HIGH COURT OF AUSTRALIA

GLEESON CJ
GUMMOW, KIRBY, HAYNE, HEYDON AND CRENNAN JJ

LIAM NEAL MAGILL APPELLANT

AND

MEREDITH JANE MAGILL RESPONDENT

Magill v Magill
[2006] HCA 51
9 November 2006
M152/2005

ORDER

Appeal dismissed with costs.

On appeal from the Supreme Court of Victoria

Representation

N Lucarelli QC with J C Paterson for the appellant (instructed by Vivien Mavropoulos & Associates)

H M Symon SC with A J Palmer for the respondent (instructed by Clayton Utz Lawyers)

D M J Bennett QC, Solicitor-General of the Commonwealth with R M Doyle intervening on behalf of the Attorney-General of the Commonwealth (instructed by Australian Government Solicitor)

CATCHWORDS

Magill v Magill

Tort – Deceit – Paternity – Whether tort of deceit can be applied in marital context in relation to false representations of paternity − Where false representations were made by wife in course of marriage concerning paternity of children born during marriage − Where birth notification forms completed by wife represented husband to be father − Where DNA testing after marriage ended revealed two children of the marriage were not the biological children of the husband − Where husband claimed damages in deceit for loss of earnings, loss of use of moneys, personal injury and pain and suffering − Relevance of history of tort of deceit − Relevance of abolition of inter-spousal immunity in tort by *Family Law Act* 1975 (Cth) − Relevance of statutory scheme intended to minimise role of fault in determining legal rights and liabilities following breakdown of marriages − Relevance of statutory regime under *Family Law Act* 1975 (Cth) for repayment of moneys wrongly paid for child support − Relevance of public policy considerations.

Statute − Statutory construction − *Family Law Act* 1975 (Cth) − Whether tort of deceit is excluded from applying between spouses by the *Family Law Act* 1975 (Cth) − Whether ss 119 and 120 of the *Family Law Act* 1975 (Cth) expressly or impliedly preclude an action for deceit by a husband in respect of false representations made by the wife during the subsistence of the marriage as to the paternity of children of the marriage.

Words and phrases – "deceit", "inter-spousal immunity", "paternity fraud".

Child Support (Assessment) Act 1989 (Cth), ss 107, 143.
Family Law Act 1975 (Cth), ss 43, 48, 51, 66X, 69P-69X, 119, 120.
Matrimonial Causes Act 1959 (Cth), ss 21, 28, 44, 98.

1 GLEESON CJ. The appellant and the respondent married in April 1988. They separated in November 1992. The marriage was dissolved in February 1998. Between 1988 and 1992, the respondent gave birth to three children: a son born in April 1989, another son born in July 1990, and a daughter born in November 1991. After the separation, following an application by the respondent, the appellant made payments under the *Child Support (Assessment) Act* 1989 (Cth) in respect of all three children. Such payments continued, although not without interruption, until late 1999. In April 2000, by DNA testing, it was established that the appellant was not the father of either the second child or the third child. Pursuant to s 143 of the *Child Support (Assessment) Act*, the appellant became entitled to an adjustment of child support payments to allow for past over-payments, and an extinguishment of arrears. The relevant statutory provisions operated of their own force to deal with the matter of child support liability and payments, and that matter was not the subject of the litigation with which this appeal is concerned.

2 In January 2001, the appellant commenced proceedings against the respondent in the County Court of Victoria. The cause of action sued upon was the tort of deceit. The damages claimed were of two kinds. First, the appellant alleged that he had suffered personal injury, in the form of anxiety and depression, in consequence of the respondent's fraudulent misrepresentations. Secondly, he claimed financial loss, including loss of earning capacity by reason of his mental or psychological problems, and loss related to the time he had spent with, and money he had spent on, the children under the mistaken belief that he was their father. He also claimed exemplary damages. The appellant succeeded at trial, and was awarded damages of $70,000. This did not include any amount by way of exemplary damages. The decision of the trial judge was reversed by the Court of Appeal of the Supreme Court of Victoria (Ormiston, Callaway and Eames JJA) on the ground that the appellant had failed to establish the essential elements of the tort of deceit[1]. The appellant now appeals to this Court, seeking the restoration of the original award of damages.

3 By notice of contention, the respondent argues that the action was misconceived, and that even if, contrary to the opinion of the Court of Appeal, all elements of the common law tort of deceit otherwise had been made out, nevertheless the remedy pursued by the appellant was not available for the following reasons:

1. Section 119 of the *Family Law Act* 1975 (Cth), which permits one party to a marriage to sue the other in tort, does not apply to the tort of deceit or, alternatively, s 120 of that Act precludes an action for deceit based on a false representation of paternity.

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1 [2005] Aust Torts Reports ¶81-783; (2005) 33 Fam LR 193.

2. The tort of deceit does not extend to claims for damages arising from misrepresentations as to the paternity of children conceived and born during the course of a marriage.

4 For the reasons that follow, I consider that proposition 1 is without substance. Proposition 2 should not be accepted, although the scope for the operation of the tort of deceit in the case of communications within the context of a marital relationship is influenced, and often limited, by that context.

The appellant's claim and the award of damages

5 At the trial, it was common ground that the father of the respondent's second and third children was a man with whom she had commenced a sexual association in September 1989 (that is, about 17 months after her marriage, and about five months after the birth of her first child). According to the respondent's evidence, she had sexual intercourse with that man once every two or three weeks until mid-1990, and less frequently after the birth of her second child. Her evidence was that when she became pregnant with her second child, she believed it was possible that this other man was the father, although when she became pregnant with the third child she believed her husband was the father. In August 1995, almost three years after their separation, the appellant learned that the respondent at least suspected that the second child was not his child. It was not until April 2000 that DNA tests confirmed that the appellant was not the father of either the second or the third child. It was then that the necessary adjustments were made in respect of past and future child support payments.

6 In September 1999, the appellant sought treatment from a psychiatrist, Dr Chong. According to the psychiatrist, the appellant presented with severe depression, from which he had been suffering for a number of months. In a report written in June 2002, Dr Chong said:

> "Mr Magill told me that his depression and anxiety state [sic] started in the setting of on-going stress from the Family Court regarding 'child support', financial difficulty and unreasonable demand [sic] from his ex-wife. He was so stressed by the 'child support agency' that he has had persistent nightmares about them threatening and harassing him. His depression and the accompanied [sic] panic and anxiety symptoms became worse when he found out with DNA testing ... that 2 of his 3 children were not fathered by him. This knowledge had devastated Mr Magill, causing him a lot of emotional turmoil."

7 Without doubt, the appellant's wife deceived him, but the hurtful deception was in her infidelity, not in her failure to admit it. The devastation he mentioned resulted from his knowledge of the truth when finally it was made known to him. That knowledge, in turn, came to him at a time when he was already distressed by the consequences of the breakdown of his marriage.

8 When the appellant's lawyers sought to express his complaints in legal form, in terms of the tort of deceit, they made the following allegations. (The original complaints made some references to the issue of child support, but at the trial these were agreed to be immaterial.) In late 1989, the respondent represented to the appellant that he was the father of the second child. In early 1991, the respondent represented to the appellant that he was the father of the third child. Both representations were false. On the faith of the representations the appellant believed he was the father, and altered his position to his detriment. The representations were made fraudulently, with the respondent either knowing they were false or recklessly not caring whether they were true or false. At the time of the representations the respondent intended the appellant to rely on them. As a result of the representations the appellant suffered loss and damage. The damage included severe anxiety and depression and loss of earnings.

9 At the trial, much attention was given to the need to particularise and prove the representations on which the appellant sued. This exposed a difficulty in fitting the case into the mould of the common law tort of deceit. From one point of view, the appellant's claim that he was misled about the paternity of the children may have appeared easy to establish. The problem was to identify a representation by the wife. It may be inferred that, while the parties were living together, and at least for a time thereafter, the respondent, by her conduct, would have said and done things many times, and in many different ways, that reinforced the appellant's assumption that he was the father of all three children. In circumstances where he obviously believed he was the father, and accepted the responsibilities of fatherhood, her silence would have contributed to his belief. Yet, in the absence of a legal or equitable obligation to tell the truth, silence of itself does not amount to misrepresentation[2]. The trial judge would have appreciated that a finding of a legal or equitable duty in the respondent to disclose her infidelity would take him into deep waters. He made no such finding. He put his conclusion as to the representations of paternity upon a very narrow basis. Soon after the birth of each of the second child and the third child, the respondent signed, and gave to the appellant to sign, a form of Notification of Birth addressed to the Registrar of Births, Deaths and Marriages. The forms described the appellant as the father and the respondent as the mother. This conduct of the respondent was found to constitute, in each case, the representation by the respondent to the appellant that he was the father of the child. That, in turn, had consequences for the approach that was taken to the issues of inducement, and damage.

10 When the appellant was asked in evidence why he believed he was the father of the two children, he made no reference to the birth notification forms, or to any other specific words or conduct of his wife. He said:

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2 *Kerr on Fraud and Mistake*, 7th ed (1952) at 50-51.

> "Well, I had no reason not to believe [that I was the father]. I watched all three of the children born. I was present at the hospital when all three children were born ... and I had no reason to believe that any of [the] children weren't mine."

11 Having found that the representations were made, the judge noted that it was not in dispute that they were false. This was established by the DNA testing.

12 As to the respondent's state of mind concerning the representations, the trial judge found:

> "I am of the view that the evidence points very strongly in favour of the conclusion that she did know that her husband was not the father of either of the children. Certainly at the very least, in my view, it pointed to the conclusion that when she filled in these forms, if she did not know for a positive fact that Mr Magill was not the father, she at least was being reckless as to the truth of her assertion, that he was and had no genuine belief in it. She intended Mr Magill to rely upon it, as indeed he did, in consenting to the naming of the children Magill."

13 After referring to the medical evidence, the trial judge summed up his conclusion as to the appellant's condition as follows:

> "The opinions seem to me of the three doctors to be fairly close together. They express themselves in different ways, and I think the easiest for a layman to understand is probably Dr Kornan's assessment of the situation, which is that the marriage break up itself on any view of it would be an extremely disturbing thing to befall anybody. And the situation [is] simply made worse when he discovers the truth about the paternity of the children, and discovers that he has been misled over the period of years as to his paternity."

14 That description of the appellant's harm, which accords with the way he himself expressed his health problems to Dr Chong, amounts to the proposition that the distress he suffered from the breakdown of his marriage and the subsequent disputes with his wife was exacerbated by the discovery that he had been misled about the paternity of two of the children.

15 The basis of the appellant's claim to have suffered economic harm, apart from the presently irrelevant matter of the overpayments of child support, is not clear, either from the record of the trial or the reasons of the trial judge. The claim appears to have included consequential loss flowing from the disability that resulted from the appellant's depression and anxiety, such as some modest loss of earning capacity. There was also an attempt to quantify "expenses involved in supporting the two children" and a claim for "compensation for time off work attending to them at birth". The trial judge was unconvinced by the attempts to quantify these claims, but considered the appellant was entitled to something.

The appellant was awarded $30,000 "by way of general damages for pain and suffering, [and] loss of enjoyment of life, past, present and future", $35,000 for past economic loss, and $5,000 for future economic loss. The judgment was for $70,000.

The tort of deceit

16 In *Donoghue v Stevenson*[3] Lord Atkin said that "acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief". Various control mechanisms are adopted by the common law to "limit the range of complainants and the extent of their remedy"[4]. The most obvious example is the requirement, in the case of the tort of negligence, of a duty of care.

17 The tort of deceit provides a legal remedy for harm suffered in consequence of dishonesty, but, as Viscount Haldane explained in *Nocton v Lord Ashburton*[5], the concept of "fraud" is wider in some legal contexts than in others. He said[6]:

> "*Derry v Peek* simply illustrates the principle that honesty in the stricter sense is by our law a duty of universal obligation. This obligation exists independently of contract or of special obligation. *If a man intervenes in the affairs of another* he must do so honestly, whatever be the character of that intervention. If he does so fraudulently and through that fraud damage arises, he is liable to make good the damage. A common form of dishonesty is a false representation fraudulently made, and it was laid down that it was fraudulently made if the defendant made it knowing it to be false, or recklessly, neither knowing nor caring whether it was false or true. That is fraud in the strict sense." (emphasis added)

18 His Lordship's reference to intervening in the affairs of another, and through fraud, causing damage, reflects the business context in which the action on the case for deceit emerged, and in which it had, and still has, a natural place. The elements of the tort fit comfortably into such a setting. *Pasley v Freeman*[7], in 1789, was an action by a plaintiff who was induced to extend credit to an

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3 [1932] AC 562 at 580.

4 [1932] AC 562 at 580 per Lord Atkin.

5 [1914] AC 932 at 950-955.

6 [1914] AC 932 at 954.

7 (1789) 3 TR 51 [100 ER 450].

insolvent third party on the faith of the defendant's fraudulent representation that the third party was a person of financial substance. The action succeeded even though there was no contract of suretyship. It was the combination of fraud and damage that entitled the plaintiff to sue. In 1837, in *Langridge v Levy*[8], Parke B said that the principle laid down by *Pasley v Freeman* was that a "mere naked falsehood" would not give a right of action, but if a falsehood is told with an intention that it should be acted upon by the party injured, and that party acts upon it in a way that produces damages to him, an action will lie.

19 In the Third Edition (1868) of Bullen & Leake's *Precedents of Pleadings*[9] there appear references to a series of cases exemplifying actions for damages for fraudulent misrepresentation. They are cases in a business context. Not all claims in deceit, however, have involved cases where loss resulted from a contractual dealing. In *Richardson v Silvester*[10], in 1873, the defendant caused to be published an advertisement to the effect that a certain farm was available for letting. The plaintiff, at some expense to himself, inspected the property. It was alleged that the advertisement was deliberately false. It was held that the plaintiff, on the facts alleged, had a cause of action to recover, by way of damages, his wasted expenses.

20 Not all actions said to have been allowed on the principle of *Pasley v Freeman* were commercial in nature, although *Wilkinson v Downton*[11], decided in 1897, and *Janvier v Sweeney*[12], decided in 1919, which were cases of deception causing nervous shock, would probably now be explained either on the basis of negligence, or intentional infliction of personal injury[13].

21 Almost 200 years after *Pasley v Freeman*, the modern common law began to refine the principles according to which damages may be recovered for loss resulting from certain kinds of misrepresentation that were not fraudulent but merely careless. In *Hedley Byrne & Co Ltd v Heller & Partners Ltd*[14], the concept of the duty of care, a control mechanism by which the law limited the

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8 (1837) 2 M & W 519 at 531 [150 ER 863 at 868].

9 At 333-337.

10 *Richardson v Silvester* (1873) LR 9 QB 34.

11 [1897] 2 QB 57.

12 [1919] 2 KB 316.

13 See Lord Hoffmann's discussion of the cases in *Wainwright v Home Office* [2004] 2 AC 406 at 425.

14 [1964] AC 465.

range of complainants, was explored in its application to determining who might sue in respect of financial harm suffered in consequence of another person's careless statements. The capacity for careless advice or information to cause harm is extensive. The search for a satisfactory exposition of the concept of duty of care in this context resulted in a division of opinion in the Privy Council in *Mutual Life & Citizens' Assurance Co Ltd v Evatt*[15]. The actual decision in that case is presently immaterial; what is significant is the kind of problem it exemplifies. The problem could well arise in a domestic context. As Dickson CJ pointed out in *Frame v Smith*[16], "[i]t is notorious that free, and not always disinterested and wise advice abounds in a family setting". So, in some family settings, does misleading conduct. The duty of care controls potential liability for carelessness. False representations about paternity could be the result of carelessness rather than deliberate fraud. Furthermore, in domestic and other personal relations, in between carelessness and deliberate fraud there may be conduct which is not easy to classify in simple moral terms.

22 If, in the area of actionable deceit, there is to be a control mechanism which, like the duty of care in negligence, limits the range of complainants, then it is difficult to see, as a matter of legal principle, as distinct from legislative fiat, how the limitation could operate by reference to one specific kind of representation. Plainly, representations about paternity relate to a sensitive issue, but there are other subjects of representation that could also relate to topics of sensitivity.

23 False representations of paternity could be made in a variety of circumstances, some of which might be closely linked to questions of property, or financial undertakings. They could be made before, during, or after marriage. They could be made between parties who are negotiating a pre-nuptial contract, or a separation agreement, or a divorce settlement. They could be made for the specific purpose of inducing a certain kind of dealing with property, or a certain kind of financial commitment. The distinction between business affairs and domestic affairs is not always clear cut. People, in anticipation of, during, or after, marriage enter into financial arrangements, and create rights and obligations which are plainly intended to have legal consequences. Not all people who cohabit in a domestic relationship intend to marry. Not all married people cohabit in a domestic relationship. Some might intend to divorce, but until their marriage is dissolved by court order they remain married. Some married people separate without any intention to divorce. Marriage is not merely one of a number of alternative forms of domestic relationship. Among other things, it is a matter of legal status. Certain formalities are required for its

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15 [1971] AC 793.

16 [1987] 2 SCR 99 at 110.

formation and its dissolution. It is attended by legal requirements of exclusivity, and publicity. In Australia, a person may have only one husband or wife at any one time. Marriages must be recorded on a public register[17]. Marriage is a context in which the law of deceit, in many circumstances, may be difficult to apply, but in modern social conditions it is difficult to mark it out as a zone of special immunity from liability for one particular kind of tort, or one particular form of deceit. Furthermore, representations about paternity could be made to a third party, such as a parent or relative of a putative father, with intent to induce the making of financial arrangements.

24 There is, however, an aspect of marriage that makes the topic of representations of paternity to a spouse one to be approached with particular caution. The *Family Law Act* 1975 (Cth), in s 43, speaks of "the need to preserve and protect the institution of marriage as the union of a man and a woman to the exclusion of all others voluntarily entered into for life". As Jacobs J explained in *Russell v Russell*[18], the institution originated, at least in Western society, partly as a means of involving males in the nurture and protection of their offspring. Blackstone, in his *Commentaries*[19], described marriage as "built on this natural obligation of the father to provide for his children". The structure of marriage and the family is intended to sustain responsibility and obligation. In times of easy and frequent dissolution of marriage, the emphasis that is placed on the welfare of the children reflects the same purpose. The appellant, when asked to explain why he believed he was the father of his wife's children, said that he had no reason not to believe it. As a married man, he was living in an environment that was designed to reinforce his parental role and obligations. There was an artificiality involved in the search for representations that he was the father of the two children. His wife had no need to make any such representations. The circumstances of their relationship constantly conveyed to him, and reinforced, that message, as they were meant to do. In many marriages, an express representation of paternity is likely to be made only if there is some reason for doubt. Few husbands expect, or seek, from their wives, assurances of paternity. Such assurances, if volunteered, would often raise, rather than resolve, suspicions. Nevertheless, there could be cases, even if exceptional, in which such assurances are sought, and given, in circumstances where there is no reason in principle to deny a remedy.

Family Law Act 1975 (Cth) ss 119, 120

25 The *Family Law Act* provides:

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17 eg *Births, Deaths and Marriages Registration Act* 1996 (Vic) s 31.

18 (1976) 134 CLR 495 at 548-549.

19 *Blackstone's Commentaries*, 15th ed (1809), vol 1 at 447.

> "119. Either party to a marriage may bring proceedings in contract or in tort against the other party.
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> 120. After the commencement of this Act, no action lies for criminal conversation, damages for adultery, or for enticement of a party to a marriage."

26 The legal and historical context of those provisions makes it plain that they do not have the consequences suggested in the respondent's notice of contention.

27 Section 119 entirely abolished the old spousal immunity based upon the concept that, at law, husband and wife are one[20]. The immunity disappeared from the law by degrees. It is unnecessary to trace the origins of the concept, or the stages by which it was broken down. With s 119, it went completely. Actions in contract or tort between spouses, or former spouses, are now commonplace.

28 As was noted above, the status of marriage may exist even when the parties to it are completely at arm's length. People who are married, happily or unhappily, may sue one another for the full range of torts. It is impossible to accept that the legislation, *sub silentio*, makes fraud an exception. Such a consequence would be absurd. Why should a woman, who is about to enter into a separation agreement with her husband, not have the full extent of the law's protection, including its protection against fraud? Why she might be able to sue him for negligent misrepresentation, but not for fraudulent misrepresentation, defies rational explanation.

29 Section 120 abolishes certain causes of action against third parties, which had no direct relationship to the tort of deceit. They reflected a view of the relationship between husbands and wives that is no longer held. Section 120 might have been in point had the appellant's lawyer dusted off some old law books and attempted to bring an action against the father of the two children in question, but it has nothing to do with the present case.

30 There is therefore no occasion to consider the appellant's challenge to the constitutional validity of these two sections. They do not stand in the path of his claim.

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20 *Chant v Read* [1939] 2 KB 346; *Corcoran v Corcoran* [1974] VR 164.

Proposition 2 in the notice of contention

31 The respondent's second proposition is similar to an argument that was considered, and rejected, by Stanley Burnton J in England in 2001. The case was *P v B (Paternity: Damages for Deceit)*[21].

32 It is not clear whether the respondent's contention is that representations as to paternity occupy a unique place in the law of deceit. If they are only a particular example of a wider class of representation, it was not made clear what that class is said to be. The respondent's contention would solve the present case, but if it is only a particular application of a more general principle then that principle was not stated.

33 The facts of the present case show the difficulties that often will be involved in attempting to deal with a grievance such as that of the appellant under the rubric of actionable deceit. Yet it is possible to imagine cases in which the elements of the tort would be recognisable, and justice would demand a remedy. The argument in *P v B* was expressed in terms of "cohabiting couples". Not all married people fall within that description. Some, whether or not they intend to divorce, deal with one another in circumstances where their respective legal rights and obligations are to the forefront of their concerns. They may be communicating through lawyers. In such a context, representations may be sought and given on the clear understanding that they are intended to be acted upon, perhaps in respect of matters affecting rights of property or financial obligations. The parties may be as much at arm's length as people who are dealing in the business context in which the tort of deceit originated.

