Paternity Fraud and the Tort of Deceit

Introduction

Recent cases in England, Australia and the United States have seen efforts to expand the tort of deceit to allow a remedy in cases of paternity fraud. The tort of deceit has traditionally applied to commercial transactions and the divergent approaches taken by both the English and Australian courts point to the complexity of applying it to domestic arrangements. In England the tort was successfully applied to two cases involving co-habiting couples, *P v B*[1] and *A v B.*[2] Meanwhile, the Australian High Court rejected the application of such a tort to a married couple in *Magill v Magill*[3] largely on the basis that the court refused to apply the tort to representations relating to sexual fidelity. This article proposes to examine these cases and consider to what extent they are relevant to an Irish court. It will also briefly question whether the current emphasis on the biological parent is correct and whether courts should instead eschew the biological model in favour of the social model of parenthood, which arguably better reflects the best interests of the child.

Tort of deceit

The elements of the tort of deceit were described in *Derry v Peek*[4] as follows

> "(1) A representation by words or conduct, in this case, words. (2) That representation must be untrue to the knowledge of the maker at the time the representation was made. (3) The maker must make the representation by fraud either deliberately or recklessly in the sense that he or she could not care whether the representation was true or not. (4) The representation must be made with the intention that it should be acted upon by the claimant. (5) It must be proved that the claimant acted upon the fraudulent representation, and thereby suffered damage."[5]

The tort has largely been used in the commercial context but has in some instances applied to non-commercial wrongs.[6] The traditionally commercial nature of the tort has influenced the Australian courts in particular in refusing to expand it to cover private relationships.[7] The tort has a number of advantages over other torts such as negligent misrepresentation in that a "special relationship" does not have to be proven, nor does the defence of contributory negligence apply. In terms of damages, liability lies for all losses

[1] [2001] 1 FLR 1041.
[2] [2007] 3 FCR 861.
[3] [2007] 1 LRC 652.
[4] [1889] 14 App. Cas. 337.
[5] Lord Hershall in Derry v Peek [1889] 14 AC 337 at 373.

[6] Stanley-Burnton J in P v B [2001] 1 FLR 1041 accepted that the tort had been applied in Wilkinson v Downton [1897] 2 QB 57, a case involving damages for injury arising from a practical joke played on the plaintiff to the effect that her husband had been injured in an accident.
[7] At para [156] per Hayne J

that flow directly from the fraudulent representation and is not simply limited to those damages that are foreseeable.[8] The stumbling block in most cases of deceit is to satisfy the court that the representation was made fraudulently, with either knowledge or reckless carelessness as to the truth of the statement made. This can raise particular issues in cases of paternity fraud, as is evidenced in the discussion of the Australian case of *Magill v Magill*[9] below.

English caselaw

The English courts have had a number of opportunities to explore the position of the tort of deceit in relation to paternity fraud. In the case of *P v B*[10] Stanley-Burnton J sitting in the Queen's Bench Division, had to consider as a preliminary issue whether the tort of deceit could apply to 'domestic arrangements'. The parties to the case were an unmarried couple who had lived together for a number of years, during which time a child was born. On discovering that the child was not biologically his, P sued for the tort of deceit and sought to recover damages of £90,000 which represented payments made in support of the child during its lifetime, and also damages for mental suffering/distress, humiliation and indignity. Stanley-Burnton J held that the tort of deceit could apply to domestic arrangements. He was unconvinced by the defence's argument that as domestic arrangements did not entail an intention to create legal relations they could not give rise to an action in tort, holding that unlike the law of contract in tort law "legal liabilities are not accepted voluntarily by the parties: they are imposed by the law."[11]

Application of the tort of deceit was not inappropriate in his view – the torts of negligence and trespass for instance apply irrespective of the relationship of the parties and there were no "compelling reasons" to find otherwise as regards the tort of deceit. Nor did it constitute an unwarranted interference in domestic relations, as Stanley-Burnton J opined "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."[12]

