CLR 1; 199 ALR 131.
44 *Magill v Magill* (2006) 231 ALR 277 at [165].

Kirby and Crennan JJ noted that their general principle 'would appear to apply to other relationships such as "long term and publicly declared relationships short of marriage"'.[45] This conclusion fits well with their two reasons for accepting the wife's submissions, which easily translate to a de facto marriage situation. It is to be expected therefore that a similar bar to deceit actions for paternity fraud would be applied to de facto couples. Not surprisingly, Heydon J in part justified his own decision on the potential for expansion of the scope of the majority's holding to create 'innumerable injustices'.[46]

Conclusion

This decision of the High Court is to be welcomed. Public debate on the matter has not addressed the complex legal consequences of opening this Pandora's Box. Many lies between intimate partners can have financial consequences[47] and thoughtful consideration must be given to the circumstances in which legal remedies are to be provided. Special family laws have developed for the precise reason that different considerations apply to domestic relations and the scope of these special rules continues to expand to encompass the various possible family and intimate domestic arrangements. In this light, it is disappointing to see the reaction of government backbenchers in castigating the High Court over this decision and proposing legislative amendments in response. As it happens, the suggestion now being considered by the Prime Minister (that fathers have an automatic right to a DNA test) would not have helped Mr Magill, as this route will only be chosen where there is a suspicion as to paternity. Where such suspicions exist, it is inaccurate to suggest that parents cannot presently resolve the issue of paternity. There is no legal impediment to a parent having a DNA test conducted on their child without the knowledge or consent of the other parent.[48] The problem lies with the admissibility of the results of the test in any later family law proceedings.[49] However, once the result of the test is known, this invariably becomes a non-issue.

Another disappointing feature of the government's response is that their concern is focused on women who lie about sexual fidelity and not their male counterparts. For every case of disestablished paternity, there is another man involved. Of course, the consequences of extra-marital sex are more easily discovered where women are concerned. For married men, the fact that they have fathered a child to another woman, and perhaps have to provide support for it, may cause damage of its own brand to their partner, including financial loss and emotional distress. Thus, had the High Court allowed the use of deceit in such cases, it may have created a law which appeared to apply equally to lies by both sexes, but in reality provided a remedy only for men. In any event, as the majority of the High Court has sensibly and clearly stated, such actions are not available.

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45 Ibid, at [133].
46 Ibid, at [230].
47 See some of the examples set out in Young and Shaw, above n 6, at 52–5.
48 For a discussion of this practice, see M Gilding, 'DNA paternity testing without the knowledge or consent of the mother: New technology, new choices, new debates' (2004) 68 *Family Matters* 68.
49 See Family Law Act 1975 (Cth) s 69ZC and Family Law Regulations 1984 (Cth) Pt IIA.