34 There are problems involved in inappropriate intrusion by the law of deceit into the domestic context. However, as a suggested solution to those problems, the respondent's proposition is both too wide and too narrow. Whether it is put in terms of representations of paternity, or widened to cover extra-marital sexual relations, the same question remains. Why single out that particular kind of representation? There are many other kinds of representation that may be made in a domestic context about matters that are regarded by the parties as intimate and sensitive.

35 One of the obvious difficulties about the topic of paternity, or the wider topic of sexual infidelity, (a difficulty that is not peculiar to those topics), is the danger of creating something very close to a legal duty to disclose facts in circumstances where there could be a serious question about the existence of a corresponding ethical obligation. With hindsight, we know that the marriage of the parties to the present proceedings later broke down. Suppose it had not

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21 [2001] 1 FLR 1041; see also Bagshaw, "Deceit Within Couples" (2001) 117 *Law Quarterly Review* 571.

broken down. Suppose that, partly in consequence of the respondent's failure to disclose her infidelity, the marriage had remained intact. Would the respondent at some point have been under an obligation to reveal the truth? It may be one thing to say that, when the respondent claimed that the appellant was legally bound to make child support payments, she ought to have told him that he was not the father of two of her three children. Yet the appellant's case implies that, when she handed him the notification of birth forms to sign, at a time when the marriage was intact, she had a duty to tell him. The *Family Law Act* declares the need to preserve and protect the institution of marriage. That is a legislative expression of public policy. The imposition of a legal duty of disclosure of infidelity would, in the practical circumstances of many cases, be contrary to that policy. There is no foundation, either in principle or authority, for the recognition of a general duty of that kind. That, however, is not to deny that such a duty could exist in particular circumstances.

36 Finally, there is a difficulty about proposition 2, once it is accepted (as it should be) that s 119 of the *Family Law Act* applies to all forms of tort. Since Parliament has abrogated, in general terms, spousal immunity, judicial creation of a new form of immunity, applicable to spouses but limited in its operation to a certain kind of tort, or a certain kind of representation, is inconsistent with the legislation. Of course, the legislative reference to tort picks up developments in the common law as they occur from time to time. Yet the creation of an inflexible exception to the general right given by s 119, by reference to a certain kind of deceit, regardless of the circumstances of the individual case, contradicts s 119.

The elements of actionable deceit as applied to the appellant's claim

37 The elements of the tort of deceit were stated by Viscount Maugham, in *Bradford Third Equitable Benefit Building Society v Borders*[22], as follows (omitting his Lordship's citation of authority):

> "First, there must be a representation of fact made by words, or, it may be, by conduct. The phrase will include a case where the defendant has manifestly approved and adopted a representation made by some third person. On the other hand, mere silence, however morally wrong, will not support an action of deceit. Secondly, the representation must be made with a knowledge that it is false. It must be wilfully false, or at least made in the absence of any genuine belief that it is true. Thirdly, it must be made with the intention that it should be acted upon by the plaintiff, or by a class of persons which will include the plaintiff, in the manner which resulted in damage to him. If, however, fraud be established, it is

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22 (1941) 2 All ER 205 at 211.

> immaterial that there was no intention to cheat or injure the person to whom the false statement was made. Fourthly, it must be proved that the plaintiff has acted upon the false statement and has sustained damage by so doing."

38 His Lordship's reference to "mere silence" contemplates, by way of contrast, the possibility of a case where there is a legal or equitable duty to speak and disclose the true facts.

39 The courts have also insisted on specificity and particularly in pleading allegations of fraud. In *Lawrance v Norreys*[23], Lord Watson quoted the rule expressed by Earl Selborne in *Wallingford v Mutual Society*: "General allegations, however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any Court ought to take notice." Lord Watson added: "There must be a probable, if not necessary, connection between the fraud averred and the injurious consequences which the plaintiff attributes to it; and if that connection is not sufficiently apparent from the particulars stated, it cannot be supplied by general averments."

40 The author of *McGregor on Damages*[24] points out that, reflecting the tort of deceit's close connection with contractual situations, most claims for damages in this area are for pecuniary loss resulting from acting in reliance on a misrepresentation by entering into a contract with the defendant or a third party. However, possible forms of pecuniary loss are not limited to such circumstances. Lord Atkin, in *Clark v Urquhart*[25], said:

> "I find it difficult to suppose that there is any difference in the measure of damages in an action of deceit depending upon the nature of the transaction into which the plaintiff is fraudulently induced to enter. Whether he buys shares or buys sugar, whether he subscribes for shares, or agrees to enter into a partnership, *or in any other way alters his position to his detriment*, in principle, the measure of damages should be the same, and whether estimated by a jury or a judge. I should have thought it would be based on *the actual damage directly flowing from the fraudulent inducement*". (emphasis added)

41 Harm may result from a course of action induced by a fraudulent misrepresentation, even though it has nothing to do with questions of contract or with inducement to undertake financial obligations. An example is *Mafo v*

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23 (1890) 15 App Cas 210 at 221.

24 17th ed (2003) at 1488.

25 [1930] AC 28 at 67-68.

Adams[26] where the plaintiff was fraudulently induced to undertake an unpleasant journey, and was awarded compensation for the inconvenience and discomfort. (The case of *Richardson v Silvester*[27], earlier mentioned, was a case where a plaintiff was compensated for the expense of a fraudulently induced journey.) There is no reason in principle why the harm for which the tort may provide compensation should not include personal injury, or why personal injury should not include psychiatric injury, but the harm for which damages are awarded is the "actual damage directly flowing from the fraudulent inducement", that is to say, the damage directly flowing from the alteration of the plaintiff's position which occurred as a result of the inducement. Distress, disappointment, frustration and anger may all be natural responses to discovery of deception, but the tort of deceit does not set out to compensate people for wounded pride or dignity, or for the pain that results from broken illusions.

42 As the Victorian Court of Appeal held, in a number of respects the appellant's case, as accepted by the trial judge, failed to establish the elements of the tort of deceit. These deficiencies are all significant, but they reveal a deeper problem with the appellant's case. It will be necessary to return to that problem after having measured the appellant's case against the generally accepted requirements of the tort. The appellant was attempting to press into service, in support of a private and domestic complaint, a cause of action that was unsuited for the purpose. This is not because marital relations are a tort-free zone, or because actionable deceit can never occur between cohabiting parties or in respect of questions of paternity or marital or extra-marital relations. It is because the law of tort, like the law of contract, is concerned with "duties and rights which can be dealt with by a court of justice"[28], and the appellant's case was difficult to accommodate to that setting.

43 First, as to the representations found by the trial judge, reference has already been made to the narrow and artificial basis upon which the appellant's case was accepted. The respondent simply handed to the appellant, for signature, routine administrative forms notifying the public authorities of the birth of each child, and conferring on them the surname of Magill. In his evidence, the appellant did not seek to relate his belief in his paternity to the signing of the birth notification forms, or to any other particular words or conduct on the part of the respondent. It was the failure to disclose her extra-marital relations and their possible connection with her pregnancies that was the

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26 [1970] 1 QB 548.

27 (1873) LR 9 QB 34.

28 *Rose and Frank Co v J R Crompton and Bros Ltd* [1923] 2 KB 261 at 289 per Scrutton LJ, quoting Pollock, *Principles of Contract*, 9th ed (1921) at 3.

critical element in the deception. Yet, unless it can be said that there was then (that is, in effect, when the children were born) a legal or equitable duty to disclose the truth, her silence did not amount to a representation. After the marriage had broken down, and when the matter of child support payments arose, there may have been a duty of disclosure; but the appellant was not claiming to recover the child support payments, and the trial judge made no finding on that basis.

44 Although there was no direct challenge in this Court to the trial judge's conclusion as to fraudulent intent at the time of the signing of the birth notification forms, it may be remarked, in passing, that the evidence raised some serious questions, which were not the subject of detailed findings, about that issue. Indeed, it is not entirely clear what was found to be the respondent's state of belief, at the times when the forms were signed, concerning the paternity of each child. Even some years later, according to the evidence, she was referring in a diary to suspicions. At the trial, she said that she thought the man with whom she had been having extra-marital relations might have been the father of the second child, but she did not think he was the father of the third child. Because the matter was not raised as an issue between the parties until some years later, the respondent might not have attempted to resolve the question in her own mind, at the time of the signing of the birth notification forms. Her state of mind on the question of paternity, and the wisdom of revealing it, at the time of the birth of each child, may have been more complex than the reasons of the trial judge acknowledge. However, that is a topic that was not considered in any detail in argument in this Court.

45 Secondly, once it became clear that the making of the child support payments was not an aspect of the appellant's claim, the course of conduct, or change of position, in which he was induced to engage by reason of the (assumed) false representations of paternity made soon after the children were born appears to be that he remained in the marriage and accepted his wife's second and third children as his own. Although it was not made explicit, presumably underlying the appellant's claim is the suggestion that if, at the time of the birth of the second child, he had been made aware of his wife's infidelity and of the possibility that another man was the father of the child, he would have acted differently. In what way he would have acted differently is not clear.

46 Thirdly, there is the related question of damage. The appellant claimed, and was awarded, damages for two kinds of harm: personal injury, and pecuniary loss. Accepting that the evidence established recognisable psychiatric injury in the form of depression and anxiety, the explanation given by the appellant, and the finding made by the trial judge, as to the cause of that harm does not identify damage directly flowing from an alteration of the appellant's position occurring as a result of the inducement. His depression resulted from the distressing circumstances surrounding the breakdown of the marriage; distress that was exacerbated by his later discovery of the truth concerning his wife's extra-marital relations and the paternity of two of her three children. The

appellant's claim for pecuniary loss took two forms. The first was consequential, and dependent, upon the claim for damages for personal injury. The second seems to have involved an attempt to show that, as a result of being misled into treating the second and third children as his own, the appellant devoted time to them that could have been used for more remunerative purposes, and outlaid moneys for their food, clothing and other necessities. Acting, at least for a few years, as the father of the two children cost the appellant money. The amount of the loss was not shown with any degree of cogency, and it is not possible, from the reasons of the trial judge, to see the extent to which it was reflected in the amount of $70,000 awarded by way of damages.

47 The Court of Appeal was right to conclude that the elements of actionable deceit were not made out. The case, however, was more fundamentally flawed, and the difficulties in relating the appellant's claim to the cause of action on which he sued were symptomatic of a more general problem which is likely to affect many such claims.

The bounds of the legal remedy

48 It has already been pointed out that, if a husband were to claim that he had suffered injury in consequence of careless misrepresentations made to him by his wife, whether they were representations about intimate matters, or whether they took the form of bad investment advice, the law would undertake a close examination of the circumstances in which the representations were made in order to see whether there was a legal duty of care. That is because, underlying the law of negligence, there is a conception of legal responsibility, based upon the idea of reasonableness, which reflects social conditions and standards[29]. Just as there are circumstances in which it is not reasonable to expect people to act under the threat of legal responsibility for carelessness, so there are circumstances in which personal relations are governed by ethical principles that do not contemplate, and may be incompatible with, legal responsibility and the risk of legal sanction. The law of tort imposes obligations, often regardless of any intention of the parties to enter into legal relations with one another. If a motorist injures a pedestrian, the motorist will not have intended to enter into legal relations with the pedestrian. Yet the act of driving a car on a public road is one that is generally understood to be attended with possible legal consequences, and the nature of the motorist's duty usually is uncomplicated by conflicting responsibilities. Underlying the legal remedy for deceit there is a duty of honesty, perhaps more general in its ordinary application than a duty to take care to avoid harming others. Yet 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. For

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29 *Donoghue v Stevenson* [1932] AC 562 at 619 per Lord Macmillan.

example, finding a false representation, made with fraudulent intent, in a marital context, or in the context of some other personal relationships, in certain circumstances may impute an obligation of disclosure, regardless of other interests and consequences, where none exists.

49 The matters which an individual party to a marriage might properly regard as intimate and private are not limited to questions of paternity of children of the marriage, or sexual fidelity, or to events that occurred during the marriage. Finding a duty to disclose the truth about some matters would be inconsistent with the ethical context in which such a judgment must be made. Furthermore, the problem goes beyond questions of disclosure. Imposing legal consequences upon behaviour in such a relationship also may be inconsistent with the subjective contemplation of the parties and with public policy as reflected in legislation. In that connection, the extensive scheme of regulation of the legal incidents of the marriage relationship contained in the *Family Law Act*, based as it is largely upon a policy of minimising the importance of questions of "fault", forms an important part of the setting in which judgments about dishonesty, and actionable damage, must be made. The application of the common law of deceit to marital relations is not impossible, and there are no rigidly defined zones of exclusion, but attempts to construct legal rights and obligations in an unsuitable environment should fail, as did this attempt.

Conclusion

50 The appeal should be dismissed with costs.

51 GUMMOW, KIRBY AND CRENNAN JJ. The Victorian Court of Appeal[30] allowed an appeal brought by the respondent in this Court, Meredith Jane Magill, against a judgment in the County Court of Victoria awarding damages against her at the suit of her former husband, Liam Neal Magill, the appellant in this Court. His claim was in deceit for false representations made by her as to the paternity of the second and third children born during the course of their marriage.

The background

52 The issues of principle debated on the appeal to this Court require consideration of the proper scope in the common law of Australia for the tort of deceit in domestic relations, in particular where the dispute is between spouses and respects the paternity of a child apparently born of their marriage. In that sense, the issues here lie at the frontiers of tortious liability, as they did in *Tame v New South Wales*[31], *Cattanach v Melchior*[32] and *Harriton (by her Tutor George Harriton) v Stephens*[33]. The treatment by this Court of the issues presented on those appeals illustrates the wisdom, when placed at a frontier, of taking a vantage point to look back to the commencement of the legal journey and to what developed thereafter.

53 The tort of deceit in its modern form first appeared in England at the end of the 18th century. At that time, an action in tort of the nature of that between the present appellant and respondent would have been unthinkable for various reasons. First, no act committed by one spouse against the other during marriage could be a tort: the reason, affirmed as late as 1876, was the fundamental and general principle of the common law that spouses "are one person"[34]. In his dissenting judgment in *Wright v Cedzich*[35], Isaacs J spoke with evident approval of Bentham's criticism of the use of such a "quibble" as the "nonsensical reason" for legal propositions respecting the matrimonial condition.

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30 *Magill v Magill* [2005] Aust Torts Reports ¶81-783. Eames JA delivered the leading judgment of the Court of Appeal, with Ormiston and Callaway JJA agreeing on the determinative issues.

31 (2002) 211 CLR 317.

32 (2003) 215 CLR 1.

33 (2006) 80 ALJR 791; 226 ALR 391.

34 *Phillips v Barnet* (1876) 1 QBD 436 at 438, 440, 441.

35 (1930) 43 CLR 493 at 501.

54 Secondly, there was the long-standing common law presumption of legitimacy, of great importance at a time before modern legislation such as s 3 of the *Status of Children Act* 1974 (Vic)[36], and when legal rights, particularly of inheritance, depended upon the status of legitimacy. Lord Mansfield, when explaining in *Goodright v Moss*[37] why a parent could not give evidence the effect of which would be to bastardize a child, said[38]:

> "As to the time of the birth, the father and mother are the most proper witnesses to prove it. But it is a rule, founded in decency, morality, and policy, that they shall not be permitted to say after marriage, that they have had no connection, and therefore that the offspring is spurious; more especially the mother, who is the offending party."

55 Statute has intervened. That part of the law of evidence is no more[39]. Nor is the common law principle respecting the single legal personality of spouses. Hence, it might be thought that there had been an expansion in the area for the operation of the tort of deceit beyond that which it occupied when it emerged in its modern form in *Pasley v Freeman*[40].

56 However, other things have remained constant. The law respecting domestic relations was heavily influenced in England by the ecclesiastical courts before 1857 and by the courts of equity. In both courts, much emphasis has been placed upon the importance of the trust and confidence between spouses and the delicacy of the married relationship[41], and more recently, courts of equity and

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36 This provides for the relationship between children and their parents to be determined irrespective of any marriage between them, and for all other relationships to be determined accordingly. See also *Status of Children Act* 1974 (Tas), s 3; *Family Relationships Act* 1975 (SA), s 6; *Children (Equality of Status) Act* 1976 (NSW), s 6; *Status of Children Act* 1978 (Q), s 3; *Status of Children Act* 1978 (NT), s 4; *Parentage Act* 2004 (ACT), s 38.

37 (1777) 2 Cowp 591 [98 ER 1257].

38 (1777) 2 Cowp 591 at 594 [98 ER 1257 at 1258].

39 Heydon, *Cross on Evidence*, 7th Aust ed (2004) at §25190.

40 (1789) 3 TR 51 [100 ER 450].

41 See the judgment of Brennan J in *R v L* (1991) 174 CLR 379 at 391-393.

courts more generally have also considered other adult, long-term, intimate, personal and sexual relationships[42].

57 The tort of deceit has had quite different origins and applications. The position is explained by Professor Fleming[43]:

> "Deceit, as an independent and general cause of action in tort, is of relatively novel origin, although traces of it are encountered as early as the 13th century when a writ of that name became available against misuse of legal procedure for the purpose of swindling others[44]. Later this remedy expanded and played a modest part in developing the incipient law of contract, principally in connection with false warranties[45]. Its scope, however, remained confined to direct transactions between the parties until in 1789, in *Pasley v Freeman*[46], it was freed from this link with contractual relations and held to lie whenever one person, by a knowingly false statement, intentionally induced another to act upon it to his detriment. There, the plaintiff had made an inquiry from the defendant concerning the financial standing of a merchant with whom he was negotiating for the sale of 16 bags of cochineal and received the assurance that he could safely extend credit, although the defendant well knew the party to be insolvent. Despite the want of any contractual bargain with the plaintiff, the defendant was held to answer for the loss in an action for deceit. At about the same time, the remedy for breach of warranty was absorbed by the action of assumpsit and henceforth regarded as purely contractual[47]. Thereafter, the two theories of misrepresentation began to

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42 *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395 at 404 [21]-[22] per Gaudron, McHugh, Gummow and Hayne JJ, 432-433 [76] per Kirby J. See also *Barclays Bank Plc v O'Brien* [1994] 1 AC 180 at 198 and *Fitzpatrick v Sterling Housing Association Ltd* [2001] 1 AC 27 at 38, 43, 50, 54.

43 *The Law of Torts*, 9th ed (1998) at 694-695. See also *Prosser and Keeton on the Law of Torts*, 5th ed (1984) at 727-729; Balkin and Davis, *Law of Torts*, 3rd ed (2004) at §23.14; Ames, "The History of Assumpsit", (1888) 2 *Harvard Law Review* 1 at 8-9.

44 See Winfield, *History of Conspiracy* (1921) at Ch 2.

45 Holdsworth, *History of English Law*, 5th ed (1942), vol 3 at 428ff.

46 (1789) 3 TR 51 [100 ER 450].

47 *Stuart v Wilkins* (1778) 1 Doug 18 [99 ER 15].

> diverge and are now quite distinct. The tort action for deceit requires proof of fraudulent intent, while breach of contractual warranty became independent of any intention to mislead or other fault."

58 The significance of the foregoing for the issues that arise on this appeal is apparent from the further observations by that learned author[48]:

> "Nevertheless, the close association of deceit with bargaining transactions has inevitably coloured the elements of the action, which largely reflect the ethical and moral standards of the market place as they relate to permissible methods of obtaining contractual or other economic benefits and of inflicting pecuniary loss through reliance on false statements. Not that the action is inapplicable to personal injuries or harm to tangible property,[49] but such instances are rare, and the typical cases in which the action is enlisted involve pecuniary loss."

59 An uncontroversial modern statement of the elements to be proved in an action in deceit is that appearing as follows in the latest edition of *Clerk & Lindsell On Torts*[50]:

> "Where a defendant makes a false representation, knowing it to be untrue, or being reckless as whether it is true, and intends that the claimant should act in reliance on it, then in so far as the latter does so and suffers loss the defendant is liable for that loss."

60 That formulation no doubt was derived from the body of case law which followed *Pasley v Freeman*[51] and was of the character described by Professor Fleming. How well it applies at the frontier of liability with which this appeal is concerned is for the consideration which will follow in these reasons.

61 However, something more first should be said of the facts and the conduct of the litigation.

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48 Fleming, *The Law of Torts*, 9th ed (1998) at 695. See also *Winfield and Jolowicz on Tort*, 16th ed (2002) at 368.

49 *Langridge v Levy* (1837) 2 M & W 519 [150 ER 863], affirmed 4 M & W 337 [150 ER 1459]; *Burrows v Rhodes* [1899] 1 QB 816; *Nicholls v Taylor* [1939] VLR 119.

50 19th ed (2006) at 1081 [18-01] (footnote omitted).

51 (1789) 3 TR 51 [100 ER 450].

The facts and the trial

62 The damages claimed by the husband included loss of earnings, loss of use of monies, damages for personal injury, namely severe anxiety and depression, and exemplary damages. The trial judge[52] found in favour of the husband and awarded him $70,000 in damages: $30,000 for general pain and suffering; $35,000 for past economic loss; and $5,000 for future economic loss.

63 The facts are dealt with comprehensively by Eames JA in the reasons of the Court of Appeal[53] and for present purposes they can be summarised. The husband and wife were married in 1988. During the time they were married the wife gave birth to three children. The first child, a boy, was born on 7 April 1989 ("the first son"). The second child, also a boy, was born on 30 July 1990 ("the second son"). On 27 November 1991, the wife gave birth to a girl ("the daughter").