The defence had also pointed to provisions in the Matrimonial Causes Act 1973 to support the argument that applying the tort of deceit to paternity cases was inappropriate. In particular reference was made to section 25(4) which provided a facility whereby husbands who were not the natural father of the child could be required to pay maintenance for any child born during the marriage. This the defence argued would lead to an absurdity if the same father could then seek to have the monies repaid through the tort of deceit. Stanley-Burnton J dispensed with this argument by stating that a married father in such a position would have to revert to the court which had

[8] McMahon & Binchy, *Law of Torts* (3rd ed., Butterworths, 2000) at 35.01, Clerk & Lindsell on Torts (18th ed, Sweet & Maxwell, 2006) at chapter 15.
[9] [2007] 1 LRC 652.
[10] [2001] 1 FLR 1041.
[11] Ibid at para [14] per Stanley-Burnton J.
[12] Ibid at para [29].

initially made the payment order, it did not however, apply to co-habiting couples, as was the situation before the court in this case.[13]

Despite however, allowing for the tort of deceit to apply to domestic relations, Stanley-Burnton J was not entirely convinced that the special damages sought by the claimant could be recoverable in this case. He was reluctant to accept that a human relationship could be a loss for which damages could be recovered, and he was swayed by the defence's argument that any damages would have to be offset against the emotional benefit of the relationships enjoyed. However, he stated that these were issues to be determined at the trial. As it transpired the case went no further.

More recently the case of *A v B*[14] has come before the courts where Sir John Blofeld, again sitting in the Queen's Bench Division, had to decide on similar facts to those outlined above. In this case the parties had been in an unmarried relationship with varying degrees of co-habitation for approximately six years. During this time a child, Y, was born who the claimant believed to be his. On separation and following an unsuccessful application for a visiting order it came to light that A was not the child's biological father. Having subsequently lost an appeal to obtain visiting rights A brought an action in deceit against the mother. Sir John Blofeld outlined the "five ingredients" of the tort of deceit as described in *Derry v Peek*[15] and stated that in relation to the requirement that the representation must be made by fraud, the more serious the allegation the higher the degree of probability required that it was made fraudulently.

Sir John Blofeld accepted the reasoning of Stanley-Burnton J in *P v B* in holding that the tort of deceit could apply to personal relationships, and cited with approval Stanley-Burton's statement that

> "I see no reason why a confidence trickster who obtains money or other property from a woman by lying to her and living with her, possibly for a short period, should be outside the scope of liability in tort; and the same must apply to a woman who fraudulently deceives a man in order to obtain his money or property."[16]

He was unconvinced by the "floodgates" argument put forward by the defence, acknowledging that since *P v B* had been decided in 2001 this was the only other case of this nature to come before the courts. In any case his view quite sensibly was that "If this is a cause of action for which justice requires a remedy, then it is right that a remedy be granted, and I am unmoved by the thought that other similar of cases may come forward."[17]

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[13] Ibid at para [33].
[14] [2007] 3 FCR 861.
[15] Lord Hershall in Derry v Peek [1889] 14 AC 337 at 373.
[16] A v B [2007] 3 FCR 861 at para [46], citing Stanley-Burnton J at para [26].
[17] Ibid at para [48].

Having accepted that the tort of deceit could apply to relations between co-habiting couples it then fell to be decided whether the elements of the tort had been made out in this case. Sir John Blofeld found that they had been. The most controversial element perhaps was accepting that the representation had been made fraudulently. On this point Sir John Blofeld held that fraud had been made out, stating that while it was possible that a single untrue statement might not constitute fraud, the fact that the representations were made on a "large number of occasions" constituted fraud in this case.[18] He further held that the representations had been made "deliberately, knowing them to be untrue, or willfully as the authorities put it in the cases."[19]

