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Magill v Magill [2006] HCATrans 163 (7 April 2006)

Last Updated: 10 April 2006

[2006] HCATrans 163

IN THE HIGH COURT OF AUSTRALIA

Office of the Registry
Melbourne No M152 of 2005

B e t w e e n -

LIAM NEAL MAGILL

Appellant

and

MEREDITH JANE MAGILL

Respondent

GLEESON CJ
GUMMOW J
KIRBY J
HAYNE J
HEYDON J
CRENNAN J

TRANSCRIPT OF PROCEEDINGS

AT CANBERRA ON FRIDAY, 7 APRIL 2006, AT 10.06 AM

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MR N. LUCARELLI, QC: If the Court pleases, I appear with my learned friend, **MR J.C. PATERSON**, for the appellant. (instructed by Vivien Mavropoulos & Associates)

MS H.M. SYMON, SC: If the Court pleases, I appear with my learned friend, **MR A.J. PALMER**, for the respondent. (instructed by Clayton Utz)

MR D.M.J. BENNETT, QC, Solicitor-General of the Commonwealth of Australia: If the Court pleases, I appear with my learned friend, **MS R.M. DOYLE**, for the Attorney-General of the Commonwealth intervening, substantially in support of the appellant. The parties have agreed that I should make my submissions to the Court after the respondent's submissions. If the Court pleases. (instructed by Australian Government Solicitor)

GLEESON CJ: Yes, Mr Lucarelli.

MR LUCARELLI: If the Court pleases. We propose to make submissions in short compass in relation to the matters in the following order, namely, first of all, the public policy issues that arise in relation to the action in question; secondly, an analysis of the issues raised by the notice of contention; thirdly, to look at the constitutional issues that may arise out of that notice of contention and how they impact upon it; fourthly, reliance; and lastly, any issues that may arise in connection to causation.

In our submission, as a matter of public policy, this case is a case which is plainly within the law of deceit and it is a case which there is no reason at all for this honourable Court not to allow the action. Much has been said about the case of *P v B*. All parties, I think, in one way or another, have referred to it. I do not want to trouble the Court for very long about it, but there is one passage at page 1047 in connection with the public policy issue that we wish to emphasise, if it would be convenient to take the Court to that passage. It is at paragraph (28) of his Honour's reasons:

Mr Smail submitted that the law had withdrawn from the domestic context, and I should follow that tendency in the instant case. He referred to the demise of the torts of enticement of a wife . . . and of harbouring . . . But these cases are examples of the law following current morality and social values, and in particular the autonomy of the individual and the equality of the sexes. They do not suggest that dishonesty in a domestic context should be outside the law of tort. The tort of negligence causing personal injury has not been withdrawn from the domestic context: men and women who drive negligently are regularly held liable to their spouses or cohabiting partners. No one could suggest that the tort of trespass to the person should be withdrawn from the domestic context. It may be questionable whether a duty of care in relation to financial loss is assumed or imposed in a domestic context –

referring to *Clerk and Lindsell* and *Chaudry* –

but liability for deliberately made dishonest statements intended to mislead is very different. It is a tort of intention rather than one of negligence. For the tort of deceit not to apply as between cohabiting partners would be anomalous.

We rely upon that passage as our starting point for public policy.

HAYNE J: His Lordship's statement includes the expression "intended to mislead".

MR LUCARELLI: Yes, your Honour.

HAYNE J: Does that not mask the problem rather than reveal it, namely that in a domestic relationship statements are made but is there to be imputed an intention that the statements that are made are to have legal as distinct from social consequences?

MR LUCARELLI: Your Honour, in our submission, they are to have legal consequence because of the nature of the statement in the circumstances. It is obvious that not all statements made between cohabitating couples would have some legal consequence. That has to be conceded. That is the way life operates. But there are some matters which go beyond mere social context. Might we also add here, of course, that there is no issue whatsoever about an intention to deceive. That issue is not before the Court. It has been resolved in favour of the appellant.

So that what is said, if we hook the two matters that we are submitting together, we say that having regard to the nature of the statement, coupled with the intention that it be relied upon – and the respondent did give evidence that by giving the form to the appellant she intended to represent to him that he was the father of the child, and it is a serious matter, we would submit, as opposed to who is to take out the rubbish or whether I have collected the milk from the store for tomorrow morning's breakfast, or whatever the position may be. This is a serious matter, we would submit, in comparison to a normal domestic matter and, given the appellant's reliance upon that statement of the respondent that by the form she intended that he understand that he was the father, it is a serious matter.

KIRBY J: Could you just explain to me why you put so much emphasis in your case on the form and in the presentation of the case. I can understand that it makes concrete an issue of representation but, as I said on the special leave hearing, arguably the whole course of conduct until the revelation that the children were not DNA matched to the putative father was one of a course of representation; it was not just this form. I just do not understand why you fixed your case and put all your eggs into the basket of the form, if I can mix my metaphors.

MR LUCARELLI: It appears from reading what did happen before his Honour in the County Court that the view was taken very early by his Honour and imposed on the parties, certainly upon the appellant, that the form was a sufficient representation of paternity in order to make out the representational part or the representational element of the tort.

GLEESON CJ: I would have thought that in most circumstances silence would be a sufficient representation.

MR LUCARELLI: The normal course, your Honour, is that for deceit, as a usual rule, silence is not sufficient unless there be an obligation to speak.

GLEESON CJ: Yes. Why not? In the standard textbook on *Fraud and Mistake* in the 7th edition the author says:

A man who by acts and deeds falsely and fraudulently impresses the mind of another with a certain belief whereby he is misled to his injury is as much guilty of a representation as if he had deliberately asserted a falsehood.

He goes on to point out that when you walk into a fruit shop and order half a dozen apples, you impliedly represent you intend to pay for them. You do not have to say, "I promise to pay the price".

MR LUCARELLI: Yes. It was the way the case was run. There is nothing to say, of course, that those facts are not present in any event and we have identified in the written submissions - - -

KIRBY J: Except that the case went off on this apparent assumption of the primary judge, either for convenience or for his understanding of the law, that you had to latch onto this document and you have run the case – and there is no notice of contention that suggests there is some other basis for the case and I just wonder if you have not unnecessarily restricted your case because there are a few problems with the form, whereas the course of conduct, and perhaps the silence, and that happening over a long period in a relationship on the face of things seems to be a course of conduct constituting a representation of paternity.

MR LUCARELLI: The facts have been identified, of course, that they were already married at that time and the appellant obviously observed the pregnancy, was at the birth and was not told otherwise, and they are the context in which the form is then presented. But we would urge the Court to look at the matter in this fashion, that is to say, having regard to those matters, coupled with a form being presented where the respondent concedes that the reason for giving the form effectively was to give the appellant to understand that he was the father, not only takes it out of the social context, but also gives it the necessary force that it requires in order for it to be a proper representation that can be relied upon for the purposes of the deceit.

GLEESON CJ: But the emphasis on the form is all a bit artificial, is it not? You have to sign a form like that, have you not? Somebody had to sign it.

MR LUCARELLI: The form has to be signed, but it is not necessary to record that the appellant was the father or, in fact, record any father, and if I could take the Court to the form briefly to demonstrate that that is what the form required. It said, in effect, that if you do not know who the father is, then you can choose the family name of the mother. There was no requirement to actually fill it out in a way which divulged to the authorities that the appellant was the father. The rear of the form explains - - -

KIRBY J: Because there are many people who – and I am not going to use the word “adultery” – knowing of an extramarital relationship and that a child is born to that extramarital relationship, accept the child and become in every full sense the father of the child. I know such people. They exist – large numbers of them.

MR LUCARELLI: Except, your Honour, generally one accepts things like that with full knowledge, or at least some knowledge of what the circumstances are. It is extremely difficult to visit upon a person something of that kind with no knowledge at all that they are not the biological father.

KIRBY J: But there are countervailing considerations, that it is very hard on the children years later, maybe decades later, to have the person they have always regarded as their father suddenly become their non-father. That is why you have to consider where this case leads. It is not just a dispute between your client and the former wife.

MR LUCARELLI: Naturally, we understand that, your Honour. Unfortunately, perhaps it is where science has – sometimes there is the argument that science jumps ahead of the law for a while and then the law needs to work out how it is going to cope with science.

KIRBY J: That is where Mr Solicitor says it should be left to Parliament to work it out – and that is, I assume, what you say – and in the meantime you have to apply the old law of deceit.

MR LUCARELLI: That is, in essence, the submission that is made. Your Honour, we wish to address the issue of the interests of the children when we deal briefly with both *Thompson* and *Doe's Case* which are the North American cases that we refer to.

KIRBY J: Anyway, I have taken you off your course and it may be better for you to stick to that structure of your argument because you will have thought it through.

MR LUCARELLI: Your Honour, may I, while I have the Court considering the form, take the Court to the appeal book at 146 just to understand the structure of what the respondent had by way of options in this case. This is the form in relation to the third of the children, the second of the children in question.

KIRBY J: There is a provision in the Convention on the Rights of the Child – it is Article 3 – which says that every court and every administrative body and every government official dealing with a matter is bound by that Convention – and it is the most widely subscribed to Convention in the world – to take as the starting point that in any problem that comes before a court the best interests of the children. That is international law and Australia has subscribed to it and *Teoh* said that people in this country have a legitimate expectation that that will be accorded by the law.

MR LUCARELLI: Accepting that, your Honour, interestingly, the provision on custody – parental orders, I think, is the way that they are properly described in the *Family Law Act* – does refer to the best interests of the children but it does not put it as the foremost consideration. I am not seeking to derogate from what your Honour says, but it is interesting and I can take the Court to the section that I have in mind at a convenient point.

KIRBY J: You do that in your own due time, but take it from me that as far as I am concerned it will be foremost in my mind in resolving the rights as between the adult parties to the action in this Court.

MR LUCARELLI: We will seek to do our best to persuade your Honour that all of this will still allow for that. May I go to the appeal book at page 146. This is the rear of the form. The front of the form is at 145. We know that it was filled in by the respondent and handed to the appellant for him to sign and that he read it and he signed it. I think we have made that point. The back:

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 (see also Note 4) –

I might go to Note 4 to complete the picture:

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 –

“not married” and “both parents”, the operative words of those are underlined –

or by the father with the consent in writing of the mother, or by the father where the Registrar has dispensed with the mother’s consent, or by either parent where they are able to produce a declaration of paternity.

So plainly the form draws a distinction between the biological parents in a marriage and the biological parents that are not married. If we then go back to point (ii) under Note 1, it says:

If no 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 mother –

So that what we submit here – and this goes to another issue a little later which deals with the disclosure that indeed in filling out one of these forms a mother is faced with the invidious position of having to disclose the extramarital relationship. Indeed, Mrs Magill's family name, so to speak, is filled in by her as Magill and therefore it could easily have been that if the details of the father had not been filled in as the form provides, then the child's name would still have been Magill, with perhaps none of the complications that one might have expected if the form asked that the family name of the child in those circumstances, for example, be – and may I use perhaps an antiquated word – the maiden or the premarital name of the mother. Point (iii) then says:

HOWEVER, IF BOTH PARENTS AGREE, the family name of the child may be entered –

and there is a series of options that are given.

The important emphasis that we seek to place on what the respondent had by way of options is that there was no requirement to actually record that the appellant was the father of the child. She need not have recorded any person as the father of the child. So, in those circumstances, once again it heightens the nature of the representation from an ordinary social context to something of some severity, we would submit – in fact of some seriousness and importance – and to present the form in those circumstances is not, if I may – I do not seek to belittle it in any way, shape or form but it is not like presenting a shopping list for what needs to be purchased or, for that matter, even something a little more serious. It would be akin in a lot of ways to a husband presenting to a wife a guarantee, for example, for signature to secure, let us say, the liability either of the husband or, alternatively, the liability of a company that the husband or even the husband and the wife may both have an interest in. It raises the action of presenting the form and the representation in it well beyond the normal social context, would be our submission.

GUMMOW J: What is the Victorian legislation under which this regulation is made?

MR LUCARELLI: It is the *Births, Deaths and Marriages Act 1958* as amended, your Honour. Also the consequences of making a statement of this kind again distinguishes it from the ordinary social context because it has been well understood in our civilisation, not even in our legal system, the importance of the proper identification of a father in all sorts of ways which our law in particular, our legal system, recognises the importance of that. We only need think of wills and trusts in a perhaps unrelated context that make provision in ways that, for example, discretionary powers might be exercised in favour of children of the marriage or children of a particular man or even children of a particular woman. So that not only the law but society fundamental to its roots has placed some very great importance and continues to place some very great importance about fathers as well as in the social context of the marriage as well as outside the marriage.

GUMMOW J: But there was a rule of law, was there not?

MR LUCARELLI: Many moons ago, one may say, your Honour, that they were the one – is that what your Honour has in mind?

GUMMOW J: No, that neither a husband nor a wife is permitted to give evidence of non-intercourse after marriage to bastardise a child: *Russell v Russell* [1924] AC 687. That was a policy in the law.

MR LUCARELLI: But again, the importance of it is to get to the bottom of precisely who the father is.

HAYNE J: On the contrary.

GUMMOW J: It does not get to the bottom – the opposite.

MR LUCARELLI: Well, in a sense yes, but in a sense no. It is still important to clear the deck, so to speak, to work out where the - - -

HAYNE J: No, it is precisely the opposite. The old rule was the child born in marriage, there was an irrebuttable presumption of fatherhood by the father, regardless of the facts. It might be rebutted I think ultimately on proof of non-access, but these issues were taken outside legal dispute.

GUMMOW J: And you now have section 69P of the *Family Law Act* and it starts with a presumption, does it not?

MR LUCARELLI: Yes, it does, but that heightens the importance of the representation, we would say.

HAYNE J: That in a relationship one of the conventional bases of the relationship will extend to and include the accepted basis by both parties of parentage of the children is a proposition that I do not find difficult to embrace.

MR LUCARELLI: No, your Honour.

HAYNE J: But the question then becomes whether the law is to apply if that conventional basis is proved – or how the law is to apply if that conventional basis is later demonstrated to be untrue.

MR LUCARELLI: Well, we would submit that the law of deceit is not impacted by that; that it should apply in that situation. Otherwise it would leave no remedy at all, because even negligence, for example, would also be impacted in the same way, and that would seem to be an odd result, in our submission.

HAYNE J: But for many years in the law there was no remedy by the operation of at least two elements: (1) this presumption about legitimacy; and (2) the rule, the fiction, the whatever it was, husband and wife are one and one cannot sue the other.

MR LUCARELLI: Naturally we have moved well away from that.

HAYNE J: I understand that.

MR LUCARELLI: We are light years from where we were in the 1850s, arguably.

HAYNE J: I will not debate that with you.

MR LUCARELLI: No, I understand, your Honour, but at the end of the day plainly the legislature has seen fit to change that in many ways since the 1850s, and dramatically so, now to the early 2000s in the sense that husbands and wives are no longer in some special position that the rest of the community is not. It seems that many of these sorts of presumptions cannot operate in that context, otherwise it would

make it very odd that, for example, in section 119 of the *Family Law Act* the legislature was prepared to permit husbands and wives to take action against each other in the context of both contract and tort, but in effectively permitting that sort of reform - the other difficulty, of course, is that cases such as *Russell v Russell* that I have been referred to were, as I put it, before, science – and I do not mean this in any disrespect – but science sometimes does jump ahead of the law.

Some would argue that it is ahead of the law a lot of the time, and it is not a criticism because of the manner in which the common law moves, first and foremost, and even Parliament itself; it moves in incremental fashion to meet the needs of new issues arising because science moves ahead. So a case such as *Russell v Russell* would need to be looked at much more favourably, in our submission, in favour of the appellant's case, given the way science has gone, that there is now a very clear method of establishing paternity that just would not have been the case back in 1924 or earlier when the presumption obviously operated. So, in our submission, a case such as that cannot be viewed in the context of 2006 or 1999 when these events were occurring, but it needs to be looked at - - -

KIRBY J: There are two big developments since *Russell v Russell*. One is the technology that you mention and the other is the very great increase in the availability of and exercise of the availability of divorce.

MR LUCARELLI: Yes.

KIRBY J: So they are both social and technological developments to which one would think the exposition of the law has to adapt.

MR LUCARELLI: Equally, sections 119 and 120 are in a sense reflective of the modern world of litigation where it appears that there is obviously a tendency towards permitting greater rights of litigation, rather than lessening them, and that was the purpose of section 119. As Mr Hamer said in introducing the Act in 1968 in Victoria, it seems anomalous that a husband and wife cannot sue each other just simply because of that fact, having regard to what the rest of the community is able to do, and given the reforms that were in place in the 1960s and 1970s, both in England and in Australia, it is very easy to see if you are going to remove a lot of the old restrictions about how marriage is to be dealt with once it comes to a point of dissolution, an unfortunate point of dissolution - - -

KIRBY J: Was the idea behind *Russell v Russell* an idea of protecting the interests of the children of a marriage or was it a paternal - - -

HAYNE J: Justice McHugh would have said in protecting property, I think, if he were here.

KIRBY J: I was going to ask the second – was it a “paternalistic” view made by male judges protective of the interests of males, husbands, from being sued?

GLEESON CJ: I think the origin of the proposition that husband and wife are one you will find in the Book of Genesis. It has been around for a long time.

MR LUCARELLI: If your Honour pleases.

KIRBY J: There is a lot in Genesis and elsewhere that has been around a long time but it does not necessarily reflect our law.

MR LUCARELLI: Nor the current moral and social attitudes of the community that the law, with the

greatest respect to this honourable Court, serves. So that at the end of the day the law needs to be reflective of those moral and social attitudes and if - - -

HAYNE J: Now, you have taken us to 119.

MR LUCARELLI: Yes, your Honour.

HAYNE J: Section 119 must be read together with 120.

MR LUCARELLI: Yes, your Honour, we accept that.

HAYNE J: Thus does it follow from 120 that a deceitful statement made and relied on with financial consequences or other consequences concerning adultery would be actionable or no?

MR LUCARELLI: Other consequences other than deceit as to paternity, is that what your Honour is asking?

HAYNE J: No, no child involved; simply financial or psychiatric consequences.

MR LUCARELLI: We would submit no, in the sense that damages for adultery – well, yes and no. May I answer it this way. First of all, no, because damages for adultery appears to have a wide import – I should say yes, because damages for adultery appears to be having a wide import. No, because damages for adultery, as it may have been understood in 1975 when section 120 was introduced, of course, had been confined to section 44 of the *Matrimonial Causes Act* and the reforms in England from the 1850s through to, and also in Australia, through to the 1960s had confined damages for adultery to be an action against the person engaged in the adulterous affair – with the spouse involved in the extra marital affair.

HAYNE J: Hence the third party.

MR LUCARELLI: The third party, if your Honour pleases. So that it had been confined; therefore, it is difficult to answer the question whether, for example, if a husband suffers because of the adulterous affair, that that would be caught by the words “damages for adultery”. That is why, unfortunately, it needs to be answered yes and no in that context. Probably at the end of the day the words are to be given the widest import in the sense that it is the damages that flow from the actual extramarital affair itself that are caught is a prospect.

We would say that this honourable Court ought to construe those words as limited to what was the position in section 44 of the *Matrimonial Causes Act*, that is that it is limited to the type of action against a third party rather than what might eventuate between spouses. But, naturally, we would submit that we do not get to that point of needing to pin our colours to one particular mast or another as to whether it would be open or not in the way that your Honour Justice Hayne has put the question to me. I do not know whether I have answered your Honour’s question.

GUMMOW J: What is the significance of this form you took us to when read with section 69T of the *Family Law Act*?

MR LUCARELLI: Would your Honour just pardon me a moment while I locate that. At times it begins to resemble a much bigger Act that - - -

GUMMOW J: It is about to get worse, I think.

MR LUCARELLI: Yes. We are always complaining about the taxation legislation. I have it.

GUMMOW J: That seemed to create a presumption for the law generally.

MR LUCARELLI: In the form.

GUMMOW J: Yes. Then there is a procedure for rebuttal under 69U.

MR LUCARELLI: Yes, your Honour.

GUMMOW J: There is a provision in 69VA for a declaration, that “that is conclusive . . . for the purposes of all the laws of the Commonwealth”. What might those laws be, do you know?

MR LUCARELLI: Probably the *Family Law Act* first and foremost, your Honour.

GUMMOW J: Yes, apart from that.

MR LUCARELLI: I would have to think about that and have a look, your Honour. We cannot submit on that point.

GUMMOW J: Because we have to consider this common law question in the light of this rather complex statutory regime. That is the way the Canadians would look at it I think.

MR LUCARELLI: We do want to make some submissions about that in terms of *Thompson* and the case that was referred to the parties in the form of *Frame*, but our submission in relation to 69T is that it strengthens the position of the representation and makes it an extremely important representation, particularly in the form, because of the consequences that flow from 69T. If the appellant here had not been asked to sign the form or to make a statement in the form effectively by his signature that he is the father, then we would submit that the consequences of 69T would not have been the same. So it is an extremely important form as recognised in a sense by section 69T and again takes it out of the social context in a very important way.

I have referred to *Thompson v Thompson* which is the Canadian decision of Justice Murray. I understand that copies have now been made available. We found it difficult to get a copy of this in the reported decisions and it was provided, I understand, by the Registry of the Court in Alberta. I do notice that in reading the case there are some spelling errors that are quite odd and I am not quite sure, so we obviously hand it to the Court in the best form that we were able to obtain it. For example, the word “movies” is used several times which is meant to be a reference to moneys. Unless movies are extremely expensive in Canada, it would not make any sense. The reason that we wish to go to *Thompson v Thompson* is because the facts of *Thompson v Thompson* are – the legislative scheme is not but the facts of *Thompson v Thompson* are very, very close to the facts of this case.