64 The husband and wife separated in November 1992. Following the separation, the three children lived with the wife, and the husband was able to spend time with them on certain weekends, according to a mutually agreed access arrangement. The wife made an application for child support from the husband in late 1992 under the *Child Support (Assessment) Act* 1989 (Cth) ("the Child Support Act"). The husband generally made payments in accordance with the child support schedule, save for certain periods in 1996 and 1997.

65 Unbeknown to the husband, the wife had commenced an extra-marital sexual relationship in September 1989. Contraception was not used. The wife had had suspicions concerning the paternity of the second son, and in 1993 these were strengthened as a result of her seeing a photograph of a child of the man with whom she had had the extra-marital sexual relationship; the child bore a physical resemblance to the second son.

66 In 1995, after suffering a nervous breakdown, the wife informed the husband of her suspicion. DNA testing conducted by consent in 2000 established that the husband was neither the biological father of the second son, nor of the daughter.

67 After the paternity of the second son and the daughter had been determined, child support arrangements were adjusted, so that payments were

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52 *Magill v Magill*, unreported, County Court of Victoria, 22 November 2002.

53 [2005] Aust Torts Reports ¶81-783 at 67,249ff.

calculated, and due, only in respect of the first son. As the husband had sufficient outstanding debt in respect of the first son as a result of his failure to meet payments in 1996 and 1997, he was not able to recover any amounts he had paid in respect of the second son and the daughter[54].

68 The husband commenced an action in deceit against the wife, in the County Court of Victoria in January 2001. The trial took place in November 2004, and the reasons of the trial judge were delivered, and the orders made, shortly after the conclusion of the hearing. The trial judge determined that the wife had made false statements about paternity, either knowing that they were false or without any belief in their truth, or recklessly, without caring whether they were true or not, and therefore without any genuine belief in their truth. Further, according to the trial judge, the husband had established that the wife intended the husband to rely on the false statements, that the husband actually did rely on them, and that he suffered damage as a result.

69 According to the husband, the representations that he was the father of the second son and the daughter were "partly written, partly oral and partly to be implied". The husband claimed the written representations were constituted, inter alia, by the completion and presentation of birth notification forms by the wife naming the husband as the father of the second son and the daughter. The husband submitted that oral representations were constituted by conversations between him and his wife, with respect to each child, to the effect that she was pregnant, and that he was the father of the unborn child. The husband further claimed that the representations were to be implied, given that the wife failed to disclose her extra-marital sexual relationship, and failed to correct his apprehension that he was the biological father of the second son and the daughter.

70 However the trial judge's reasons referred only to the written representations in the completed birth notification forms presented to the husband for signature by the wife soon after the birth of each child. Evidence

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54 Section 66X of the *Family Law Act* 1975 (Cth) provides for recovery of amounts paid under maintenance orders in circumstances such as the husband's here and applies retrospectively. This amendment commenced operation on 3 August 2005 and followed changes to parentage testing procedures. The child support arrangements for the three Magill children fell within the Child Support Act (ss 20 and 21) which contains a power for the Registrar to amend assessments (s 75) and a power for a court to make "such orders as it considers just and equitable" to effect the rights of the parties and the child (s 143(3)), and to recover payments of child support in respect of which there was no liability to pay (s 143(1)).

relating to the oral or implied representations was not explicitly advanced as proof of separate and discrete instances of making or repeating the false representations[55].

The birth notification forms

71 In each of the birth notification forms in evidence, the name of the child was entered by the wife, and in the section entitled "FATHER" the wife entered the husband's name. Further down the page was a section entitled "PARENTS PREVIOUS CHILDREN". In the notification form for the second son, the name of the first son was entered in this section; and in the notification form for the daughter, the names of the first and second sons were entered.

72 At the bottom of the form for the daughter was a section entitled "DECLARATION BY MOTHER / INFORMANT". It was completed by the wife in the following way:

> "I, Meredith Jane Magill request that the child be registered with the family name of Magill and certify that the above information is correct for the purpose of being inserted in the Register of Births and am aware that persons wilfully making or causing to be made a false statement concerning the particulars required to be registered shall on conviction be liable to the penalties of perjury."

73 Below this was a section entitled "DECLARATION BY FATHER", which, upon presentation by the wife to him, was signed by the husband below the words:

> "I agree to be registered as the father of the child and that the family name of the child be Magill."

74 On the reverse of the form, the following Notes appear:

> "NOTE 1 – CHILD
>
> Family Name: (i) If a person is registered as the father of the child, the family name of the child should be entered as the same family name as the father …
>
> NOTE 4 – FATHER

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55 [2005] Aust Torts Reports ¶81-783 at 67,253 [32].

> Where the parents are not married to each other, do not enter particulars of the father unless the form is being signed by both parents …
>
> NOTE 5 – PARENTS PREVIOUS CHILDREN
>
> Enter only details of children born to or adopted by both parents of the child being registered ..." (emphasis in original)

A form in similar terms was completed in relation to the second son after his birth.

75 The following exchange regarding the birth notification forms took place between the husband and his counsel at trial:

> "Did she show you a birth certificate? - - - All three children were born in Sea Lake Hospital and at each birth upon discharge there's a form that is filled out regarding the birth of the particular child and that was done on all three occasions of the birth of our children.
>
> Did you see that form? - - - Yes.
>
> Who showed it to you? - - - Well, it was shown to both of us. [The wife] filled the form out on each occasion and — naming me as the father and I had no reason to believe otherwise so I signed the particular form."

76 When asked about whether her husband would consider each form (as filled in by her showing him as father) as an assertion of the truth, the wife replied,

> "I don't think I really thought too hard about it at all, it was a birth registration."

77 In his reasons, the trial judge described the birth notification forms as the "most direct evidence" of the making of the alleged representations. His Honour stated:

> "It seems to me to be impossible to conclude that [the wife] could have had any real belief in the assertion that she made, and in my view she must have known that [the husband] was not the father … At the very least, she has just been so reckless as to not have any genuine belief in the truth of the assertion at all, but nevertheless made it, intending it to be relied upon."

78 In awarding damages, the trial judge referred to the evidence of three doctors who had treated the husband for psychiatric disorders, which included

depression and anxiety, which followed from the revelation of the "painful knowledge that two of his three children [for] whom he cares and loves … have turned out not to be his".

79 Of the wife's situation, his Honour said:

> "[The wife] found herself in a position [in] which she [had] a choice between endeavouring to save her marriage or face the enormous uproar which undoubtedly would follow upon her making a truthful statement concerning her beliefs as to the paternity of her children. This solution to the problem of course is no solution at all, that is to lie about it, but I am not so much lacking in comprehension of human frailty that I would ignore and push past an understanding of the extreme difficulty which faced [the wife] when presented with the form to fill in concerning notification."

The Court of Appeal

80 In allowing the wife's appeal from the decision of the trial judge, both Ormiston and Callaway JJA noted that this was an "unusual case", fought on very narrow grounds[56], as the only representations to which the trial judge explicitly referred and which he tested against the elements of the cause of action in deceit were those representations described in the birth notification forms[57].

81 All members of the Court of Appeal assumed that the claim in deceit had been brought appropriately[58] and concentrated upon whether, on the facts of the case, the elements of the cause of action in deceit had been established.

82 Callaway JA found that there was no evidence on which the trial judge could find that the wife intended the husband to rely on the birth notification forms for any purpose other than signing them and agreeing that the children should be registered with the family name of Magill[59]. Eames JA (with whom Ormiston JA agreed) determined that the only finding made by the trial judge

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56 [2005] Aust Torts Reports ¶81-783 at 67,247 [1].

57 [2005] Aust Torts Reports ¶81-783 at 67,248 [3].

58 See, for example, [2005] Aust Torts Reports ¶81-783 at 67,257 [50] per Eames JA.

59 [2005] Aust Torts Reports ¶81-783 at 67,248 [6].

concerned the representations in the birth notification forms[60] and further stated[61]:

> "The [husband] did not give evidence that the completion of the forms induced him to do anything. Rather, his evidence was that it was his belief that he was the father that caused him to provide the financial and emotional support for the children, and that his belief in that respect was based on the whole situation of being in a marriage and his ignorance that his wife was conducting an affair. He said that had he known their paternity he would not have maintained the two children, but that evidence was not related to reliance by him on the contents of the forms.
>
> In my view, therefore, there was no evidence that the [husband] acted in reliance on the representations in the forms, save (by inference) with respect to the naming of the children."

83 The Court of Appeal noted that of the $35,000 awarded by the trial judge for the husband's economic losses, the trial judge had awarded $10,000 for time taken off work after the births of each of the two children, and $25,000 was for "expenses incurred for the two children over the many years before their paternity was resolved"[62]. It was also noted that the trial judge had expressly stated that he was not, in effect, refunding or adjusting child support payments[63].

The appeal to this Court

84 In this Court, by her Notice of Contention, the wife submitted 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.

85 Arguments regarding the scope and constitutionality of ss 119 (abolishing spousal immunity in tort) and 120 (abolishing actions for "damages for adultery") of the *Family Law Act* 1975 (Cth) ("the Family Law Act") were also raised in that context. The Attorney-General of the Commonwealth intervened and

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60 [2005] Aust Torts Reports ¶81-783 at 67,255 [39].

61 [2005] Aust Torts Reports ¶81-783 at 67,262 [82]-[83].

62 [2005] Aust Torts Reports ¶81-783 at 67,264 [100].

63 [2005] Aust Torts Reports ¶81-783 at 67,264 [100].

submitted that ss 119 and 120 were valid and supported the interpretation of the sections advanced by the husband, which will be considered in more detail later.

86 In the reasons which follow, the conclusions will be reached that an action for deceit between spouses is not excluded by the provisions of ss 119 and 120 of the Family Law Act and that, while an action for deceit may be maintainable between spouses or former spouses in certain circumstances[64], the tort does not apply to false representations made during the course of a marriage about an extra-marital sexual relationship or paternity.

87 This is for two reasons. First, speaking broadly, the Parliament has passed legislation governing the dissolution of marriage in which the determination of fault between spouses, including inquiry into their extra-marital sexual conduct, is no longer the province of the law. At the same time, in step with scientific developments, the relevant legislation facilitates accurate determination of paternity and permits the recovery of amounts wrongly paid for child support. The legislation is federal and thus applies throughout the Commonwealth. The common law of Australia in a field appropriate for further development after that legislation ought not to proceed on a divergent course[65].

88 Secondly, conduct which constitutes a breach of promise of sexual fidelity and any consequential false representation about paternity, occurring within a continuing sexual relationship, which is personal, private and intimate, cannot be justly or appropriately assessed by reference to bargaining transactions, with which the tort of deceit is typically associated.

89 These conclusions will result in the dismissal of the appeal and make it unnecessary to determine other matters which were the subject of submissions.

Submissions

90 In argument, both parties dealt with the question in terms of whether or not there should be "an exception" to the application of the law of deceit, in the circumstances of this case. That treatment of the question reflected the course of the argument in an English case, *P v B (Paternity: Damages for Deceit)*[66].

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64 For example, where one spouse has induced another by fraud to enter a contract or dispose of property.

65 *Esso Australia Resources Ltd v Federal Commissioner of Taxation* (1999) 201 CLR 49 at 62-63 [24]-[25]; cf at 89-90 [105].

66 [2001] 1 FLR 1041.

However, what has already been said in these reasons shows that what is at stake is not the creation of "an exception" to the established principles or of a "control mechanism" upon their operation. Rather, the appeal calls for a decision as to whether the action for deceit should run at all in circumstances where in previous times it could not have done so.

91 The husband submitted that there should be no exclusion, or non-application, of the law of deceit in respect of the wife's liability based on the fact that the false representations concerned the paternity of two children born during their marriage were made during the course of the marriage, and he relied on *P v B (Paternity: Damages for Deceit)*, which has been characterised as confirming the general application of the principle encapsulated by the tort[67]. He relied also on the plain and literal meaning of ss 119 and 120 of the Family Law Act, the text of which shall be referred to later in these reasons. Calling in aid examples of judicial reasoning from other jurisdictions, the husband argued that public policy considerations which were animated by concern for the welfare of children should not bar his action.

92 The wife submitted that a cause of action in deceit was generally relied on when a remedy was sought in respect of pecuniary losses arising from inducement to lay out money or enter a contract. It was conceded that examples could be found where deceit founded a remedy in a context which was not commercial[68] including where deceit caused physical injury, specifically nervous shock[69]. It was next submitted that a false representation made during the course of a marriage should be treated differently from a false representation made in a commercial context, just as agreements between spouses were not normally treated as creating legal relations[70]. The wife also contended that an action for deceit was not apt in a continuing marital relationship because of the difficulty of establishing the requisite elements, as happened here with the element of reliance, a matter to which these reasons will return.

93 Further the wife questioned the social utility of allowing such an action when that course is weighed against the potential for damage to families and children. She also submitted that the family law regime provided for the

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67 *Clerk & Lindsell On Torts*, 19th ed (2006) at 1081 [18-01].

68 See, for example, *Burrows v Rhodes* [1899] 1 QB 816.

69 *Wilkinson v Downton* [1897] 2 QB 57; *Janvier v Sweeney* [1919] 2 KB 316.

70 *Balfour v Balfour* [1919] 2 KB 571; *Cohen v Cohen* (1929) 42 CLR 91; *Jones v Padavatton* [1969] 1 WLR 328; [1969] 2 All ER 616.

recovery of maintenance that has been paid without legal obligation, and that it does so without allocating blame, so it was unnecessary to rely on the tort of deceit to do justice between the parties[71]. Then it was argued that the novel reliance on an action for deceit, as here, would not have been within contemplation when s 119 of the Family Law Act was drafted; that s 119 should be read down to exclude deceit of the kind alleged here; and that ss 119 and 120, read together, exclude tortious claims inconsistent with the exercise of jurisdiction and powers provided for in the Family Law Act. The wife also relied on public policy considerations, telling against recognising an action for deceit as sought here, as adverted to in a number of decisions elsewhere; these decisions will be considered later in these reasons. It is convenient to start with a consideration of the arguments concerning ss 119 and 120 of the Family Law Act.

Sections 119 and 120 of the Family Law Act

94 Section 119 provides:

> "Either party to a marriage may bring proceedings in contract or in tort against the other party."

95 The effect of s 119 is to abrogate rules applied at common law which flowed from the common law premise that husband and wife were one, to which reference has been made earlier in these reasons. The premise included a claim for a tort committed by one spouse against the other during or before the marriage. This spousal immunity from tortious claims has been progressively abrogated in Australia[72] (following earlier legislation enacted in the United Kingdom[73]). The Commonwealth submitted that there is nothing on the face of s 119 (or to be found in the relevant extrinsic material) which suggests there is a continuing spousal immunity in relation to some torts, specifically deceit, and not others. This submission is correct and must be accepted. The plain terms of the section would permit actions brought in respect of disparate intentional torts, for

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71 Child Support Act, s 143(3).

72 See *Married Persons (Equality of Status) Act* 1996 (NSW); *Law Reform (Husband and Wife) Act* 1968 (Q); *Statutes Amendment (Law of Property and Wrongs) Act* 1972 (SA); *Married Women's Property Act* 1965 (Tas); *Marriage (Liability in Tort) Act* 1968 (Vic); *Law Reform (Miscellaneous Provisions) Act* 1941 (WA); Married Persons (Torts) Ordinance (ACT); Married Persons (Torts) Ordinance (NT). Finally, see s 119 of the Family Law Act.

73 *Law Reform (Husband and Wife) Act* 1962 (UK).

example trespass to the person, or deceit in the context of contractual negotiations. However, the conclusion that s 119 allows the possibility that an action for deceit now lies between spouses is inconclusive of the outcome in this case. Section 119 does not compel any conclusion that the common law must now be developed to permit recovery by the appellant in the novel way he claims.

96 Section 120 of the Family Law Act states:

> "After the commencement of this Act, no action lies for criminal conversation, damages for adultery, or for enticement of a party to a marriage."

97 The wife submitted that s 120 prevented the husband's claim because the phrase "damages for adultery" encompassed the deceit relied on in this case; the husband rejected this construction. The Commonwealth supported the husband's construction and submitted that each of the three causes of action abolished by s 120 were once brought by an injured party against third parties, and in particular "damages for adultery" refers to a former statutory cause of action against a co-respondent[74]. These submissions are also plainly correct and must be accepted.

98 However, s 120 does not stand in isolation. It is consonant with the entire thrust, theoretical underpinning and overall legislative purpose, of the Family Law Act, which constituted a radical alteration to the basis of family law legislation as previously enacted. The goal was to remove provisions for divorce based on fault which involved the allocation of blame and "indignity and humiliation to the parties because of the inquiry into fault"[75]. It was for that reason that the 14 grounds for divorce contained in the preceding *Matrimonial Causes Act* 1959 (Cth) (which included adultery[76]) and the four grounds of voidability (which included the wife being pregnant by a person other than the

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74 *Matrimonial Causes Act* 1959 (Cth), s 44.

75 See the Second Reading Speech for the Family Law Bill 1974: Australia, Senate, *Parliamentary Debates* (Hansard) 3 April 1974 at 641. See also the Second Reading Speech for the Family Law Bill 1973: Australia, Senate, *Parliamentary Debates* (Hansard) 13 December 1973 at 2827-2833.

76 *Matrimonial Causes Act* 1959 (Cth), s 28(a). The *Divorce and Matrimonial Causes Act* 1857 (UK) which first permitted the dissolution of marriage on the basis of fault, contained the grounds of adultery, cruelty or desertion without cause (s 16).

husband[77]), were all reduced to a single ground for the dissolution of marriage, namely "that the marriage has broken down irretrievably"[78]. It can be noted in passing that decrees of nullity can be obtained if a marriage is void[79].

99 Further, the principles to be applied under the current legislation premised on "no-fault" divorce are set out in s 43 of the Family Law Act as follows:

> "The Family Court shall, in the exercise of its jurisdiction under this Act, and any other court exercising jurisdiction under this Act shall, in the exercise of that jurisdiction, have regard to:
>
> (a) the need to preserve and protect the institution of marriage as the union of a man and a woman to the exclusion of all others voluntarily entered into for life;
>
> (b) the need to give the widest possible protection and assistance to the family as the natural and fundamental group unit of society, particularly while it is responsible for the care and education of dependent children[80];
>
> (c) the need to protect the rights of children and to promote their welfare;
>
> (ca) the need to ensure safety from family violence; and
>
> (d) the means available for assisting parties to a marriage to consider reconciliation or the improvement of their relationship to each other and to their children."

100 The differences between the current family law provisions dealing with family breakdown and earlier provisions reflect profound social changes. No

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77 *Matrimonial Causes Act* 1959 (Cth), s 21(1)(d).

78 Family Law Act, s 48(1).

79 See Family Law Act, s 51, read in conjunction with the *Marriage Act* 1961 (Cth), as amended, s 23.

80 This provision derives from Art 23 of the International Covenant on Civil and Political Rights. See also Australia, Senate, *Parliamentary Debates* (Hansard), 3 April 1974 at 640-641.

longer does a *paterfamilias* hold a "commanding position"[81], husbands and wives are treated as equal, divorce is not dependent on findings of marital fault, and actions for any solace in respect of sexual infidelity have been abrogated.

101 Divorce is now not uncommon, and many children are part of families which include step-parents and half-siblings. Further, reflecting the language and principles of the United Nation's Convention on the Rights of the Child[82], Pt VII, Div 1 of the Family Law Act states principles which underlie the provisions directed to the proper parenting of children. By way of example, s 60B(2)(a) of the Family Law Act provides that, subject to a child's best interests, children have "the right to know and be cared for by both their parents". It can also be noted that child maintenance orders dealt with in Pt VII, Div 7 relate to children whose parents are their biological parents, step-parents, adoptive parents, or (as defined in the Family Law Act) parents as a result of artificial conception procedures. It is sufficient for present purposes to note that the retreat by the legislature from regulating private sexual conduct between spouses, evidenced in part by s 120, has been accompanied by a correlative increase in regulation of matters affecting the welfare of children, one of which is the issue of identity.

102 While s 120 does not encompass, or expressly or impliedly forbid, the husband's action for deceit, the terms of s 120 support the argument that such an action would not seem consistent with the overall thrust, theoretical basis, and general legislative purpose of the comprehensive legislation of which s 120 is a part. This is relevant to the issue raised as to whether the common law of tort of deceit should be found by this Court to apply, in the novel way claimed, in the circumstances revealed by the evidence in this case.

103 The conclusion that ss 119 and 120 (whether considered individually or collectively) do not expressly or impliedly prohibit an action in deceit between spouses makes it unnecessary to consider an alternative argument of the husband's (if the wife's construction of ss 119 and 120 were accepted) that the provisions were unconstitutional, as beyond the powers in ss 51(xxi) and 51(xxii) of the Constitution.

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81 Fleming, *The Law of Torts*, 9th ed (1998) at 718.

82 Articles 2, 3 and 7-9.

Question

104 The question then becomes whether the common law action of deceit covers or should cover false representations of paternity made during the course of a marriage.

Applicable legislation

105 In the Family Law Act and the Child Support Act, Australia has a comprehensive statutory framework for dealing with marital breakdown and collateral issues affecting children. An action in deceit, as pursued here, cuts across specific provisions in the Family Law Act establishing a single ground for divorce, which excludes fault, abolishing specific actions including an action for "damages for adultery", dealing with presumptions of parentage, and providing for the rebuttal of those presumptions (particularly by determination of paternity by scientific testing), as well as further provisions in both the Family Law Act and the Child Support Act allowing for the recovery of amounts paid, or property transferred or settled, under maintenance orders, in respect of a child who is not the biological child of the father.