The final matter to be dealt with was that of damages. The defence had argued that special damages should not be awarded as the monies spent arose not from the fraudulent representations but due to the affection that A felt for B and Y. The court disagreed, stating that it was significant that no payments were made until the pregnancy arose and none after the discovery that A was not the biological father. However, each of the categories of special damage had to be examined to determine whether it was appropriate that an award would be made. Sir John Blofeld was guided by the House of Lords decision of *McFarlane v Tayside Health Board*[20] as to the importance of taking into account the public policy dimension of not viewing the cost of rearing a healthy child as a 'loss'. He also stated that the court would have to take into account in cases such as these the enjoyment A derived from his relationship with Y. On this basis he refused to award any damages for the maintenance costs of Y stating that "I find it difficult to envisage circumstances in which damages in looking after and caring for children could be successful..".[21]

However, he did allow for special damages for the cost of holidays and restaurants, reduced by 50% to allow for A's enjoyment in them. Damages were awarded for this category for two reasons, that they were luxury items, and that they were largely for the benefit of A and B and not Y, who was too young to enjoy them. It is difficult to see however, how they arose from the representations made as regards A's paternity of Y, as arguably the costs might well have been incurred regardless of knowledge or otherwise of paternity, simply being the outgoings from a normal relationship.

As regards the sum of general damages to be awarded, Sir John Blofeld was guided by the award of £12,000 made by the trial court in the Australian case of *Magill v Magill* and the payment of £10,000 permissible under the Fatal Accidents Act 1976. Sir John Blofeld felt that the distress felt although "genuine and continued"[22] was not as serious as that of Mr. Magill, who required medical help, nor as serious as a bereavement, and awarded damages of £7,500.

[18] Ibid at para [51].
[19] Ibid at para [49].
[20] [2000] 2 AC 59.
[21] A v B [2007] 3 FCR 861 at para [62].
[22] Ibid at para [57].

Australian caselaw

Five months before the decision in *A v B* the High Court of Australia handed down a judgement in a similar case, that of *Magill v Magill.*[23] Unlike the English cases described above this case involved a couple who had been married at the time of the alleged deceit. During Mr. and Mrs. Magill's ten year marriage three children had been born. At the time of separation (after four years of marriage) Mr. Magill suffered a nervous breakdown and his wife informed him of her suspicions that he was not the father of the middle child. It transpired following DNA testing that the situation was in fact worse, and that he was not the biological father of either of his two youngest children. Mr. Magill sued his ex-wife for the tort of deceit claiming damages for anxiety and depression, and also financial loss for the monies spent on the two children and other financial costs incurred in raising them. He was awarded $70,000 in damages when the trial court (Victorian County Court) found in his favour. This finding however, was reversed by the Victorian Court of Appeal on the basis that the elements of the tort of deceit had not been made out. This decision was further appealed to the High Court of Australia where it was heard by Gleeson CJ and Crennan, Hayne, Heydon, Gummow and Kirby JJ.

The respondent argued that even if the elements of the tort were made out, the action should not be allowed as s 119 and s 120 of the Family Law Act 1975 did not allow for actions in deceit as between married couples[24] and/or the tort of deceit did not extend to claims for damages arising from misrepresentations as to the paternity of children conceived and born during the course of a marriage.

All of the judges rejected the first contention, that the tort of deceit could not apply between married couples. Gleeson CJ was uncomfortable with marking marriage out as a "zone of special immunity for one kind of tort" and he accepted that within marriage representations might be made about property or financial arrangements which were not so different to the commercial situations to which the tort of deceit traditionally applied.[25] He appeared uncomfortable with his own reasoning but ultimately rejected the respondent's argument that a special immunity should be afforded between spouses. Gummow, Kirby and Crennan JJ who delivered a joint judgement, also accepted that the s 119 and s 120 of 1975 Act did not confer immunity,[26] a view with which Heydon JJ agreed.[27]

The majority (Gummow, Kirby and Crennan JJ) accepted the second argument and held that in principle, the tort could not apply to representations between spouses in relation to paternity or sexual fidelity. They gave two reasons, firstly, that issues of fidelity were excluded from legislative scrutiny. Legislation also allowed for the recouping of paternity

[23][2007] 1 LRC 652.