KIRBY J: Would you tell me where you are slotting this into the structure of your argument.

MR LUCARELLI: It is in public policy, your Honour, and it is seeking to deal with what his Honour Justice Gummow was touching upon a moment ago, which is that all of these issues need to be considered in the family law context and we cannot resile from the fact that naturally the *Family Law Act* needs to be considered. We submit that first, as I have already said, *Thompson* is a case based on

similar facts to the facts of this case.

However, unlike *Frame*, *Thompson* was based on the tort of deceit among others, but the tort of deceit was central to his Honour's consideration and it was deceit for paternity fraud. *Frame* of course was based on other torts, importantly conspiracy. The action in *Frame* was taken against both the wife and a third party, including for conspiracy, and in a very important way not for deceit, for paternity fraud. In *Thompson* his Honour found that the tort of deceit for paternity fraud was available. If I may take the Court to paragraph 30 – you will need to rely on paragraphs because there are no page numbers in this version.

GUMMOW J: One starts at 22, does not one?

MR LUCARELLI: Yes, your Honour is correct. His Honour's consideration of *Frame* starts at 22 under the heading "Tort Remedies in the Family Law Context" and his Honour opens with *Frame* and looks at carefully the dissenting judgment of her Honour, I think it is her Lordship - - -

GUMMOW J: Her Ladyship.

MR LUCARELLI: Your Honour, I am indebted. Madam Justice Wilson his Honour describes her as, intermittently as her Ladyship as well, so I am a little confused, but nevertheless. Then his Honour progresses through both the minority decision and the majority decision in *Frame*. At about paragraph 26 there is a reference to *Frame* at page 114 which is part of the passage that the Court has directed the parties' attention to. This is at the top of the page that also has paragraph 27 and there is a paragraph where they are quoting from the majority:

The spectacle of parents not only suing their former spouses but also the grandparents, and aunts and uncles of their children, to say nothing of close family friends, for interfering with rights of access –

and we emphasise those words –

is one that invites one to pause. The disruption of the familial and social environment so important to a child's welfare may well have been considered reason enough for the law's inaction, though there are others.

Then his Honour also looks at further, at pages 116 and 117, distinguishing - - -

KIRBY J: No, this is Justice La Forest, I think.

MR LUCARELLI: Yes, it is, your Honour, in the majority. Finally, his Honour dealing with this issue at paragraph 30, having surveyed *Frame's Case* at 28, for example:

Certainly the focus of the majority was on issues of custody and access and at the end of the day their reasoning was that any judicial initiative in respect of family breakdowns and in particular custody and access issues had been overtaken by legislative action. Also, there are certainly policy arguments as identified by the Court against the utilization of certain torts as a cause of action in many family matters.

29. The position taken by the Defendants is that torts can only be used in the family law

context in a limited number of areas such as assault and sexual assault.

In a sense, not dissimilar to what the respondent is inferentially submitting here, that the cases that have been identified as allowing, for example, for the recovery of damages for battered wives, if I may use that, or for sexual or battery cases for wives, are, in a sense an exception, so that the respondent is making a very similar point that those cases are an exception and not really a tort of the kind that should be allowed.

Counsel for Thompson referred to a number of cases involving various torts which the courts have dealt with such as defamation, fraud relating to improper financial disclosure and civil conspiracy involving fraudulent conveyances of matrimonial property designed to defeat a matrimonial property claim . . . Counsel for Hale –

who was the wife in this case –

distinguishes these cases primarily on the basis that the defamation related to a false allegation of sexual assault in *M.(M.J.)* and the cases of *Miller* and *Helmy* both involve property and not support.

30. Other than the conspiracy claim, in this case we are not dealing with any of the torts dealt with in *Frame v. Smith* –

and we would submit that that is precisely the position here. We are not dealing with conspiracy or intentional infliction of emotional or physical harm, which were two of the primary torts in *Frame*. His Honour continues:

but rather we are dealing with a specific and clearly defined tort of deceit. This tort is not subject to some of the restrictions placed on the ill-defined or anomalous torts alleged and rejected in *Frame v. Smith*. The alleged deceit placed Thompson –

who is the equivalent of the appellant here –

in a situation where he was unaware that another person might be liable to contribute to child support and unable to take steps to seek that contribution. As will be discussed, neither Hale nor Johnston –

who is the third party –

have shown that there is a statutory remedy available to Thompson by which to obtain retroactive contribution from Johnston respecting support which he has paid for Matthew –

who is the child in question –

or to recover spousal support paid to Hale which he may not have been required to pay had the truth been known. I find it difficult to imagine that the Supreme Court of Canada in *Frame v. Smith* intended to prohibit an action based on deceit in the family context. To do so would be tantamount to the Court directing that fraud be condoned in this type of circumstance. Also, this action in large part is about monies paid by reason of the wrongful act or acts of others. We are not here concerned with remedies such as custody and access which are unique to family relationships nor are we dealing with the amount of

support payable for Matthew, but rather with a question of fraud which may or may not have induced Thompson to pay such support, as well as with what rights Thompson has to recover monies so paid from Johnston and from Hale insofar as the spousal support is concerned.

We rely on that paragraph naturally because of the direct symmetry that it has with the submissions that are made on behalf of the appellant.

GLEESON CJ: Can I just take you back to that expression “in the family context”?

MR LUCARELLI: Yes, your Honour.

GLEESON CJ: Can a child sue its parents for negligence in upbringing?

MR LUCARELLI: I do not know of any case where that has been done is the first way to answer that question, your Honour. If I may venture, it would depend on the context. If, for example, the child had been – your Honour has used negligence and that does make my examples very difficult.

GLEESON CJ: Yes, I cannot think of a clearer example of what would ordinarily be regarded as a situation involving a duty of care, in one sense.

MR LUCARELLI: It is a fiduciary obligation first and foremost but, yes, your Honour, it would be difficult not to see that there would be a duty of care because of the vulnerability, if nothing else.

GLEESON CJ: Could a child say, “I’m unhealthy because I wasn’t given a proper diet. You didn’t look after me properly”?

KIRBY J: Too many chips.

GLEESON CJ: If a child cannot sue a parent for negligence in upbringing, why not, unless it has something to do with what is there referred to as the “family context”?

MR LUCARELLI: In our submission, what his Honour is referring to is the family context in terms of the legislative scheme, we would submit, rather than the family context in the broad form, because his Honour is there dealing with the way in which *Frame* had addressed the remedies that were available for the failure to grant access, which is what was the foundation stone of the *Frame Case*. In our submission, those words ought not be interpreted as your Honour is doing so, which is to say the family context generally, because it needs to be read fairly in light of what his Honour is seeking to grapple with.

KIRBY J: There is absolutely no doubt that a child can sue a parent in negligence and we see many, many cases where that happens in motor vehicle accidents.

MR LUCARELLI: Yes.

KIRBY J: Now, what is the point of distinction between those cases and the case of poor upbringing, lack of religious instruction or giving religious instruction which later the child thought should not have been given?

GLEESON CJ: Or lack of proper education.

MR LUCARELLI: Yes, one can imagine thousands of examples, and that is readily conceded.

GLEESON CJ: You do not have to have much imagination to think of complaints that children might make to the effect that they were not properly taken care of.

KIRBY J: And this might fall outside the personal injuries litigation limiting actions.

MR LUCARELLI: Yes, it may well, your Honour. I do not think the legislature has sat down and thought about that.

KIRBY J: It might be a new growth area.

MR LUCARELLI: It might be a new jurisdiction, your Honour, but may I answer the questions that have been put this way. Negligence, as this Court has said on many, many occasions, including in *Cattanach* by your Honour the Chief Justice, is that naturally negligence needs to move in incremental manner very carefully from well-established factual situations, not only as to the duty of care, but the type of loss that is recoverable. It must be both because of the natural interaction between the duty of care and its expansion, and the type of loss that is recoverable. The only way that I can properly answer what is being put is to say that the Court would naturally need to look at the fact situation on an incremental basis.

I am not seeking to be a coward about the answer, but that would appear to be the natural answer, having regard to the way in which the Court has dealt with negligence, certainly in the last 30 or 40 years, including this honourable Court. So that I would not say no, but obviously it would need to be very carefully within the rubric of what the Court has already allowed with that very careful incremental step moving forward. But it would be impossible to say no, that, as his Honour Justice Kirby has put, if the McDonald's complaint were to be made, and I am perhaps unfairly picking one of the - - -

KIRBY J: I did not mention any company.

MR LUCARELLI: No, your Honour did not mention it. I am interpolating in my own way to say that one of the corporations – in America we know of cases that have been taken in relation to fast food. That is what I had in mind. I did not mean to pick any particular corporation or to attribute that to your Honour. But one can imagine that a child might say, “I went to one of the fast food chains far too often and I am now in a condition that my life is going to be considerably shortened or made terrible by diabetes or whatever”.

KIRBY J: You might be right about this, because once it would have been equally unthinkable that children would sue teachers but such actions have in recent times been ventured and some, I think, have succeeded, certainly overseas.

MR LUCARELLI: Yes. So again the best way to answer it is just simply to say we would need to look at that on a case-by-case basis, as this Court has done with negligence on many occasions. If I might return to *Thompson* then - - -

GUMMOW J: Was this action a matrimonial cause?

MR LUCARELLI: In *Thompson v Thompson*?

GUMMOW J: No, this case here within paragraph (e) of the definition. Was the proceeding between the parties to a marriage for an order in circumstances arising out of the marital relationship?

MR LUCARELLI: I am sorry, I am not sure what section your Honour is referring - - -

GUMMOW J: Paragraph (e) of the definition of “matrimonial cause”.

MR LUCARELLI: If your Honour pleases, it is in section 5 from recollection.

GUMMOW J: Section 4(1).

MR LUCARELLI: If your Honour pleases. It does not fit within (a), your Honour, because it is not - - -

GUMMOW J: Paragraph (e), E for Edward.

MR LUCARELLI: Paragraph (e), if your Honour pleases.

GLEESON CJ: I presume “order” there means order of the kind referred to in this Act.

MR LUCARELLI: Presumably so. I cannot answer that.

GLEESON CJ: Consider an apprehended violence order of the kind that is made day by day by magistrates between parties to marriages.

MR LUCARELLI: Yes. Well, one would have to give it some meaning. It cannot just mean any order in the circumstances but, in any event – and this comes to the issue about section 119 and also the constitutional issue, if we ever get to it in a meaningful sense, and that is that in *Re F* there is statements about what is within and without both the matrimonial power and also section 51(xxii). If the child is outside of the marriage in the true sense of the word, in the biological sense, then *Re F; Ex parte F* says in effect that both of the paragraphs of the Constitution that could give the constitutional power do not extend to those children, certainly in *Re F* for the purposes of custody. Therefore one would need to read subparagraph (e) in that context, and that is that it would be limiting the power of the Commonwealth to legislate to make orders only that related to children that were truly biologically of the marriage, having regard to the way in which the constitutional power to date has been interpreted, both in paragraphs (xxi) and (xxii).

KIRBY J: Even if the child is fully accepted and even if that has gone on for 15, 16 years? I mean that seems a very narrow ruling. I mean, people do exist as non-biological but social children of a marriage. I know them.

MR LUCARELLI: *Re F* did not deal with that specifically and it talks of the exceptions based on adoption and guardianship and does not talk about the matter that your Honour is raising. That is accepted and it is accepted that *Re F* is now approximately 20 or more years old and it did not have to specifically deal with the issue, but I was merely paraphrasing what the impact of *Re F* is upon the constitutional power in relation to (e), to say that (e) would have to be - - -

KIRBY J: We are getting a bit lost here. I think we have moved to the constitutional argument.

MR LUCARELLI: Well, it was the only way that I felt that the best answer could be given to Justice Gummow’s question, which is whether (e) would apply to this type of action. Perhaps I did not

start by explaining that because this is an action for deceit in connection with a child that is not of the marriage in the true sense of the word, the biological sense, then it is not the type of proceeding that would be caught, or the type of matter that would be caught by (e).

CRENNAN J: How would sections like 69(1) fit within what you are saying – 69VA, 69(1) of the *Family Law Act* – sections 69VA and 69W?

GUMMOW J: Do these sections rely on a referral of power? They just talk about children, you see.

MR LUCARELLI: Yes, they probably do, your Honour, and, of course, sections 119 and 120 – and I know I keep going back to those – did not rely upon any referrals power when they were enacted, and I venture to say that they probably are not the subject of any referral of power. I do notice that they were introduced in 2000 in the case of VA and W, your Honour, I notice that that was introduced in 1995. At hand I am not able to inform – I would venture to say that VA is probably a referral. I cannot answer for W.

GUMMOW J: Yes, and I took you off your course.

MR LUCARELLI: Have I sufficiently answered your Honour Justice Crennan's question or have I not done so?

CRENNAN J: May I just ask you one more thing and you may not be able to answer it. Orders of the kind referred to in 69W(1), is that a common procedure or - - -

MR LUCARELLI: I am not able to answer that offhand. Perhaps I can take that on notice and – may I look at 69W(1) while your Honour - - -

CRENNAN J: Subsection (2), for example, provides that:

A court may make a parentage testing order:

(a) on its own initiative; or

(b) on the application of:

(i) a party - - -

MR LUCARELLI: Yes, your Honour, and may your Honour please ask me the question again because I was just distracted?

CRENNAN J: I was just asking whether you were able to give any indication about whether such applications were common or such orders being made were common.

MR LUCARELLI: There are applications that are made. There are about half a dozen cases that have come to my attention, but I have not looked at them in detail. Most of the orders appear to be refused, but I think there are some instances where the orders are made, but most of them appear to be refused, and in this case, of course, the DNA tests were conducted by consent as a result of court orders that were made under these provisions. Does that assist your Honour?

CRENNAN J: Thank you.

GUMMOW J: I think the answer to the referral of power point is section 69ZE. That indicates, I think -

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MR LUCARELLI: Yes, if your Honour pleases. Finally, I wish to take the Court to paragraph 58 of *Thompson* in conclusion of what is to be said on behalf of the appellant in connection with *Thompson*. At paragraph 58:

However, Madam Justice Wilson was not prepared to extend this tort into the family law context.

The tort there had been conspiracy. Then they quote from her Ladyship:

In light of these comments I would not extend the tort of civil conspiracy to the custody and access context.

Then over the page continuing the quote, there is a number of policy matters that were advanced as to why the tort of conspiracy ought not be allowed in that access and custody context. In particular, if I might take the Court about halfway down the next page, it starts with the words:

But the paramount concern in extending the tort of conspiracy into the family law context is, I think, that such an extension would not be in the best interests of children. If the tort only applies to conduct in combination it would do little to encourage the maintenance and development of a relationship between both parents and their children. Yet it would be tailor-made for abuse. It would lend itself so readily to malicious use by one spouse against the other. The fact that the action is against not only the ex-spouse but also his or her "friend" may well provide an incentive to the plaintiff to litigate. Moreover, a single "agreement" to deny the plaintiff one visitation would be actionable and the success of that action would depend largely on uncertain evidence of agreement and intention as to which each party might be expected to take a fundamentally different view.

A little further down there is a suggestion that the cause of action would be used:

as a "weapon" with little possibility of amicable settlement. These concerns are aggravated by the fact that, if the tort of conspiracy were introduced into the family law context, it would be difficult to restrict it to the area of custody and access. Acts which contributed to marriage breakdown would also be actionable as conspiracy and the potential for detrimental impact on the children could be substantial. Having regard to the overriding concern for the best interests of the children, I am not persuaded that the tort of conspiracy should be extended to encompass the claim of the plaintiff.

KIRBY J: That is Madam Justice Wilson.

MR LUCARELLI: Yes, it is.

KIRBY J: With all respect to that very distinguished judge, is the way she approaches it in those last two sentences the correct approach? That is to say, the tort "extended to encompass the claim of the plaintiff" as distinct from the tort of conspiracy being a tort of long standing should be taken away from the plaintiff. Does a court extend a tortious right to a person in the society? Does that not belong to the person as a citizen or resident as part of their birthright, if you like, of legal entitlements?

MR LUCARELLI: Yes, your Honour. As we would submit here, if the elements of the deceit are made out, then the cause of action in deceit is available. If there is a remedy to be had as a result of it, then the remedy must follow. So in a sense what your Honour is saying we would respectfully agree with and say that it is either available or it is not. It is not a matter of extending it.

GLEESON CJ: Could one party to a marriage or former marriage sue the other on the basis that the defendant made a misrepresentation to the plaintiff as to his or her wealth to induce the marriage?

MR LUCARELLI: In using misrepresentation of course, there are two possibilities there, the *Trade Practices Act* or negligent misstatement. The *Trade Practices Act* would require trade or commerce, and we do not know that we want to get into that. May I answer on the basis of negligence? Is that sufficient, your Honour, or does your Honour want an answer on both?

GLEESON CJ: Let us assume for the moment that it is not trade or commerce. Would an action lie for misrepresentation as to the defendant's financial means inducing a marriage?

MR LUCARELLI: In inducing marriage?

GLEESON CJ: Yes.

KIRBY J: Or attractive in-laws.

GLEESON CJ: "He told me he was a millionaire".

MR LUCARELLI: Yes, and in fact the exact opposite was the case and he had millions of dollars in debt, for example.

GLEESON CJ: Yes. Can you have an action for damages for misrepresentation in that context?

MR LUCARELLI: What is exercising my mind in answering your Honour's question is I went to damage immediately to see how I would persuade this Court that there was a cause of action made out. In other words, by relying on all the elements that I would need to persuade the Court about, I immediately went to damages, the one where I am not quite sure how to characterise the answer if I do not know what damage I am being asked to address. Is it just simply the fact that the person is now married?

GLEESON CJ: It does not require a great amount of imagination to think of a circumstance in which a person might be induced to enter into a marital relationship on the faith of representations as to the circumstances in which that person might live following the marriage. That expectation might be disappointed. Could that sound in damages?

MR LUCARELLI: But negligence, as a general rule, does not allow for disappointment because what -

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GLEESON CJ: I was talking, I thought, about fraud.

MR LUCARELLI: Fraud, your Honour?

GLEESON CJ: Deliberate misrepresentation.

MR LUCARELLI: Deliberate misrepresentation. I beg your pardon, your Honour.

KIRBY J: “I have a country castle in Kent.”

MR LUCARELLI: Yes, that is just completely false. In our submission, if there was damage that flowed from that misrepresentation, then we would submit that the tort of deceit would be available and would provide for that compensation.

KIRBY J: You might have real questions of causation.

MR LUCARELLI: Yes, and what the loss and damage may be.

KIRBY J: And being believed.

GLEESON CJ: Your answer is, in principle, there is no reason why not?

MR LUCARELLI: Yes. May I conclude in connection with 58 to make some observations about – first of all, to go back to a matter that your Honour Justice Kirby put, it appears that the tort of conspiracy in Canada, from some observations that his Honour makes in *Thompson v Thompson*, is not considered favourably at all in any context. There are some observations made – and I am not sure that I can put my hand on them immediately, or point to them immediately – to the effect that the law of conspiracy in general is not well received in the Canadian courts.

KIRBY J: Why is that? Is that because of the sort of consideration that Madam Justice Wilson has expressed that it is not apt to allow the law to intrude into that relationship?

MR LUCARELLI: Not just in the context of family - - -

KIRBY J: That sounds like *Russell v Russell* that you do not get to the point of litigating this issue, it is a sort of immunity from legal intrusiveness.

MR LUCARELLI: I was making the observation more in terms of the law of conspiracy generally, as opposed to the law of conspiracy in the family law context, as it is put,.....starting point. His Honour has to deal with four matters that Madam Justice Wilson put forward and in doing so what his Honour does is he examined – and perhaps my learned junior might be able to find the four points on questions of public policy. If I might move on for a moment and perhaps come back to it.

His Honour in *Thompson* said, of course, that the tort of conspiracy could not be compared with deceit because of the distinctive features of the application of conspiracy. For example, the fact that you are also bringing in another party and the greater potential for there to be the use of the tort of conspiracy in a more vindictive way than perhaps the tort of deceit itself because you are able to bring in the third party.

KIRBY J: I can imagine that some actions for deceit might be brought in a vindictive way.

MR LUCARELLI: They may, but the potential for the conspiracy to do so where it is possible to bring the third party in without the third party having made a representation to the plaintiff – if the third party made a representation to the plaintiff that “You are the father” and it was a believable representation, and it is false, then it is possible for the third party also to be joined as a party to the deceit, but absent a representation by the third party, the third party cannot be joined in the deceit. But with conspiracy, of

course, it requires an agreement of the kind necessary to constitute the tort and therefore it brings about the very natural need to join not only the spouse but also to join the third party.

GLEESON CJ: If a person is induced by a fraud to enter into a bigamous marriage, can that person sue for damages for misrepresentation?

MR LUCARELLI: Again, going back to the tort of deceit, provided the elements are met, we would submit, yes, and the American authorities appear to suggest that that is indeed available.

GUMMOW J: Canada as well, do they not? *Graham v Saville* (1945) 2 DLR 489.

MR LUCARELLI: Yes, that have been referred to in *P v B* and by literally all the parties in their submissions. My learned junior has found the passage that I had in mind. It is in paragraph 59 where what his Honour is addressing is four points numbered (i), (iii), (iv) and (v):

I do not read the majority's decision as a blanket approval of Madam Justice Wilson's reasoning, but rather a finding that there were grave disadvantages associated with applying the tort of conspiracy to the circumstances of that particular case which involved custody and access. When one examines the reasoning of Madam Justice Wilson it would appear that Her Ladyship rejected the tort of conspiracy in the custody and access context for the following reasons:

- (i) The Court in *Canada Cement LaFarge Ltd.* had pointed out that the tort of conspiracy had lost much of its usefulness in the commercial world and survived in the law as an anomaly and thus its use should be restricted.