106 Turning to the presumptions of parentage[83], relevantly, a child born to a woman during a marriage is presumed under the Family Law Act to be her husband's child (s 69P) and a presumption of parentage arises from the registration of a birth (s 69R). The Family Court may make orders compelling the production or giving of evidence relevant to parentage (s 69V) and it may compel parentage testing (ss 69W and 69X) and make consequential declarations (s 69VA).

107 Reference has been made earlier in these reasons to the common law presumption respecting legitimacy and to the view on the subject of Lord Mansfield, expressed shortly before *Pasley v Freeman*[84] launched the modern tort of deceit.

108 Until the development of medical knowledge and technology for objectively determining paternity, the presumption of legitimacy remained strong[85] as demonstrated by *Russell v Russell*[86], where as late as 1924

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83 Family Law Act, Pt VII, Div 12, subdiv D.

84 (1789) 3 TR 51 [100 ER 450].

85 For a brief account see *Re F; Ex parte F* (1986) 161 CLR 376 at 393-394 per Mason and Deane JJ.

Lord Mansfield's rule operated to preclude the reception of evidence of adultery in divorce proceedings. However, the strength of the common law presumption declined over time to the point where it was held in 1970 that it "merely determines the onus of proof"[87] in proceedings. In any event, in Australia, Lord Mansfield's rule was abrogated by statute[88]. What lay behind the deconstruction of the rule was not only changed preconceptions of "decency and morality" in respect of illegitimacy and adultery, but also advances in medical knowledge. The capacity to exclude paternity by blood testing of a child and its parents, which emerged before World War II, was seen as a technological development of particular relevance to affiliation proceedings[89]. It was inevitable that this would lead to greater emphasis on the biological or genetic connection between parent and child in the context of the dissolution of marriage and consequential orders for the maintenance and support of children[90]. That development has been followed more recently by the ability to determine paternity with a greater degree of probability than was possible with blood tests, by testing based on analysis of DNA (deoxyribonucleic acid), the molecule which contains the genetic information inherited by children from their parents. The position has now been reached that the statutory presumptions for determining a child's parentage, as a matter of law (ss 69P-69T) may be rebutted (s 69U) by determining parentage scientifically through DNA testing (s 69W-69X).[91]

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86 [1924] AC 687 at 697-700 per the Earl of Birkenhead, 706-716 per Viscount Finlay.

87 *S v S* [1972] AC 24 at 41 per Lord Reid.

88 *Matrimonial Causes Act* 1959 (Cth), s 98.

89 This development was first debated in 1939: see United Kingdom, House of Lords, *Parliamentary Debates* (Hansard) 8 February 1939 at 686-712; and also Harley, *Medico-Legal Blood Group Determination* (1944). The topic re-emerged in United Kingdom, Law Commission, *Blood Tests and the Proof of Paternity in Civil Proceedings*, Report No 16, (1968). Similar work was undertaken in Australia: see for example Law Reform Commission of Western Australia, *Final Report on Affiliation Proceedings*, Report No 13, (1970).

90 *G v H* (1994) 181 CLR 387 at 391 per Brennan and McHugh JJ.

91 These developments have been considered in the Australian Law Reform Commission, *Essentially Yours: The Protection of Human Genetic Information in Australia*, Report No 96, (2003) at Ch 35.

109 The conduct of the wife in this case, both in relation to the birth notification forms (and her continuing silence, until 1995, about her extra-marital sexual relationship during the marriage) was not inconsistent with Lord Mansfield's rule once flowing from the presumption of legitimacy. However, it is the availability of more reliable DNA testing of paternity which has given rise to the husband's novel application to rely on an action for deceit in his particular circumstances.

110 Further, under s 143(1) of the Child Support Act[92] payments can be recovered where child support has been paid by a person who is not liable, or who subsequently becomes not liable. A court has a discretionary power to make such orders as it considers just and equitable for the purposes of adjusting or giving effect to the rights of the parties and the child concerned[93]. Section 66X of the Family Law Act also contains provisions enabling orders for the repayment of child maintenance which has been paid by a person who is not a parent or step-parent of the child[94]. In this manner, the legislature has evinced an

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92 Section 143(1) relevantly provides:

"Where:

(a) an amount of child support is paid by a person to another person; and

(b) the person is not liable, or subsequently becomes not liable, to pay the amount to the other person;

this amount may be recovered in a court having jurisdiction under this Act."

See also s 107 which provides that a court may make a declaration to the effect that an applicant is not entitled to an assessment of child support.

93 Section 143(3). These provisions distinguish the situation here from that in *P v B (Paternity: Damages for Deceit)* [2001] 1 FLR 1041.

94 Section 66X(1) provides that repayment can be ordered if:

"(a) … a court has at any time purported to make an order … requiring a person … to pay an amount, or to transfer or settle property, by way of maintenance for a child; and

(b) the maintenance provider has:

(i) paid another person an amount or amounts; or

(ii) transferred or settled property;

(Footnote continues on next page)

intention to deal with the economic loss caused by a wife to a husband, after the breakdown of their marriage, in circumstances such as those arising here, namely payments for child support or maintenance. It can be noted that these amounts are not coterminous with the damages for economic losses awarded by the trial judge as described earlier in these reasons.

Development of the tort of deceit

111 Significant developments of the tort of deceit in the last quarter of the 19th century arose out of the increased use of companies as suitable vehicles for the conduct of commercial activity, and representations to be commonly found in prospectuses and like documents.

112 In the Court of Appeal below, both Callaway JA[95] and Eames JA[96] referred to the familiar passage in Lord Selborne's reasons in *Smith v Chadwick*[97]:

> "… I conceive that in an action of deceit … it is the duty of the plaintiff to establish two things; first, actual fraud, which is to be judged of by the nature and character of the representations made, considered with reference to the object for which they were made, the knowledge or means of knowledge of the person making them, and the intention which the law justly imputes to every man to produce those consequences which are the natural result of his acts: and, secondly, he must establish that this fraud was an inducing cause to the contract; for which purpose it must be material, and it must have produced in his mind an erroneous belief, influencing his conduct."

113 This passage was subsequently extracted in the reasons of Lord Herschell in *Derry v Peek*[98], after which his Lordship went on to explain[99]:

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in compliance, or partial compliance, with the purported order; and

(c) a court has determined that the maintenance provider is not a parent or step-parent of the child."

95 [2005] Aust Torts Reports ¶81-783 at 67,248 [7].

96 [2005] Aust Torts Reports ¶81-783 at 67,256 [42].

97 (1884) 9 App Cas 187 at 190.

98 (1889) 14 App Cas 337 at 373.

99 (1889) 14 App Cas 337 at 374.

> "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."

114 The modern tort of deceit will be established where a plaintiff can show five elements: first, that the defendant made a false representation[100]; secondly, that the defendant made the representation with the knowledge that it was false, or that the defendant was reckless or careless as to whether the representation was false or not[101]; thirdly, that the defendant made the representation with the intention that it be relied upon by the plaintiff[102]; fourthly, that the plaintiff acted in reliance on the false representation[103]; and fifthly, that the plaintiff suffered damage which was caused by reliance on the false representation[104]. Generally, the elements of the tort have been found to exist in cases which concern pecuniary loss flowing from a false inducement and the need to satisfy each element has always been strictly enforced, because fraud is such a serious allegation.

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100 *Edgington v Fitzmaurice* (1885) 29 Ch D 459 at 483 per Bowen LJ.

101 *Derry v Peek* (1889) 14 App Cas 337 at 374 per Lord Herschell.

102 *Bradford Third Equitable Benefit Building Society v Borders* [1941] 2 All ER 205 at 211 per Viscount Maugham.

103 *Redgrave v Hurd* (1881) 20 Ch D 1 at 21 per Jessel MR; *Edgington v Fitzmaurice* (1885) 29 Ch D 459 at 483 per Bowen LJ; *Arnison v Smith* (1889) 41 Ch D 348 at 369 per Lord Halsbury LC.

104 *Pasley v Freeman* (1789) 3 TR 51 at 56 [100 ER 450 at 453] per Buller J, 64 [457] per Lord Kenyon CJ; *Smith v Chadwick* (1884) 9 App Cas 187 at 196 per Lord Blackburn; *Bradford Third Equitable Benefit Building Society v Borders* [1941] 2 All ER 205 at 211 per Viscount Maugham. That "damage" is the gist of the action reflects the development of deceit as an action on the case.

115 Not only do the cases themselves show that an action for deceit has historically been associated with commercial and economic matters, and particularly with inducing contractual relations, but the method by which damages in deceit may be assessed also reflects this link[105]. Where a person makes a fraudulent representation to a purchaser about the value or nature of a product or property, which representation induces the purchaser to buy the product or property, damages can be quantified by reference to the difference between the price paid, and the actual value of the product or property[106]. In *Gould v Vaggelas*[107], this Court quantified damages in deceit as those representing the loss suffered by the purchaser as a consequence of reliance on the fraudulent representation.

116 In 1974, the common law action in tort for deceit in Australia was eclipsed in part by Pt 5 of the *Trade Practices Act* 1974 (Cth) ("the Trade Practices Act") and cognate provisions under State legislation[108]. The consumer protection regime embodied in that legislation prohibits both conduct that is misleading or deceptive, or likely to mislead or deceive[109], and the making of false or misleading representations[110].

117 The current position is that whilst the tort of deceit involves a "perfectly general principle"[111], as contended by the husband, applications outside a

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105 See for example, the decision in *Sibley v Grosvenor* (1916) 21 CLR 469, involving related but independent actions in contract and deceit.

106 The authorities for that proposition were collected by Gibbs CJ in *Gould v Vaggelas* (1984) 157 CLR 215 at 220. See further *HTW Valuers (Central Qld) Pty Ltd v Astonland Pty Ltd* (2004) 217 CLR 640 at 656-657 [35] per Gleeson CJ, McHugh, Gummow, Kirby and Heydon JJ.

107 (1984) 157 CLR 215.

108 See *Fair Trading Act* 1987 (NSW), ss 42 and 44; *Fair Trading Act* 1989 (Q), ss 38 and 40; *Fair Trading Act* 1987 (SA), ss 56 and 58; *Fair Trading Act* 1990 (Tas), ss 14 and 16; *Fair Trading Act* 1999 (Vic), ss 9 and 12; *Fair Trading Act* 1987 (WA), ss 10 and 12; *Fair Trading Act* 1992 (ACT), ss 12 and 14; *Consumer Affairs and Fair Trading Act* (NT), ss 42 and 44.

109 Trade Practices Act, s 52.

110 Trade Practices Act, s 53.

111 *Clerk & Lindsell On Torts*, 19th ed (2006) at 1081 [18-01].

commercial or economic setting are rare and the action is mainly associated with pecuniary loss. However, two older cases in which damages for personal injury arose out of a claim of deceit deserve mention. *Wilkinson v Downton*[112] concerned a claim for damages in respect of nervous shock resulting from a false representation intended as a practical joke. While it was argued that the claim was one of fraud, falling within principles established in *Pasley v Freeman*[113], Wright J doubted that the conduct complained of did fall within that authority and preferred to recognise the cause of action as arising from an imputed intention to cause another physical harm[114]. Likewise false words and threats uttered with a similar imputed intention to cause physical harm, including nervous shock, were held actionable in *Janvier v Sweeney*[115]. Subsequent developments in Anglo-Australian law recognise these cases as early examples of recovery for nervous shock, by reference to an imputed intention to cause physical harm, a cause of action later subsumed under the unintentional tort of negligence[116].

118 In *Smythe v Reardon*[117], Stanley J held that the false statement by the defendant that he was a bachelor and free to marry the plaintiff was not calculated to cause the degree of illness required by *Wilkinson v Downton*[118]. However, his Honour did allow recovery in deceit for moneys provided by the plaintiff during their cohabitation to assist the defendant in his business as a baker[119].

119 The question of whether an action for deceit should run in circumstances such as those of the present case has been considered elsewhere.

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112 [1897] 2 QB 57.

113 (1789) 3 TR 51 [100 ER 450].

114 [1897] 2 QB 57 at 58-59.

115 [1919] 2 KB 316.

116 *Tame v New South Wales* (2002) 211 CLR 317 at 376 [179] per Gummow and Kirby JJ.

117 [1949] St R Qd 74 at 79.

118 [1897] 2 QB 57.

119 [1949] St R Qd 74 at 79-80.

Decisions in other jurisdictions

120 The English case *P v B (Paternity: Damages for Deceit)*[120] concerned a man's claim that he had been fraudulently deceived by a woman, with whom he had lived for many years, into believing he was the father of her child. In deciding a preliminary question of whether the tort of deceit applied in the context of domestic relations, in a brief judgment, Stanley Burnton J determined that it could be maintained as between a cohabiting couple chiefly because torts of negligence and trespass to the person applied in a domestic context and he considered it would be anomalous to except deceit[121]. He recognised that it would not be appropriate to award damages for the tort if to do so conflicted with orders made in the Family Division of the High Court of Justice[122].

121 From about 1930[123], a number of jurisdictions in the United States of America have come to recognise actions in tort for the intentional infliction of emotional distress[124], as a further development of the approach in *Wilkinson v Downton*[125] and *Janvier v Sweeney*[126]. As the tort has not been recognised in Australia[127], and as differing decisions have been arrived at in different American States in respect of the availability of the tort in respect of circumstances such as here, depending often on the terms of differing State legislation[128], the decisions

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120 [2001] 1 FLR 1041.

121 [2001] 1 FLR 1041 at 1047 [28].

122 [2001] 1 FLR 1041 at 1048 [33].

123 *Prosser and Keeton on the Law of Torts*, 5th ed (1984) at 60.

124 See *Doe v Doe* 712 A 2d 132 (1998). See also *Richard P v Gerald B* 249 Cal Rptr 246 (1988); *Pickering v Pickering* 434 NW 2d 758 (1988); *Nagy v Nagy* 258 Cal Rptr 787 (1989).

125 [1897] 2 QB 57.

126 [1919] 2 KB 316.

127 See *Tame v New South Wales* (2002) 211 CLR 317 at 374-375 [171]-[175] per Gummow and Kirby JJ, 402-403 [251] per Hayne J. See also at 338-339 [44] per Gaudron J.

128 Berger, "Lies Between Mommy and Daddy: The case for recognizing spousal emotional distress claims based on domestic deceit that interferes with parent-child relationships", (2000) 33 *Loyola of Los Angeles Law Review* 449 at 459ff.

are of limited assistance in determining the content of the Australian common law in question here. However, two matters are worth noting. The lack of consensus about the availability of the tort in respect of false representations concerning an extra-marital sexual relationship and paternity during marriage stems, at least in part, from the adjectival definition of the tort[129]. Secondly, a cautious approach has been taken by a number of American courts when dealing with tortious actions for deceit in a family context, particularly where public policy considerations come into play[130]. In 1980 in *Stephen K v Roni L*[131] (a case concerning deceit in respect of contraception) it was stated:

> "Broadly speaking, the word 'tort,' means a civil wrong … for which the law will provide a remedy in the form of an action for damages … [but it] does not lie within the power of any judicial system, however, to remedy all human wrongs. There are many wrongs which in themselves are flagrant. For instance, such wrongs as betrayal, brutal words, and heartless disregard of the feelings of others are beyond any effective legal remedy and any practical administration of law."

122 It was also acknowledged that it was not the business of the court to "supervise the promises made between two consenting adults as to the circumstances of their private sexual conduct"[132]. In a more recent case also

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129 *Restatement of the Law (Second)*, Torts 2d, published in 1965, of which Professor Prosser was Reporter, describes in §46(1) intentional infliction of emotional distress as follows:

> "One who by *extreme and outrageous conduct* intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm." (emphasis added)

130 See, for example, *Day v Heller* 653 NW 2d 475 (2002); *Wallis v Smith* 22 P 3d 682 (2001); *Nagy v Nagy* 258 Cal Rptr 787 (1989); *Richard P v Gerald B* 249 Cal Rptr 246 (1988); *Pickering v Pickering* 434 NW 2d 758 (1988); *Perry v Atkinson* 240 Cal Rptr 618 (1987); *Douglas R v Suzanne M* 127 Misc 2d 745 (1985); *Stephen K v Roni L* 164 Cal Rptr 618 (1980). Such cases have been distinguished where paternity or parental responsibilities to children are not in issue: *Kathleen K v Robert B* 198 Cal Rptr 273 (1984); *Barbara A v John G* 193 Cal Rptr 422 (1983).

131 164 Cal Rptr 618 at 619 (1980). See also *Douglas R v Suzanne M* 127 Misc 2d 745 (1985).

132 164 Cal Rptr 618 at 620 (1980).

involving an action for deceit in respect of misrepresentations concerning contraception, one member of the Court of Appeals of New Mexico stated[133]:

> "If we recognize a claim based on intentional misrepresentation, we have started down the road towards establishing standards of conduct in reproductive relationships — one of the most important and private forms of interpersonal relations. In the absence of a clear balance favoring the imposition of legal duties of disclosure in reproductive relations between competent adult sex partners, candour in reproductive matters should be left to the ethics of the participants."

Similar reservations have been expressed in Canada[134], regarding the "undesirability of provoking suits within the family circle"[135].

123 By way of contrast, the husband relied on two United States authorities in which appeal courts permitted claims for deceit, similar to the husband's, to be maintained on the grounds that public policy considerations, premised on the "best interests of the child", do not constitute a bar to such actions being brought[136].

124 The division of opinion in other jurisdictions, including differences on public policy issues demonstrates the need to consider the elements of the tort of deceit with an eye to testing its application to a false representation of paternity made during a continuing marital relationship. In principle, the same need for close scrutiny would appear to arise in respect of any attempt to invoke the tort of deceit in other intimate person relationships, especially instances of "reproductive relations between competent adult sex partners"[137].

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133 *Wallis v Smith* 22 P 3d 682 at 688 (2001) per Alarid J.

134 *Fleming v Fleming* (2001)19 RFL (5th) 274; *D (DR) v G (SE)* (2001) 14 RFL (5th) 279; *S (F) v H (C)* (1994) 120 DLR (4th) 432, affirmed (1994) 133 DLR (4th) 767.

135 *Frame v Smith* [1987] 2 SCR 99 at 110 per La Forest J; cf *Thompson v Thompson*, unreported, Alberta Court of Queen's Bench, 15 September 2003.

136 *Doe v Doe* 712 A 2d 132 (1998); *GAW v DMW* 596 NW 2d 284 (1999).

137 *Wallis v Smith* 22 P 3d 682 at 688 (2001) per Alarid J.

Application of deceit to the facts

125 That the representations made in connection with the birth notification forms were false was not in contest at the trial. However, the wife submitted in this Court that the most she knew at the time of the completion of the birth notification forms was that there was an inevitable doubt in her mind about the truth of the representations because of her extra-marital sexual relationship. As already noted, the representations were not inconsistent with the long-standing presumption of legitimacy or the statutory presumption of parentage in the Family Law Act, nevertheless they were capable of being demonstrated to be false by DNA testing.

126 There was no evidence before this Court of whether the wife could have undergone DNA testing during pregnancy without risk to herself or her children so as to establish the truth and in any event the trial judge recognised the difficulty for the wife in trying to investigate her position, while simultaneously trying to maintain her marriage and her family.

127 All judges in the Court of Appeal found that the evidence of the wife's intention in respect of the birth notification forms was of an intention to register the two children under her married name. They also found that the husband was not induced by the birth notification forms to support the children financially and emotionally, essentially because his wife's continuing silence about her extra-marital sexual relationship is what actually led him to assume such obligations[138].

128 This reasoning highlights the most problematic distinction between this case and orthodox claims of deceit. Marriage is a relationship of trust and confidence. Representations made within such a relationship would have to be assessed with that reality in mind.

129 In general terms, silence will only constitute a misrepresentation if there is a legal or equitable duty to disclose something[139]. However, numerous authorities recognise a duty of care on one spouse to disclose to the other any matter which will cause physical injury, such as one spouse having a sexually

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138 [2005] Aust Torts Reports ¶81-783 at 67,248 [6] per Callaway JA, 67,261 [75] and 67,265 [106] per Eames JA, with whom Ormiston JA agreed.

139 Kerr, *On the Law of Fraud and Mistake*, 7th ed, (1952) at 47; Cartwright, *Misrepresentation*, (2002) at 337-339.

transmitted disease[140]. The law has also long recognised that a false representation, for example as to being unmarried, can vitiate the consent of the other party to a marriage[141]. The tort of deceit also applies between spouses when a false representation by one induces the other spouse to take some commercial or contractual step resulting in damage[142]. All three classes of cases are distinguishable from the question under consideration here.

130 There is currently no recognised legal or equitable obligation, or duty of care, on a spouse to disclose an extra-marital sexual relationship to the other spouse during the course of a marriage[143]. There is a mantle of privacy over such conduct which protects it from scrutiny by the law. However, that mantle does not cover conduct between spouses involving duties recognised by the law such as the duty of disclosure in certain contractual negotiations or a duty of care. The rationale for that position is easily appreciated by comparing commercial transactions which are the province of the law, with the private aspects of a relationship such as marriage which are not the province of the law.

131 In a commercial context, it has been stated that once an intention to induce a person to rely on a false statement has been made out, motive is irrelevant[144]. However, motive may be relevant to proof of intention[145].

132 In considering whether the tort of deceit applies to the circumstances of this case, it is appropriate to consider the possibility of more comprehensive evidence of the wife's intention than was provided. A person in the position of the wife in the present case may be impelled by a congery of motives. An important consideration at the time of completing the birth notification forms (or remaining silent about an extra-marital sexual relationship) may be the welfare and status of any new child and the continuing welfare of any other children of

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140 *Kathleen K v Robert B* 198 Cal Rptr 273 (1984). See also *Beaulne v Ricketts* (1979) 96 DLR (3d) 550 and *Barbara A v John G* 193 Cal Rptr 422 (1983).