[24] Section 119 abolished spousal immunity for tort actions and s 120 barred actions for *inter alia* adultery as between spouses.

[25] Magill v Magill [2007] 1 LRC 652 at para [23] per Gleeson CJ.
[26] Ibid at para [85] per Gummow, Kirby and Crennan JJ.
[27] Ibid at para [185] per Heydon J.

payments wrongly made, which led the court to presume that the legislature intended to deal exclusively with such cases. Secondly, they held that representations of this intimate nature were not suited to the tort of deceit which had been developed to deal with commercial wrongs. In their view "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." [28]

In principle they were happy that this would also "apply to other relationships such as 'long term and publicly declared relationships short of marriage'" but acknowledged that this did not fall to be considered in this case.[29]

Hayne J agreed with the majority on this point on the basis of the facts in this case, but left the door open for claims of this nature to be taken where it could be shown that the person making the representation intended that it give rise to legally enforceable rights. In this vein he stated that

> "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."[30]

While Gleeson CJ was more convinced by this argument he ultimately rejected it. In considering this argument Gleeson CJ made reference to the legislative framework within which marriages operated and in particular he made reference to the Family Law Act 1975, which emphasized the public policy objective to "preserve and protect the institution of marriage". Imposing a legal requirement to disclose extra marital affairs was, somewhat bizarrely one might say, in his view a development which could seek to undermine marriage and this legitimate public policy.[31] Despite this however, creating an exemption as requested by the respondent would run contrary to the legislative intention which allowed actions in tort between married couples[32] and it was not open to the courts to limit this where Parliament had not. Heydon J came out most strongly against the respondent's argument. He rejected the public policy argument against allowing for the tort of deceit to apply for fear of undermining marriage, being more convinced by the reasoning of Stanley-Burton J in *P v B*, that it is the fraud itself which undermines the relationship and not the honesty in disclosing it.[33] He also rejected the mother's contention that to allow such an action would cause psychological damage to the child

[28] Ibid at para [132] per Gummow, Kirby and Crennan JJ.
[29] Ibid.
[30] Ibid at para [140] per Gummow, Kirby and Crennan JJ.
[31] Ibid at para [35] per Gleeson CJ.
[32] Section 119 of the Family Law Act abolished spousal immunity for tort actions.
[33] Magill v Magill [2007] 1 LRC 652 at para [215] per Heydon J.

and run contrary to public policy by seeing the child as a form of damage. He referred to the High Court of Australia's decision in *Cattanach v Melchior*[34] where such arguments were rejected and he found no reason to decide otherwise in this case.

All of the judgements handed down however, found that the elements of the tort had not been made out in this case. In relation to whether a representation had been made, Gleeson CJ was not convinced that it had been. Referring to *Bradford Third Equitable Benefit Building Society v Borders*[35] where Viscount Maugham stated that "mere silence" was insufficient to constitute a representation however "morally wrong"[36] he refused to accept that the representations as to paternity in this case – essentially handing over of the birth notification forms for signature – were sufficient representation unless the court accepted that a duty existed to disclose suspicions as to paternity. As this essentially meant that a duty would have to be imposed to disclose extra-marital affairs Gleeson CJ refused to accept that such a duty existed because it might lead to the breakdown of marriage, which ran contrary to legislative intention. The case could be different where the marriage had already broken down, in which case a duty to disclose might arise, but this was not being argued in this case, principally because a legislative facility already existed in Australia whereby child support payments erroneously made could be reclaimed.[37] Gummow, Kirby and Crennan JJ similarly held that the handing over of the birth registration forms could not constitute sufficient representation and in the absence of a duty to disclose, which they rejected, no fraudulent representation could be found in this case. Hayne J also was unconvinced that the registration forms were the sole reason that the husband believed the children were his and that he continued in his relationship with his family, and that they could not be said to be the representation which gave rise to his 'damage'. He further held that even if it were to fall to that representation then a positive duty to divulge the infidelity would have to be imposed, Hayne J, felt that this was outside the scope of the law and the powers of the court. Heydon J rejected the husband's claim on a narrower basis, simply holding that the husband had not shown that he had relied on the representation made and that his action should therefore fail.[38]