Then the second point – I apologise, there is actually a second point which is the British Court of Appeal in *Mogul Shipping*. It is the indentation that has confused my reading. I was seeking to use that point to say that if the general nature of the legal system in Canada is to be shying away from the tort of conspiracy and its use in a commercial context, then perhaps what is being said by his Honour is, of course, if you are saying away from it in a commercial context, why are we now bringing it back in in a family law context? It seems an odd way to approach a tort of that kind. His Honour does deal with that point. At paragraph 60 he takes the first point and he says that it applies. His Honour deals with the second point, which is that:

a combination may make oppressive or dangerous that which if it proceeded only from a single person would be otherwise –

and his Honour says at the bottom of that page and the top of the next page:

However, with respect to point (ii) the conspiracy alleged in the Statement of Claim, if proven, may well be more oppressive and dangerous than if the defendants singly sought to defraud Thompson, for example, if it were established that Johnston financed in whole or in part Hales litigation with Thompson in seeking both spousal and child support for Matthew.

KIRBY J: Are there any old cases that you have found long before DNA came about where a spouse has sued another spouse or ex-spouse? In the very old days they would have been forbidden by the

spousal immunity, but are there any cases in any jurisdiction where deceit has been used as between spouses other than for DNA cases?

MR LUCARELLI: There may be one of the American authorities but I do not have it to hand, your Honour, but I would have to say, in the main, no.

KIRBY J: It is really presented by overriding the spousal immunity and by the presentation of DNA evidence - - -

MR LUCARELLI: Yes.

KIRBY J: - - - and the increase in marital breakdown. Those three social or technological factors have presented us with a new problem.

MR LUCARELLI: It would appear to be so.

KIRBY J: Is it a feasible answer to that problem, if you are focusing on the best interests of the children, of children generally who are born to a marital relationship and are for a time social children of the father, that you, as it were, say it is against public policy, it did not exist before, and therefore we do not extend the tort to such a case, so there is no precedent in old times that did apply to such case, or (b) that we use the, as it were, procedural principle of *Russell v Russell* and say you do not get to it because there is this either presumption or immunity in the marital relationship that keeps the law out of it?

MR LUCARELLI: Well, your Honour, the first point that we would submit in connection with that is that there is no need for an extension. All the tort of deceit is doing is just simply applying to what happens to be a proof which is now far more available than it ever was and that really is what is bringing about any tension that the Court may be feeling about the interests of the children. May we answer the interests of the children point by going to *Doe v Doe*? I feel that I may be able to answer your Honour's question by going to *Doe v Doe* and the passage we intended to rely upon in that regard, if I may be permitted to do that. That does conveniently conclude what we need to say about *Thompson v Thompson*, if the Court pleases.

KIRBY J: Did that go on appeal to the Supreme Court of Canada or the Court of Appeal of Alberta?

MR LUCARELLI: The researches we have conducted do not show it having gone on appeal but - - -

KIRBY J: You had better have a look at that just to satisfy us that it did not go on appeal.

MR LUCARELLI: If your Honour pleases, we will make a note of that and we will inform the Court. Having concluded with *Thompson v Thompson*, we also conclude with what we wish to say about *Frame v Smith*. We say just simply that, of course, *Frame v Smith* now needs to be viewed as limited to access and custody and to the way in which the tort of conspiracy interacts and naturally also because of the very special scheme that is in place in Canada. There is not much reliance that can be placed upon *Frame v Smith*.

Doe v Doe was again a case involving both allegations of fraud and intentional infliction of emotional distress, including negligent misrepresentation, promissory estoppel, breach of contract and constructive trust. One of the arguments that were run was that fraud was not barred by public policy. The Court of Special Appeals of Maryland – it is pages 13 and 14, commencing in the right-hand column of page 13 with the words “We consider”.

GLEESON CJ: Where do we find these page numbers?

HAYNE J: We have 712 A 2d as the report *Doe v Doe*.

MR LUCARELLI: Yes, it is. At 123 is the – copies should have been provided to the Court this morning. This is the version that we have. I thought that a full copy of *Doe v Doe* should have been provided this morning.

GUMMOW J: Yes, we have it.

GLEESON CJ: We have it, but we do not have the numbers that you are referring to.

KIRBY J: There are paragraphs. Do you have the paragraphs in your - - -

MR LUCARELLI: No, I do not. 326 is one of the paragraphs that appears on – but these paragraph numbers appear to be for different purposes and they are not actually paragraph numbers. I am not quite sure why this has occurred.

HAYNE J: What is the nearest heading?

MR LUCARELLI: It is about 13 pages in, if that helps in any way.

HAYNE J: What is the nearest heading?

MR LUCARELLI: The nearest heading is “The Best Interests of the Children”.

GUMMOW J: Paragraph [10], page 146.

MR LUCARELLI: It is a lower case bold heading about - - -

GUMMOW J: We have it.

MR LUCARELLI: The passage that I am seeking to take the Court to is “We consider ‘the best interests of the children’”.

HAYNE J: Page 147, column 1, bottom paragraph.

MR LUCARELLI:

We consider the “best interests of the children” to be a red herring in the analysis of whether to permit an interspousal suit for intentional infliction of emotional distress, fraud and deceit.

GLEESON CJ: Without that footnote I would never have thought - - -

MR LUCARELLI: No, if the Court pleases.

Although this sometimes elusive doctrine is usually an important consideration in most family law matters, the counts of the complaint with which this appeal is concerned do not implicate this doctrine. This is not a child custody case, where the appropriate standard *is*

the best interest of the child. *See Taylor v. Taylor* . . . Here, the children are neither parties nor witnesses in the counts of the complaint at issue here; therefore, the standard does not apply.

We note that in the instant case, there is no question regarding paternity. The DNA tests show that Mr. Doe is not the father of the twins. Thus, contrary to Ms. Doe's argument, this is not a case in which "it would not be in the child's best interest to have the blood tests reveal that a man who has been the *de facto* father in the whole of the child's life is not the biological father..." *Monroe v. Monroe* . . . Here, the blood tests have been performed and the results announced; it is a *fait accompli*.

This may well be a case before DNA, your Honour, given that they are relying on blood tests rather than DNA.

In a case similar to the one at hand, where the child's mother deliberately misrepresented to the plaintiff for eight years that he was the child's father, the Illinois court rejected the "best interest of the child" as a basis for precluding a suit for intentional infliction of emotional distress. *Koelle* . . . The Court stated that the "[d]efendant claims that public policy disfavors plaintiff's lawsuit because 'intrafamilial warfare' may be harmful to the child." The Illinois court concluded, however, that "any harm [the child] may have suffered from this alleged situation would have been caused by defendant.... If anything, plaintiff's lawsuit seeks to limit the harm caused [and to allow] plaintiff and [the child] to continue their loving father-daughter relationship." Here, as well, despite Ms. Doe's allegedly duplicitous conduct, Mr. Doe proposes to maintain a loving and close relationship with the twins, and he has requested permanent custody of them.

Furthermore, the innocent parties in this case, the twins, will not be subjected to any more intrafamilial warfare in a tort action than that which would be present during the companion divorce action. Many of the same factual allegations regarding Ms. Doe's alleged deception will be presented during the divorce. Because the Court of Appeals has abrogated interspousal immunity in intentional tort cases without mentioning any reservation for cases in which the parties happen to have children, and because we find the "best interests of the children" are not more implicated by the claims before us than similar claims in a divorce proceeding, we find no public policy reason to preclude this interspousal tort suit. As the Illinois Court of Appeals stated in *Koelle* : "We find that public policy does not serve to protect people engaging in behaviour such as that with which plaintiff's complaint charges defendant, and we will not allow defendant to use her daughter to avoid responsibility for the consequences of her alleged deception." *Koelle* . . . Here, too, Ms. Doe cannot use the twins as a shield in order to avoid potential liability for her allegedly tortious conduct towards her husband.

Naturally we rely upon the reasoning of the Court of Appeal in *Doe* in a very similar way here. May we conclude on this point as to the interests of the children in connection with *Doe* in this way. One of the arguments that no doubt would be run on the issue of the interests of the children is that of course if the appellant were to be successful, it would deplete the resources of the respondent and therefore may impact upon the children, and one can understand that argument.

The difficulty with that argument is simply this. Any suit that is brought against any parent in whatever capacity, whether it be a spouse or whether it be a person outside, has the potential to harm the interests

of the children because it diminishes the financial capacity of that parent to look after those children. It may affect the inheritance of those children, it may affect the ability of the children to be properly schooled. But the law does not obviously take that into account in considering any normal litigation, whether it be in the form of a commercial piece of litigation or negligence or any other matter, nor does the criminal law necessarily take into account how the financial impact, for example, of the sequestration of proceeds of crime and the like might impact upon the financial wellbeing of children.

So that, albeit that one does not want to belittle the interests of children, what needs to be borne steadily in mind, in our submission, is that it is an easy phrase to bandy around, so to speak, to use a colloquial expression, but when one actually looks at it very, very carefully, what does it mean in light of the economic harm that has been caused to the appellant in this case? It cannot just simply be that a banner is put up at the door of the common law to say the interests of the children are to be taken into account when the economic harm that has been done to the appellant is somehow not only not part of the banner but is swept aside.

HAYNE J: What relevantly are you identifying as the economic harm?

MR LUCARELLI: The economic harm is that this man now suffers from depression. He has taken out of the workforce for a number of years. There is the prospect that he may not be able to return to the workforce for many years, as has been found not only by the doctors that he adduced evidence from, the psychiatrists, but also the - - -

HAYNE J: But consequent upon the injury he is found to have sustained.

MR LUCARELLI: Correct, but - - -

HAYNE J: You are not referring when you speak of the economic consequences to the economic consequences of supporting the child during marriage or subsequently, or are you?

MR LUCARELLI: No, I was confining what I was saying to the damages that were actually claimed here, which was the money that was spent during access, the time that was spent as well that was the subject of the compensation, but the real economic harm that I had in mind was the fact that a member of the community has been taken out of the economic equation, so to speak, both for themselves and for the community as a whole. To just simply say the interests of the children and to be not so much blinded but perhaps to be guided towards that light is leaving a very darkened passageway for the economic harm that has been created by the deceit here.

KIRBY J: I understand that argument and it is a fair argument to put, but on the other hand, experience teaches that when courts, and particularly this Court, in Australia makes decisions, they both solve a legal problem and stimulate proceedings. So we have to keep our eye on the fact that we have to test these propositions with the help of overseas decisions, in my view, the help of international principles, but we also have to keep our eye on the fact that if your client wins in this case, it just does not stop with your client. It would tend to encourage a large number of such cases simply because it gets into the legal culture and then maybe stimulate actions of different other kinds that have been mentioned. That may not socially be a good thing when you are expressing what the common law of Australia is.

MR LUCARELLI: Your Honour, we naturally are very mindful of all the matters that your Honour has put forward and we would not resile from them for one moment. We understand what the obligations of this Court are and the way in which this decision may be used one way or the other and we trust that our submissions on behalf of the appellant properly reflect the sort of sentiments that your Honour has

expressed in the sense that we are not just charging in, we are endeavouring on behalf of the appellant to be, as one can, given the social gravity of the issues involved, as even handed as possible, one would hope, albeit it in an adversarial context.

KIRBY J: Where does the land lie in the United States now in the authorities both ways? I get an impression that they tend to favour your arguments.

MR LUCARELLI: Yes, they do because what appears to be the case – and this was pointed out in *P v B* is that the early cases in the 1980s appear to be going against our case but the cases since then like *Doe* and *Koelle* and *Miller v Miller* and *W v W*, which we do not need to take the Court to – they are all in our submissions – appear to be going in favour of permitting the action.

GUMMOW J: They have a tort of intentional infliction of emotional harm.

MR LUCARELLI: Which often seems to be very closely allied to the claim for fraud, yes, your Honour.

HAYNE J: The cases in that field of discourse are conveniently collected in an article in (1999-2000) 33 *Loyola of Los Angeles Law Review* 449 by Professor Linda L. Berger – no doubt you will go home and pull it off your shelves, Mr Lucarelli – and at least my first impression reading it is that the tide may not be necessarily running at least as strongly as you would have us understand. In particular, one element of the cases is consideration of whether, by abolition of the kind we find in section 120 of actions for criminal conversation, damages for adultery and the like, that is the abolition of what the Americans refer to as heart balm actions, the legislature is to be taken as intending to preclude all spousal claims of the kind with which we are now concerned. Now, that seems to be a rather large proposition but it is a proposition that is at least under active consideration in some of the State jurisdictions in the United States.

MR LUCARELLI: We would address that, naturally, by pointing to section 119 and saying it is of very general import, yes.

HAYNE J: As do they. They recognise the abolition of interspousal immunity is to be taken into account in also considering the consequences of the abolition, legislatively, of the so-called heart balm actions.

MR LUCARELLI: Except for the use of the word “torts”. If 119 had used “negligence”, instead of “torts”, there would have been far greater force in which is being suggested by your Honour in discussion, naturally, I understand.

HAYNE J: But what does emerge from such little of the American literature as I have so far looked at is a great struggle in the courts and legislatively with the problem that is presented by facts of the kind with which we are now concerned, which are struggles being resolved in all sorts of ways, including by estoppels, about denying parentage, giving effect to presumptions of parentage, either absolutely or after certain times, but the problem is seen as a difficult one not resolved simply by saying the elements of the tort are made out therefore.

MR LUCARELLI: We understand that, your Honour. That is why we, in a sense, went to the public policy issue first, because we do recognise that these are difficult issues to grapple with. The final point in connection with public policy - - -

KIRBY J: Is the correct approach in the circumstances that Justice Hayne has laid out to say this is new territory, because in the past interspousal immunity and the rule in *Russell v Russell* forbade it, and so we have a new situation and it is no good looking back on the general law of deceit because that never in the past applied to this sort of issue, and then facing the new situation, it is not appropriate to just apply deceit, which never there applied, and it is better to leave it to Parliament to sort this out and provide for it, if it wishes, and that would be so-called judicial modesty.

MR LUCARELLI: Yes, your Honour, but - - -

KIRBY J: Or is it for us to say we will step in and just apply the old law and let it work its way out and, if Parliament does not like it, they can change it, subject to the Constitution?

MR LUCARELLI: But that would be our submission.

KIRBY J: But that might be called judicial activism.

GLEESON CJ: It might be called Lord Scarman's approach.

MR LUCARELLI: We would certainly advocate, if the shoe fits, it is to be worn, and if someone says that it is not to be worn, then someone with a greater power, so to speak, can step in – the legislature can step in and can put an end to what might be perceived to be the floodgates argument, which of course was rejected in *P v B* – it was argued and rejected in *P v B* – as being not a basis for denying a remedy where a remedy exists.

KIRBY J: You are really adhering to the traditional view, which is that the common law entitlements and rights and actions are your birthright and you are simply asking for it to be applied, having lifted the barriers of interspousal immunity and perhaps *Russell v Russell*, and therefore the Court is simply applying the general principles of the law of torts, as it now can, and if Parliament does not like that, it can fix it up.

MR LUCARELLI: Yes, in a nutshell. We respectfully agree that that is the way that this honourable Court ought to proceed, because otherwise we just simply submit that there is no way that the Court can resile from the fact that the elements are made out. The Court's hands, to some extent, are tied because it is assumed that the Parliament knew of the tort of deceit – and it is not a completely impossible proposition, even before DNA, that a person may have admitted that the paternity was not as had been previously represented. I am not just talking about necessarily between a mother and her husband, but it could be any type of situation that one can envisage where paternity fraud might arise, which is another important element in considering whether it ought to apply or not.

May I postulate a position as follows. Mr and Mrs Smith are married. Ms Jones is closely connected to Mr Smith, let us say in a working arrangement, in a working environment. Ms Jones becomes pregnant and Mrs Smith says to Mr Smith, "Is Ms Jones' child your child?" Mr Smith says, "No, it's not". Mrs Smith, relying upon that, continues the relationship. She may have said, "I won't continue with you if that's what has happened". Let us assume for the purposes of the argument that Mrs Smith then finds out that indeed Ms Jones' child is Mr Smith's child. Mrs Smith then suffers harm as a result, physical harm or psychiatric harm. That would be a paternity fraud case, in our submission, but not in the married relationship, because naturally it was not a paternity about a child in the marriage; it was the paternity of a child outside of the marriage.

One can envisage why that action would be permitted. If that would be permitted, why is not the current

action permissible in the same circumstances where there is a deception about the paternity of the child?

The submissions advanced by the respondent in effect are creating an exception which appears to be prejudicial in the sense that the marriage, by simple fact that you are married, you cannot bring an action, by the simple fact that the child is born to the mother in the marriage, that is sufficient to preclude the action.

GUMMOW J: I think one of the matters your opponent will have to cope with is the social fact that a large number of births are ex-nuptial.

MR LUCARELLI: Yes, your Honour, both conceived before the marriage or during the marriage.

GUMMOW J: Or completely outside marriage.

MR LUCARELLI: Yes, it is a social reality – been a social reality for as long as man and woman have probably existed but it now is a much more exposed reality, is perhaps the way to put it.

GUMMOW J: Yes. It does not run in the American cases. They all trumpet on about marriage, but it is not quite like that out there.

MR LUCARELLI: If your Honour reflects back, even to the very old cases in the 16th and 17th centuries dealing, for example, with the interpretation of wills, many of those were about the uncle and the nephew. If one reads those cases very carefully, that was a very kind or polite way of the court saying an ex-nuptial child and whether it was to be provided for under the will or not. One could identify probably at least a hundred cases in the English reports that have dealt with this issue in one way or another. They were just extremely polite in those days and did not perhaps refer to them in that fashion. It is just the social mores now are such that we do speak of the ex-nuptial child rather freely compared to perhaps even 50 years ago, if I may so venture.

GLEESON CJ: The spousal immunity of which you speak would have applied in the example that you just gave of Mr and Mrs Smith while it existed, that is before the legislation, but it never had any application, did it, to relations between people who were not married?

MR LUCARELLI: No, that is correct, your Honour, but the Mr and Mrs Smith example was given to demonstrate that the child need not necessarily be of the mother who is married.

GLEESON CJ: I understand that point.

MR LUCARELLI: The other one, I am reminded, is of course grandparents and what their position may be and whether, for example, if a grandparent was to be told by, let us say, a son-in-law – let us not even go to the daughter-in-law who may be the mother – but told by the son-in-law that “This is my child”, knowing full well that it is not and the grandparents, because they are told that by the son, are inclined to pay, let us say, for the grandson’s education in the belief that it is truly their son’s son.

GLEESON CJ: The point that you make is that the spousal immunity occupied a much narrower area of human relations than this problem does.

MR LUCARELLI: Yes.

KIRBY J: Do you point to anything in the Court of Appeal’s several reasons which either wrongly or

inadequately address the matters that we have been discussing with you during your arguments?

MR LUCARELLI: On the public policy issue?

KIRBY J: Yes.

MR LUCARELLI: No, because what his Honour Justice Eames, who is the central judge – if I might refer to his Honour Justice Eames; it is easier – did accept that the tort of deceit applied in the same way that in *P v B* it was accepted that it applied. Therefore, we cannot quibble with the way in which his Honour has dealt with that or, for that matter, with sections 119 or 120 in the sense that we may well seek to put it differently on behalf of the appellant. But in essence at the end of the day his Honour, in our respectful submission, applied his mind to those matters correctly and there is no quibble with that. Naturally it is far more useful to have explored it in this sort of detail. It was not explored in that sort of detail below. It is accepted the debate was not quite as vigorous.

KIRBY J: So the error you rely on is in the conclusion on the facts in the particular case?

MR LUCARELLI: Particularly the application of the law of reliance to the facts is the way that we would submit is the – in particular, and allied to that, of course, causation, which in this sort of case appear to be so closely allied that sometimes it is very difficult to see daylight between the two, both as a matter of fact and also as a matter of law, we would submit.

KIRBY J: In a sense, their Honours may have replaced the rule in *Russell v Russell* with the rule in this case, which is that there is not a presumption or a barrier, but a court will look very, very carefully at the facts in order to make sure that torts of this kind do not too readily apply in particular circumstances. That is an impression I had when I read their Honours' reasons, because these are very distinguished judges and they came to that conclusion.

MR LUCARELLI: Yes. We would submit, of course, that what the court below did was to look far too – to be far too onerous upon the meeting of the elements of reliance and causation that is justified by either the facts or by the law.

KIRBY J: That may have, as we said at the very beginning of this case, arisen out of the primary judge's desire to have exhibit A, a document, the smoking gun that everyone talks about.

MR LUCARELLI: Yes, but, as I think I may have submitted to your Honours in the special leave application – and if not, we do so now – at the end of the day what the appellant needs is a representation that is clear and unequivocal to meet the first element, as is usually accepted, the first element of deceit, and albeit that it appears in – whether it is in the birth notification form or some other form at the end of the day is not really to the point. It is the beginning. It is the key representation that is required and it is in black and white, so to speak.

GLEESON CJ: I wondered whether on the assumption that you are otherwise correct and that the tort of deceit is capable of application in this context, it would be appropriate to import into it the kind of control mechanism that exists in relation to *Hedley Byrne v Heller* actions for negligent misrepresentation, the kind that you see in *Evatt v MLC*. That is to say that the representation is made on a serious occasion or in circumstances where it is obvious that reliance is being placed for business purposes. I do not use that word “business purposes” to apply literally.