141 *Marriage Act* 1961 (Cth), as amended, s 23.

142 In *Ennis v Butterly* [1996] 1 IR 426 an action in deceit between de facto spouses in these circumstances was allowed to proceed to trial; see also *Smythe v Reardon* [1949] St R Qd 74.

143 See *Wallis v Smith* 22 P 3d 682 at 688 (2001) per Alarid J.

144 *Derry v Peek* (1889) 14 App Cas 337 at 374 per Lord Herschell.

145 See, for example, *Tackey v McBain* [1912] AC 186.

the marriage. Another consideration may be a desire to avoid an irretrievable breakdown of the marriage. A further consideration may be the avoidance of grief and distress, to the husband and to others such as grandparents, and avoiding the wife's own humiliation.

133 These considerations are not raised so as to introduce considerations of moral blame or judgment concerning the conduct of such a person, but to show that the imposition of a justly imputed intention[146] to mislead or induce which may be as straightforward as "the state of [a man's] digestion"[147] in a commercial setting, is likely to prove far more problematic in circumstances such as those here, where a representation (or a silence) is but one act (or omission) in a voluntary complex and private relationship of trust and confidence. In such a relationship matters of intention and inducement could only arise if the impugned conduct was intended to give rise to legal consequences[148]. Private matters of adult sexual conduct and a false representation of paternity during a marriage are not amenable to assessment by the established rules and elements of deceit. In terms of principle, this would appear to apply to other relationships such as "long term and publicly declared relationships short of marriage"[149] although that question does not fall to be determined in this case. In the absence of a clear need for the common law to impose a legal or equitable duty of disclosure of such matters they should be left, as they are now, to the morality of the spouses, encouraged by the legislature's support for truthfulness about paternity in the various provisions of the Family Law Act which have been mentioned.

Pain and suffering

134 There is one further consideration. The husband's claim included damages for economic loss and damages for pain and suffering. The legislative provisions enabling the recovery of economic loss arising from the payment of child support wrongly obtained have been dealt with above. In an action such as this it will always be difficult to establish whether the pain and suffering alleged by the husband is truly caused by a false representation or is a compound reaction to the distress occasioned by the discovery of what is felt as betrayal and the breakdown of the marriage that it has occasioned. Acknowledging this is to

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146 *Smith v Chadwick* (1884) 9 App Cas 187 at 190 per Lord Selborne.

147 *Edgington v Fitzmaurice* (1885) 29 Ch D 459 at 483 per Bowen LJ.

148 *Cohen v Cohen* (1929) 42 CLR 91 at 96 per Dixon J.

149 *Garcia v National Australia Bank Ltd* (1998) 194 CLR 395 at 404 [22] per Gaudron, McHugh, Gummow and Hayne JJ, 432 [76] per Kirby J.

recognise the inherent difficulty of establishing reliance (and causation) in such cases. Further, the utility of permitting a person such as the husband to pursue a claim for such damages at common law is outweighed by the capacity of such an action for adverse effects, financial, emotional and psychological, on the wife and all three children, and adverse emotional and psychological effects on the husband. The determination of some courts to put aside such public policy issues and allow the tort to be maintained in cases[150] which were relied upon by the husband are not persuasive in the Australian context.

Conclusions

135 For the reasons set out above, false representations concerning an extra-marital sexual relationship or its consequences made by one spouse to another during the course of a marriage (ie excluding circumstances involving either a duty of care or a duty of disclosure) are not actionable in deceit. Nevertheless, a husband is entitled under the family law regime in Australia to seek an order for the repayment of any moneys wrongly paid for child support[151], or child maintenance[152], in reliance on such representations.

Order

136 The appeal should be dismissed with costs.

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150 cf *Doe v Doe* 712 A 2d 132 (1998); *GAW v DMW* 596 NW 2d 284 (1999).

151 Child Support Act, s 143(1).

152 Family Law Act, s 66X.

137 HAYNE J. The facts and circumstances giving rise to this appeal are set out in the joint reasons of Gummow, Kirby and Crennan JJ. I need repeat few of those matters. I agree with their Honours' conclusions, and the reasons given for those conclusions, about the application and validity of ss 119 and 120 of the *Family Law Act* (1975) Cth.

138 I agree that the appeal should be dismissed with costs but I would express the applicable principle differently.

139 I would not state the principle that leads to the dismissal of this appeal by reference to an absolute rule that is tied to the subject-matter of the asserted misrepresentation, whether that is identified as "the paternity of a child" or, more generally, as "sexual fidelity". That is, I do not consider that those *subjects* are to be treated as producing some special rule. I would identify the relevant principle as being one which is not confined to questions of sexual fidelity or the consequences of infidelity. And I would identify the relevant principle as one that may admit of exception.

140 The relevant principle that should be adopted is analogous, and of generally similar content, to that concerning contracts and family relations[153]. That is, save in exceptional cases, representations made by one party to a marriage to another about the relationship between them (including, but not limited to, questions of paternity of children and sexual fidelity) are not intended by the parties to give rise, and are not to be treated by the law as giving rise, to consequences enforceable by an action for deceit. The cases in which a court could conclude that the party making the representation, and the party to whom it was made, both intended at the time of the representation that legal consequences should attach to the veracity of what was said or written would be rare indeed. Unless both parties are shown to have intended that what was said or done should give rise to legally enforceable consequences, the action for deceit will not lie. Misrepresentations about matters of health and physical well-being (like misrepresentations about transmissible diseases) raise other considerations than those that need to be considered in this matter. Nothing that is said here should be understood as foreclosing the determination of those issues.

141 There are several reasons for identifying the relevant principle in the way described. Each is closely related to the other and there is, therefore, some artificiality in describing them as separate reasons, but it is as well to expose the reasoning in this way.

142 The first set of reasons can be illustrated by the facts of the present case, and can be described as the difficulty of identifying the elements of the tort of

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153 *Cohen v Cohen* (1929) 42 CLR 91.

deceit in the continuing relationship between parties to a marriage. In particular, it will generally not be easy to identify what is later said to have been a misrepresentation upon which the opposite party relied to his or her detriment. Those elements, of misrepresentation and reliance, are not easily identified because what is said or done between parties to a marriage takes its meaning and its significance from the whole of the shared experience between them. To look at a single statement made or act done by one of the partners to a marriage, without a full understanding of that context, would be very likely to yield unjust results. And in the context of the action for deceit, it will be very likely to lead (as here) to the attempt to isolate one or more particular statements or events from an otherwise undifferentiated course of conduct, and the elevation of that statement or that conduct into a misrepresentation upon which the other party claims to have relied to his or her detriment.

143 In the present matter, the appellant alleged that the respondent had falsely represented to him that he was the father of each of the second and third child. The particulars he gave of those representations fastened specially upon "the completion and presentation by [the respondent] to [the appellant] of a birth registration application" in respect of each child. The "birth registration application" was a form of Notification of Birth prescribed under the Registration of Births, Deaths and Marriages Regulations made under the then provisions of the *Registration of Births Deaths and Marriages Act* 1959 (Vic). He signed each as "father".

144 As the appellant's case was conducted at trial, it was the presentation of each of these forms to him, and their completion by him, which was proffered as the specific representation by the respondent that was said to be false and upon which he relied to his detriment. But the presentation and completion of these forms could not be considered as separate and discrete events standing outside the context in which they were presented and completed.

145 At the time the forms were presented to, and completed by, the appellant, he and his then wife were living together in a relationship of trust and confidence founded in the premises provided by the sharing of their lives (as their lives had been shared in the past, were being shared then, and would be shared in the future). So far as the evidence revealed, the trust and confidence between them had not then been overtly challenged. The intimate relationship which the respondent had then formed with another man was unknown to the appellant. In those circumstances, from the appellant's perspective, it went without saying that the children conceived by, carried by, and born to the mother were the children of their union. So far as the appellant was concerned, nothing had occurred, and nothing had been said or done, to displace that assumption. And the assumption continued for some time after the birth of the third child.

146 His actions after the births of the second and third children are thus to be explained by the continuance of that assumption, not any reliance upon the

accuracy of what was said or done in connection with registering their births. Only when the respondent was taken ill in 1995, well after the parties had begun to live separately, and the appellant read in the respondent's private diary of her doubts about the paternity of one of the children, was there any occasion for the appellant to question what, until then, was and always had been, the conventional basis of his relationship with his wife and all three children.

147 It is to be inferred that this assumption about paternity, which formed the conventional basis of the parties' relationship, was created and maintained in many different ways. There can be no doubt that during the marriage, the parties acted and spoke one to another, and dealt with third parties, on the basis that all three children were children of the marriage. Presumably the assumption was sometimes made explicit (whether by reference to the appellant as father or otherwise) but the assumption pervaded all that the parties did or said in relation to the children. As the appellant rightly said in his evidence at trial: "I had no reason to believe that any of my children weren't mine."

148 In these circumstances, it is altogether unreal to single out from an otherwise undifferentiated course of conduct and statements, in which the appellant's paternity of the children was assumed, one kind of event (the completion of a form necessary to register the birth of a child) as constituting a distinct representation upon which the appellant relied in ordering his future conduct.

149 The second set of considerations can be seen as lying behind the first. It can be identified as the law's insistence upon identifying a particular misrepresentation as founding the action for deceit. To explain the point, it is desirable to begin from some fundamental aspects of the modern law of deceit, and then to relate the point to the particular facts of this case.

150 The modern law of deceit is sometimes treated as if it had its origins in the late nineteenth century decision of the House of Lords in *Derry v Peek*[154]. There is no doubt that Lord Herschell's speech in that case has been of particular importance in the development of the tort, especially his recognition[155] that:

> "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."

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154 (1889) 14 App Cas 337.

155 (1889) 14 App Cas 337 at 374.

But it is important to recognise that the tort was not then, and is not now, confined to cases in which the parties make, or intend to make, a contract, and that the origins of the tort as an independent cause of action are to be traced well beyond the late nineteenth century. In particular, in 1789, in *Pasley v Freeman*[156], an action in the nature of a writ of deceit was held to lie even if there was no privity of contract between the parties. Nonetheless, as Fleming was later to point out[157]:

> "[T]he close association of deceit with bargaining transactions has inevitably coloured the elements of the action, which largely reflect the ethical and moral standards of the market place as they relate to permissible methods of obtaining contractual or other economic benefits and of inflicting pecuniary loss through reliance on false statements."

151 This close connection with the marketplace, coupled with the moral opprobrium attending a finding of fraud, has led to great emphasis being given by the courts to the accurate specification by a plaintiff of the representation said to be false[158]. This emphasis is no matter of mere form or pleading practice. It is founded in basic considerations of fairness. A party alleged to have deliberately misled another must know precisely how the misleading is said to have occurred.

152 The connection between the law of deceit and bargaining transactions may also be understood as supporting the proposition, commonly stated as being an element of the tort of deceit, that the representation must be one which the defendant *intended* should be acted upon by the plaintiff[159]. But whether that latter proposition is accurate, or complete, is a question that need not be decided here.

153 It is not possible to conclude in the present case that there was a particular statement made by the respondent, about the paternity of either child, which was a misrepresentation upon which the appellant relied to his detriment. There was a course of events that could be traced back to when the parties met, in which things were said and done, and not said and not done, which together led him to form and maintain the belief he held from the first moment of revelation of his

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156 (1789) 3 TR 51 [100 ER 450].

157 Fleming, *The Law of Torts*, 9th ed (1998) at 695.

158 cf *Banque Commerciale SA en Liquidation v Akhil Holdings Ltd* (1990) 169 CLR 279 at 285; *Middleton v O'Neill* (1943) 43 SR (NSW) 178 at 184; *Wallingford v Mutual Society* (1880) 5 App Cas 685 at 701.

159 cf Spencer Bower, Turner and Handley, *Actionable Misrepresentation*, 4th ed (2000) at 69-70 [117]; *O'Doherty v Birrell* (2001) 3 VR 147 at 169 [54]-[55].

wife's pregnancy, that he was the father of the child she carried and later bore. And this will be so in very many cases in which misrepresentations are said to have been made about the paternity of a child. It is at least difficult, perhaps even impossible, to force the facts of a relationship in which a conventional basis of that relationship is later falsified into the mould of the tort of deceit.

154 Moreover, to single out one particular element of the course of events occurring in a marriage (in the present case by focusing upon the presentation and completion of a Notification of Birth form) by suggesting that it should be treated as standing apart from the general course of events, suggests, even assumes, that one party to the marriage (here, the respondent) was duty bound at that particular point of their relationship to inform the other (the appellant) of doubts about the child's paternity. Yet the appellant, correctly, stopped short of contending that the respondent had been under such a duty when the forms were presented to the appellant for signature as father, or at some other point in their relationship.

155 It is this question of duty to speak which yields the third of the considerations that supports the adoption of the principle stated in these reasons.

156 There are cases, particularly commercial cases, in which a failure to speak conveys a falsehood as clearly as would the direct telling of a lie. But there can be no unthinking transposition of such principles from a commercial setting into the radically different context provided by the publicly proclaimed commitment of marriage and its necessary underpinning assumptions of trust and confidence. Effect cannot be given to those necessary assumptions of trust and confidence, nor their vitality maintained, by the law supplying rules about the subjects in relation to which, or about the occasions on which, one partner should speak or may stay silent. The trust and confidence required between marriage partners must be supplied by them; it cannot be provided by legal norms and duties in the same way as those norms and duties may regulate commercial interactions.

157 That the law cannot supply a rule which would oblige a marriage partner to reveal doubts entertained about the paternity of a child is demonstrated by considering what content that rule would have, and how that rule could apply to the infinite variety of circumstances that may confront a married couple. Would it be a rule that always, and in every circumstance, obliged the revelation of infidelity regardless of the prospect of pregnancy? Upon what basis could a rule be devised that confined the duty to requiring revelation of infidelity only when a pregnancy ensued or a child was born and its birth was to be registered? And why would the rule be confined to questions of sexual infidelity? There are many other matters that may affect the degree of trust and confidence the parties to a marriage have in each other. How would those matters be identified? Would some objective criteria be established or would the inquiry be subjective? What could be said to be the relevant objective criteria? And if a subjective inquiry is suggested, would the duty extend to revealing any and every departure

from the bases that the particular parties to a marriage identify as supporting their mutual trust and confidence?

158 The law cannot satisfactorily prescribe how a relationship that depends entirely upon matters wholly personal and private to the parties to it is to be maintained. The trust and confidence between marriage partners is based in much more than considerations of sexual fidelity; it is based in complex and subtle considerations of human relationships. These are not amenable to the external application of duties of the kind described.

159 The fourth set of considerations that point to the adoption of the principle stated in these reasons concerns the nature of the relationship of trust and confidence that is to be identified as underpinning the relationship of marriage.

160 Because the relationship of trust and confidence, upon which a marriage is and must remain founded, extends well beyond matters of sexual fidelity and questions about the paternity of children, there is an evident difficulty in stating the principle that should be applied in the present case in a way that is confined to representations about particular subject-matters. It is the nature of the relationship between husband and wife that leads to the conclusion that the tort of deceit should find no application in the present case. And that is why the relevant principle should be identified, not by reference to the subject-matter of the particular misrepresentation that is alleged, but by reference to the consequences that flow from the nature of the relationship within which the misrepresentation is made.

161 It is well-established that a consequence of the trust and confidence that must underpin the relationship of marriage is that, save in exceptional circumstances, the parties to the marriage are not to be understood as contemplating resort to an action for breach of contract, as the means for establishing the content of certain obligations between them, or as the means for remedying what are said to be the consequences of the breach of those obligations. A like rule should apply as a limit to the availability of an action for deceit for misrepresentations made in the course of a marriage about matters concerning the basis of marital trust and confidence, including, but not limited to, matters of sexual fidelity and the paternity of children.

162 The fifth set of matters that must be considered are matters that might be said to tend against applying to the tort of deceit a rule whose content is evidently taken from the radically different context of the law of contract (the rule regarding intention to create legal relations), and matters that might be said to tend against the adoption of *any* special rule for claims in deceit that are made between spouses or former spouses. Two different kinds of question are identified - one concerns the application of legal principles devised in one context to another legal context; the other concerns the more general question of why a party who has been wronged should not have a remedy. But it is

convenient to deal with them together because the same answer must be given to both questions.

163 That the same answer should be given to both questions becomes apparent when each question is restated in terms that are related more closely to the issues that must be decided. The first question can be restated as: "Why should a rule devised to reflect the assumed intentions of parties to a marriage (or other family relationship) in respect of *voluntarily assumed* obligations be applied in the altogether different field of *legally imposed* tortious obligations between such parties?" Is there not a discordance and incongruity in applying a rule based in mutual intention to circumstances where, by hypothesis, one person has misled another? The second question can be restated as: "Should not the law provide a remedy where, as in this matter, one party to a marriage will look back at all that was said and done during the marriage and rightly conclude that the other party misled and deceived him or her?" Why should it matter whether the deceived party can fix upon a particular event as the point at which the deception occurred or the point at which it began? Hindsight demonstrates that the appellant was misled.

164 The answers to these questions lie in the nature of the relationship within which and from which the questions arise. The apparent difficulty or incongruity in applying a rule devised in one field of legal discourse (contract) to another and radically different field (deceit) is much reduced, even eliminated, when it is recalled that the rule that is applied is a rule which is devised to reflect the nature and incidents of the larger, pre-existing, relationship between the parties within which the particular event said to give rise to legal liability has occurred. And because that larger, pre-existing, relationship is one in which a deception takes its significance from the degree to which there is a departure from the commitment of one to the other in mutual trust and confidence, the law of deceit finds no satisfactory application. It finds no satisfactory application because it depends upon the application of objective and generalised standards of conduct to a very particular and personal relationship in which it is the parties themselves who do, and must, mould the way in which their relationship is ordered and conducted.

165 Finally, the present case concerns parties who, at the relevant times, were married. It is, therefore, neither necessary nor appropriate to decide any wider question about the application of a similar rule to domestic relationships in which the parties are not married. I would not wish to be taken, however, as excluding the possibility that a rule of generally similar content may properly find application in other domestic relationships. Whether that is so must await a case in which the question properly arises.

166 HEYDON J. This appeal should be dismissed for the following reasons.

Reliance

167 *The crucial point in the Court of Appeal.* "A worse vehicle could not be imagined for deciding the scope of the tort of deceit." So spoke Callaway JA of this case[160]. It is hard to disagree. The representations originally pleaded in the statement of claim dated 31 January 2001 were allegedly made when the wife announced her pregnancies to the husband. These representations were not referred to in the reasons of the trial judge. It must be presumed that they were rejected. The representation on which the husband did succeed at trial was the presentation to the husband by the wife of birth notification forms naming the husband as father. That representation was not alleged until it appeared in amended further and better particulars supplied the day after the trial began, 11 November 2002. All the members of the Court of Appeal found that one integer of the tort of deceit was not made out on the facts. Two found that more than one was not. In those circumstances Callaway JA rightly saw as a sufficient reason for dismissing the husband's claim a reason identified by Eames JA, with which Ormiston JA also agreed. That reason is that the husband did not rely on the notification of birth forms for any purpose other than the registration of the children's name as "Magill"[161]. That is a conclusion based on factual considerations relating to the evidence – or the lack of evidence – on that subject. They can be summarised thus.

168 *Justification for the Court of Appeal's conclusion.* The husband gave no evidence that he relied on the representations in the forms. He gave evidence that the wife "filled the form out on each occasion and – naming me as the father and I had no reason to believe otherwise so I signed the particular form". A little later he said that until he separated from the wife he "believed that I was the father of all three of my children". When he stated the basis of his belief, he did not mention the forms, but rather said:

> "I had no reason not to believe it, I watched all three of the children born. I was present at the hospital when all three children were born ... and I had no reason to believe that any of my children weren't mine ...".

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160 *Magill v Magill* [2005] Aust Torts Reports ¶81-783 at 67,247 [2]. It is certainly an entirely unsatisfactory vehicle for deciding what heads of damage may be recovered, and nothing will be said about this subject, to which, appropriately, very little attention was directed in argument.

161 *Magill v Magill* [2005] Aust Torts Reports ¶81-783 at 67,247-67,248 [1]-[2] and 67,262-67,263 [83]-[85]. There were concurrent findings on this point.

The Court of Appeal accepted that evidence[162]. The Court of Appeal concluded that it was the absence of any reason for the husband to believe that he was not the father, coupled with "the whole situation of being in a marriage and his ignorance that his wife was conducting an affair"[163], which caused him to believe that he was the father, not the wife's statement in the forms that he was the father. That was a circumstantial inference which was open to the Court of Appeal. It has not been shown that the Court erred in drawing it, although the notice of appeal challenged it and the husband endeavoured to demonstrate error in it in various ways.

169 *Erroneous inference?* The husband argued that the Court of Appeal were wrong to draw the inference for various reasons. Apart from the statements in the forms, the husband had never been told by the wife that he was the father. The wife voluntarily made clear unequivocal written statements that he was the father in the forms. The wife believed that in filling in the forms as she did she gave the husband to understand that he was the father. The husband's signing of the forms was extremely important, because that act caused a presumption of paternity to arise by reason of s 69T of the *Family Law Act* 1975 (Cth) ("the Family Law Act"). These points do not invalidate the Court of Appeal's conclusion, because they do not meet squarely the problem of reliance. That the wife had never told the husband he was the father except on the forms does not negate the view that his belief in paternity arose from circumstances other than the forms, however clear the statement of paternity in the forms and however much the wife believed she was communicating that statement to the husband. The husband's evidence is consistent with the conclusion that the representation was not, in context, seen as having any materiality. The request for the husband's signature did not call for him to make a particular decision leading to a significant change of circumstances on his part. It would not have appeared to him to be a representation made in order to obtain some advantage. To him the form must have seemed to be no more than a routine administrative document of the kind which parents have to fill in on many occasions in life.