All of the judges in the High Court of Australia essentially agreed that the tort had not been made out in this case as unlike in *A v B* insufficient representation had been made that he was the father of the children. If this was otherwise however, and the mother had given the father assurances that he was indeed the father then presumably the tort would have been made out. There may be no obligation to tell the truth (i.e. to disclose an affair) but there may be an obligation not to lie (give a false representation). It could be argued that as a lie might best "protect" the marriage that such an obligation might not be found but this was not adequately explored by the court.

In any case three of the six judges (Gummow, Kirby and Crennan JJ) emphatically rejected the application of the tort of deceit to issues of paternity and sexual fidelity with

[34] [2003] 5 LRC 1.
[35] [1941] 2 All ER 205 at 211.
[36] Magill v Magill [2007] 1 LRC 652 at para [37] per Gleeson CJ.
[37] Section 66X of the Family Law Act 1975 (Cth).
[38] Magill v Magill [2007] 1 LRC 652 at para [251] per Heydon J.

a fourth (Hayne J) excluding it in such cases unless "exceptional" circumstances existed where the parties could have been shown to have intended legal obligations.

Interestingly, the court appeared to accept that a similar finding would be made had the case involved a co-habiting as opposed to a married couple, indicating that it was not the married nature of the union that informed their decision but rather the intimate nature of the communication involved.[39]

Deceit and 'paternity fraud' in Ireland

The Irish courts have thusfar only addressed the issue of the applicability of the tort of deceit to cases involving personal relationships on one occasion, *Ennis v Butterly*[40] heard by Kelly J in the High Court. The parties to the case were a couple (both were married but separated from their original spouses) who had co-habited for a number of years before the relationship broke up. The woman alleges that she re-entered the relationship on foot of promises of marriage and promises of a financial nature, neither of which materialised. On the break-up of the relationship and failure to honour the promises made she sued *inter alia* for fraudulent misrepresentation. It fell to be decided by Kelly J as a preliminary issue whether the case should go to trial. Kelly J outlined the requirements for the tort of fraudulent misrepresentation and found simply that as he could not say that the claim "must" fail, that he would allow it to proceed to trial. It might be argued that this was implicit authority for finding that an Irish court would entertain the application of the tort of deceit as within co-habiting couples and, it is submitted, this would not be a controversial finding. Neither the English courts nor the more conservative Australian courts had any difficulty with such a finding and there is no obvious reason that an Irish court would find otherwise. It is not a leap to suggest that the tort could apply equally to married couples, notwithstanding the constitutional guarantee that falls to the State to protect the institution of marriage from attack.[41] The State allows many actions as between married couples from the criminal to the civil sphere and the tort of deceit should be no different. In the *Ennis* case also, the representations made were largely of a financial nature, involving the share of a business, entirely in keeping with the traditional commercial nature of the tort. It is however, another thing entirely to suggest that the application of the tort of deceit to issues of sexual fidelity or paternity would find favour in an Irish court.

It is difficult therefore to speculate as to how an Irish court might address the application of the tort of deceit to paternity disputes. There are two principal considerations, firstly whether the tort ought to apply to representations of this kind, and secondly, the practical difficulties in establishing the elements of the tort in cases of this nature.