MR LUCARELLI: No, I understand.

GLEESON CJ: In other words, in that area of negligent misrepresentation you deal with the problem that a whole lot of representations are made in social contexts which are never intended to create legal responsibility by that control mechanism.

MR LUCARELLI: Your Honour is correct in that and we would say that we would satisfy most of those types of elements because to talk about who the father of a child is – it is hard to imagine a more important element of that sort of relationship.

KIRBY J: Your question is who the biological father is.

MR LUCARELLI: Yes, I should have prefaced it with that, your Honour. Your Honour is correct. Society treats it as an extremely important matter. There is no doubt about that.

HAYNE J: No doubt it is central to the basis of the relationship between the parties as a relationship of trust and confidence.

MR LUCARELLI: But also for the child, your Honour.

HAYNE J: Just so. But to pursue the question posed by the Chief Justice, to draw on the field of contract rather than tort, and taking *Cohen v Cohen* 42 CLR 91, particularly at 96, the case about intention to create legal relations in contract as between husband and wife, Justice Dixon described the question as being:

if the arrangement which the plaintiff made with the defendant was intended to affect or give rise to legal relations or to be attended with legal consequences.

It is that last phrase, “attended with legal consequences”, that I direct attention to specifically. May it be said that the solemn assurance given in a relationship, particularly of marriage, about parentage is important, fundamental to the continuation of the relationship of trust and confidence, but is it intended to give rise to legal consequences in the sense of, “And if you are wrong, I have an action for damages against you”, or is it in truth something that is intended to sound in the relationship between the parties as going to that element of trust and confidence that is at its centre?

MR LUCARELLI: Perhaps if I might conclude that, your Honour, or perhaps only the social consequences that would flow from it.

HAYNE J: Social consequences may embrace many things which are - - -

MR LUCARELLI: Or personal consequences that may flow from it if it is found not to be true, if I may conclude what your Honour is saying.

HAYNE J: Yes.

MR LUCARELLI: We understand that point, but we would also submit that legal relations is obviously not, in the way in which his Honour Justice Dixon, as he then was, was using it, of course, contractual relations. His Honour makes the distinction.

HAYNE J: I understand the difference in the context, but the point I want you to grapple with is whether the assumed misrepresentation that is demonstrated to get a case of deceit off the ground in this context of a relationship between parties to be understood as carrying with it the message, “And if your

answer is not right, I am going to the courts”, or is what it carries with it, “If the answer is not right, what lies at the centre of this relationship of trust and confidence is broken”?

MR LUCARELLI: The former and not the latter, for this reason: not because people immediately think, “If the statement is wrong, I will take you to court”. With the greatest respect, that is probably as lawyers would view the matter, but the deluge of obligations that arise upon the person who accepts that they are the father is plainly apparent in the *Family Law Act*, if nowhere else, if not the Child Support Act, an absolute deluge of legal obligations, none the least of which is to care for the child.

The normal reaction of any person who is told that they are the father is obviously to provide for that child and to believe it and to build an emotional bond with that child as a consequence. It takes it out of the mere – for those reasons, if it was carefully explained to both people, almost in the way that the officious bystander would be standing in the room in an implied term in the contract, if it was explained to both the husband and to the mother that, “If you make this statement, then your husband, if he finds out that this statement is not accurate, may be able to seek compensation from you”, both parties would probably say, if they understood the law to its full impact, that would seem to be sensible and sensible because the husband is embarking upon not only economic but emotional commitment which the husband should have a choice about.

It is because the choice is taken away that, in our submission, those two persons to whom the matter was fully explained, the consequences that may flow from the obligations that the husband is taking on would, in our submission, in all the circumstances, say that is a statement which does impact on legal relations and therefore should have consequences if it is not true. I know there has been a lot of debate about the man or the woman on the omnibus, and I do not want to get into that sort of expression, perhaps, but to ordinary members of the community, if such a thing exists, it is very important that a parent carry out their obligations and, therefore, to not have a choice to adopt, accept and pursue those obligations seems to strike at the very heart of our legal system.

GLEESON CJ: I am only guessing, but it is not the case, is it, that the problem only arises in America in the context of representations of paternity made in a marital situation? To take the example you gave about Mr and Mrs Smith and Mr Smith’s friend at work, suppose the misrepresentation about paternity is made by the friend at work to Mr and Mrs Smith and Mr Smith says, “In those circumstances I will face up to my moral responsibilities and support the child, pay for the child’s education”, and somewhere down the track Mr Smith or Mr and Mrs Smith find out that that is a misrepresentation. What is the test that you then apply to determine whether they have any cause of action against the friend at work?

MR LUCARELLI: The ordinary test of deceit is the way that we would answer that, which is to find the five elements including reliance which we would submit in your Honour’s example there had been reliance because before the representation was made Mr Smith had no obligation at all. But it may well be that also there may be some legal obligations that are imposed upon Mr Smith if it were to be established that he was in fact the biological father. So in circumventing that position, Mr Smith may decide to take on the obligation without the need for messy proof, for example, but an obligation that he otherwise should not have taken on given the true facts. Therefore, we say that the tort of deceit is properly tailored, is properly constructed at its fundamentals to deal with that situation. I do not know whether I have answered your Honour’s question.

GLEESON CJ: I think so, thank you.

MR LUCARELLI: I am reminded that there are – and it goes to this point of choice that is taken away.

There may be situations where the husband really does not know. For example, being absent but not being absent at the appropriate point in time for the conception, for example, may create some real doubt in the husband's mind which is changed by the statement. I have dealt to some extent with the - - -

KIRBY J: Can one say that another public policy principle is that marriage is a consensual arrangement formalised by the State which is for better or for worse and that sometimes the worse includes that there may be an ex-nuptial child?

MR LUCARELLI: The difficulty that the appellant has with that, in our submission, is this, that there is no choice in the sense that there is not the right to elect. The right to elect is taken away, and that seems to strike at the very heart of the public policy arguments against allowing the tort because if an election is made with full knowledge, then not only would the tort of deceit not be necessary but the child would be looked after and if the husband decided at some point that the marriage was to end, then obviously other arrangements would be made given the de facto parenting that had been undertaken but with knowledge and consent and approval.

GLEESON CJ: Whatever the outcome, at the public policy level one of the issues we have to face up to is whether the result of this case would have been different if the Magills had never been married but in other respects the facts had been identical.

MR LUCARELLI: We would submit that the public policy arguments would find a lot more difficulty in being run against that case, the appellant's case, in that set of circumstances. There would be far less public policy arguments to run. For example, the interspousal immunity arguments, the abrogation of interspousal immunity, and the operation of sections 119 and 120 would find a lot more difficulty. If one goes to perhaps an encounter that is brief and does not involve cohabitation, but the same "You are the father" and in fact the person is not, to imagine that that person would not be able to bring action against the mother that made the deceptive statement is very difficult.

KIRBY J: I think we would have to be very careful drawing a different principle, given the very large numbers of people in Australia now who have children who are not married.

MR LUCARELLI: The appellant's case seeks to make that very point, that to disallow the action here on public policy grounds or because of the operation of 119 or 120 is creating two types of classes of persons as far as paternity fraud is concerned, those that are somehow - - -

KIRBY J: Are unmarried couples liable under the child support legislation?

MR LUCARELLI: The persons who are parents – and "parent" is defined, from recollection. Broadly speaking, until you can demonstrate that you are not a biological parent, if my recollection serves me correctly, you remain a parent, so to speak.

GLEESON CJ: Yes, but there used to be a court in Sydney called the Children's Court down at Albion Street and a large part of the business of that court was dealing with what used to be called paternity claims, and almost all of the respondents to paternity claims were not married to the people making the claims, and the claims were for support of children.

MR LUCARELLI: But it seems anomalous, your Honour, if that is going one way, why then, one asks rhetorically, does the law suddenly say it is all too difficult to deal with these sorts of issues and, furthermore, a person who is affected adversely by a very, very similar type of issue cannot claim, yet they make out the elements of a common law tort that has been around for at least 200 years? I think it is

in *Pasley's Case* that one of the judges says that it has been around for 200 years and it will be around for 200 years more. It was decided in 1789 and I thought perhaps we are not that far from 1989 that suddenly the tort of deceit does not apply in the way that it has applied for nearly 400 years.

KIRBY J: Well, it was not a problem until very recently because of the principle of interspousal immunity. It is now a new problem.

MR LUCARELLI: If your Honour pleases, it is but - - -

KIRBY J: But I would be grateful if you could find the reference to the child support legislation afterwards and let us know.

MR LUCARELLI: My learned junior is making notes, I am sure, and we will deal with those as soon as we are able. We have dealt to some extent with the analysis of the notice of contention which was to follow on from the submissions that we sought to make about public policy, but may I recap on those by going to the notice of contention. These now interlink with the constitutional issues that arise after a proper analysis of section 119 and 120. The notice of contention, which is at appeal book 267, basically raises three issues in paragraphs 2(a), (b) and (c). If the Court pleases, paragraph 2(a) of the notice of contention, our submissions in connection with that are as follows – first of all, to look at its actual words that:

The Court ought to have held:-

(a) “tort” in section 119 in the [Family Law Act 1975](#), properly construed, does not comprehend a claim of deceit arising from the paternity of children conceived and born during the course of a marriage –

and we emphasise the words “conceived and born during the course of a marriage”. In our submission, those words have been added in order to give the exception a semblance of some connection with marriage, to bring both the conception and the birth of the child during the course of a marriage. Presumably what is meant is the marriage of at least the biological mother to the husband in question.

What we submit, in relation to that paragraph is that the exception sought by the respondent would create innumerable anomalies and injustices as the law of deceit would be applied differently to different classes of persons for reasons that we touched on earlier. Married persons would be in a different position to those who were not. Those whose alleged fraud centred on a child conceived and born during the course of a marriage would be in a different position to those whose paternity fraud centred on children not conceived and born during the course of a marriage. It just seems an anomaly that is very - -
-

GLEESON CJ: A marriage might come into being in consequence of a misrepresentation as to paternity made before the marriage.

MR LUCARELLI: Yes, but, of course, the exception that is sought here would not cover that situation, your Honour, because the child would not be conceived and born during the marriage. We do look very carefully at the words to see how the exception to the word “tort” in [section 119](#) is sought to be construed – is sought by the respondent to have this Court construe that word.

HAYNE J: The facts identified by the Chief Justice are pretty close to those in *Miller v Miller*

956 P 2d 887, a decision in Oklahoma in 1998 where the husband was persuaded to marry the wife on the basis that she was pregnant with his child and he discovered some 15 or 20 years later not so.

MR LUCARELLI: And after the daughter had moved in with him and the parents-in-law and the former wife went about their business of letting the daughter know that that was the fact as well. That is one of the cases that we do rely upon, your Honour. But what is submitted here in a nutshell is that you will end up with classes of persons who can make claims because they are not married and classes of persons who cannot make claims just simply because they are married, and one wonders in the Mr and Mrs Smith example with Ms Jones, whether Mr and Mrs Smith would be able to bring an action because of the fact that they are married, even albeit that it may relate to a misrepresentation that is made by Ms Jones. I am not for one moment suggesting that that is what is intended by the way in which the exception was put forward, but that is a consequence of it and that is the difficulty with creating exceptions of such a narrow nature.

GUMMOW J: What 119 means, I think, or is understood to mean, applying it to contract, for example, and to *Cohen v Cohen*, which Justice Hayne referred to, is that it will be no answer to an action in contract that otherwise answer the requirements of a contract that the other party was married, but the considerations that Sir Owen Dixon referred to would come into play in deciding whether there was a contract, namely was there animus contrahendi, and a factor in considering that might be that it was set on the social occasion within the marriage relationship.

MR LUCARELLI: I accept what your Honour says.

GUMMOW J: In other words, the fact that this is an action in deceit is not answered simply by referring to the marriage relationship any more, but still you have to enter into these questions of the nature of the representation and so on, and that may take its colour from the setting of the parties in their matrimonial relationship.

MR LUCARELLI: Perhaps to put it a different way, if I may, your Honour. It was not said when introducing [section 119](#) to apply to contracts, but all of a sudden the law as to *Balfour v Balfour*, for example, should be thrown out the door.

GUMMOW J: Yes, exactly.

MR LUCARELLI: In fact, it is to be presumed that [section 119](#) was enacted within the context of the common law and compatible with it rather than to abrogate it unless by specific words. But, equally, the tort of deceit was there and, equally, no specific words have been used to take away a deceit that otherwise exists.

GUMMOW J: Yes.

MR LUCARELLI: So all elements of the common law that were there survived – in fact were enhanced in terms of removing barriers that otherwise were artificial. Just simply the marriage meant that if you had the best contract in the world with the intention to create legal relations outside of the family context, you could not bring it, although, I must admit - - -

GUMMOW J: But, nevertheless, that construction does not foreclose the public policy arguments that are in play now.

MR LUCARELLI: No, it does not foreclose it, but what we submit is that [section 119](#) needs to be

construed as to the word “tort” in a way that does not constrict it in the manner set out in 2(a). It could not have been, we would submit, the intention of Parliament to - - -

GUMMOW J: I understand that submission.

MR LUCARELLI: Yes, but we cannot resile from the fact that at the end of the day, if there was an exception to the tort of deceit, for example, for paternity fraud that existed before 119 had been enacted, that we could somehow overcome that. Our primary submission is, of course, that there was no such exception and therefore 119 does not affect it in the way that it is contended for.

As to further matters about 2(a) and 2(b) of the notice of contention, in most common instances of paternity fraud where the facts are similar to those in the present case it seems that what is being effectively sought is to create a special exception to deceit and an immunity, but only for mothers who were married at the time that the child was conceived and born, and we went to *Doe v Doe* about that at 148. I think there were some difficulties with the page numbers.

KIRBY J: But this tort that you argue for though would have total application only to women, would it not?

MR LUCARELLI: It seems so.

KIRBY J: How would a man ever recover under this tort? The argument to the other side is that the man will normally or usually be made responsible, including under federal legislation, for child support. But this would be a tort that would fall very heavily on women in Australia and, if you are right and succeed, I can imagine that there might be a lot of men in the country who might then bring proceedings against their wives, or former wives. That is a sort of burden of the law which is gender specific.

MR LUCARELLI: Not when one considers that there may be other instances where – like for Mrs Smith, if she was to suffer as a result of the deceit of Mr Smith or - - -

KIRBY J: I can see that in guarantee cases or things like that it would have a non-gender – but birth cases and DNA cases would be gender specific against women.

MR LUCARELLI: But, as we mentioned earlier, there may be other persons that might be affected, for example, grandparents that might rely upon a misrepresentation of this kind of a paternity fraud.

KIRBY J: But it would be representation of the mother, would it not?

MR LUCARELLI: No, because imagine a son, your Honour, that says to his parents, “This is my child”, knowing full well it is not, “I want you to assist me to pay for its education”. The grandparents might say, “Is it your son?” “Yes, it is my son.” “If it’s your son and you would like us to assist, we will change our position. We will sell our home to” - - -

KIRBY J: So we are going to have grandparents suing now.

MR LUCARELLI: I beg your pardon, I did not mean to cut your Honour off.

KIRBY J: No, I should not have interrupted you. It is the ripple effect; we are going to have grandparents suing. Everybody is going to be suing.

MR LUCARELLI: The examples are not to frighten the Court, your Honour, but to seek to illuminate the Court's thinking on the issue. What is said is it is not just about the mother. That is the point about the tort of deceit in connection with paternity fraud. To say that it is just about the mother therefore we will shut it down for that reason is, in our respectful submission, the Court taking the wrong path.

There is another issue that is allied to this on public policy that I would like to go back to briefly. In paragraph 18 of our reply submission on behalf of the appellant, there is a reference to the duty of disclosure point that was sought to be made. This in a sense is allied to what your Honour Justice Kirby said a moment ago, that in a sense it is mother specific, if I might use that. The fact is that one of the platforms used by the respondent to create that impression is that the mother is left with a dilemma as to whether to disclose or not to disclose. In paragraph 18 – and this was touched on a little earlier with the forms and we took the Court to the forms to demonstrate that the mother does have an option. It is not essential. This is not the law holding the mother to ransom to make a disclosure as to whether the husband is the father or not.

This is in addition to the matters that are raised in 18 in a very brief compass. The law of deceit if it were applied here would not give rise to an obligation to disclose the extramarital affair. That is because the forms did not require the disclosure. No naming of the father would have led to the name Magill anyway with none of the necessary consequences that might flow of having to explain why the child at school is called X instead of Y which might be the husband's name. In our submission, as a result the law of deceit does not impose a duty to disclose. If it is applied here, it does not leave the mother in an inevitable position of having to disclose the extramarital affair, which is one of the underpinning public policy issues that is sought to be advanced by the respondent.

GLEESON CJ: Mr Lucarelli, can I interrupt your argument for a moment to ask you this question. Has counsel agreed upon a division of time between themselves?

MR LUCARELLI: No, we had not discussed that, your Honour.

GLEESON CJ: You had better discuss it at lunchtime because we will expect you to have made an agreement about that when we resume after lunch.

MR LUCARELLI: If your Honours please.

GLEESON CJ: We will be finishing at 4.00 pm.

MR LUCARELLI: If we may resume on this point about [sections 119](#) and [120](#) in connection with the notice of contention, in our submission, a general distinction is drawn on the basis of whether it can be shown in a temporal sense that the child was conceived and born during the course of a marriage.

This is a point that we touched on briefly earlier. One asks the question rhetorically: why is this temporal distinction relevant? If the narrowing of the exception by distinguishing between different classes of children was directed at overcoming potential anomalies, then, in our submission, it fails. The exception during the course of the marriage is itself unclear. Whilst the relevant marriage will in many instances obviously be the marriage which is consistent with the representation, as was said earlier, parties may seek to take refuge in the fact that there is no marriage at the relevant point in time.

For example, if a wife suffered shock upon learning that her husband had lied to her about the paternity of a child of which he was not the father, the Mr and Mrs Smith example, and which was conceived and born during – that he was the father and it was born to a woman not his wife but during the course of his

marriage in a temporal sense may be prevented from bringing proceedings. Again, one asks the rhetorical question: why?

One may also envisage this sort of situation: the ability of a trustee of a charitable trust who mistakenly makes a distribution in reliance upon a misrepresentation as to paternity may be able to bring proceedings to recover the amount that was wrongly distributed but, arguably, if the misrepresentation was made by the mother during the course of a marriage, would it mean that that trustee could not recover, could if the mother was not married, could not if the mother is married?

Another example of where paternity fraud may lead to loss, for example, the trustee relying upon the deceit, depleting the resources of the trust, whether it be a family trust or a charitable trust or an education trust, whether it be for public purposes or for private purposes. The trustee would be able to in one but not in another. Again, one asks the question: why is the marriage then pivotal to the exception that is being contended for in the notice of contention? In our submission, it does not follow.

Now, as to the constitutional issue which flows in a moment, we want to commence and also support the arguments in relation to the exception by going to *Re F; Ex parte F*, which is amongst the cases that are identified in the appellant's material to be taken to the Court. This is a case that dealt with the two powers in paragraphs 21 and 22 of [section 51](#) in the context of custody. So this case is being relied on first to support the construction of both [sections 119](#) and [120](#) and also, if the constitutional issue ever arises, as to that as well. So I may just go through the passages at one time and then comment upon them. At page 382, Chief Justice Gibbs, at about line 7 or 8:

The fact that a child is a child of one party to a marriage does not in itself provide a sufficient connexion with that marital relationship to sustain the validity of a law with respect to the custody of that child. That in my opinion is true even if the child was born to a wife during the marriage once the presumption of legitimacy has been rebutted, for if it is established that the child is an ex-nuptial child, the fact that it was born during the subsistence of the marriage does not make it a child of the marriage or give it any relevant connexion with the marital relationship.

At page 400, Justice Brennan, at about point 2:

Children who are not children of the marriage do not attract the support of the marriage power to laws governing their custody and guardianship.

At pages 403 onwards is the reasons for decision of Justice Dawson. His Honour recites *In the Marriage of Cormick* at about point 7 again and cites from the Chief Justice in that case:

“ . . . the Parliament cannot, under the marriage power, enact a law which provides for the adjudication of a dispute between persons who are not and never have been married, when the child whose custody or guardianship is in issue is not a child of any marriage. It is immaterial that in such a case one of the parties to the dispute happens to be married (although not to the other disputant), since the rights claimed do not arise out of the marriage relationship, and the fact that the claimant happens to be married is merely accidental. The connection between the marriage and the law in such a case is far too tenuous and insubstantial.”

Continuing on, his Honour does there accept that not always should the power necessarily be so interpreted, but continues at page 404, at about line 2 to 3:

The decision in *Cormick* was consonant with the view which I held at the time (and which I would still favour if I were not constrained by later authority) that a law purporting to allow rights of custody to be conferred upon the partners to a marriage otherwise than as between themselves, is not a law with respect to marriage.

GUMMOW J: What are you seeking to get out of these judgments?

MR LUCARELLI: First of all, that the marriage power - - -

GUMMOW J: I say that because, to my mind 20 years later, what is said by Justices Mason and Deane starting at 393 where they fixed upon this common law presumption of legitimacy is much more compelling.

MR LUCARELLI: Which particular passage is your Honour directing my - - -

GUMMOW J: Page 393 about point 7, “At common law, a child born”.

MR LUCARELLI: Yes:

At common law, a child born of a woman during the subsistence of a marriage was presumed to be a legitimate - - -

GUMMOW J: Yes, and it carries over to 394:

In that common law context, it is difficult to see any proper basis for denying –
et cetera.