170 *A single inducement?* The husband also submitted that a fraudulent misrepresentation need not be the only inducement: it sufficed if it was one inducement, even though the husband was also partly influenced "by his own mistake"[164]. However, the Court of Appeal did not identify two groups of factors

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162 *Magill v Magill* [2005] Aust Torts Reports ¶81,783 at 67,262 [82] per Eames JA (Ormiston JA concurring).

163 *Magill v Magill* [2005] Aust Torts Reports ¶81,783 at 67,262 [82] per Eames JA (Ormiston JA concurring).

164 *Edgington v Fitzmaurice* (1885) 29 Ch D 459 at 483 per Bowen LJ.

operating on the husband – the representations on the forms and his own mistaken beliefs derived from other sources. Instead their conclusion was that the latter group of factors were the only material ones. The husband has not shown that this conclusion was false.

171 *Onus on wife?* The husband further argued that representations by the wife to the husband that he was the father of a child born to her would naturally operate on his mind in considering whether or not he was the father[165]; that after the representations the husband believed he was the father; and that in the circumstances an onus lay on the wife to show that the husband had not relied on her representations[166]. The husband relied on the following statement in *Gould v Vaggelas*[167]:

> "Where a plaintiff shows that a defendant has made false statements to him intending thereby to induce him to enter into a contract and those statements are of such a nature as would be likely to provide such inducement and the plaintiff did in fact enter into that contract and thereby suffered damage and nothing more appears, common sense would demand the conclusion that the false representations played at least some part in inducing the plaintiff to enter into the contract."

The wife, it was submitted, in not cross-examining the husband about reliance, had treated reliance as not having been in issue, and certainly had not discharged the onus referred to.

172 However, the present case is not a case of contract. There is no analogy between a case where, after negotiations between two strangers, one, after receiving a representation, changes position by entering a contract, and a case like the present, where a wife makes a representation of fact already believed by the husband. The wife was not intending to induce the husband to enter a contract, the representations were not likely to induce him to enter a contract, the spouses in fact entered no contract, and the husband did not change his position in any other way. The onus referred to in the statement quoted from *Gould v Vaggelas* was only an "evidentiary onus"; it was made plain that the legal burden

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165 *Sibley v Grosvenor* (1916) 21 CLR 469 at 473 per Griffith CJ.

166 Reliance was placed on *Redgrave v Hurd* (1881) 20 Ch D 1 at 21 per Sir George Jessel MR, 24 per Lush LJ; *Smith v Chadwick* (1882) 20 Ch D 27 at 44 per Sir George Jessel MR; *Allan v Gotch* (1883) 9 VLR (L) 371 at 376-377; *Power v Kenny* [1960] WAR 57 at 64 per Wolff CJ.

167 (1984) 157 CLR 215 at 238 per Wilson J.

of proving reliance remained on the plaintiff[168]. Nor was the present a case where "nothing more appears": there was ample reason for the husband to believe that he was the father apart from the statements in the forms.

Other issues

173 That is sufficient to dispose of the criticisms made by the husband in support of his notice of appeal. It is therefore not a necessary step towards dismissing the appeal to consider the attempts by the wife to support the Court of Appeal's orders by reference to the three propositions stated in her notice of contention. The parties, however, examined in considerable detail the merits of the second proposition, namely that "the tort of deceit does not extend to claims for damages arising from the paternity of children conceived and born during the course of a marriage". They also examined the first and third propositions, which relate to ss 119 and 120 of the Family Law Act[169]. The first was that "'tort' in section 119 ... does not comprehend a claim of deceit arising from the paternity of children conceived and born during the course of a marriage". The third was that s 120 "applied to prevent the appellant's claim". In view of the attention paid by the parties to these important issues, it is desirable to say something about them. It is convenient to begin with ss 119 and 120.

Sections 119 and 120: construction

174 *The wife's submissions.* In the event that the debate analysed below[170] about whether under the general law, and independently of the effect of ss 119 and 120, an action in deceit may be brought by one spouse against another by reason of the latter's fraudulent representations about paternity was resolved against the wife's arguments that no such action lay, the wife put the following submissions about ss 119 and 120.

175 First, instances of the tort of deceit outside a commercial context are "at best" anomalous. The husband's attempt to rely on the tort in the present proceedings was unique in Australia. Accordingly, Parliament cannot have intended that s 119 would apply to claims in tort in relation to the paternity of children conceived and born during the course of a marriage.

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168 *Gould v Vaggelas* (1984) 157 CLR 215 at 237, 238-239 per Wilson J, 250-251 per Brennan J.

169 They are set out by Gleeson CJ at [25].

170 See [188]-[231].

176 A second and alternative submission – a true alternative, since it is inconsistent with the first submission – was that the abolition by s 120 of actions for criminal conversation, adultery and enticement of a party to a marriage necessarily also entailed the abolition of actions in deceit about the fact of adultery or its consequences.

177 Thirdly, s 119 was to be read down to extend only to torts which can occur as much between spouses as between a spouse and a stranger. So read, it did not extend to an action for deceit arising out of a false representation about the paternity of children, which, if it could be brought at all, could only be brought by one spouse against another.

178 Finally, the wife submitted that it would be anomalous if s 120 were to be construed as prohibiting claims for damages for adultery while permitting recovery of damages for suffering caused by misrepresentations about the consequences of adultery; and if the latter damages were recoverable, damages should also be recoverable in any case where a spouse is able to show that he or she suffered damage in relying on a false denial of adultery.

179 *Difficulties with the wife's submissions.* The fundamental obstacle which causes these submissions of the wife to founder is the clear and intractable character of the statutory language.

180 *Section 119.* Section 119 was directed to one particular issue – whether one spouse has the capacity to sue another in contract or tort. It permits either party to a marriage to bring legal proceedings against the other in tort – *all* torts, not all torts other than deceit, and not all torts other than one particular form of deceit. There is no basis on which to read down the word "tort" in s 119 to exclude the tort of "deceit arising from the paternity of children conceived and born during the course of a marriage". Nor is there any basis on which to read an exception into s 119 for that form of the tort. The quoted language was no doubt carefully crafted to ensure that a spouse can sue the other spouse for frauds in proprietary and contractual matters, and to provide some ammunition with which to repel the husband's constitutional challenge[171]. But its very precision is inconsistent with the universality of s 119.

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171 That challenge was based on the proposition that if s 119 were construed in the manner urged by the wife, it would not be supported by s 51(xxi) and (xxii) of the Constitution. Section 51 provides that the Commonwealth Parliament may legislate with respect to "marriage" (xxi) and "divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants" (xxii).

181 *Section 120.* Nor can the wife's construction of s 120 be accepted. Section 120 deals with three wrongs that had existed at different times before 1975. The action for criminal conversation was an action by a husband for loss of consortium by reason of his wife's adultery with a third party. Consortium included his wife's "comfort and society"[172] and her assistance in "the conduct of the household and the education of his children"[173]. The action in enticement was also an action by a husband for loss of his wife's consortium[174]. The action for criminal conversation was abolished in England by s 59 of the *Matrimonial Causes Act* 1857 ("the 1857 Act"). However, s 33 of that Act permitted recovery of damages by a husband against a person who had committed adultery with a petitioner's wife on the same principles as applied to criminal conversation, but only on a petition for judicial separation or dissolution of marriage. A permissible ingredient in those damages was damages for loss of consortium[175], though by 1966, if not earlier, the recoverable quantum at least in England was only "a modest conventional figure"[176].

182 In Australia the legislation of the Colonies and then the States followed similar principles. Thus, in Victoria, legislation between the enactment in 1861 of *An Act to amend the Law relating to Divorce and Matrimonial Causes* (Vic) ("the Victorian Act of 1861")[177] and the time when ss 98 and 99 of the *Marriage Act* 1958 (Vic) ceased to be operative[178] has contained provisions corresponding to ss 33 and 59 of the 1857 Act as described in the Table set out below[179].

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172 *Weedon v Timbrell* (1793) 5 TR 357 at 360 per Lord Kenyon CJ [101 ER 199 at 201].

173 *Wright v Cedzich* (1930) 43 CLR 493 at 498 per Knox CJ and Gavan Duffy J.

174 *Wright v Cedzich* (1930) 43 CLR 493. In England this action was extended to permit wives to sue as well: *Gray v Gee* (1923) 39 TLR 429; *Newton v Hardy* (1933) 49 TLR 522.

175 *Butterworth v Butterworth* [1920] P 126 at 142.

176 *Pritchard v Pritchard* [1967] P 195 at 212 per Diplock LJ.

177 25 Vict No 125.

178 Sections 98 and 99 were repealed by s 13 of the *Registration of Births Deaths and Marriages (Amendment) Act* 1962 (Vic). They must have already ceased to have force by reason of s 109 of the Constitution on the coming into force of s 44 of the *Matrimonial Causes Act* 1959 (Cth) on 1 February 1961: see s 2 and *Commonwealth of Australia Gazette*, No 81, 1 December 1960 at 4245.

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(Footnote continues on next page)

183 Section 44(5) of the *Matrimonial Causes Act* 1959 (Cth) ("the 1959 Act") provided that "[n]o action for criminal conversation lies, whether under this Act or otherwise". Instead, provision was made by s 44(1)-(3), as it had been made (at least to the advantage of husbands) in the earlier Victorian legislation, for an action for damages by one party to a marriage against a stranger to the marriage for adultery. It lay only on a petition for a decree of dissolution of the marriage on the ground of adultery, only if a decree of dissolution on that ground was made, only where the adultery had not been condoned, and only if the adultery had been committed less than three years before the date of the petition. Section 44 created "a statutory cause of action different from the old action for criminal conversation"[180]. Australian judges differed on the extent to which loss of consortium justified recovery of damages under s 44. Some considered that it was necessary to find "some tangible injury beyond mere loss of consortium or feelings of hurt to one's ego before an award of damages is justified"[181]. Others thought that s 44 of the 1959 Act continued the pre-1959 law[182].

184 Of these three wrongs, the two common law wrongs rested in part on ideas involving husbands having quasi-proprietary rights in the consortium of their wives – but not vice versa[183]. The third wrong – the statutory wrong – rested in

Act	**Recovery of damages for adultery**	**Abolition of action for criminal conversation**
The 1857 Act	Section 33	Section 59
The Victorian Act of 1861	Section 20	Section 40
Marriage and Matrimonial Causes Statute 1874 (Vic) (28 Vict No 268)	Section 76	Section 75
Marriage Act 1890 (Vic)	Section 93	Section 92
Marriage Act 1915 (Vic)	Section 147	Section 146
Marriage Act 1928 (Vic)	Section 101	Section 100
Marriage Act 1958 (Vic)	Section 99	Section 98

180 *Yule v Junek* (1978) 139 CLR 1 at 11 per Mason J.

181 *Forsyth v Forsyth* (1970) 16 FLR 248 at 264 per Carmichael J; *Woodman v Woodman* [1972] 2 NSWLR 451 at 460 per Jenkyn J.

182 *Moore v Moore* [1976] 1 NSWLR 635 at 637 per Hutley JA, Moffitt P and Reynolds JA concurring.

183 In *Locksley Hall*, Tennyson described the mentality thus:

"He will hold thee, when his passion shall have spent its novel force,

Something better than his dog, a little dearer than his horse."

part on notions of consortium as well, although the 1959 Act made it available to wives as well as husbands. The abolition of these three wrongs by s 120 is matched by a general statutory rejection, or a general obsolescence, of causes of action involving similar ideas such as the action per quod consortium amisit and the father's action for seduction, enticement and harbouring in relation to the loss of his daughter's domestic services[184]. The fundamental concepts underlying recovery of damages for criminal conversation, adultery and enticement of a party to a marriage have little in common with those underlying the tort of deceit, either generally, or in its potential operation between spouses. Those three causes of action give one party to a marriage rights against a third party. The tort of deceit between spouses gives one spouse rights against the other. The statutory cause of action for damages for adultery depended on dissolution of the marriage on the ground of adultery; deceit does not. Although s 120 in terms abolished that statutory cause of action, its abolition was an inevitable consequence of the abolition of adultery as a ground for divorce, with all other fault-based grounds for divorce, effected by the Family Law Act[185]; there is no equivalent connection between deceit and the grounds for divorce. The gist of the three wrongs referred to in s 120, unlike deceit, does not lie in deceitful words or conduct; it lies in different acts having particular results. The abolition by s 120 of the three causes of action specific to marriage does not entail the exclusion of a general tort like deceit from its application to marriage, particularly in view of s 119.

185 Finally, the wife's appeal to the absurdity of reading s 120 as not extending to deceit about the paternity of children on the ground that, if it did, a spouse could recover damages for deceitful denials of adultery on the part of the other spouse, must be rejected. The proposition that one spouse can recover damages for the other's denials of adultery which satisfy the requirements of the tort of deceit may have difficulties and may be open to objections, but it is not absurd.

186 *Conclusion.* Sections 119 and 120 do not have the effect of preventing one spouse suing another for deceit, and in particular for paternity fraud, if that action otherwise lies.

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184 See *CSR Ltd v Eddy* (2005) 80 ALJR 59 at 73 [44] per Gleeson CJ, Gummow and Heydon JJ; 222 ALR 1 at 15-16.

185 *Yule v Junek* (1978) 139 CLR 1 at 17 per Jacobs J.

Sections 119 and 120: constitutional validity

187 In view of the conclusion that neither s 119 nor s 120 affects the right of one spouse to sue another in deceit, it is not necessary to deal with the husband's argument that, if either section did, it would be beyond constitutional power.

Does the tort of deceit extend to deceit in relation to the paternity of children conceived and born during the course of a marriage?

188 The wife advanced two groups of arguments against the availability of an action in deceit for damages arising from the paternity of children conceived and born during the course of a marriage. The first relied on what were called "public policy" reasons. The second centred on the contention that the availability of such actions would undermine the statutory regimes for dealing with disputes arising out of marriage and divorce, and that those statutory regimes by implication prevented those actions being available. The statutory regimes were those in the Family Law Act and the *Child Support (Assessment) Act* 1989 (Cth) ("the Child Support Act").

Preliminary matters of background

189 There are two preliminary matters of background to be borne in mind.

190 *History of deceit.* The wife's arguments tended to stress the narrowness and youth of the tort of deceit. They contended that normally deceit was only relevant in inducing contracts, and that beyond that field it was limited to commercial contexts. However, the majority judges in *Pasley v Freeman*[186], the case said to have created the tort of deceit, engaged in some discussion of old authority which satisfied them that they were not innovating. Thus Ashhurst J said[187]:

> "Where cases are new in their principle, there I admit that it is necessary to have recourse to legislative interposition in order to remedy the grievance: but where the case is only new in the instance, and the only question is upon the application of a principle recognized in the law to such new case, it will be just as competent to Courts of Justice to apply the principle to any case which may arise two centuries hence as it was two centuries ago; if it were not, we ought to blot out of our law books one fourth part of the cases that are to be found in them."

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186 (1789) 3 TR 51 [100 ER 450].

187 (1789) 3 TR 51 at 63 [100 ER 450 at 456].

That view that there was nothing novel in the decision has also been taken by Milsom[188]:

> "Not until 1789 in *Pasley v Freeman* was a liability for deceit clearly established as an entity in its own right, neither necessarily associated with contract nor excluded by it; and this resurrection of an ancient and elementary liability has been treated by modern writers as an example of the rare 'invention' of a new tort."

His view was that the former reach of the tort of deceit was pre-empted by the development of contractual actions, and for a time equivalents to it survived only in Star Chamber and Chancery. He also stated[189]:

> "But even in the common law the realisation that deceit was itself a proper basis of liability probably never quite died. Cheating at dice or cards, for example, may have been actionable in the late fifteenth century, though the matter was still not beyond argument in the early seventeenth century[190]. Late in the sixteenth century money had been paid to the plaintiff to pay over to a named third party; and the defendant, who got it by pretending to be that third party, was held liable in an action on the case for the deceit[191]. But claims of this nature were at least rare, perhaps because those who go in for such deceptions are not often worth suing."

191 Accordingly the approach adopted by the wife, of starting with a narrow tort of deceit and inquiring whether it should, in 2006, be unprecedently expanded, is questionable.

192 *Two common law bars to paternity fraud actions.* This appeal arose from a dispute between a couple resident in Victoria. The husband sued in the County Court of Victoria. He invoked a general rule of the common law of Australia applicable in Victoria. The wife relies on the impact on that general rule both of the circumstances in which the conduct of the kind she engaged in takes place

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188 *Historical Foundations of the Common Law*, 2nd ed (1981) at 366 (footnote omitted).

189 *Historical Foundations of the Common Law*, 2nd ed (1981) at 363-364 (including author's footnotes).

190 Fitzherbert, *Natura Brevium*, f 95D; *Baxter v Woodyard and Orbet* (1605) Moore KB 776 [72 ER 899]; *Anon* (1633), Rolle's *Abridgement*, vol 1, at 100, no 9.

191 *Thomson v Gardner* (1597) Moore KB 538 [72 ER 743]. Cf *Baily v Merrell* (1615) 3 Bulstrode 94 [81 ER 81] (harm to horses resulting from misstatement of load; opinion unfavourable to action).

and of federal legislation. In assessing that impact, it is desirable to remember some background history. Before 1882 it was a rule of the common law applying in the Australian Colonies including Victoria, subject to various exceptions[192], that one spouse could not sue another in tort. The first significant inroad on this doctrine of interspousal immunity was made by s 12 of the *Married Women's Property Act* 1882 (UK), which relevantly provided[193]:

> "Every woman, whether married before or after this Act, shall have in her own name against all persons whomsoever, including her husband, the same civil remedies ... for the protection and security of her own separate property, as if such property belonged to her as feme sole, but, except as aforesaid, no husband or wife shall be entitled to sue the other for a tort."

The legislature of Victoria enacted successive statutes based on this model from 1884[194], which continued in force until 1968[195]. The other Australian jurisdictions took a similar course[196].

193 This legislation left in place very substantial interspousal immunity from actions in tort. By 1930 this state of affairs came to be justified not on the old fiction that husband and wife "were one flesh"[197] but on the ground that litigation between spouses was "unseemly, distressing and embittering"[198].

194 In 1959 the English Law Reform Committee was asked to consider whether any changes in the law relating to the liability in tort of one spouse to the other were called for. They rejected the idea that spouses should have complete freedom to sue each other in tort because it would be disruptive to the

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192 *Gottliffe v Edelston* [1930] 2 KB 378 at 385-387 per McCardie J.

193 45 & 46 Vict c 75.

194 *Married Women's Property Act* 1884 (Vic), s 15.

195 *Married Women's Property Act* 1890, s 15; *Married Women's Property Act* 1915, s 15; *Married Women's Property Act* 1928, s 15; *Marriage (Property) Act* 1956, s 6; *Marriage Act* 1958, s 160.

196 *Married Women's Property Act* 1893 (NSW), s 15; *Married Women's Property Act* 1890 (Q), s 15; *Married Women's Property Act* 1883-4 (SA), s 12; *Married Women's Property Act* 1883 (Tas), s 10; *Married Women's Property Act* 1892 (WA), s 12.

197 Winfield, *A Text-Book of the Law of Tort*, 5th ed (1950) at 100.

198 *Gottliffe v Edelston* [1930] 2 KB 378 at 392 per McCardie J.

marriage[199]. They considered whether a precondition to a spousal action in tort should be the leave of the court. However, they decided that it would be sufficient if the court were given the power to stay the proceedings. Subject to that qualification, they recommended that spouses should be able to sue each other as if they were unmarried[200]. That recommendation was implemented in the *Law Reform (Husband and Wife) Act* 1962 (UK), s 1. That model was followed in 1965, 1968 and 1972 by Tasmania, Queensland and South Australia respectively[201]. In 1968 Victoria[202] and the Australian Capital Territory[203], and in 1969 the Northern Territory[204], abolished the interspousal immunity without any qualification about a stay. In 1964 New South Wales legislation[205] permitted spouses to sue each other only in relation to the protection of property, or bodily injury or death arising out of the use of a motor vehicle. However, in 1996 New South Wales in substance adopted the Victorian position[206], and in 2003 Western Australia did so as well[207].

195 The enactment of s 119 of the *Family Law Act* in 1975 thus came after most of the States and both the Territories had made a legislative choice – some

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199 Great Britain, Law Reform Committee, Ninth Report, *Liability in Tort between Husband and Wife*, (1961), Cmnd 1268, par 9.

200 Great Britain, Law Reform Committee, Ninth Report, *Liability in Tort between Husband and Wife*, (1961), Cmnd 1268, pars 11 and 13.

201 *Married Women's Property Act* 1965 (Tas), s 4, inserted s 7A into the *Married Women's Property Act* 1935 (Tas) (still in force); *Law Reform (Husband and Wife) Act* 1968 (Q) (now replaced by *Law Reform Act* 1995 (Q), s 18, giving rights of action without any qualification about stay); *Statutes Amendment (Law of Property and Wrongs) Act* 1972 (SA), inserting a new s 32 into the *Wrongs Act* 1936 (SA) (still in force as *Civil Liability Act* 1936 (SA), s 64).

202 The *Marriage (Liability in Tort) Act* 1968 (Vic) substituted a new s 160(1) in the *Marriage Act* 1958 (Vic).

203 Married Persons (Torts) Ordinance 1968.

204 Married Persons (Torts) Ordinance 1969.

205 *Law Reform (Married Persons) Act* 1964 (NSW), substituting s 16 and inserting ss 16A and 16B into the *Married Women's Property Act* 1901 (NSW).