[39]Magill v Magill [2007] 1 LRC 652 para [132] per Gummow, Kirby and Crennan JJ, para [226] per Heydon J, para [165] per Hayne J.
[40] [1997] 1 I.L.R.M. 28.
[41] Article 41.3.1 provides that "The State pledges itself to guard with special care the institution of Marriage, on the family is founded, and to protect it against unjust attack."

Applying the tort of deceit to "paternity fraud" cases

Sir John Blofeld in *A v B* followed *P v B* in finding that there was no reason to exclude cases of paternity fraud from the scope of tort of deceit actions. He did so without reference to the decision or reasoning in *Magill v Magill* a move which some commentators have described as "disappointing".[42] In the Australian decision, influential to the finding of the majority that an action in deceit ought not lie, was the non-fault nature of divorce proceedings in Australian law. Wikeley & Young argue that this runs contrary to the system in England where "obvious and gross conduct" can be considered.[43] As accepted however by these commentators, it is questionable if even in England a lie as to paternity would constitute suitably reprehensible conduct to influence divorce proceedings.[44] Similarly in Ireland, the divorce mechanism is essentially non-fault, the Family Law Reform Act 1989 removed adultery as a bar to recovery of maintenance and while conduct can be considered in proceedings where the "interests of justice require it" it is unlikely that issues of infidelity would influence matters. While this does not necessarily mean that to allow an action in deceit would fail on this basis (as it clearly did not in England), it leaves it open to an Irish court to adopt the reasoning of the majority in *Magill* who were certainly influenced by the intention of Parliament to leave these issues outside of the scope of the law.

Apart from such considerations, it is questionable whether the tort of deceit ought to apply to intimate personal relations. Stanley-Burnton J and Sir John Blofeld had no difficulty in stating that the tort of deceit should apply where appropriate. A similar finding was made by Gleeson CJ and Heydon J in *Magill.* On the other hand the majority in *Magill* were emphatic that such an action was inappropriate to such matters, with Hayne J stating that it should only apply to such intimate relations in "exceptional circumstances". As to how an Irish court might find, within the martial context at least Constitutional implications will no doubt play a part, but the same cannot be said for co-habiting couples, who despite recent developments are not afforded similar legal recognition. Courts will also have to take into account the interests of the child, and whether public policy supports the expansion of the tort of deceit in this direction.

Fulfilling the requirements of the tort of deceit

There are inherent difficulties with applying the tort of deceit to cases of paternity fraud. As highlighted in the case of *Magill* the issue of the representation itself is fraught with difficulties. While the tort allows for the representation to be made by "words or conduct" the conduct of Mrs. Magill in presenting the birth authorization form to Mr. Magill and her silence in the face of doubts as to the paternity of at least one of her children was not sufficient in their view to constitute representation. Imposing a duty to disclose an infidelity is as the Australian court highlighted, runs contrary to public policy as an unwarranted interference into the private life of couples. However that is not to say that clear representations, knowing them to be false, ought to escape the scope of the tort.

[42] Wikeley & Young, 'Secrets and Lies: No deceit down under for Paternity Fraud', CFam 20 1 (81).
[43] Ibid at p 86.
[44] Ibid.

In the case of *A v B* it was more straightforward in that B was asked directly by A on at least one occasion as to whether he was the father. There are arguably very few cases where such a conversation will arise in the case of co-habiting or married couples where a child is born. However, where it does and a communicated lie as to paternity arises it is this author's view that as in *A v B*, sufficient fraudulent representation should be made out and the tort should apply.