MR LUCARELLI: Yes, but at the end of the day - - -

GUMMOW J: Whether or not a child is a child of a marriage, it is the law with respect to marriage. Anyhow, we do not have to revisit it now, but I do not think it is an altogether shining moment, the majority decision in that case.

MR LUCARELLI: No, it may not be, your Honour.

GUMMOW J: As a practical matter, it was followed by the referral of power.

MR LUCARELLI: Yes, it was, your Honour, because it dealt with custody and the view was taken that custody of ex-nuptial children could not be dealt with by the two powers, the allied powers. But we would submit that to either construe [section 119](#) and [120](#) in the way that is being advanced alternatively would lead literally to a situation of different classes and would be unconstitutional if it were to be allowed in its literal sense.

If one looks at 2(c), for example, of the notice of contention which says that “section 120 of the [Family Law Act 1975](#) applied to prevent the appellant’s claim”, the appellant’s claim being a claim in deceit, to

read into 120 that deceit generally would be abolished in relation to paternity fraud, presuming that that is the limitation that is sought to be placed on it, would go beyond the marriage power because it would stop an action for deceit in connection with paternity fraud between persons who have never been married. They may have only either not cohabitated or, alternatively, only cohabitated for a short period of time, perhaps not sufficient to form the requisite common law de facto relationship.

So our submission is that the way in which the notice of contention seeks to both constrict the operation of [section 120](#) and [119](#) is beyond power in that sense because it would go beyond literally marriage or, in paragraph 22, divorce and the allied matrimonial causes and the other matters that are given as power to the Commonwealth. But at the end of the day, we submit, naturally, that [section 119](#) and [120](#) ought to be construed literally and the constitutional question never arises.

As far as the reopening of *Gazzo* is concerned – we note that the Attorney-General seeks to have *Gazzo* reopened – our submission as to that is very simple. We say that we just simply never get to that position. It is either clear that the restriction that is sought to be imposed is beyond power or it is not. If the Court takes the view that to restrict to seek, for example, between persons who are not married, but to seek relating to paternity fraud comes within the power, then so be it. *Gazzo* does not need to be reopened and otherwise reopening *Gazzo* is not going to assist with what is, in our submission, a clear-cut position in relation to both 120 and 119. That is that the constriction sought to be imposed does not follow and is not within the constitutional power.

I do not know whether I can assist the Court any further on those matters, but they are the only things that we wanted to say about the constitutional issue.

We wanted to conclude, as I said at the outset, with reliance and with causation, and I would seek to be as brief as possible because the written submissions make copious reference to the submissions that the appellant wishes to rely upon. The one matter on reliance that orally we want to leave with the Court is this. The appellant puts two positions.

The first position is that the evidence is clear and direct that he relied upon the statement and that that in itself was sufficient for the finding made by the trial judge and that the Court of Appeal erred because the reliance was clear and unequivocal. In the event that reliance was not so, that, in other words, there was some ambiguity about the reliance or there was some ambiguity about whether the statement was clear, the body of case law that deals with reliance in those contexts is led by *Gould v Vaggelas*, and the statement of principle in *Gould v Vaggelas* particularly of Justice Wilson but also of Justice Brennan is clear and has not been applied in this case and wrongly so.

GLEESON CJ: Can I ask you a question about the facts? There came a time when these parties separated and assuming that there was a representation involved in a course of conduct after the separation, is it the case that your client paid money for the support of the children?

MR LUCARELLI: Yes.

GLEESON CJ: Presumably there could be no doubt that after the separation whatever representation was involved in the conduct of the respondent was in a context where they were in every sense at arm's length and where their legal obligations and rights would have been intended to be affected by the representation.

MR LUCARELLI: We would submit so, your Honour, because of course my client was on the train. He was already on the train with the belief that he was the father. All that happened after separation is

that a different regime comes into place, so to speak, to fix the payments.

GLEESON CJ: Yes, but one thing that clearly happened after separation was that their relations were no longer purely social.

MR LUCARELLI: Yes, your Honour, that is accepted.

GLEESON CJ: They were then presumably in a position of asserting their legal entitlements and obligations - - -

MR LUCARELLI: As a presumption, yes, your Honour. I mean, I am not quite sure where your Honour is directing these - - -

GLEESON CJ: I was harking back to the question about the possible limitations on this cause of action for deceit involved in the necessity for the representation to be made in a context where people's legal relations were intended to be affected. If there was a continuing representation being made after separation, then presumably that was being made in a context where people's legal entitlements, rights and obligations were at issue.

MR LUCARELLI: Yes, we would accept that, your Honour, because, for example, if nothing else, a certain amount of pay is deducted from your pay packet.

GLEESON CJ: Which is only another way of saying I still find it puzzling that so much emphasis was placed in this case on that form.

MR LUCARELLI: In a manner, yes, your Honour, except that at the end of the day what needs to be looked at – and this comes to the causation issue in a sense – is to look at the type of loss that is being claimed because to some extent it also colours the reliance. We would submit that the two are almost inextricable, in a lot of ways, in deceit because the course that the appellant was put on was to believe that he was the father and thereafter the losses that are claimed, the damage that is claimed, only results or flows from that belief.

GLEESON CJ: But there is such a thing as a continuing representation.

MR LUCARELLI: There is, your Honour, and there was some effort made in the court below to seek to put that position. It was rejected by the Court of Appeal and no direct issue is taken with it here, except that the way that the case has been perceived on behalf of the appellant is that there is certainly plenty of evidence to demonstrate that he continued to believe the representation and in a sense it does not become necessary that every time someone takes the children to the football, whether in a relationship or after the relationship has ended and they are separated, and thinks, "The reason I am going to buy the ticket for this child to go to the football is because I was told in the birth notification form or in some other way, five, eight, 10 years ago, that I am the father." The world does not operate that way is the appellant's submission.

What happens is you are put on the train, which is the belief that you are the father, and thereafter it would be just nonsensical to give evidence in a court that, "Every time I bought a ticket or bought a meal for the child or bought them a present, I harked back to the representation. I thought about that representation and I would not have spent the money but for the representation." It is inconceivable that the world operates that way.

In our submission, that is why both reliance and causation here are overwhelming, in our respectful submission, because the evidence is there that, having made the representation, he took on the fatherly role, he supported the children both during the course of the cohabitation of the appellant and the respondent and thereafter. Whatever the obligations may have been, either under the Child Support Act, he continued access with the children and there is evidence that he paid for them to do things and so forth. No quibble is made about that except to say – and in fact there is no claim made to recover the child payments that were made under the Child Support Act. There is no claim for that.

KIRBY J: Nor other expenditures in support of the children during the time that he believed that they were his genetic children.

MR LUCARELLI: There is a claim for both time spent and lost income. I take what your Honour says. I think that is correct. I just wanted to think about it for a moment. I think what your Honour is saying is correct. I was postulating it more in the situation of a common occurrence. So that in a sense there is a continuing representation. It is just that it is not - - -

KIRBY J: The claim was basically, was it not, insofar as damage was concerned, the emotional and psychological impact on him? Is that a correct understanding?

MR LUCARELLI: That is part of it, but there is also some time spent in connection with the children that is being claimed for lost income and there is also an element of lost income going forward in connection with the psychiatric condition, the exacerbation of it.

KIRBY J: But would not that child have also been with the eldest child who is his genetic child?

MR LUCARELLI: Yes, and again - - -

KIRBY J: So how did you sort out the marginal increase in time?

MR LUCARELLI: I think that is why his Honour at first instance refused to go into the evidence of, I think it was a Dr Valenzuela, about what it costs to run a family and how one might divide out two of the three children and so forth. I think that that was knocked on the head, in a sense.

KIRBY J: This is the Pandora's box we open with this tort though, that every case where the male, hurt and having to pay child support, is unhappy about it, they are going to sue and claim minutiae of time they spent with the child who turns out not to be their genetic child. We all know that in the family law situation it is not just an ordinary case about money; it is often a case that involves a lot of emotion.

MR LUCARELLI: One accepts that, your Honour, but the common law has been very well equipped to deal with those sorts of matters and to identify true loss as opposed to - - -

KIRBY J: Well, it did, because it invented these immunities and fictions, but they have gone by the way now.

MR LUCARELLI: But, equally, your Honour, the loss of a finger, for example, the law has been able to cope with the way in which - - -

KIRBY J: Anyway, I think I am taking you back to the things you dealt with earlier.

MR LUCARELLI: May I just finally deal with your Honour's point about the continuing

representation. An effort was made to run the case on that basis in the Court of Appeal and that was knocked on the head, perhaps because there is always a perception that there has to be certain elements to be found in connection with continuing representation cases. We submit that it was correct to advance the case in that way because of the fact that the – one does not need to be told every single day “You are the father”. The world does not operate that way, if I may again be so bold.

Once you are told and you are on what I call the train, then you do not get off before your destination. You do not revisit each time “Am I on the right line?” If one is heading for a particular station and they believe they are on the right line, they do not get out at each intermittent station to check. So that in a sense your Honour started with the question about, did the rights change upon separation? In a sense they did because the legislation imposes certain obligations, but the obligations in a sense were the same, albeit that the character in which they might be enforced was different.

Finally, in connection with reliance, I am reminded that – and we might just emphasise paragraph 2(b) and (d) of our reply, just very, very quickly. That is the fact that the appellant was not told by the respondent mother that he was the father apart from the statements made by her as to paternity in the forms is relied upon as showing reliance, and that is supported by the evidence of the respondent that she had not otherwise, apart from the fraudulent misrepresentations, told the appellant he was the father. Finally, in 2(d), the context of the respondent’s making of the fraudulent misrepresentations which was illuminated by her evidence that by filling in the forms she believed that she gave the appellant to understand that he was the father, we place emphasis upon that as the appropriate context in which reliance is to be viewed.

As to causation, we would emphasise there were two types of loss which was what might be termed the pure economic, which is monetary in time, and that is to be distinguished from the psychiatric loss, which we do accept does have some complexities associated with it in the sense that one of the issues that has been raised is that the true cause of that loss is not so much the false representation itself but it is finding out that the representation is false.

There seems to be a suggestion that somehow because that is what causes the aggravation, that that should not be compensable because it is not directly caused by the representation. In our submission, that is simply putting the cart before the horse, or misconceiving the whole nature of deceit and causation and what is recoverable as a matter of law.

If the false representation has been made which leads to the loss, it is artificial to say that it is caused by finding out the truth, so to speak. Finding out the truth is integral to the whole misrepresentation that was made. I am reminded that no real causation issue arises in relation to what might be called the pure economic loss in terms of money and time. If the Court pleases, they are our additional submissions.

GLEESON CJ: Yes, thank you. Yes, Ms Symon.

MS SYMON: If the Court pleases.

GLEESON CJ: We will adjourn from 1.00 until 2.00.

MS SYMON: I am indebted to your Honour for the indication. What I propose to do, if the Court pleases, is to principally address the questions of reliance and causation which are raised on the notice of appeal. That is for a number of reasons. The first is that we understand, and for that reason put in the notice of contention, that this case cannot be sensibly dealt with in the absence of the social and policy

context in which it sits. However, we are also satisfied that we have explored the issues which arise in those contexts adequately in our submissions.

The other reason why it is important, we say, to concentrate on the issues raised by the notice of appeal is because when one looks closely at the way the law might apply in this circumstance, this case itself might set a dangerous precedent. In looking at the way the principles with regard to reliance and causation operate in the circumstances of this case, another policy issue starts to arise, or one gets another way of looking at the policy issues, and that is one sees the difficulty of applying the tort of deceit in the circumstances of a continuing relationship that is in the kind of circumstances which arise here.

The tort of deceit was devised to deal with the cases of parties who entered into contracts or entered into investments. It is based upon a series of very discrete elements which must be made out. When one starts to investigate those elements and the questions of reliance and damage, one sees the difficulty and we would say the inadvisability of applying them in the context of parties in a continuing relationship, if I could put it more broadly than the question of the marriage context.

When one looks at the question of reliance, the appellant has relied on a number of authorities to support the proposition that an inference ought to be drawn because when one receives a form which names one as the father and signs the form, then one necessarily believes and relies on the representation that one is the father. We say there are a number of features of that proposition which is erroneous and ignores the reasoning in the authorities. What one sees in the authorities is a number of matters which will be considered before the inference of the kind that our learned friends contend for is drawn and indeed before a conclusion of reliance will be arrived at.

They to some extent address the matter raised by your Honour the learned Chief Justice in the context of the negligent misstatement cases. That is, one sees the sense of there must be a special occasion or there must be something special about the representation, but perhaps I can enumerate them this way. The first and most important feature of the principles with regard to reliance and what one sees in the authorities and best so in *Gould v Vaggelas* itself is that the ultimate onus as to reliance rests upon the plaintiff. Reliance is an element of the cause of action and the question is to be decided not just on the basis of inferences which might be drawn but on all the facts and circumstances of the case. An inference which might be drawn is one of those facts and circumstances.

The second thing one sees in the cases is that before drawing an inference or before drawing a conclusion about reliance the courts consider the nature of the representation that was made and particularly consider was it a representation which was material and one which was likely to influence the mind of the ultimate plaintiff.

Thirdly, one sees the court looking to what was the plaintiff concerned with at the time the representation was made. So, of course, in the contract cases one sees a party who hears the representation who has a particular interest or a particular concern, "Shall I make the investment?", a party in that kind of frame of mind is going to be induced by something which is said about the matters which that party is concerned about.

The other thing which one sees throughout the cases is a change of position, so one can see that there was a point where parties were in negotiation to enter into a contract or a party was considering making an investment. There is a change of position because the party does enter into the contract or does make the investment. That means that one can then say something about the role that the representation that occurred between those two events played in the change of position.

So if I could take the Court firstly to the authorities where I have drawn these elements from. The first is, of course, *Gould v Vaggelas*, and the judgment firstly of Justice Wilson beginning at page 237. One sees a number of the elements that I have referred to in his Honour's consideration and expression of the principles. His Honour begins at page 237 at about point 8 by referring to the Lord Chancellor Lord Halsbury's decision in *Arnison v Smith* and his summary of the principles in *Smith v Chadwick*. What was said there was:

“ . . . if the Court sees on the face of the statement that it is of such a nature as would induce a person to enter into the contract, . . . the inference is, if he entered into the contract, that he acted on the inducement so held out, unless it is shewn that he knew the facts, or that he avowedly did not rely on the statement whether he knew the facts or not.”

So one can see in that statement the Court's concern with the nature of the representation, is it the kind of representation which would induce a person to enter into the contract; one sees a change of position, the entry into the contract; and one sees, as Justice Wilson then draws out, the ultimate onus remaining on the plaintiff. His Honour enunciates it in the passage which follows:

However, decisions of this Court leave no room to doubt that the ultimate onus of proving inducement rests upon the party seeking relief in respect of the fraudulent misrepresentation. In *Holmes v. Jones*, O'Connor J. makes it plain that before the plaintiffs can succeed in an action of deceit “[t]hey must show, not only that the representation was fraudulent, but also that that fraudulent representation induced the contract which was afterwards entered into”.

GLEESON CJ: What if the contract that is entered into on the face of the fraudulent representation is a contract of marriage?

MS SYMON: Well, your Honour, the kind of contracts which were being dealt with by these cases and, in my submission, in the contemplation of the judges framing these principles was not a contract of marriage.

GLEESON CJ: No, but contracts of marriage or relationships of marriage are often entered into on the faith of representations as to paternity.

MS SYMON: Indeed, your Honour. The difficulty, I suppose, is that that is not this case and one of the ways we at least have looked at this case is to acknowledge that the Court has to – well, that the Court should not be taking a wholesale broad-brush approach to whether deceit applies in a broad range of circumstances which have not come before the Court. There is a basis, of course, for saying deceit ought not to apply outside the commercial context simply because, except in one or two anomalous cases, it never has, and of course, as I am attempting to demonstrate at the moment, one sees that the tort arose from commercial relationships and is peculiarly apt to an application in a commercial context.

I suppose, your Honour, there is a middle ground to that though which is that one of the things one sees about a marriage induced by a representation is what is missing in the case of a continuing relationship such as the one in the case before the Court. One sees a clear change of position; that is the parties were not married, the parties became married and in between somebody said something and one can say something about the role of the representation as a result. But we say that where the Court ought to proceed with extreme caution is where there is a marriage relationship or a continuing relationship rather than one which is commenced because of a representation.

KIRBY J: The appellant says in some of the evidence that I have seen that after the birth of the first child, that is his genetic child, the respondent, your client, showed him little affection and sexual relations really petered out. Whilst that is not necessarily unique, it may be one of the factors in the case that led to these events.

MS SYMON: Indeed, your Honour, and the evidence given by the psychiatrists with regard to the mental illness now suffered by the plaintiff is that Mr Magill suffered because of the break up of the marriage, and of course that introduces another element of complication. Is the damage which is suffered damage which arises from the upset around the discovery of the paternity, or is it linked to the betrayal itself, by the extramarital affair?

Perhaps if I can return to *Gould v Vaggelas* and draw out the points that I was commencing to make, continuing at page 238 of his Honour Justice Wilson's judgment at about point 3 in the sentence which begins that paragraph:

There is no reason to doubt the correctness of these statements –

which his Honour had cited –

They accord with sound principle, namely, that a plaintiff carries the burden of establishing every element of his cause of action. At the same time, one can readily understand why it is in cases of deceit that a tribunal whose duty it is to find the facts may require a defendant to make some answer to the case that is put against him.

Then his Honour gives an example which is based in the contractual context. He says:

Such cases are of a kind where in the general experience of mankind the facts speak for themselves. 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 –

again there is this sense of looking at the nature of a statement –

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 –

again we see the change of position, and importantly his Honour says “and nothing more appears”; that is that one could draw the inference and there is nothing else in the circumstances of the case which would interfere with the drawing of the conclusion about reliance, but his Honour does not elevate the drawing of the inference to the point which we say the appellant's argument seeks to do. The appellant's argument seeks to say, if one can draw the inference, then one also draws the conclusion about reliance. His Honour finishes:

common sense would demand the conclusion that the false representations played at least some part in inducing the plaintiff to enter into the contract.

But his Honour concludes four lines up from the bottom of the page, having looked at the shifting of the burden:

But it is no more than an evidentiary onus – an obligation to point to the existence of circumstances which tend to rebut the inference which would ordinarily be drawn from the primary facts. When all the facts are in, the fact-finding tribunal must determine whether or not it is satisfied on the balance of probabilities that the misrepresentations in question contributed to the plaintiff's entry into the contract. The onus to show that they did is a condition precedent to relief and rests at all times on the plaintiff.

Justice Brennan spoke in similar terms at page 250. His Honour at about point - - -

KIRBY J: Can I just ask you under the *Births, Deaths and Marriages Act* in Victoria, do I understand that if the couple are married the husband does not have to sign the certificate?

MS SYMON: According to the notes on the back of the form, yes, your Honour.

KIRBY J: Is that in the statute or is it just the practice of the Office of Births, Deaths and Marriages? Perhaps you could check that.

MS SYMON: I am not sure, your Honour, but we can check the statute.

KIRBY J: Because if it were something that was not required according to the note and according to the statute and that your client had got her then husband to come along to do it, unless it is common practice notwithstanding the note – and I can understand it might be – to get the husband to sign as a badge of pride, amongst other things, it might suggest a possibility that this was done in order to get the financial and other support to the child.

MS SYMON: That may be so, your Honour, but we would suggest that something more is required than simply filing in the form. One would have to show that the intention was to obtain some financial advantage for the child rather than simply to, as your Honour puts it, have the badge of honour or perhaps legitimacy even.

KIRBY J: I do not think we should revive talk about legitimacy.

MS SYMON: In these days, perhaps not. It is a bit old-fashioned.

KIRBY J: But it cannot be gainsaid that knowing that the child is genetic is an important matter to many people.

MS SYMON: Indeed, your Honour, but if I could return to the form. One of the things that it is our submission that ought to be borne in mind is that the form appears and calls on its face – calls for filling out with certain information. The notes on the back of the form may not be read at all. They may not be read by parties in the same way a lawyer would read them. The form is unlikely to be filled in with an understanding of the requirements of the *Births, Deaths and Marriages Act*. So if one has a form that calls for a filling out of the mother's name, a filling out of the father's name, signing, the witnessing and dating of the document, then, in our submission, that is most likely what most members of the community confronted with a form are going to do: to simply provide the information that is required by the form.

We would suggest that the appellant's submission that the form does not require the information that was given is erroneous because to the ordinary person the form on its face appears to call for the information which was filled out on this form and on that basis we say, when one starts to think about questions of the nature of the representation which was made, one ought not elevate this form beyond the ordinary administrative document that it was, required to filled out by parties who are presented with it, as the evidence was in this case, on leaving the hospital as something which needs to be done and they do it – in Heath's case, 15 days later; in the case of the second child, four months later.

GLEESON CJ: Is that a convenient time?

MS SYMON: Yes, your Honour.

GLEESON CJ: We will adjourn until 2.00 pm.

AT 1.00 PM LUNCHEON ADJOURNMENT

UPON RESUMING AT 2.02 PM:

GLEESON CJ: Yes, Ms Symon.

MS SYMON: As the Court pleases. If I could deal firstly with your Honour Justice Kirby's question about the requirements of the *Registration of Births Deaths and Marriages Act*, the position has changed as between the time of the registration of birth forms were signed pertinent to this case and the current position.