206 *Married Persons (Equality of Status) Act* 1996 (NSW), ss 4 and 5.

207 *Acts Amendment (Equality of Status) Act* 2003 (WA) inserted ss 2 and 3(2) into the *Law Reform Miscellaneous Provisions Act* 1941 (WA).

following the United Kingdom model, some going further, one not going so far. These Australian enactments plainly rejected the modern justification for interspousal immunity, which had already been largely abandoned by the Law Reform Committee, namely that interspousal litigation was "unseemly, distressing and embittering". It is true, however, that the English Law Reform Committee and the legislatures did not refer specifically to fraud or paternity fraud.

196 That body of legislation by degrees removed one bar to actions by husbands against wives for paternity fraud. Another bar had been removed in Victoria in 1958 by the enactment of the *Evidence Act* 1958, s 31[208], which abolished the rule[209] preventing spouses from giving evidence of non-intercourse after marriage, thereby making the presumption of legitimacy of any children of the marriage very difficult to rebut[210].

197 It has become clear that various torts other than deceit may be the subject of litigation between spouses since the abolition of interspousal immunity. Spouses can sue each other for negligent driving. They can also sue for assault and battery[211]. Unless some sound reason can be identified, it would be anomalous if they could not sue for deceit.

The extent of deceit independently of statute: the wife's arguments

198 The wife's first argument was that there was little support in authority for the husband's cause of action. She submitted that cases in which deceit was established in a domestic (ie non-commercial) context were limited to the

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208 See also *Evidence Act* 1898, s 14D (NSW) (introduced by the *Evidence (Amendment) Act* 1954 (NSW), s 12(c)); *Evidence Act* 1977 (Q), s 12; *Evidence Act* 1929 (SA), s 34H; *Evidence Act* 1910 (Tas), s 95A (introduced by the *Evidence Act* 1943 (Tas)); *Evidence Act* 1906 (WA), s 19; *Evidence Act* 1971 (ACT), s 55; *Evidence Act* (NT), s 8. The *Evidence Act* 1995 (Cth), and its equivalents in New South Wales and Tasmania, have the effect of preserving the abolition by s 56(1), notwithstanding the repeals of the former legislation in those States and the Australian Capital Territory.

209 The rule was stated in *Goodright v Moss* (1777) 2 Cowp 591 [98 ER 1257]; *Russell v Russell* [1924] AC 687.

210 The 1959 Act, s 98, had adopted an intermediate position: in proceedings under that Act the parties to a marriage were competent but not compellable to give evidence showing that a child born to the wife during the marriage was illegitimate.

211 *In the Marriage of PG & BJ Marsh* (1993) 17 Fam LR 289; *In the Marriage of Kennon* (1997) 139 FLR 118.

following categories. One comprises instances, in England and Canada, of women who became pregnant after being deceived into entering a void marriage by married men who untruthfully said they were single[212]. In Australia, a claim of that kind once succeeded before a single judge[213]. In another case, she said, it failed before a single judge[214]. The wife called the cases in which the claim succeeded "exceptional" and "anomalous"; she went further in calling the case in which she said it failed correct. Another comprises cases in which damage was caused by a knowingly false statement[215], but which are in truth to be explained, according to the wife, not as deceit cases but as forerunners of other tortious causes of action such as intentional infliction of mental harm[216] or as precursors to the recognition of recovery for negligently inflicted mental trauma[217].

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212 *Beyers v Green* [1936] 1 All ER 613 (jury verdict); *Graham v Saville* [1945] 2 DLR 489; *Beaulne v Ricketts* (1979) 96 DLR (3d) 550.

213 *Garnaut v Rowse* (1941) 43 WALR 29 (no pregnancy).

214 *Smythe v Reardon* [1949] St R Qd 74 (no pregnancy). In fact the plaintiff did not entirely fail. Stanley J did not deny the availability of deceit, but he declined to broaden the damages recoverable by analogy to those recoverable in assault, and he found that no general damages were recoverable (because there was no evidence of illness, pain and suffering, and damage suffered by reason of the plaintiff's having adopted a child was too remote). He gave judgment for the plaintiff for £76.10s damages for monies lent to the defendant or paid on a guarantee of his debt. It is not clear whether the £76.10s was recovered in deceit or otherwise.

215 The parties referred to *Wilkinson v Downton* [1897] 2 QB 57 (defendant practical joker told a wife that her husband had broken both legs in an accident); *Janvier v Sweeney* [1919] 2 KB 316 (private detective in 1917 accused a French woman whose fiancé was German of having "been corresponding with a German spy"). See also *Dulieu v White & Sons* [1901] 2 KB 669 at 682-683 per Phillimore J.

216 In *Wilkinson v Downton* [1897] 2 QB 57 itself, at 58-59 Wright J preferred to base the outcome not on deceit but on the fact that the defendant had infringed the plaintiff's legal right to personal safety by wilfully doing an act calculated to cause physical harm to the plaintiff. See *Northern Territory v Mengel* (1995) 185 CLR 307 at 347 per Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ and *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 255 [123] per Gummow and Hayne JJ.

217 *Tame v New South Wales* (2002) 211 CLR 317 at 376 [179] per Gummow and Kirby JJ.

199 The wife accepted that there was United States[218] and Canadian[219] authority supporting the cause of action for deceit in relation to the paternity of children of a marriage, but pointed to various other decisions to the contrary.

200 The wife also accepted that in England a single judge of the Queen's Bench Division had decided a preliminary issue of whether a de facto husband could sue his de facto wife in deceit for telling him he was the father of her child favourably to the de facto husband[220].

201 The wife agreed that it was often possible, although she said it could be difficult, to analyse disputes arising from false statements about paternity in such a way as to satisfy the discrete elements of the tort of deceit. However, she submitted that the following arguments which those United States courts denying relief had accepted ought to be accepted here.

202 *Intrusion of a blunt commercial tort into complex non-commercial relationships.* First, the wife submitted that intimate relationships frequently involve deceit, betrayal and emotional distress. A person may profess love to gain sexual favours, or deny an affair in order to preserve a marriage, or lie about contraception or fertility. The law does not treat agreements between spouses in the same way as it treats commercial dealings[221]. By the same token, it ought not to treat fraud between spouses in the same way as it treats commercial fraud. Deceit actions are an appropriate means of remedying commercial fraud, but not paternity fraud. The tort of deceit is limited to mendacious attempts to obtain a commercial advantage. It cannot be transposed to marital relationships, where a wife who has a doubt about the paternity of her child may be faced with a difficult choice between lying to save her marriage and telling the truth at the risk of what the wife in argument called, using a phrase employed by the trial judge, "enormous uproar". Further, the law is incapable of remedying the suffering

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218 *Koelle v Zwiren* 672 NE 2d 868 (Ill App, 1 Dist, 1996) (paternity fraud by mother in relation to two casual acts of intercourse with father); *Doe v Doe* 712 A 2d 132 (Md Ct Spec App, 1998); *GAW v DMW* 596 NW 2d 284 (CA Minn, 1999).

219 *Thompson v Thompson*, unreported, Alberta Court of Queen's Bench, 15 September 2003.

220 *P v B* [2001] 1 FLR 1041.

221 *Balfour v Balfour* [1919] 2 KB 571; *Cohen v Cohen* (1929) 42 CLR 91; *Jones v Padavatton* [1969] 1 WLR 328; [1969] 2 All ER 616.

caused by betrayal[222]. This point was expanded upon in *Douglas R v Suzanne M*[223]:

> "The judiciary should not attempt to regulate all aspects of the human condition. Relationships may take varied forms and beget complications and entanglements which defy reason. Wrongs which occur in this context admit of no simple remedy. It is doubtful whether the court could fashion an order which would effectively resolve all the issues and make the parties whole."

Hence it is undesirable to seek to apply to complex human relationships so blunt an instrument as an action for damages for deceit.

203 *Artificiality of, and difficulties in, applying tort of deceit.* Secondly, the wife submitted that that course is undesirable for the further reason that it is very difficult to apply the tort to those relationships. The precise elements of the tort of deceit are highly artificial when considered against the daily events affecting, conversations between and assumptions of parties to, a personal relationship. It is therefore difficult to isolate from those events, conversations and assumptions the key elements of the tort, particularly representation and reliance. It is also difficult to prove the integers of deceit in cases involving private conversations between the parties, where often it will be only oath against oath[224]. Hence a further reason why the law should not intervene is to be found in the fact that it is technically difficult, from the forensic point of view, to do so.

204 *Ill-directed nature of tort of deceit.* Thirdly, the wife submitted that although the tort of deceit is directed at particular untruthful statements, the conduct complained of in relation to paternity fraud is not really any particular untruthful statement. It is rather the commission of the particular act leading to the birth and the failure either to abstain from it or to disclose it. But if a duty of disclosure were imposed under cover of potential recovery for paternity fraud, it could cause more social damage than its imposition would justify[225]. It could destabilise marriages and divide families. It could harm children. "[T]he

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222 *Richard P v Gerald B* 202 Cal App 3d 1089 at 1093-1094; 249 Cal Rptr 246 at 249 (Cal App 1 Dist, 1988).

223 127 Misc 2d 745 at 747; 487 NYS 2d 244 at 245-246 (SCNY, 1985).

224 *Douglas R v Suzanne M* 127 Misc 2d 745 at 747; 487 NYS 2d 244 at 245 (SCNY, 1985).

225 *Richard P v Gerald B* 202 Cal App 3d 1089 at 1093-1094; 249 Cal Rptr 246 at 249 (Cal App 1 Dist, 1988); *Pickering v Pickering* 434 NW 2d 758 at 761-762 (SCSD, 1989).

possibility exists that judicial intervention will exacerbate the initial wrong in some unanticipated way."[226]

205 *Damage caused by introducing tort of deceit.* Fourthly, the wife submitted that even if there is no duty of disclosure, litigation for paternity fraud will create the undesirable consequences just referred to.

206 *Child support as damage.* Finally, the wife submitted that it is wrong to treat as a form of compensable damage the birth of, and need to support, a child. Litigation to recover damages on that ground "would indeed be strong evidence of parental rejection, which could only be emotionally detrimental to the child"[227]. A man who develops a close relationship with a child falsely represented as his cannot be said to suffer "damage" compensable at law[228].

The extent of deceit independently of statute: conclusion

207 *A background point.* The tort of deceit gives a remedy where damage is caused by reason of the plaintiff having relied on fraudulent misrepresentation. In *Nocton v Lord Ashburton*, Viscount Haldane LC said[229]:

> "*Derry v Peek*[230] simply illustrates the principle that honesty in the stricter sense is by our law a duty of universal obligation. This obligation exists independently of contract or of special obligation. If a man intervenes in the affairs of another he must do so honestly, whatever be the character of that intervention."

Viscount Haldane LC was not considering anything in the nature of paternity fraud. But in that celebrated speech he was attempting to survey authoritatively the relationship between fraud at law and fraud in equity. It is true that in 1914 a husband could not sue a wife for paternity fraud, because in general no action in tort lay between spouses, and no evidence tending to bastardise the child of a marriage was admissible. Nonetheless, Viscount Haldane LC's language admits

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226 *Douglas R v Suzanne M* 127 Misc 2d 745 at 747; 487 NYS 2d 244 at 246 (SCNY, 1985).

227 *Barbara A v John G* 145 Cal App 3d 369 at 379; 193 Cal Rptr 422 at 429 (Cal App 1 Dist, 1983); *Day v Heller* 653 NW 2d 475 (SC Neb, 2002).

228 *Nagy v Nagy* 210 Cal App 3d 1262 at 1269-1270; 258 Cal Rptr 787 at 791 (Cal App 2 Dist, 1989).

229 [1914] AC 932 at 954. The whole passage is set out by Gleeson CJ at [17].

230 (1889) 14 App Cas 337.

of no exceptions to or limitations on the general principle that honesty is a duty of *universal* obligation. It was not his custom to speak loosely. And language of equivalent breadth was used two centuries earlier by Sir John Comyns LCB: "An action upon the case for a deceit lies when a man does any deceit to the damage of another". Those words were approvingly quoted by Lord Kenyon CJ in *Pasley v Freeman*[231].

208 Against that background, the points made by the wife do not negate the application of the tort of deceit to statements by a wife to a husband about the paternity of a child conceived and born within the marriage.

209 *Intrusion of commercial tort into complex non-commercial relationships.* It is commonly accepted that the general law, including the tort of deceit, applies to such matters as the procurement, including the fraudulent procurement, by husbands of the consent of their wives to guarantees, the consent of their wives to decisions affecting family companies or family trusts, and the consent of their wives, or their wives' relatives, to engage in particular proprietary dispositions or contractual steps. Despite the commercial or proprietary character of these dealings, they can be closely related to the events, emotions and assumptions of the matrimonial life being shared by the spouses. The distinctions which the wife in this appeal wishes to draw between fraud in relation to the paternity of children conceived and born in marriage and other forms of fraud between husband and wife (or between fraud as to the paternity of children born to couples in a "continuing relationship", and other forms of fraud), are too crude. The facts underlying actions in deceit arising out of paternity fraud are distressing and embittering. But the same is true of the facts underlying other actions based on deceit – setting aside guarantees, other contracts or proprietary dispositions. Matrimonial discord can be as acute if it is caused by proprietary fraud as it is when caused by paternity fraud. Trouble in the property aspects of marriage can affect its emotional aspects, and vice versa. Both have an impact on the relations between the two families whom the marriage has joined. In marriage there remains even now, as there was in former times, "far more at stake than gratification of momentary infatuations"[232]. The relatives of marrying couples have not only an emotional concern, but often to some extent a financial concern, for the parties and their children, and sometimes they make financial arrangements on that basis. Both commercial fraud and paternity fraud disrupt the financial and emotional expectations so created.

210 *Artificiality of, and difficulties in, applying tort of deceit.* The law often develops doctrines which are useful tools of analysis in standard instances, even

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231 (1789) 3 TR 51 at 64 [100 ER 450 at 457].

232 Thompson, *English Landed Society in the Nineteenth Century*, (1963) at 19.

though they are difficult to employ in other instances. An illustration is the doctrine of offer and acceptance in relation to contract formation. That works in many factual circumstances. The fact that it does not work well, and can only be applied with some artificiality, in other sets of circumstances, has not been seen as a reason for its wholesale abandonment[233].

211 The wife contended that the husband could not succeed in this case without eroding the requirement of reliance to nothing. That may be a sound submission on the present facts, but to conclude that the tort of deceit applies to paternity fraud does not entail any erosion of its integers: it merely entails the result that plaintiffs may not easily succeed. That is true of the tort of deceit in many other areas. In its very nature it is not a tort which it is easy to establish in any circumstances. However common fraud is, it is rarer than some other forms of tortious misconduct; and the seriousness of a finding of fraud has influenced courts to call for precise pleading and strict proof[234]. The application of a cause of action is not necessarily to be negated merely on the ground that its application, and in particular its proof, is difficult, or on the ground that the courts will not lightly hold that it has been made out. It is for plaintiffs to make their cases. It is they who must suffer the consequences of difficulties that arise as they seek to shoulder that burden. That courts may experience difficulties in applying a rule of law is not a reason for not accepting its existence. And nor is the fact that plaintiffs frequently will not succeed in a cause of action.

212 It may be that it is often not possible to prove that statements made in domestic circumstances which are knowingly untrue were made with an intention to affect legal relations or to be attended with legal consequences. These are requirements for the enforceability of promises as to future conduct or warranties of present fact under the law of contract. They are not, however, in terms necessary conditions of the tort of deceitfully making false representations of present fact. It is true that some statements of fact made, for example, in jest, or on some purely social occasions, are not capable of being the subject of actions in deceit. But that is because they do not satisfy that integer of the tort which requires that the defendant intend that the plaintiff should act in reliance on the relevant representation. It follows that the non-commercial context in which paternity fraud takes place is not of itself a bar to recovery. If all the ingredients of the tort are made out, actions will lie for paternity fraud.

213 *Ill-directed nature of tort of deceit.* The husband's case did not depend on creating a duty of disclosure. He sued on an express written representation of fact, not on any duty to break silence. There are difficulties in the way the

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233 *Vroon BV v Foster's Brewing Group Ltd* [1994] 2 VR 32 at 79-83 per Ormiston J.

234 *Briginshaw v Briginshaw* (1938) 60 CLR 336 at 362 per Dixon J.

husband chose to put his case, but that case did not depend on a contention that they be overcome by the creation of a new duty of disclosure. The problems that might flow from doing so may be put on one side.

214 *Damage caused by introducing tort of deceit.* The damage which the wife contended could be caused by allowing actions for paternity fraud is of two broad kinds. One is the destabilisation of marriage and the division of families into partisans of either husband or wife. The other is harm to the children of the marriage. It is hard to view either kind of damage as being caused, as distinct from being accompanied, by proceedings in deceit. As Stanley Burnton J has observed[235]:

> "Actions for deceit between couples will in practice be commenced only when their relationship has broken down. An action in deceit will not cause the breakdown of the relationship: more likely, the breakdown in the relationship will be the consequence of the fraud."

At least from the time when a husband discovers that paternity fraud has taken place, if not earlier, it is probable that the marriage either is unhappy or is likely to become unhappy, and, as a direct consequence of the discovery, the child is less likely to receive from at least one spouse the love a natural parent usually bears a child[236]. In short, it is the knowingly false representation, and the conduct which rendered the representation false, which cause the familial harm, not the enforcement of a legal remedy through the action for deceit[237]. The same potentiality for harm would exist even if actions in deceit of this kind were legislatively proscribed.

215 Further, although interspousal immunity was once justified on the ground that litigation between spouses was "unseemly, distressing and embittering", that justification has ceased to appeal to legislatures. For courts to revive the proposition as a justification for not recognising the tort of deceit in relation to paternity between spouses is to substitute their view of public policy for that acted on by legislatures.

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235 *P v B* [2001] 1 FLR 1041 at 1047 [29].

236 *Wallis v Smith* 22 P 3d 682 (NMCA, 2001).

237 *Doe v Doe* 712 A 2d 132 at 147-148 (Md App, 1998). Great Britain, Law Reform Committee, Ninth Report, *Liability in Tort between Husband and Wife*, (1961), Cmnd 1268, par 8, recorded: "We are told that in several foreign countries whose social standards are similar to our own the law imposes no bar on proceedings between spouses and that there is no reason to believe that marriages have been put in jeopardy in consequence."

216 Turning to the issue of damage to the children in particular, a majority of this Court in *Cattanach v Melchior*[238] permitted recovery of damages for the upbringing of a child notwithstanding the fact that recovery related to complex human relationships operating in a domestic context. It did so in the face of arguments that there was potentiality for an adverse impact on the child if it ever discovered that it was not wanted at the moment of its conception. In the view of the majority, it was necessary to make "hard choices", and not simply repeat "broad statements"[239] involving "speculation as to possible psychological harm to children"[240] which were "unconvincing"[241] or trivial: "there are many harsher truths which children have to confront in growing up"[242]. Arguments based on damage to children having failed in that case, it is difficult to see how they can be accepted in this appeal.

217 *Child support as damage.* The wife argued that to permit a father to recover damages from a mother by reason of her deceit about the paternity of her child is unacceptably to treat the birth of a child as a form of damage. That is an appeal to some of the minority reasoning in *Cattanach v Melchior*[243]. The fundamental difficulty in the argument is, again, that the majority rejected the minority view. The minority reasoning cannot in these circumstances be followed.

218 *Loss of opportunity to make a crucial choice.* In some respects the family context, and the complexities of the relationships involved, point more towards the desirability of tortious liability applying than against it. A husband who thinks he is a father does more than provide material support for the child: typically he endeavours to love it, to build an emotional bond with it, to ready it for life in the years ahead in a hostile world in the way he judges best – because it is *his* child. A husband may behave in the same way towards a child of his wife's whom he does not believe he fathered, but he has a choice whether or not to do so. If a lie affects the choice a husband makes to support a child born to his wife financially and in every other way, he has lost the chance to make an informed choice about his own role in relation to the child. Provided the husband can prove damage and the other elements of deceit, it is not startling that the law

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238 (2003) 215 CLR 1.

239 *Cattanach v Melchior* (2003) 215 CLR 1 at 28 [56] per McHugh and Gummow JJ.

240 *Cattanach v Melchior* (2003) 215 CLR 1 at 36 [79] per McHugh and Gummow JJ.

241 *Cattanach v Melchior* (2003) 215 CLR 1 at 56 [145] per Kirby J.

242 *Cattanach v Melchior* (2003) 215 CLR 1 at 108 [301] per Callinan J.

243 (2003) 215 CLR 1.

should attach adverse financial consequences to the conduct of a person responsible for a lie which can so radically affect the husband's life.

219 *American cases: constitutional right of privacy.* The American authorities frequently cite *Stephen K v Roni L*[244]. In that case a man alleged that in reliance on the mother's representation that she was taking contraceptive pills he engaged in intercourse with her, resulting in the birth of a child. The action was held not maintainable: the claim arose from conduct of so "highly intimate" a nature and "so intensely private that the courts should not be asked to nor attempt to resolve such claims"[245]. To allow it "would encourage unwarranted governmental intrusion into matters affecting the individual's right to privacy"[246]. This reliance on constitutional doctrines not known to Australian law casts a shadow over the applicability in Australia of the reasoning in the American cases generally.