Issues arise also as to the nature of damages to be awarded. While awarding general damages for humiliation and anxiety as in *A v B* is relatively uncontroversial the case for special damages is less straightforward. This was highlighted by Stanley-Burnton J in *P v B* when he referred to the defence's argument that to regard a human relationship as a cost would be "distasteful and morally offensive".[45] Clearly, recovering the costs of rearing the child ought not to be recoverable as this would conflict with the generally accepted stated public policy objective of not regarding a healthy child as an 'injury'.[46] However, as argued by Stanley-Burnton J, the situation could be different where the couple did not live together or where the man had no access to the child in question.[47]

Determining legal paternity

Quite apart from the human misfortune at the heart of these cases, in particular for the child, there are considerable legal questions raised by the appropriateness of basing paternity on the basis of biological considerations alone. In all of the above cases, the identification of the financially responsible father was judged on the basis of genetic or biological information only. However, it is by no means settled that this is the best approach. Kording in her article proposes a broader view of the position or role as father, one based not on genetic identity alone.[48] Baron has also rejected the genetic model, basing her arguments on the works of Lacan and Freud who place emphasis on the role of the father figure rather than his genetic identity.[49] She argues that in the US increased litigation regarding paternity is motivated not by a desire to "embrace paternity but to shirk parental responsibilities", a move motivated by "narcissism and possibly revenge", but certainly not the best interests of the child.[50] She advocates the rejection of genetic paternity as used in many of these cases, and advances as an alternative Kording's proposal. This would involve an investigation by the court as to whether a 'social-father-child relationship' has been established, the existence of which would preclude genetic testing.[51] She also argues that judicial arguments emanating from Australia (as in *Magill)*

[45] P v B [2001] 1 FLR 1041 at para [40].
[46] This is in keeping with decisions involving the cost of rearing a healthy child arising from a failed sterilisation, see McFarlane and Another v Tayside Health Board [2000] 2 AC 59.
[47] P v B [2001] 1 FLR 1041 at para [38].
[48] Kording, N., "Little White Lies that Destroy Children's Lives – Recreating Paternity Fraud Laws to Protect Children's Interests", 6 J.L & Fam Stud (2004) 237.
[49] Baron, P., "In the name of the Father: The Paternal Function, Sexuality, Law and Citizenship", (2006) 37 VUWLR 307. See Henry, R., "The Innocent Third Party: Victims of Paternity Fraud", 40 Fam. L.Q. 51 2006 – 2007 for a contrary view.
[50] Ibid at 322.
[51] Ibid at 326.

which give precedence to the biological father over those who have acted as de facto parents is misplaced.
These arguments raise particular questions about the current emphasis on biology as the determining factor in parenthood. An indication that Irish courts may be leaning towards a more expansive view of paternity is evidenced by the case of *Mc D. v L & Anor*[52] where Hedigan J, considered the lesbian parents of a child as the *de facto* parents, with the biological father as a 'favourite uncle'. Whether the same expansive view will be held where the court is called upon to consider issues of parental identity in cases of the tort of deceit remains to be seen. It raises questions at a minimum as to whether paternity fraud actions as currently framed, with their emphasis on the biological parent, ought to be actionable in Irish courts.

Conclusion

Two divergent approaches to whether the tort of deceit ought to apply to paternity fraud cases are emerging in the jurisdictions of our common law neighbours. In the Australian case of *Magill* such an expansion of the tort was rejected, and while that case involved a married couple there were clear signals that the court felt that the principles enunciated could apply equally to co-habiting couples. In England on the other hand, it has been accepted (admittedly at Queen's Bench Division only) that the tort could apply to domestic arrangements and in both cases the judges involved were unswayed by arguments that the tort could not apply to questions of sexual fidelity. In both jurisdictions the imposition of financial parental responsibility was based on the identification of the biological parent and not on whether the person was in every other sense, apart from biology, Kording's de facto parent. In Ireland we have very little yet to guide us as to how the Irish courts might find. The case of *Ennis* merely established as a preliminary issue that the tort might apply to the case of a co-habiting couple, and then as to matters that were largely of a commercial nature. While this might signal an openness to the tort being applied to cases of paternity fraud, this is by no means certain, such actions involve difficult questions of the role of law in questions of sexual fidelity and paternity and the very nature of paternity itself. We can only await a suitable case to find how an Irish court might decide these issues.

[52] [2008] IEHC 96