According to the *Registration of Births Deaths and Marriages Act 1959* at section 12, the father or mother of any child or a legally qualified medical practitioner was obliged to give notice of a birth, and by section 13 the information to be given was to be given by the father or mother of every child and the information to be given was "in the prescribed form". I assume for the moment that the prescribed form is the one that the Court sees in the appeal book. The current position under the *Births, Deaths and Marriages Registration Act 1996* is by section 15 that:

The parents of a child are jointly responsible for having the child's birth registered under this Act and must both sign the birth registration statement but the Registrar may accept a birth registration statement from one of the parents if satisfied that it is not practicable to obtain the signatures of both parents –

So my learned friend's point is partly answered by the current position. We would say the Court has to consider the current position which does require the signature of both a father and a mother.

KIRBY J: Was that in force at the time of - - -

MS SYMON: No, the position at the time was as I first stated. The responsibility was on the father or the mother who could – and the information was to be given by the father or the mother.

KIRBY J: One of the problems of this case is that we are asked to determine an important social question without necessarily having all the relevant social data, namely the increase in the number of ex-nuptial children, whether it is in practice, whatever the law is, the normal thing for both parents throughout this period to sign a birth certificate. I feel in my bones that it probably was normal for both parents to sign.

GLEESON CJ: I had four children and I do not remember ever signing one of these notices.

KIRBY J: So that shatters that illusion.

MS SYMON: I was going to make a perhaps inappropriately gendered comment, your Honour.

KIRBY J: Maybe the Chief Justice was just too busy.

MS SYMON: Perhaps if I could return to the submissions I was making before lunch with regard to the matters raised by the notice of appeal and the question of reliance and a demonstration of how difficult it is to apply the tort which is sought to be applied in this and other cases like it in circumstances of this kind. I did outline four matters which it is our submission are to be drawn from the authorities and which are relevant to the consideration of the question of reliance and govern the question of reliance. Rather than take the Court chapter and verse through the sources of the propositions that I have made, I will if I may give the Court references to the authorities that I rely on and an indication of the kind of language that is to be found in them.

I have taken the Court to *Gould v Vaggelas*. Justice Brennan, with regard to the first of the matters that I raised, that is the question of the ultimate onus, echoed the language of Justice Wilson with regard to the proposition that the ultimate onus lies on the plaintiff to prove reliance, and he also expressed himself in terms which are relevant to the question of is the representation material, what is the nature of the representation. He speaks in terms of it being a real representation or a representation of real import. That is in the passages at page 250 to 251.

GLEESON CJ: May I interrupt you to ask a question of fact relating to something you were discussing with Justice Kirby a minute ago?

MS SYMON: Yes, your Honour.

GLEESON CJ: Does the evidence show one way or the other whether the appellant signed such a document in relation to the first child?

MS SYMON: It does not, your Honour. We do not know.

GLEESON CJ: Thank you.

MS SYMON: With regard to the question, if I might call it the sort of element or a consideration of the courts that runs through the authorities, that is the courts look to what is the nature of the representation or was it material, I have already referred to Justice Wilson in *Gould v Vaggelas* at page 238. The language used by Justice Brennan at page 250 to 251 was whether the representation was “a real inducement”. The formulation of the elements of the cause of action in *Smith v Chadwick* in the House of Lords in Lord Chancellor the Earl of Selborne’s formulation at page 190 which is at the very outset of his judgment speaks of “the nature and character of the representations”.

KIRBY J: What is the name of this case?

MS SYMON: *Smith v Chadwick* (1884) 9 App Cas 187, your Honour. It is a decision in the House of Lords and the passage I am referring to is at page 190. The Lord Chancellor sets out the elements of the cause of action and he speaks in terms of “the nature and character of the representations”. One must consider whether the fraud is material and whether it influenced the plaintiff’s conduct.

Similarly, in *Edgington v Fitzmaurice* (1885) 29 Ch D 459 at 485 Lord Justice Fry spoke in terms of a representation which “materially affected the conduct of the Plaintiff” and actually influenced the plaintiff. They are important elements in circumstances, as *Edgington v Fitzmaurice* itself was, where there were a number of matters which might have influenced the plaintiff’s conduct and the representation sits amongst them. One cannot simply say there was a representation and the subsequent entry into a contract or an investment. The court looks to see whether the representation did in fact induce the conduct, was it material, and did it really actually influence the plaintiff, even though it sits amongst a number of other matters and might be said to be one of the things, well, it obviously did, but the court looks closely at that.

Then there is the matter I have identified that flowed through the authorities. The courts looked to what was the plaintiff concerned with at the time. One would find reliance on a particular representation because of what the plaintiff was interested in at the time. That is a particular representation would play on the mind of a particular plaintiff who had a particular interest.

In *Gould v Vaggelas*, Justice Brennan at page 252 at about point 8 looks at the trial judge’s conclusions and finds them open. One of the things that he does is adopt the trial judge’s language. There the trial judge found that the plaintiffs relied on the representations in question because they had no independent information, but also because the plaintiffs had, in the words of the trial judge, “a lively concern about the financial position” of the resort that they were negotiating to buy.

Similarly, in *Sibley v Grosvenor* (1916) 21 CLR 469, at page 473, in a passage relied on by the applicant, in relation to representations made with regard to a sale of land, that the land was the subject of a mortgagee sale, the Court said that is a:

representation [which] would naturally operate on the minds of such intending purchasers in considering the price they would pay for the land.

Again, one sees this sense of the plaintiffs are considering something and the representation that is made would play on the mind of that particular person considering something in a particular way.

Lord Justice Bowen in *Edgington v Fitzmaurice* at page 483 put it more bluntly. That was a case where there was a misstatement about the objects of an investment in a prospectus and they were found to be material and the inference was drawn that the plaintiff was influenced. Lord Justice Bowen put it this way:

What is the first question which a man asks when he advances money? It is, what is it wanted for?

Then finally one sees the change of position is something which is closely related. It is not something which is articulated in the cases but it is something that one sees in the cases. The way the principle relating to the ability to draw an inference is expressed in *Gould v Vaggelas* and in the passage relied upon by his Honour Justice Wilson from *Arnison v Smith* and, again, the reliance of Lord Chancellor Halsbury there in *Smith v Chadwick*.

One can see that in the contractual situation the plaintiff entered into a contract and he was not in a contract before. That means that one can then say something about the role the representation might have played. Having teased out those various features and factors which are looked at in determining the question of reliance, one comes to this case. When it comes to the onus and the satisfaction of the onus, even if this was a case where one could draw an inference, one would say one ought to infer that if one

is presented with a form naming one as the father, one would ordinarily believe that one was the father and then act on that belief. Even if that inference could be drawn, there are other matters in this case which make the Court of Appeal's conclusion correct. Indeed, the evidence is inconsistent with the inference even if it is drawn.

I refer the Court to the evidence firstly in the appeal book at page 23. While the Court is turning up the appeal book at page 23, my learned junior has referred me to a passage on the same page which suggests that the form was signed in relation to Arlon – that is the first child – page 23 at paragraphs 7 to 11 says that he filled out the form on all three occasions, or the form was filled out on all three occasions in the same way. The passages that I want to refer the Court to at page 23 are firstly at lines 1 to 3. Mr Magill was asked:

Can you tell the court what Mrs Magill said to you about Heath and his conception?

That question was prompted by the statement of claim in its original form. In its original form the statement of claim relied upon a representation that was made at the time that Mrs Magill announced the pregnancy of each of the children. But Mr Magill does not answer the question. He does not refer to a representation and instead he says:

I was – had no reason to believe that Heath was not my child –

Then further down with regard to the filling in of the form at lines 14 to 16 on page 23, Mr Magill says:

Meredith 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.

As we say in our submissions, the evidence is that the appellant came to the form already believing he was the father. It could not have played a role in either forming or continuing a belief that he was the father of the children. At page 26 beginning at line 14, the appellant said:

I believed that I was the father of all three of my children.

Why did you believe that?

He does not refer to the forms. He says:

Well, 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 in Sea Lake and I had no reason to believe that any of my children weren't mine, sir.

We say that even if an inference could be drawn from the forms, the evidence itself is inconsistent. Adopting Justice Wilson's formula, when all the evidence is in, when the finder of fact looked at all the circumstances of the case, it was correctly found and the Court of Appeal correctly upheld the finding that there was not any reliance on the representation which had been found to be made.

KIRBY J: It just seems a little unreal though. If a person is the husband and he is presented with the form and he fills the form in and thereafter day by day he provides for the child, it seems a little unreal to suggest that there is no representation by the wife that he was the father of the child.

MS SYMON: There may have been a representation, your Honour, it is a question of whether it was

relied on, and what the evidence shows is what was relied upon was something other than the representation.

KIRBY J: Yes, but we cannot get into the minds of people and therefore you look at the objective facts and the inferences available from them and if the child is just included in the family, we know the first child was the husband's, and then he is presented with the form, it just seems hard not to say that the representation was made and that he provided for the child, looked after it out of love and affection, because he believed it to be his child.

MS SYMON: Exactly, your Honour, but not because of the form.

KIRBY J: No, that is why I think the reliance on the form is a factor, but it is not the whole of the representation in this case.

MS SYMON: Well, rightly or wrongly, your Honour, that is what we have to deal with, because that is the only representation which was found and it is the only - - -

KIRBY J: But it is in the context of the relationship of the parties; it is not divorced from the context. You have to be realistic.

MS SYMON: Yes, your Honour, but your Honour's line of thinking really illustrates why these cases do not lend themselves to what we are sort of loosely calling the domestic context because, as his Honour Justice Hayne said, in a continuing relationship, whether it is a marriage relationship or some kind of de facto relationship, it is a relationship which is based on certain trusts and confidence, and - - -

KIRBY J: That is what the husband complains about.

MS SYMON: Yes, your Honour, but is the trust and confidence and the basis of the relationship not a representation which also forms the basis of, we would say, an assumption about paternity. The tort of deceit is based upon a representation and it would be very dangerous, and we would say a departure from the tort, to say it could be made out because there is a relationship of trust and confidence. One of the parties to the relationship has broken that trust and confidence by having an extramarital affair as a result of which at the least she must have a doubt about the paternity of the child, and therefore it sounds in damages. One is starting to depart from a tort which relies on a representation and the finding of a distinct representation and moving towards the imposition of some kind of duty, and it is there in the submissions made by my learned friend. He complains that what the appellant was robbed of in this case was the ability to make a choice because he was not informed of all the facts.

The tort of deceit is not based upon an obligation to inform another party of all the facts. It is based on an obligation not to make a representation that is false. It is a very important distinction and it is why there is a potential danger that in allowing cases like this to proceed one at the very least starts to move away from the classic elements of the tort of deceit and is at risk of imposing a duty instead. The second matter that I refer to - - -

HAYNE J: Can I just understand that proposition a little better? Do I understand it to come to this, that in the context of a continuing relationship between the parties the difficulties of isolating a representation, either explicit representation or representation by conduct, from the context of the relationship are such that, what? The tort is not established? The tort should be found not to be open? What is the consequence?

MS SYMON: Either could be the consequence and it is ultimately a matter for the Court.

HAYNE J: No, that is a matter for you. What do you say?

MS SYMON: We say that what is pointed to is that the tort ought not to apply in the circumstances of the continuing relationship. One sees it, and I will come to it, when one looks at some of these other features which are relevant in considering the question of reliance, because there are not only difficulties in isolating a representation, there are dangers in isolating a representation. If one isolates a representation – and we say one has to – from the overall context of the relationship, then one starts to focus on something which is potentially – there is an air unreality about it, at the very least.

HAYNE J: But saying that the problem is hard, even saying that the problem is very hard, is not reason enough to deny grappling with it.

GLEESON CJ: Take a representation as to paternity that induces a marriage. That, I should have thought, is quite a common situation in an age when many people live together before they get married and get married because they want to start a family. I can understand your proposition that it may be very awkward to find the elements of the tort of deceit in many circumstances, but I do not have much difficulty with the potential to find such elements in a case of a representation of paternity that is made for the purpose of inducing a marriage and that induces a marriage. Most such representations, I hasten to say, will be truthful.

MS SYMON: Your Honour's concern really starts to grapple with where should one draw the line? We say a line should be drawn. In the case posed by your Honour, the classic features are there in the sense that there is a representation made in order to obtain some kind of advantage and, more importantly, one can see a clear change of position. That is what one cannot see in a continuing relationship and so the example given by your Honour the Chief Justice is an example where a relationship is started because of the representation. We say it is a different position because of the trust and confidence and the assumptions which underpin a continuing relationship to try and find those elements and impose the framework of the tort of deceit when parties are in a continuing relationship.

One sees the same in this case. This case really provides an example of why it is so difficult and why the Court ought to be reluctant to permit a cause of action which parties might embark on and, at the end of the day, nine times out of 10 in a continuing relationship situation is doomed to failure because one or other of these elements will fail. One can see the example in the Court of Appeal. Justice Callaway said the tort failed on a different element than the majority found it failed on. We say it could equally have failed on the question of the intention with which the representation was made. Each of the elements requires a particular look in and in the context of the continuing relationship each of the elements could – a party could fail at the point of any of these elements.

I know one might say any party could fail when there are five elements to make out, but we say it is peculiar to these particular cases. This Court, in a way, is in a different position than were the courts in *P v B* in England and in the *Thompson v Thompson Case* in Canada. The tort was considered in both those cases in the context of applications to strike out a statement of claim, so the courts were considering in theory whether one ought to limit the application of a tort when the elements are made out. What this Court has the unfortunate advantage of is that here is a case which has been to trial, one has seen the difficulties of formulating the representation because the representation we are now concerned with was not part of the proceedings until the second day of the trial when it was the subject of further and better particulars.

HAYNE J: But your proposition seems to be that this is not a representation because it took its place in a series of events and statements which had already conveyed to the plaintiff, the appellant, the information which this form conveyed. Is that your proposition?

MS SYMON: No, your Honour. I am stuck with that it was a representation because that is what was found in the court below, but our proposition is it is not a representation which the appellant relied on.

HAYNE J: Not relied on.

MS SYMON: The Court of Appeal correctly found that because the basis of the belief that he formed and his evidence was, "I had no reason to believe not to".

HAYNE J: So this representation is not relied on because there were earlier and other statements and events which had drawn me to this conclusion?

MS SYMON: Not even earlier and other statements and events, your Honour. Parties get married. They make a certain assumption. As your Honour said, parties get married and they enter into a continuing relationship, and a relationship in which they cohabit. They do it because they express a certain trust and confidence in each other. They do it because they are willing to go through the highs and lows of a relationship and, in the marriage context, they say for better or worse, and sometimes the worse is worse than people imagined.

GLEESON CJ: What was the finding of fact in the courts below as to the intention with which this representation was made?

MS SYMON: I will just get my learned junior to locate that, your Honour. I do have a note, but I cannot think where it is.

GLEESON CJ: I will tell you why I asked the question. There is a line of authority in the context of fraud to the effect that where you find somebody making a fraudulent representation a court will normally be very quick to conclude that they achieved what they set out to achieve.

MS SYMON: Yes, your Honour. I am aware of that line of authority.

HEYDON J: Page 222, line 27 to 223, line 2:

her intention at that time was, in part at least, to induce the respondent to act on the representation -

made in the forms.

MS SYMON: "[T]hat he was the father of each child".

HEYDON J: Your case has to be that that was her intention but it came to nothing.

MS SYMON: Exactly, your Honour. One has to be careful, we would submit, about saying one has to bear the consequences of one's actions and what one intended to achieve, because reliance is a separate element of the cause of action and there is a danger in collapsing the intention with the question of inducement. So one ought not to conclude reliance on the basis of the intention with which a representation was made.

The nature of the forms, we say, does not support the inference of reliance for which the appellant contends. We say, and I said it this morning, that basically this is an administrative standard form. An ordinary person coming to it sees it calls for particular information and fills it in. It is a very different case, for example, from the prospectus cases which are the kinds of cases in which the tort was formulated and applied.

We would say it is also impossible to conclude that these representations were material or influenced the plaintiff's conduct in any way. I have taken the Court to the evidence. When asked why he thought the children were his, the appellant did not mention the forms. It is also significant, we would say, that the forms did not play any role in the proceedings at all until they became the subject of the further and better particulars which were filed at the trial. So one has the situation of a case which is mounted on the basis of a statement of claim filed on 31 January 2001 and then the representation, which became the basis of what is now this Court's consideration, did not come into play until further and better particulars were filed over a year later during the course of the trial on 11 November 2002.

HEYDON J: Where are they in the appeal book?

MS SYMON: The statement of claim begins at page 1 and - - -

HEYDON J: Page 1, and then there are some amended further and better particulars on - - -

MS SYMON: - - - the further and better particulars commence at page 10.

HEYDON J: It is those on page 10, is it?

MS SYMON: Yes, your Honour.

HEYDON J: Yes, thank you.

GLEESON CJ: I cannot help wondering – and I think this may ultimately be in your favour on a public policy argument – why all this concentration on the form was because nobody wanted to grasp the nettle of saying this is a circumstance in which silence can amount to a representation, and I can think of a reason in public policy why your opponents would not want to embrace the proposition that there could be a duty of disclosure.

MS SYMON: That is the risk, your Honour, as I have said, that at the end of the day, if one is – because the elements would be so readily made out, parties are in a continuing relationship, the wife or the female partner has an extramarital affair, she falls pregnant and at the very least she must have a doubt. As this case demonstrates and also the family law case, a child support assessment case of, I think, *PRB v AJL*, it is a short step from saying the woman had an affair, therefore she must have had a doubt, to finding that therefore she did not have a genuine belief. So that if one says this can be a continuing representation, the continuing representation is readily drawn from the circumstance of the marriage itself. The circumstance of the marriage, the fact of the - - -

GLEESON CJ: They would say half a dozen times a day, “Wait till your father comes home”.

MS SYMON: Exactly, and this is not the only form which parties fill in, your Honour. If every time a mother fills in a form – it could be a passport application form, it could be one of the myriad forms one has to fill in in the course of educating one's children. Every time she fills in that form, is she to be faced with, “I'd better tell them about the affair or there could be a damages claim”?

GLEESON CJ: There is something opportunistic about the use to which this form was put in this case that masks the reality that in most cases the husband's grievance will be based upon silence.

MS SYMON: Indeed, your Honour, and that is one of the things one sees in the evidence in this case and it is extracted in our learned friend's submissions and I will take you to the passages. In speaking about the aggravation to the appellant's psychiatric illness, Dr Chong wrote a report and it is extracted in the trial judge's decision at page 175 at lines 17 to 28. The doctor said:

His depression was, and the accompanying panic and anxiety symptoms had become, worse when he found out with DNA testing in April 2000 that two of his three children were not fathered by him. This knowledge had devastated Mr Magill, causing him a lot of emotional turmoil. He couldn't believe that his then wife was unfaithful to him and had become pregnant twice with other men."

So the issue is not the paternity; the issue is the betrayal. One sees the same element in the evidence of the other doctor, Dr Kornan, which is referred to in Justice Eames' judgment at page 228, or quoted there at lines 7 to 11. There is a reference to Dr Kornan's report of 20 August 2002. Dr Kornan refers to the effect of the alleged fraudulent misrepresentation, but of course he wrote his report before the fraudulent misrepresentation we are now concerned with was part of the proceedings. So what he says has to be read in light of the fact that when he refers to the alleged fraudulent misrepresentation, we do not really know what he means. But the real concern is with the betrayal, not the issue of paternity which is also present here. Dr Kornan said:

"... the alleged fraudulent misrepresentation to the paternity of the children would be a noticeable added factor to raising the level of any psychiatric reaction. I think this was an extremely bitter blow to him –

but here is why –

that he now felt doubly cheated, so to speak, over the break-up of the marriage.

So again the focus is the break up of the marriage and the sense of betrayal.

There is another aspect of course which is important when one looks at the representation or the question of continuing representations or the context of the marriage, and it is something that the trial judge took into account. He took it into account not in determining the question of intention, but looked at it in the context of damages, but we say it is a very important observation. I refer to the passage at page 181 of the appeal book, beginning at line 7. His Honour said:

One part of her evidence which I can and do accept is that she found herself in a position which she could have 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 the children.

In a continuing relationship, the purpose of making a representation, unlike the contractual commercial situation, is not in order to gain a financial advantage, is it? It is because of this. It is because the woman who has a doubt about the paternity of the children is faced with a choice. If she tells the truth, there is

the potential of losing her relationship and the enormous uproar, or she could stay silent and endeavour to save her marriage. That is again why, when one starts to look at pure questions of representations, what are the intentions of the representations, when a tort has been devised in a commercial context where the object of representations is to obtain a financial advantage simply does not translate where people have other emotional concerns, questions that affect their life choice overall, not just about how they are going to spend their money.

GLEESON CJ: In the ordinary commercial application of the tort of deceit, there is a lot of law, is there not, on the subject about the circumstances in which silence can amount to a misrepresentation?

MS SYMON: The leading authority, as I understand it, is *Peek v Gurney*, your Honour. I may be mistaken about that when I think about it. I suspect *Peek v Gurney* might be the intention case. There is reference to the question of the role of silence in *Smith v Chadwick* because it was partly relevant there, and I suspect it was mostly considered in the context of – in the Court of Appeal’s decision in the Master of the Rolls decision. Beyond that, I cannot assist your Honour with the degree to which there is law about the role of silence, because we say of course it is not relevant to this case.

GLEESON CJ: No, but I guess this is not the kind of relationship – maybe it is – to which caveat emptor applies.

MS SYMON: Or perhaps precisely because it does is why the tort of deceit does not apply, your Honour.

GLEESON CJ: We had better not go down that track.