220 *American cases: recovery by women for sexual deceit.* The wife in this appeal was evidently prepared to allow for the possibility of some actions in deceit in relation to intimate sexual matters; certainly the notice of contention did, since the restriction stated in it was limited to "damages arising from the paternity of children". It was acknowledged that there have been cases in which actions in deceit have been approved. One authority approved an action in deceit by a woman who alleged that her attorney, to whom she was not married, had rendered her pregnant after intercourse in reliance on his knowingly false representation that he was sterile, with the woman suffering an ectopic pregnancy and being forced to undergo surgery to save her life. Another approved an action in deceit by a woman who contracted a venereal disease after having intercourse with a man in reliance on his misrepresentation that he was free of venereal disease. These cases have been distinguished on the basis that they both involved the plaintiff suffering personal injury and that the litigation had no potential for harming children[247]; the wife in this appeal placed reliance on the case drawing this distinction. While a distinction between recovering for "physical" injury and non-recovery for hurt feelings caused by betrayal is intelligible, a distinction between "physical" injury and mental disorder caused by deceit is much less sound[248]. Further, if in each case the parties were married

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244 105 Cal App 3d 640; 164 Cal Rptr 618 (Cal App 2 Dist, 1980).

245 105 Cal App 3d 640 at 643; 164 Cal Rptr 618 at 619 (Cal App 2 Dist, 1980).

246 105 Cal App 3d 640 at 645; 164 Cal Rptr 618 at 620 (Cal App 2 Dist, 1980).

247 *Richard P v Gerald B* 202 Cal App 3d 1089 at 1094-1095; 249 Cal Rptr 246 at 250 (Cal App 1 Dist, 1988).

248 See generally *Tame v New South Wales* (2002) 211 CLR 317.

with children, there would, on the wife's general approach, be a risk of harm to the children; would that risk in these circumstances debar the plaintiffs from relief?

221 *Anomalies and injustices.* The wife's contention that the tort of deceit does not extend to claims for damages by husbands against wives arising from the paternity of children conceived and born during the marriage stops short of considering whether other forms of paternity fraud are actionable. The wife submitted that the Court should confine itself to deciding the law for the particular category of circumstances illustrated by this case. Often submissions of that kind are powerful. However, the present controversy is an example of controversies which are difficult to decide without considering related, though different, factual circumstances.

222 What if a child is conceived, not during the marriage, but before marriage, and the marriage takes place on the knowingly false representation of the mother that the husband is the father? There is American authority that the husband has a good cause of action in deceit[249]. There is no reason to doubt that that is so in Australian law too, and the wife accepted this. Yet if the action lies, it lies in the face of many of the difficulties said to prevent actions between spouses based on fraudulent representations about the paternity of children conceived and born during their marriage. There are complex human relationships involved; proof depends on a contest of oath and oath; arguably the interests of the child may be injured when it learns of the litigation. What if a child is conceived before the marriage, and after the marriage takes place – or after it is terminated – the wife commits paternity fraud? The circumstances fall outside the wife's second proposition in the notice of contention. It would be bizarre if the wife were liable in those circumstances but not in the circumstances of this case. It is hard to see why a wife should not be liable for post-marriage paternity fraud: the complex human relationships are over; if children are to be injured, they will already have been injured.

223 If a husband's female friend gives birth to a child and falsely represents to the wife that the husband is not the father in such a way that the ingredients of deceit are made out, why does an action not lie for that tort by the wife against the female friend? If it does, similar difficulties to those relied on by the wife in this case exist.

224 If an action by the wife lies against the female friend, why would an action by the wife not lie against the husband if it were he who made the fraudulent misrepresentation?

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249 *Miller v Miller* 956 P 2d 887 (SC Okla, 1998).

225 If an unmarried woman living with a man gives birth to a child and falsely tells him he is the father, will an action lie? There is no policy inhibition to be inferred from the now-abolished common law rule against spouses giving evidence bastardising children or the now-abolished common law rule of interspousal immunity. It is hard to see why the action should not lie; again, if it does, it lies despite the factors supposedly pointing against interspousal litigation for paternity fraud. The wife contended that no action for paternity fraud lay in any "continuing relationship"[250], but did not deal with how that expression might be defined.

226 If an unmarried woman gives birth to a child and falsely tells a man with whom she had a single casual sexual encounter that he is the father, will an action lie?

227 Assume that a grandfather, on being told that his son and daughter-in-law cannot pay for the education of their child, agrees to pay for the education on the faith of a knowingly false representation by either the son or the daughter-in-law that the son is the father. Does an action in deceit lie?

228 If a stranger to the marriage says that the wife's children were not fathered by her husband, can she sue him in defamation? If so, can the stranger justify? If the husband says that the wife's children were not fathered by him, can the wife sue him in defamation?

229 If there are legal principles preventing actions for paternity fraud between spouses, they may apply to prevent actions for paternity fraud between unmarried men and women, and indeed fraud of all kinds other than paternity fraud between unmarried men and women – even between non-heterosexual couples.

230 To accept the wife's submissions in this case, but to limit the refusal of the law to allow paternity fraud litigation to the narrow area of litigation between husband and wife about the paternity of children conceived and born during the marriage, would create innumerable anomalies. On the other hand, to accept the wife's submissions, but to extend them to many other kinds of paternity fraud, and non-paternity fraud, would create innumerable injustices.

231 *Conclusion.* The tort of deceit may have had a limited range of practical applications in the past, but it has long been stated in general terms as, in the

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250 The wife put no argument that any such action would be inconsistent with State and Territorial statutory schemes which operate when de facto relationships break down corresponding with the arguments she put, considered below at [232]-[238], that actions for paternity fraud undermine the Family Law Act and the Child Support Act.

words of Viscount Haldane LC, a duty of universal obligation. The common law rule that no spouse could give evidence bastardising the child of a marriage remained until legislation abolished it. But the common law rule was a prohibition on a particular type of testimony: it did not alter the duties created by the substantive law. Similarly, although no spouse could sue another spouse until legislation abolished that incapacity, the incapacity was an immunity from suit, not an immunity from duty. As Cardozo CJ said[251]: "A trespass, negligent or willful, upon the person of a wife, does not cease to be an unlawful act though the law exempts the husband from liability for the damage. Others may not hide behind the skirts of his immunity." The immunity of a negligent driver from being sued for damage he caused his wife, a passenger, could not be relied on by the owner for whom the husband was acting as servant or agent[252]. The immunity of a negligent employee from being sued for damage he caused to his wife, a co-employee, could not be relied on by the employer[253]. The testimonial prohibition and the immunity from suit having been removed, an action for the tort of deceit, like an action for any other tort, is available to one spouse to the natural extent of the language in which the tort has traditionally been expressed.

Inconsistency of deceit with legislative regime: the wife's submissions

232 The wife then put various submissions on the assumption that, but for the Family Law Act and the Child Support Act, an action of deceit for paternity fraud could lie. She submitted that the availability of actions for deceit for paternity fraud would so undermine those statutory regimes that Parliament cannot have intended to permit the survival of the tort. She submitted that it was not necessary to extend the tort of deceit to paternity fraud because justice between the parties was better achieved under those Acts, which were both fully capable of dealing with false representations about paternity. She submitted that because the tort of deceit "focuses on an isolated act or incident within the context of the entirety of a marriage relationship – with all its complexities and rights and wrongs – it is unlikely to do justice between the parties in the way that the multi-factored approach required by the [Family Law Act] can."

233 The wife drew attention to four aspects of the legislation – those relating to property orders, spousal maintenance orders, financial agreements and child support.

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251 *Schubert v August Schubert Wagon Co* 249 NY 253 at 256-257 (NYCA, 1928).

252 *Waugh v Waugh* (1950) 50 SR (NSW) 210.

253 *Broom v Morgan* [1953] 1 QB 597 at 604, 607 per Singleton LJ, 609-610 per Denning LJ.

234 *Property orders.* Section 79(1) of the Family Law Act gives the court power to make orders altering the property interests of spouses. Section 79(4) requires various factors to be considered, including any child support provided or to be provided under the Child Support Act; the "contribution" of the parties; and matters listed in s 75(2). Among the matters listed in s 75(2) are matters relating to child support, and "any fact or circumstance which, in the opinion of the court, the justice of the case requires to be taken into account": s 75(2)(o). The wife submitted that the birth of a child whose father was a man other than the husband could be a negative "contribution" under s 79(4) or a "fact or circumstance" under s 75(2)(o) relevant to an adjustment of the property distribution in favour of the husband. And if the true paternity was discovered after s 79 orders were made, they could be set aside or varied under s 79A(1)(a) if the court is satisfied that "there has been a miscarriage of justice by reason of fraud, duress, suppression of evidence (including failure to disclose relevant information), the giving of false evidence or any other circumstance".

235 *Spousal maintenance orders.* Section 72(1) provides that a party to a marriage is liable to maintain the other party, to the extent to which the first party is reasonably able to do so, if, and only if, that other party is unable to support himself or herself adequately for one of three reasons, of which the third is "any other adequate reason", having regard to any relevant matter referred to in s 75(2). Several of the matters referred to in s 75(2) relate to child support, and the terms of s 75(2)(o) have already been quoted. The wife submitted that if the husband were not the father of his spouse's child that could be taken into account under s 75(2). The wife also submitted that even if the actual paternity of a child were not known until after a spousal maintenance order had been made, the order could be modified (s 83(1)) by reason of a change of circumstances (s 83(2)(a)) or by reason of the fact that "material facts were withheld from the court that made the order or from a court that varied the order or material evidence previously given before such a court was false": s 83(2)(c).

236 *Financial agreements.* Section 90D provides that the parties to a former marriage may determine questions of property and maintenance by making a "financial agreement". Section 90K permits the court to set aside a financial agreement if the court is satisfied of one of various matters. One is that "the agreement was obtained by fraud (including non-disclosure of a material matter)": s 90K(1)(a). Another is that there has been "a material change in circumstances ... relating to the care, welfare and development of a child of the marriage": s 90K(1)(d). Another is that "in respect of the making of a financial agreement – a party to the agreement engaged in conduct that was, in all the circumstances, unconscionable": s 90K(1)(e). The wife submitted that this language was sufficiently broad to permit a court to set aside a financial agreement made in circumstances where the true paternity of a child had been known but not disclosed.

237 *Child support.* The wife submitted that the Child Support Act lays down a comprehensive scheme for the payment of child support by a biological parent. It also provides for the cessation of payments by a man who thought he was, but in fact was not, the father; and for the recovery of payments already made by that man in a court of competent jurisdiction (s 143).

238 *General.* The wife concluded by making the following two submissions. First, depending on the size of the asset pool to be divided between the spouses, allowing an action for deceit might produce a radically different result from that achieved under the Family Law Act. Secondly, a husband dissatisfied with the outcome under the Family Law Act might seek to do better by commencing an action in deceit for paternity fraud, and re-litigating issues already litigated under the Family Law Act. If successful, that could lead to a shifting of resources away from the mother, who will have the care of children for whom the husband will have no financial responsibility under the Child Support Act. That would in turn be damaging to the interests of the children.

Inconsistency of deceit with legislative regime? Conclusions

239 The present controversy is unconnected with any concrete dispute about the operation of the Family Law Act or the Child Support Act. It is therefore not desirable to decide whether the arguments advanced by the wife rest on sound assumptions about the meaning of the legislation. The argument of inconsistency is to be rejected on the following grounds.

240 *Self-contradiction.* There was an element of self-contradiction in these submissions. Either the Family Law Act regime is capable of accommodating fully the complaints of a husband who has been the victim of paternity fraud, or it is not. If it is, it is difficult to see how it can be said that allowing an action for deceit will produce a radically different result from that which is achievable under the Family Law Act. If it is not, then the contention that the Family Law Act regime renders an action of deceit unnecessary is baseless, and the contention that the statutory regime would be "undermined" if a husband could sue in deceit would be met by the retort that undermining would be a consequence to be accepted with equanimity, provided that the legislation did not actually forbid the action. In truth, the financial obligations which may arise between parties to a marriage under the Family Law Act are narrower than those which may arise in consequence of the tort of deceit in at least one respect: damages for that tort may extend to a wider range of loss and damage.

241 *Recovery of payments by non-father*. That last point is illustrated by the provision which the legislation makes for recovery of payments made by a non-father. A husband who is not the biological or adoptive father has no obligations under the Child Support Act; by reason of s 143, he has only rights to be repaid whatever he ought not to have paid. And s 66X of the Family Law Act permits recovery by a man (inter alia) who has complied with an order under s 66P(1)(a)-

(b) to pay money by way of child maintenance, or an order under s 66P(1)(c) to make a transfer of property by way of child maintenance of what has been paid or transferred, if a court has determined that the man is not the parent of the child. To these provisions may be added the provisions to which the wife's submissions pointed, if they are sound, as permitting variations of property orders, spousal maintenance orders and financial agreements made on the erroneous assumption that the husband was the biological father of the child. But these provisions deal only with adjustments in the light of monies paid or promised to be paid, or property transferred or promised to be transferred in order to allow for the maintenance of children – not with damages beyond that.

242 *An imperfect analogy.* One of the authorities relied on by the wife in support of the proposition that an action in deceit for paternity fraud is inconsistent with the legislative regime was a decision of the Court of Appeals of New Mexico denying the claim of a de facto husband to relief against the de facto wife for the costs of rearing a child which, he alleged, would not have been born but for her deceitful representation that she was using contraceptive pills. One reason was that it would be "difficult to harmonize the legislative concerns for the child, reflected in the immutable duty of parental support"[254], with the father's attempt to shift financial responsibility solely to the mother. The reasoning related to that problem is distinguishable from the present case. In each case the question is what impact legislation compelling fathers to support their children has on a common law claim by a de jure or de facto husband in deceit. But in the New Mexico case the common law claim is by a father; in the present case the common law claim is by a non-father. Legislation about the duty of fathers to support their children does not of itself speak to the question of what rights a non-father has.

243 *The terms of the legislation and the tort relied on.* The wife's arguments relied on an analogy with a decision of the Supreme Court of Canada, *Frame v Smith*[255]. That Court declined the invitation of a former husband to recognise a new tort of interference with his legal right of access to his children, and to extend the tort of conspiracy into a new field – the conduct of the former wife and her present husband in preventing the plaintiff from exercising his legal rights to access. The Court took these approaches largely because it saw the matter as being dealt with in a comprehensive fashion by a particular statute, and held that so far as there were relevant remedies at common law they had been

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254 *Wallis v Smith* 22 P 3d 682 at 684 (NMCA, 2001). See also *Douglas R v Suzanne M* 127 Misc 2d 745; 487 NYS 2d 244 (SCNY, 1985).

255 [1987] 2 SCR 99.

abolished by other legislation[256]. Further, the Court considered that the tort of conspiracy was so anomalous as not to justify its extension to family law[257]. The conclusions to be drawn from this kind of analysis depend, obviously, both on the legislation to be construed and the torts which it is said to limit. Reasoning which may be sound in dealing with very specific legislation about access to children, to which no existing tort applied, is not necessarily sound in dealing with less specific legislation that says nothing about a well-established general tort such as deceit. Similarly, reasoning which declines to create or extend torts which are relied on in order to enforce court orders for post-divorce access made in reliance on legislation is not necessarily applicable to the question whether, without the plaintiff having to rely on any legislation, a well-established general tort such as deceit applies to the pre-divorce conduct of the parties.

244 *Second bite at the cherry?* It is hard to criticise a husband, who was unaware of the fact of paternity fraud until after Family Law Act proceedings in relation to maintenance and property are over and who has been damaged, from wishing to claim compensation for that damage when he does learn of the fraud. Those are not circumstances pointing towards a statutory limitation on the tort of deceit. That this is so is supported by the fact that so far as the Family Law Act permits orders to be reopened, on the wife's arguments of construction, if they are sound, there are avenues in that Act for use by such a husband. On the other hand, a husband who was aware of the fact that he had a cause of action in deceit but who failed to raise it in the divorce proceedings either in its own right or in one of the ways which, according to the wife, the Family Law Act permits, would not deserve sympathy. Any proceeding by a husband in that position attempting a second bite at the cherry would be open to dismissal as an abuse of process[258]. The possibility of such an attempt is not an argument against husbands who are not engaged in such an attempt being able to sue.

245 *Compatibility of legislative regime with common law*. While courts must obviously give full effect to legislation which abolishes common law rules, or which, to avoid doubt, provides that they do not exist, and while some statutory schemes have the effect of abolishing common law rules because of their nature and structure, normally legislation, even complex legislation, will be treated as co-existing with earlier rules of the general law. No-one contends that the tort of deceit does not apply to trade or commerce on the ground that many provisions

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256 [1987] 2 SCR 99 at 111-114 per Dickson CJ, Beetz, McIntyre, Lamer and La Forest JJ.

257 [1987] 2 SCR 99 at 109 per Dickson CJ, Beetz, McIntyre, Lamer and La Forest JJ, 123-127 per Wilson J.

258 *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589.

of the *Trade Practices Act* 1974 (Cth), and the Fair Trading Acts of all the States and Territories, attract wide-ranging remedies, and to some extent criminal sanctions, for conduct in trade or commerce which is misleading or deceptive and for many different categories of misrepresentations. No-one doubts that the general law duties of company directors survive, and operate congruently with, companies legislation like the *Corporations Act* 2001 (Cth). No-one doubts that the general law of tort in relation to driving cars, or running factories, or operating mines, coexists with statutory enactments about those activities. The same is true of the application of the general law of tort to trade union officials, despite legislation about industrial relations. In all these instances, and similar instances, statute law can modify the general law, but in the absence of clear language doing so, the two bodies of law operate in tandem. The wife pointed to no particular language modifying the law relating to deceit in its application to paternity fraud, nor to any particular language suggesting that the legislation covered the field. Beneath the surface of the wife's submissions there perhaps lay a suggestion that there was inconsistency between a legislative regime permitting couples to divorce without "fault" being proved, and the survival of a common law rule permitting recovery of damages where the integers of deceit, one of which requires proof of a type of fault, are established. There is no inconsistency. The legislative regime produces one result without any need to prove any "fault" or tort; the common law rule produces another, not inconsistent, result for conduct which is tortious and which requires, inter alia, both a type of "fault" and consequential damage.

246 *Superiority of legislative remedial armoury.* It may be true that complex statutory regimes like the Family Law Act, giving the courts powers more extensive than they have under the general law, may be more capable of achieving a just outcome in disputes between the parties – just as may be the case in relation to trade practices legislation and companies legislation, for example. But it does not follow from the fact that common law relief has greater bluntness that it does not exist.

247 *Adverse to interests of children?* The wife argued that paternity fraud actions would be adverse to the best interests of the children on the ground that the greater the husband's recovery, the fewer the assets the wife will have to bring the children up on. Among the typical factual circumstances postulated by the wife's argument are that the wife has borne a child not fathered by the husband, that that child, being incapable of supporting itself, is dependent on its mother, and that in consequence the mother is incapable of supporting herself adequately. Either these factual circumstances can be taken fully into account in assessing the maintenance orders to be made in favour of the wife or they cannot. If they can, rather than paternity fraud actions being financially injurious to the children, it is probably the case that paternity fraud actions are likely to be deterred by the fact that the greater the recovery for the husband, the greater may be his liability to adverse orders under the Family Law Act. If they cannot, the position is no different from that which applies in general litigation where the

fact that success for the plaintiff may damage the economic capacity of the defendant to nurture the defendant's children is irrelevant.

248 *Changes in the legislation.* If the tort of deceit applied in Victoria to paternity fraud by wives or husbands in the sense that before 1968 there was a duty to abstain from that type of fraud, subject to an immunity from action for breach of the duty, and the enactment of a provision effecting the removal of that immunity in 1968 permitted the tort to be sued on, it was a tort which predated the introduction in 1975 of an equivalent Commonwealth provision effecting the removal of the immunity, namely s 119 of the Family Law Act. On that basis the inquiry would be into whether the Family Law Act, or the Child Support Act, abolished that tort, and if so when. The position is complicated by the fact that many of the provisions relied on by the wife wholly or partly post-dated 1975. Thus ss 72, 74, 75 and 79 of the Family Law Act were not in their present form in 1975. Section 79A was introduced in 1976 and has been much amended. Section 90D was not introduced until 2000. The Child Support Act was not introduced until 1989. Other provisions of the Family Law Act which were discussed in argument were also introduced well after 1975 – s 66P (introduced in 1987, repealed and substituted in 1995 and amended in 1999), s 66X (2005), s 69P (1995), s 69R (1995), ss 69U-69V (1995), s 69VA (2000), and ss 69W-69X (1995). Some of those provisions were introduced after a time when proof of paternity became easier. The fact that paternity is now easier to prove and the fact that legislation has been introduced to reflect this (all of it post-dating the proffering of the forms said to constitute the wife's torts in this case, in 1990 and 1992) does not establish a general legislative regime or a specific legislative intention inconsistent with the application of the tort of deceit to paternity fraud. But, quite apart from that point, the wife's argument did not devote attention to the question whether the application of the tort of deceit to paternity fraud was to be denied because of the condition of the legislation in 1975, or at some later date.

249 *Absence of precise provisions.* However, the fundamental difficulty is a difficulty raised by the statutory language. In ss 119 and 120 Parliament showed that it was capable of dealing clearly and decisively with problems arising out of the interrelationship of tort law and family dealings. Had it been desired to abolish actions for paternity fraud, or to make it plain that they must not arise, it would have been easy to do so. In these circumstances it is difficult to extract a legislative intention to proscribe actions for paternity fraud by reason merely of the general structure of the Family Law Act and the Child Support Act.

Conclusion

250 The husband's attack on the Court of Appeal's conclusion that he did not rely on the fraudulent representation found by the trial judge fails, and for that reason the appeal should be dismissed with costs.

251 The arguments advanced in support of the wife's notice of contention that:

(a) the tort of deceit does not extend to claims for damages arising from the paternity of children conceived and born during the course of a marriage;

(b) even if it did:

(i) s 119 of the Family Law Act does not comprehend those claims;

(ii) s 120 prevents them; and

(c) those claims so undermine the Family Law Act and the Child Support Act that parliament cannot have intended to allow them,

must be rejected.

Orders

252 The appeal should be dismissed with costs.