MS SYMON: Again, coming back to these considerations that I have identified from the authorities on reliance, the courts ask: what was the plaintiff concerned with at the time of the representation? The plaintiff who is concerned with how he is going to spend his money is in a very different position than this plaintiff because here there is nothing at all to suggest that this appellant was concerned with whether he should act as the father of the children or whether he was in any doubt about it. Indeed, the evidence was that he was already acting as the father of the children. The evidence shows that.

He attended their births at a time before the representations were made. The forms which are the subject of this case were signed after the births. Was he acting as the father of Heath or Bonnie before the forms were signed? No. One looks at the situation of the relationship and one sees that the appellant was acting as the father before the forms and after the forms. It does not allow us to say anything about the role the forms played or what might have been the influence on his mind of these forms because he is not showing any concern about the particular issue to which the representations were directed.

It is the same thing with the change of position. One cannot see any difference in the conduct of the appellant before the forms or after the forms. He acted as the father in both instances. So that is what I wanted to say about reliance.

With regard to causation, we say the Court ought to consider that separately because one cannot and ought not to assume that a conclusion about causation follows from the conclusion which is made about reliance. It is particularly important in this case because Justice Eames, albeit obiter, said that in this case if the question was addressed separately, if the appellant had not fallen foul on the element of reliance, he would have fallen foul on the element of causation.

We say that that is right and it is right for the reasons that Justice Eames gave and it is right because of

the evidence in the case, as we have set out at paragraph 24(b), and we also say it is right because one cannot say that the representation caused the aggravation of the appellant's psychiatric illness. That was caused by his discovery of the truth and the discovery that he had been lied to. That is evident in the conclusions which I have just taken the Court to of the doctors. It is not that he acted as the father that caused his mental distress; it is that he found out that he was not.

HEYDON J: He would have suffered as much distress even if there had never been any misrepresentation in the forms is your point?

MS SYMON: Exactly. In the absence of the forms, the situation would have been the same. Indeed, I know it is speculation, but if he had been told the truth at the time the forms were filled in – I mean, it is the truth that was damaging, not the lie, and deceit is about what is the impact of the lie. Neither can one say that the damage is a consequential loss because when one looks at instances of consequential loss – and there are a number of examples set out in Chief Justice Gibbs decision at page 222 of the report of *Gould v Vaggelas* – one sees that consequential loss is given because as a consequence of the misrepresentation in question the plaintiff bought a machine or a cow or a car and something happened as a result. The consequence of buying the machine, having been told that it was ready for immediate use and it was not, was that the plaintiff suffered loss to the business. The consequence of buying a cow on the basis that it was a sound cow, that is that cow when it was diseased, was that some of the other cows in the plaintiff's herd also became diseased.

So there is a consequence of the representation that somebody did something that they were not otherwise going to do. They bought that cow or that car rather than some other cow or car which broke down and caused them injury, but it does not translate here. What one says here is that as a consequence of the representation the appellant acted as the father of the children. Clearly one of the consequences of that representation is that he expended money, but the consequence to his mental state does not come from acting as the father. As the evidence shows, his mental distress arose from finding out that he was not and of his wife's affair.

GLEESON CJ: This topic that we have been talking about of duty to disclose is dealt with in the 7th edition of *Kerr on Fraud and Mistake* under the heading "Concealment" at page 46 and the author says:

A concealment to be material must be the concealment of something that the party concealing was under some legal or equitable obligation to disclose - - -

MS SYMON: Well, that is an important precondition, of course, your Honour, and obviously one of the concerns in this case, as I have said, is that one might, in committing deceit in cases of this kind, end up imposing a duty of disclosure, because if the appellant's arguments are accepted, the risk is that even if we do not end up having something other than the tort of deceit because the elements are eroded in some way or applied in ways that are inappropriate, at the very least there is a risk of some kind of dumbed-down version of the law of deceit in which some of the elements are either lost or subsumed or so readily made out that they lose their meaning because it starts this way.

We are in an age where DNA testing can readily determine paternity, but the results of the DNA test, as in this case, will also reveal something else. They will reveal an extramarital relationship. In this case, as well as in the family law case, which is *DRP v AJL*, and we refer to it at paragraph 41(d) of our submissions on page 17, the court said if there has been an extramarital relationship and the wife has conceived, then she must have a doubt as to the paternity of that child. As this case demonstrates and the *DRP v AJL Case* also – or the element is there, it is a short step there from that point to saying the wife must have a doubt because of the circumstances to saying then she must have had no genuine belief.

Then if one says one can make the representation by one of the myriad of administrative forms which parties will fill in during the course of the continuing relationship, in the course of bringing up children in that relationship, then you have elevated an administrative act in the filling out of the form to the status of a fraudulent representation because every time the wife fills in a form like that she must have had a doubt and she must have made a choice.

Then, if the appellant is right, the plaintiff does not have to prove reliance. The plaintiff can simply rely on the form to say, "Well, look what the form said. Of course I believed I was the father and I acted on the basis of the form". If one then says one can have deceit and one can base it on a continuing representation or one can base it on silence in some way, then one is moving even further from the classic elements of a tort of deceit and in circumstances like this making the proof of the cause of action whether one calls it deceit or whether one calls it something else can be something that is readily done.

GLEESON CJ: If you base it on concealment, the logical corollary of that has to be a legal or equitable obligation to disclose infidelity.

MS SYMON: Indeed, your Honour. We are dealing with a tort of deceit here and I am not sure if any of the parties are asking the Court to impose an obligation of that kind.

GLEESON CJ: No, indeed. I suspect that is why there has been so much attention on this form.

MS SYMON: Yes, your Honour.

GLEESON CJ: Once you go past that form, you are right into that area.

MS SYMON: Yes, and it is because once one goes past that form one is not necessarily in the tort of deceit anymore because the tort of deceit does rely on a representation and one can see it in the way this case unfolded. There was a – perhaps I am overstating it – desperate search for a representation.

GLEESON CJ: Other than a representation by concealment?

MS SYMON: Indeed, your Honour. If I could say something briefly about the policy questions, what we have endeavoured to do in our submissions is to put before the Court a spectrum which starts at one end with strict legal theory. Now, of course what is put against us is a matter of strict legal theory if the elements of the cause of action are available and can be made out, then why stand in the way of it, the tort ought to apply.

We would say that when one looks at this cause of action and strict legal theory that the cause of action was devised in a commercial context. Its elements are peculiarly conducive to a commercial context and it is no accident that it has not been applied outside the commercial context except in what, we would say, are some anomalous cases, and they are the cases that your Honour has referred to: cases of a false representation by a man as to being a bachelor and an inducement of marriage as a result. We would say they are anomalous.

The other cases which are often relied on – *Wilkinson v Downton* and *Janvier v Sweeney* – as being examples of the application of the tort of deceit beyond the commercial context, we would say, were not deceit cases at all and the measure of damages in both those cases was largely upheld because there had been an intentional infliction of emotional harm. They were the cases where a representation was made – in the *Wilkinson v Downton Case*, for example, a representation was made to a wife as a practical joke that her husband had met with an accident and had lost both his legs and she should go and send

someone to look for him and pick him up, and she suffered a severe emotional and mental reaction as a result. So that is one end of the spectrum.

In the middle there are the straight policy questions and there are some straight policy social questions and they are the ones that we have - - -

GUMMOW J: Did not the plaintiff suffer physical consequences in *Wilkinson v Downton*?

MS SYMON: Yes, your Honour, but the - - -

GUMMOW J: Hence the jump in America to emotional harm.

MS SYMON: Yes, that is right, it was emotional – but interestingly the - - -

GUMMOW J: Yes, but they root their cases in *Wilkinson v Downton* but they jump beyond them.

MS SYMON: Yes, but one of the interesting observations which is made about the American cause of action is that its elements are particularly confined in order to ensure that not every party to an unhappy marriage breakdown can look back on the marriage and say, “There’s been an intentional infliction of emotional distress”. So the elements of the cause of action in America require, firstly, outrageous conduct on the part of the putative defendant, and severe harm as a result, in order that the floodgates are not opened and, I suppose, as with *Frame v Smith*, the court puts a weapon in the hands of unhappy parties.

We set out in our submissions at paragraph 35 a summary of what we say are the broad policy reasons. That is before one gets to the question of the family law regime, there are broad policy and social questions about – the ones we have been discussing this afternoon – the ability to sensibly apply the cause of action in circumstances of parties in continuing relationships, whether the courts should do that, the question of the effect on children who are excluded from the consideration by the courts when one is confined to the elements of this cause of action; things of that nature.

We also say the family law regime is in itself a policy reason – before one gets to section 119 and 120, the family law regime, as our examination of that regime, we would submit, shows, is that that regime is both adequate and appropriate for dealing with issues of paternity - - -

GUMMOW J: Where do you deal with this in your written submissions?

MS SYMON: The examination of the family law regime and how it might apply where paternity questions arise begins at paragraph 36 and we summarise what we say that examination shows at paragraphs 42 and 43. What we say, putting it perhaps more briefly than there, is that it is adequate and appropriate to dealing with these issues, that is, that an aggrieved party can recover moneys, there can be an adjustment of property settlements, and it is not a case, as the Attorney-General contends, of deceit being needed to fill a gap which is left by that regime.

We would say, indeed, that the gap is already filled by the regime and that it is more appropriately filled by that regime because it considers issues according to a broad set of criteria and with the interests of all those concerned, including the children, in mind. It does not isolate the parties to the marriage, as the deceit context does, and consider the elements of the cause of action in isolation from the relationship as whole, including the relationship with the children.

It is why we say the statement in *Doe v Doe* that says the interests of the children are a red herring because we are not dealing with custody cases is not really apt because the children are concerned in this. It is a cause of action which has been brought in this case which concerns the children, but in its resolution excludes them. We say that is inappropriate when we have a regime which can deal with these issues in a way which does include them and where interests and property settlements and indeed money paid out on their behalf can be adjusted - - -

GUMMOW J: Is the child support legislation limited to children of marriages?

MS SYMON: No, your Honour.

GUMMOW J: It is not, is it?

MS SYMON: No, it affects anyone who is the father of a child.

GUMMOW J: It is under the reference with respect to children, is it not? It is enacted under the referral of power.

MS SYMON: I am in your Honour's hands with regard to that. I have not looked at that question.

GUMMOW J: But it is not limited to children of the marriage.

MS SYMON: No, your Honour, not at all.

KIRBY J: But there is a provision in the *Child Support (Assessment) Act 1989* for the recovery of amounts in section 143(1) where a person is not liable or subsequently becomes not liable to pay the amount to the other person.

MS SYMON: Yes, your Honour, and we have examined that provision in its operation in our submissions.

KIRBY J: I suppose you draw from that the argument that in the Commonwealth of Australia where there is such a legislative provision, it does provide a legislative regime for the recovery of overpayments of child support. To that extent, insofar as that is influencing an outcome on policy grounds, that provides a means by statute to address a very substantial part of the burden that falls on an Australian father who turns out not to be genetically related to the social child.

MS SYMON: Yes, your Honour. Indeed, adjustments are made administratively without the need for action in some cases, and this is a case in point. There was an adjustment made which cancelled arrears of child support which would have otherwise been due.

GUMMOW J: [Section 69VA](#) of the *Family Law Act* which I referred to earlier talks about "conclusive evidence of parentage for the purposes of all laws of the Commonwealth". That would include the child support statute, I suppose?

MS SYMON: Yes, the child support regime where there is a marriage makes an assumption about who the father is in terms of – or makes an assumption about who is the party responsible for the support of the child.

GUMMOW J: No, I do not think so. [Section 69V](#) is just talking about parentage at large, I think.

MS SYMON: Yes, it is, your Honour. I thought we were still talking about the child support regime.

GUMMOW J: That is right, but it could include ex-nuptial children.

MS SYMON: Yes. Even though [the Act](#) - - -

GUMMOW J: I am not saying it against you but I am just saying it is comprehensive.

MS SYMON: But it is important that [the Act](#) is comprehensive in terms of the assumptions it makes about who is responsible for support but it also has mechanisms for adjusting property settlements and provisions for children in the event that those assumptions and the presumptions made here come to be rebutted. So we say it is comprehensive at two levels.

So we would say that to permit an action of deceit at least where there is a marriage would be to undermine the family law regime and it is something which the Canadian Supreme Court in *Frame v Smith* regarded as a very serious matter. Of course, *Frame v Smith* occurred in a different fact situation, but the court at paragraph 87 in the majority decision said that the courts will not permit violence to be done indirectly to a legislative scheme. It is our submission that violence would be done - - -

GUMMOW J: What paragraph is that?

MS SYMON: It is paragraph 87 of the decision in *Frame v Smith*, your Honour. Does the Court have paragraph numbers?

GUMMOW J: No. What page? We have the Supreme Court Report.

MS SYMON: I am not certain that I can identify the page number in the – my learned friend, Mr Bennett, tells me it is page 111.

GUMMOW J: Yes, thank you.

MS SYMON: It is the sentence which begins halfway through paragraph 87.

KIRBY J: Is that the sentence that begins, “But what really determines the matter”?

MS SYMON: I was referring to the sentence:

I might mention here that the courts will not permit violence to be done indirectly to a legislative scheme.

KIRBY J: What is the first word in the paragraph? We do not have paragraph numbers.

MS SYMON: The paragraph begins “Permitting such an action may well be violative of the express direction of [the Act](#)”. I fear I may have different paragraph numbers as well.

GUMMOW J: We do not have any paragraph numbers; that is our problem.

HEYDON J: Yes. It is 115, two-thirds of the way down.

MS SYMON: Yes. It is page 115, “Permitting such an action may well be violative”, and I am referring to the sentence which begins about halfway down that paragraph:

I might mention here that the courts will not permit violence to be done indirectly to a legislative scheme.

GUMMOW J: You get similar notions, I think, in the cases that say you cannot contract out of the family provision potentialities. The law of contract says we will not get into that because it would frustrate the statute. This is about the law of tort, you say, not getting into it.

MS SYMON: Yes, and I suppose it is the question of whether one ought to be allowing a party to rely on rights in tort in a way which would undermine the family law scheme. As we have said in paragraph 43 of our submissions, the Family Court may well make a property settlement and distribute parties’ assets. If the tort of deceit is allowed, then a husband or ex-husband might well get a second bite at the cherry and there is a redistribution of the assets without the consideration of the Family Court. It is something that Justice Stanley Burnton was mindful of in the *P v B* case. That was a case where the parties were not married and he said, had the parties been married, this is a question which should arise, should be taken in family proceedings. He made that observation at paragraph (33) of the report.

GUMMOW J: Insofar as this problem arises outside marriage but in a de facto situation, I think we might need to know how your argument would run as to apprehended violence to the various State systems for de facto relationship property.

MS SYMON: We have not looked closely at those situations, your Honour.

GUMMOW J: I am not saying do it on your feet, but we need to know I think.

MS SYMON: But the analogy, in our submission, may follow that the de facto situation would be governed insofar as the support of the children is concerned by the *Child Support (Assessment) Act*. Settlements of property would be affected where that has happened following the breakdown of a de facto relationship in the same sort of way. What we have not looked at is whether the mechanisms of those regimes would permit a readjustment of a distribution of assets in the way that the [Family Law Act](#) does because we were dealing with a marriage.

GUMMOW J: I would be assisted to know that.

GLEESON CJ: Children, of course, are not always the result of anything that could be described as a relationship.

MS SYMON: That is really why one has to consider where to draw the line. That is why we were conservative about where one might draw the line in this case because there was a marriage in this case. The family law regime would apply to it and it creates a compelling reason why, at least when these issues arise in the context of a marriage or a former marriage, they ought to be dealt with. We say that the tort of deceit ought not to apply. But one can see that the line could be drawn in any case where there is a continuing relationship.

Now, if the parties are cohabiting or there is a continuing relationship, there might be a question of fact which would have to be determined because whether they are in that kind of relationship might be a question at issue which would not arise in the marriage. We would submit that the examination of the way the tort applies or might apply shows that in any continuing relationship the application of the tort

is so difficult that that is where the line ought to be drawn. Where there is a clear change of position, then it might be different, but where there is a continuing relationship, it may be the place where one can draw the line.

KIRBY J: That might be correct, but as against that, the Family Support Act is not specific to marriage. As I understand it, it applies to children in and not in a marriage.

MS SYMON: That is right, your Honour.

KIRBY J: As I understand it, in this case the appellant did not claim for the recovery in the tort action of the moneys paid under the Family Support Act in respect of the two children.

MS SYMON: No.

KIRBY J: So, as I understand it, his argument is that that is a self-contained scheme for children of marriages and children of relationships, or children of no relationship but born to a person, and that that still leaves a great job for the tort of deceit to perform which does not undermine the statutory scheme. It simply addresses other issues.

MS SYMON: Well, we submit it does undermine the statutory scheme because the statutory scheme is not concerned just with the support of children. It is concerned with the reallocation and the appropriate distribution of resources between the parties. Of course, the interests of the children are taken into account in making that redistribution of the parties' assets. Now, if the court says there is a mother with custody of children and the father should therefore provide a certain percentage of the assets and that turns out to be wrong because the father is not in fact the father of those children, then the redistribution of those assets can be reconsidered, but it will be reconsidered with the interests of those children in mind, albeit that they are not the biological children of the father in question.

So we say that it is a bit of a red herring to say you do not undermine the jurisdiction by allowing a cause of action for damages because the cause of action for damages, if successful, is necessarily going to affect the question of the allocation of the assets and the Family Court is not going to have an opportunity to consider the allocation of the assets according to the criteria which are relevant to that court.

Your Honours, I have promised my learned friends I would finish. I have not addressed [sections 119 and 120](#) but we would say that that sits at the other end of the spectrum of the broader considerations. At the end of the day, [section 119](#) - of course it uses the broad word "tort". We say when one looks at the history of the tort of deceit, "tort" used in [section 119](#) cannot have been meant to apply to this one and it certainly cannot have been meant to apply to a tort, the application of which would so undermine the regime which [the Act](#) sets up.

[Section 120](#) gives a clue to that and interestingly our learned friends say "tort" should be read in the widest possible meaning of the word and we ought not to refer to the historical context, yet when we come to [section 120](#) our friends say damages for adultery always meant a particular cause of action and it was a particular cause of action that was applied to third parties. We would say that your Honours at the very least ought to be consistent. If one is going to apply the broad meaning to the word "tort" used in [section 119](#), then one also ought to apply a construction which follows from the broad use of the words "damages for adultery" in [section 120](#) and we say that these cases, as we have seen from the evidence of the psychiatrists, are potentially cases of damages for adultery dressed up as something else. But I need to yield ground to my learned friend, the Solicitor-General now.

GLEESON CJ: Thank you, Ms Symon. Yes, Mr Solicitor.

MR BENNETT: Your Honours, in relation to that last submission, we submit that we are construing a broad word broadly and narrow words narrowly, in each case in accordance with their tenor. If one looks at the two sections, it is absolutely clear that one is a very broad section and the other just cannot have the meaning that is sought to be given to it. [Section 119](#) says:

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

One asks rhetorically, “What part of the word ‘tort’ don’t you understand?”

KIRBY J: I do not think you need to ask that question.

MR BENNETT: The word is a simple word with a simple meaning, your Honour, and it includes the tort of deceit. It is not a question of broad or narrow. The section is there and there is simply no scope, we would submit, for reading down the section for saying, “but not torts that we don’t really think ought to be applied in this way”. There is just no scope for doing that.

CRENNAN J: What about torts that introduce the notion of fault into matrimonial relationships, having regard to that being one of the basic matters addressed by the [Family Law Act](#)?

MR BENNETT: Your Honour, the legislature would have known, as we do, that there are no such torts. The only possible such torts are those listed in the following section which are expressly abolished. There are no other such torts and this is simply not one. To say that on the particular facts of a particular case one of the consequences may be seen in a colloquial and loose sense to be similar to an action of that type, which is the highest my learned friend can put it, just does not get there. The one section says three specific types of cause of action which were in the category your Honour puts to me are abolished. The other says you can sue each other in tort and contract. There is just no scope for saying this particular tort or this particular contract is a bit like something in [section 120](#).

GLEESON CJ: Well, I suppose husbands and wives often enter into financial transactions with one another and the tort of deceit in its classic commercial operation could apply to transactions between husbands and wives.

MR BENNETT: One can think of many examples, some commercial, some not necessarily commercial. My learned friend referred to the two cases, *Janvier’s Case* and *Wilkinson’s Case*, which are examples of the tort of deceit being applied outside the commercial area. One was, as you said, the case of the cruel practical joke. The other was the case of a police officer saying to a household servant that she was being investigated for a relationship with a German spy and thereby causing great mental suffering.

There are of course numerous cases where one can have deceit outside the commercial context, even in a social context. One very obvious example might be a person who has an allergy who goes to a dinner party and says to his host, “I’m allergic to a particular foodstuff. Is there any of that in the food?”, and the host recklessly says, “No”, and the guest becomes very sick. Now, clearly an action of deceit lies. It is a social context, but there is no exclusion because of that. It is a serious occasion and if it was not a serious occasion it would be hard to find the elements of the tort of deceit, the elements of reliance, intention to cause the person to rely, and so on, but we submit that the sections are clear and unambiguous and there is just no scope for reading them in the manner in which they are sought to be

read.

No one seems to have put a constitutional argument at the end of the day in relation to the sections. I do not take there as being any submission against me that either section is invalid and therefore I perhaps do not need to say more about that unless the Court wishes me to address it. I would simply just say one very short thing, and that is that clearly the abolition of an anomalous doctrine which was a doctrine the common law had attributed to marriage for many years, the idea that a husband and wife were one person in law, clearly one of the consequences of that anomalous doctrine being abolished is classically a law relating to marriage. If the proposition that there is a spousal immunity is a common law principle relating to marriage, as it clearly is, its abolition must be in the same category. A subject matter of power includes excluding things from it.

A classic example of that, I suppose, is jactitation of marriage, which is clearly within the matrimonial causes power and probably the marriage power. Although, ex hypothesi, the allegation is that the marriage never existed, and one can think of other examples. *Kartinyeri*, of course, has a remote analogy to this situation, the idea that if a law is within power it is within power to repeal it; the same sort of principle.

KIRBY J: What is your answer to the suggestion that this is damages for adultery dressed up in a new guise?

MR BENNETT: Well, it is just not, your Honour.

KIRBY J: Was adultery a tort at common law?

MR BENNETT: No, your Honour, not as I understand it. There were specific - - -

KIRBY J: What does that generic expression mean? You have to give meaning to it if it is not technical.

MR BENNETT: There were specific rights in the ecclesiastical courts and later by statute which are the three causes of action – one has to.....inverted commas around “causes of action” – referred to in [section 120](#) but they would not be referred to as torts. I say that subject to one matter. In the United States certainly the word “tort” is used very widely. It is said, for example, that infringement of intellectual property is a tort, which is something we probably would not say. That is a matter of use of language. We tend to think in terms of the subjects we did at law school and we know what we studied in torts and we know what we studied in other subjects. We did not study damages for criminal conversation in torts and we did not study infringement of copyright in torts.

GLEESON CJ: It may be important. It has been pointed out that many people live together in domestic relationships who are not married. In construing [section 119](#) it may also be important to bear in mind that marriage is a matter of public status, and many people who are married do not live together in domestic relationships. You do not have to be living like two birds in a nest to have the status of being married. The possibility of one party to a marriage practising deceit of a commercial kind, if you like, upon another party to a marriage is very easy to imagine.

MR BENNETT: Guarantee cases are the most obvious, I suppose, but one could think of many others.

KIRBY J: But of course we have to formulate a principle for Australia as it is and that includes people who are living together but are not married and people who are married but are not living together. But

we cannot leave out the first category in formulating a principle of the law of tort for contemporary Australia, otherwise we are excluding a very large proportion of the population. The law of tort as we pronounce it is the law for the whole country both physically and in terms of population.

MR BENNETT: To say that this particular claim in tort, a paternity fraud case brought under the tort of deceit, is in some way back door damages for adultery is simply wrong. The damages would be quite different. It would be the duty of the court, as it no doubt was in this case, to separate them out. I do not want to get involved in the facts of this case but if one says the problem was due to the adultery and not to the misrepresentation about paternity, then no damages would flow. If the evidence was that what caused the damage was the wife having a child by someone else, then again no damages would flow. The only damages are those which flow from the representation which would not have been suffered if the representation had not been made.

KIRBY J: One does get a bit of an impression though in some of the evidence that the appellant's reaction has been at first and in part a reaction to the break down of his marriage, though the knowledge of the relationship came later.

MR BENNETT: That no doubt, your Honour, was an important point in relation to damages for the respondent to make at the trial. As I said, we do not want to get involved in the rights and wrongs of the trial or of these parties, but that is clearly something which the courts have to separate out and there are many cases where the courts have to separate things out, right down from the common law action where a plaintiff is involved in successive motor accidents and the court has to work out how much of the disability is due to the first and how much due to the second. The courts just have to do this.

Your Honours, we have pointed out in paragraph 53 of our submissions that the fact that it may be difficult or "artificial" when "considered against the framework of the daily events and conversations of a personal relationship", as is said in the respondent's submissions. That is just a matter of pleadings and proof in the particular case and the courts have to deal with it as they do with other difficult matters. The fact is that whatever forensic arguments one can bring to bear to say that this may be similar in some ways to a case - - -

GUMMOW J: What does all this have to do with your intervention, Mr Solicitor? It is all very interesting, but what does it have to do with the Attorney-General for the Commonwealth?

MR BENNETT: Well, your Honour, we are only concerned to make the proposition that the tort ought not to be limited or qualified either by reference to these sections or generally. We submit that the tort is available in this type of situation. We do not go further and express any views about the facts of this case, of course, but the - - -

KIRBY J: If one looks at those two sections and then you look at the categories of torts that have been excluded, you ask yourself why those, and that cuts both ways. On the one hand, they appear to be matters which are intruding in an inappropriate way, intruding in the law – or contemplating the intrusion of the law in an inappropriate way into intensely personal relations where there are other people than the parties involved, their children and so on. On the other hand, you could say, as Parliament has taken the trouble to specify the three, one should draw the inference that because they did not use some generic additional word like "and other like wrongs", that the Parliament has just left the other torts to apply as they will and maybe in the future they will be restricted even more or maybe they will not. You just have to apply the law of deceit released from the old principle of interspousal immunity.

MR BENNETT: Your Honour, there is simply no principle of statutory construction which allows one to say that where one has a section saying husband and wife may sue each other in tort and another section abolishing particular causes of action to say in certain cases a particular type of tort can be very similar to those causes of action, so Parliament must have intended to cover that as well although it did not say so. That, your Honour, is just not the way we construe statutes. There is no ambiguity here. "Tort" means tort.

KIRBY J: You do not construe the statute that way but when you are asked, in effect, to create a new tort for this particular case, where it never applied before until quite recently, then you have to ask yourself, in the legislative context, given that the common law develops in the orbit of statute now, whether one takes into account the three that Parliament has dealt with and then you say, amongst the many, many other factors in considering the matter, that the fact that they have been excluded, partly for reasons of delicacy and modernity and the effect on others, is that relevant at all to whether or the Court re-expresses deceit in an entirely new context.

MR BENNETT: Your Honour, if this were an attempt to create an entirely new tort, as was done in *Frame's Case*, for example, where a number of new torts were suggested, what your Honour says would be totally accurate. There would be reasons why the Court would not embark upon the exceptional task of creating a new tort, but no one is creating a new tort here. The elements of deceit are well known: the representation of fact which is untrue to the knowledge of the person making it, intending to induce and actually inducing a person to act to his or her detriment. We all know the elements. They are straightforward.

GUMMOW J: I bet you in 1975 no one who was drafting [this Act](#) or was involved in it thought that it would give rise to this sort of action if you passed 119. They had cases like *Broom v Morgan* in mind, did they not, a motor accident problem and that sort of situation?

MR BENNETT: It has never been the law, your Honour, that when Parliament makes a general enactment that one says, "Well, it is unlikely they would have intended this particular consequence, therefore, we will read an exception into it".

GUMMOW J: Is there any anterior material about 119?

MR BENNETT: No, your Honour.

GUMMOW J: Exactly.

MR BENNETT: Not that we have found that is of any help at all.

HAYNE J: It was not in the old *Matrimonial Causes Act*?

GUMMOW J: Certainly not.

GLEESON CJ: I thought we were told this morning – and I may have misunderstood what you said – that there was State legislation to similar effect earlier.

MR BENNETT: I think there was some, your Honour, in - - -

KIRBY J: Yes. Mr Hamer introduced it in Victoria. It is in the written submissions.

MR BENNETT: Yes, there was. Some of that - - -

KIRBY J: That is repealed by [section 5\(1\)](#), I think, of the *Family Law Act*.

MR BENNETT: Some of that was even more general. Some have said in tort, contract or otherwise. One does have to wonder why the draftsman limited it to tort and contract, did not include quasi-contract or admiralty or partnership or any equity or any other areas. Some of those, of course, might not have been the subject of the immunity and it may be that it was assumed the immunity only applied to contract in tort, but it must have applied to quasi-contract and to the indebitatus counts, and one wonders why that was not included, but we are not concerned with that in this case. Here we have a simple red-blooded tort which we are all familiar with. Of course, the other aspect of reading the sections together is that everything in [section 120](#) was a tort against third parties, not against the other party to the marriage.

GLEESON CJ: A lot of married people include people who are separated. They may or may not be on their way to a divorce, but divorce has not yet become compulsory, but they are very much at arm's length in their dealings with one another.

MR BENNETT: Precisely, your Honour. This is a general provision saying they may sue each other in contract in tort. Incidentally, in relation to the argument that was put at the end of my learned friend's submissions about the scheme of the legislation dealing with this problem, there is a case called *Barkley v Barkley* (1976) 25 FLR 405. I have copies for your Honours. This was a case involving an assault by the husband against the wife which had caused her physical damage which interfered with her ability to earn income. The question was how this could be taken into account in the making of property orders, adjusting property rights between husband and wife. Justice Carmichael said there is a cause of action for which she can sue at common law. That clearly has to be taken into account. He, in effect, added to what she got an amount representing what he thought were appropriate damages and then said, "To prevent double dipping, I pronounce an injunction preventing the wife suing on her common law cause of action because I have dealt with it and given her the amount". That was done under the general provisions of the *Family Law Act*.

It is an illustration of the fact that the existence of this type of cause of action can be taken into account in the adjustment of the property rights, so there is no necessary inconsistency between a party having a claim for tort against the other, and even completing it, and there is a - - -

KIRBY J: But as you are here for the Commonwealth and as the Commonwealth of Australia is a party to the Convention on the Rights of the Child, the most universal convention in international law, as Article 3.1 says:

In all actions concerning children . . . [in] courts of law . . . the best interests of the child shall be a primary consideration.

Do you have anything to say on behalf of the Commonwealth of Australia on that?

MR BENNETT: Two things, your Honour, first that this is not an action of the type being referred to there.

KIRBY J: Well, it is very general; it is concerning a child.

MR BENNETT: “Concern”, your Honour, means having a result which has a direct effect on them, for example, custody, maintenance, matters of that sort. It does not mean matters between - - -

KIRBY J: Well, we are talking about depletion of the family income that is needed for the welfare of the child, or children in this case, so why is not Article 3.1 – I mean, apparently we were in breach of that Convention in the case of *B v The Minister*, or at least it looked distinctly arguable. I would not want to be a party to too many cases where we are in breach of a Convention which we have ratified.

MR BENNETT: Your Honour, there is no way this would be a breach of a provision like that. If one had a case between two schools where the final of a football game occurs pursuant to some contract between them, one would not apply that sort of section to it. That section is concerned with cases where the child is directly affected, not cases where the result might be the depletion of the assets of one party. Your Honour, if that was so, whenever a bank or creditor sued a married person, it might be a defence to say, “Oh, no, you’ve got to look at the interests of my children who would be affected if judgment was given for you”. It would not even be a relevant consideration.

KIRBY J: It is “all actions concerning children”. What could be more concerning of children than actions concerning their paternity and the consequences of the determination thereof?

MR BENNETT: Because, your Honour, that involves a pun on the word “concerning”. It is using the word “concerning” in a totally different sense, “concerning” in the sense of relating to or about so far as subject matter is concerned and “concerning” so far as the result of the case is something which directly affects them obviously otherwise than by merely depleting family assets.

KIRBY J: I raised that with you without notice but I do not think your submission is consistent with the Vienna Convention on the Interpretation of Treaties. They have used in that treaty a word of the greatest connection, namely “concerning”, and I do not think that would be read down. It would be read up in the context of the Convention on the Rights of the Child.

MR BENNETT: Your Honour, I am not aware of that Convention being regarded as having any effect on the former rules in relation to the exclusion of evidence which would illegitimate a child. It is simply not concerned with that sort of situation. In any event of course, the treaty is not directly the law of - - -

KIRBY J: Why ratify such treaties if you are not going to pay any regard to them?

MR BENNETT: Your Honour, I am not suggesting for a moment that we do not pay any regard to them. What I am suggesting is that as a matter of law in determining a case such as this case, first of all, the terms of that treaty simply do not apply and, secondly, even if they did, they are not capable of affecting the result. They are directed to the legislature and perhaps the Executive but not to the courts.

KIRBY J: If they do apply – and I understand your submission that they do not – in considering the expression of a new tort or the re-expression of an old tort for an entirely new situation, the authority of this Court permits the international law to be taken into account in doing that.

MR BENNETT: Your Honour, we simply do not accept that there is anything new about what is being sought to be done here. This is a tort which has always been available. It was limited as between husband and wife but, as has been pointed out many times in this case, the facts of this case could arise in most respects other than between a husband and wife where a false statement about paternity is made by a woman to a man whether or not they are married and whether or not either party is married. It is not a question of extending something to a totally novel situation. It is simply taking existing principles and

applying them to facts, maybe facts to which they have not been applied before, but that is all.

Frame's Case is a very useful example of that because in *Frame's Case* all the court were at pains to say that what they were asked to do was either invent a new tort or to extend existing torts to situations to which they would not have otherwise applied. The dissent of Madam Justice Wilson was based on fiduciary duty. The Canadians have gone a long way in their development of the doctrine of fiduciary duty, a lot further than we have.

KIRBY J: They have tried to actually bring it into the 21st century, something that is resisted in some quarters here, but that is for another day.

MR BENNETT: That is for another day, your Honour.

GLEESON CJ: Now, we need to leave Mr Lucarelli adequate time for a reply.

MR BENNETT: Yes, I will not be much longer, your Honour. I will be as quick as I can. We do stress the distinction between on the one hand simply inventing an exclusion and saying, "We will say that this tort of negligent injury shall not apply to this new invention of aeroplanes", which might be an example of – it would not be an example of refusal to extend the tort; it would be an example of creating an exception. That is what we say is being done here.

The doctrine of public policy, as something which prevents what would otherwise be available causes of action, is very limited indeed. It has been applied to situations such as contracts for sexual relationships and contracts in restraint of trade and there are some areas which are fairly established areas where it has been applied. But it is not a general doctrine in which the courts are at large to say, "We will carve out new exceptions on the grounds of public policy".

I simply refer your Honours to a chapter in Sir Robert Megarry's book *Miscellany-at-Law*, volume 1, commencing at page 270. The chapter is called "A horse high and unruly" and it contains numerous quotations of judges saying, in effect, that public policy is a very dangerous doctrine when used to interfere with what would otherwise be legal principles. Justice Burrow in 1824 said - - -

GUMMOW J: We know he leads an unruly horse, Mr Solicitor, and it is 8 to 4.

MR BENNETT: Well, that is what is being done here. It is hard to imagine cases where the tort of deceit would be excluded by public policy. One can with considerable imagination construct some peculiar ones. It may be that an action against a politician for fraud based on electoral promise might fall into that category, but that would probably be caught by the implied freedom of political communication. It is almost impossible. There are examples one can think of but they are very artificial and unlikely examples and, in my respectful submission, this is certainly not one of them.

In relation to paternity fraud, may I just say this. It is not analogous to what concerned the minority in *Cattanach v Melchoir*. It is not analogous to a situation where a father is saying, "I would have been better off if I hadn't had this child, or if this child had never been born". It is not analogous to that. All the father is saying here is, "I was lied to about the nature of my relationship with this child and that has caused me damage". That does not have anything like the sort of potential that the minority were concerned about in *Cattanach v Melchoir*. We would submit there is simply no public policy reason why this type of fraud should be treated any different to any of the other myriad non-commercial frauds.

We have given examples from the United States jurisprudence: people who lie about having diseases

and thereby induce sexual intercourse or marriage, people who lie about their assets with a view to inducing marriage. There are a great many situations where fraud may occur in a context where a person suffers damage and ought to be entitled to recover. We would submit that paternity fraud is no different to anything else. It is not, as was suggested by your Honour Justice Kirby in one question, gender specific. There is of course an element of gender specificity because one always knows who the mother is and does not always know who the father is for obvious reasons - - -

GLEESON CJ: I think because we need to finish at 4.00 and because we need to give Mr Lucarelli an opportunity - - -

MR BENNETT: Yes, your Honour. I will be two minutes, your Honour, if I may. The case of *Barbara v John*, which we have referred to in our submissions, in California where there was a representation of sterility by a male – as a result a woman had unprotected intercourse with him and had a child and suffered consequences and she recovered damages for fraud. That is another example of the fact that the action of fraud may well be available in areas that people have not thought of in the past, but that does not mean that it is something new. It is a straight application of the common law principles and we submit that there is no reason for them not to be applied.

GLEESON CJ: Thank you, Mr Solicitor.

MR BENNETT: Those are my submissions.

GLEESON CJ: Yes, Mr Lucarelli.

MR LUCARELLI: If the Court pleases, there was some debate about the question of causation and there was some suggestion that the form really had, in a sense, no impact upon the psychiatric condition because it was the finding out of the untruth that caused the aggravation and there was some suggestion that perhaps then the position is that the condition may have occurred in any event regardless of when the truth was found out.

The submission as to that is that of course it is a matter of mere speculation as to what may have happened if the revelation had been made immediately at the time that the forms were completed and handed to the appellant and, in a sense, one cannot look at what might have happened if the truth had been divulged earlier; one needs to look at precisely what the facts are and what has occurred here in terms of the aggravation. There is also in that connection no basis at all to attack the causation upon the issue of the financial loss that has been sustained and which has been the subject of recovery before the trial judge.

As to the general tort of deceit, there was a suggestion that there needs to be a financial advantage to be derived by the representor. It is our submission that the authorities are clear that the intention of the representor in terms of what financial or other advantage might be gained by making the representation is completely irrelevant. It does not matter whether the representation is made with a view to gaining a commercial advantage or any advantage of a financial nature or not. What is relevant is that the representation is made with the intention that it be relied upon.

Similarly attached to that was the implied suggestion in the submissions that an inducement is not sufficient but, in our submission, the authorities are very clear, including *Edgington v Fitzmaurice*, particularly at page 485, where the Court there had to look at the situation of where the representee had made a mistake in his own mind as to whether the security that was being given, the notes that were being given in that case, actually created security or not.

The Court was prepared to find that, despite that mistake, there was still an inducement based on the type of need for the money, as to how the money was actually going to be used that was raised. So, even though there was a mistaken belief about the impact of the notes, in effect other inducements were also looked at and an inducement was sufficient.

As to reliance itself, there was really very little about reliance at the trial. The cross-examination reveals – and we have made this point and I really will not labour it a great deal, but there was very little issue at the trial, very little in the pleadings, very little at trial, even when the form was adduced as evidence and the representation was confined to the representation in the form, there was no attempt to seek to establish some bases for attacking reliance. There was very little in the pleading. There was a lot of “not admits” about reliance. Even the way in which the cross-examination proceeded demonstrated that reliance was almost conceded as far as at least the children were concerned until 1995 because the Court may recall there was a questioning about – Heath was the child where there had been some revelation about the fact that it may not be the appellant’s child in 1995.

The other point that we seek to make is about some debate about the representation in the form once again. Our submission is that it may well seem strange in this case that the representation in the form played such a pivotal role, not only in the way the case was put, but also in the actual facts of the case itself, but there is something at page 112 of the appeal book that is pertinent to that. It is some evidence of the respondent. It is at lines 12 to 15:

And you told him it was his child?---No, I don’t believe I ever made such a statement.

You gave him to understand that he was the father, didn’t you?---Yes, by filling out the form, I believe I did.

It may seem odd that there had not been that statement but it is the respondent’s evidence that she had not said to the appellant, “It is your child”, or, “They are your children” in each instance. So that if the representation in the form is looked at in that sense, one can understand perhaps a male in a different position saying, “Well, thank goodness that I have been told in this form that has been handed to me that I am the father because up until now I have not been told anything of the kind”. Perhaps relations are frosty in a particular relationship at a particular time and to get a statement like that in clear black and white which you are asked to sign and to adopt might be the changing event. Here it is significant that on her own evidence the respondent had not said anything of the kind other than in the form.

So that in the sense of a one-off encounter case, one again can imagine that receiving a notification of this kind, again in black and white, to say you are the father might be very significant, but even in a marriage where the relationship perhaps, as I have just said a moment ago, might be on frosty grounds at a particular point in time, receiving a document of that kind may be quite significant. Now, the appellant was not challenged about any of this in cross-examination and, as I said earlier, indeed, the cross-examination proceeded on the basis that what was really relevant was a change of position post-1995.

Finally, there was some questioning about the relevance of the intention of the representor in reliance in some fraud situations. In that regard, we just simply emphasise again appeal book 112 and the lines particularly that I read a moment, 16 and 17:

You gave him to understand that he was the father, didn’t you?---Yes, by filling out the form, I believe I did.

In our submission, in the respondent’s own words, the significance of the form was even in her own

mind a very significant inducement and not only that, a significant event for the purposes of reliance. There are a couple of matters that we were asked before lunch. If I might very briefly address those, and I realise that we are 3 minutes past. The first is as to *Thompson*. I was asked during the course of debate this morning as to whether *Thompson's Case* had gone on appeal. The only thing we can do in the short time available is to say that in the case of *Raju v Kumar*, which is in the materials identified, the judge in that case referred to *Thompson's Case*, that is Justice Edwards referred - - -

GUMMOW J: That was decided just last week, or a few weeks ago.

MR LUCARELLI: Yes, it was, about two weeks ago, your Honour. In that case, Justice Edwards refers to the *Thompson Case* that we have advanced to the Court, and in the time available we have not found any other – one would have thought that his Honour might have been in a better position perhaps to identify it. Finally, in response to a question from his Honour Justice Kirby, we have looked at the question of the definition of “paying parent” in the *Child Support (Assessment) Act* and may we direct the Court’s attention to [section 5](#), which defines “parent”, and also direct the Court’s attention to section 29 and, in particular, section 29(2). There appears to be a series of events there which appear to be pertinent to that issue. Other than those matters, they are our submissions, if the Court pleases.

GLEESON CJ: Thank you, Mr Lucarelli. We will reserve our decision in this matter and we will adjourn until 10.15 on Tuesday, 11 April 2006.

AT 4.04 PM THE MATTER WAS ADJOURNED

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