[Courts in Britain and Australia have recently decided claims by men seeking damages in deceit against mothers who wrongly identified the men as the genetic father of their child. Despite the Australian High Court’s rejection of the tort of deceit as an avenue for these men to claim damages against the mother, these types of claims are echoed in Australian Child Support legislation, and sparked an amendment to the Family Law Act.1 While it looks like tort-based “paternity deceit” claims have been effectively banished in Australia, their statutory cousins remain a part of Australian law, and share much of the same underlying assumptions and anxieties about what fatherhood means. In the UK, tort-based paternity deceit claims still appear to be viable, though damages may be limited.2 It is important, then, to articulate how the courts have responded to those assumptions and anxieties in a tort context and to analyse what

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2 While a recent UK paternity deceit claim was unsuccessful, this appeared to be largely on the basis that the husband had initial raised paternity deceit as part of a claim for ancillary relief within the family law proceedings as part of the divorce, but had abandoned that claim, and reached a compromise with his former wife. Webb v Chapman [2009] EWCA Civ 55, at [2] per Thorpe LJ (Aikens LJ and Bennett J agreeing).
notions of fatherhood (and disclosure obligations of mothers) the broader concept of “paternity deceit” is based upon. Ultimately, the article suggests that the harms that cuckold claims attempt to address are less about a violation of autonomy than about breached expectations about a relationship and the sexual and parenting conduct to occur within it.]

I INTRODUCTION

Cuckoos exploit other bird species by laying their eggs in the nests of other birds. Soon after hatching, the cuckoo chick kills host young by tipping them out of the nest. The foster parents then work hard to rear the imposter in their nest, for which they gain no genetic reward.3

…cuckold. That word emerged in the mid thirteenth century as a derisive name for a husband whose wife had cheated on him.4

In recent years a new species of litigation has arisen which I have dubbed ‘cuckold claims’. Like the eponymous cuckold who unwittingly raises a cuckoo chick, the men making these legal claims feel cheated out of a genetic connection which was the assumption on which their contributions as a parent had been based. Where DNA testing has shown that they are not the genetic fathers of their partner’s children, a handful of men have turned to the tort of deceit to claim against the mother for losses which they claim were caused by her incorrect representation about paternity.

3 University of Cambridge, ‘Getting their own back on cuckoos: Australian fairy-wrens have the last laugh’ (Press Release, 13 March 2003). The very application of such metaphors from bird life to human social relationships is problematic, and is a theme the author is exploring in as this research continues.

4 Mark Morton, The Lover's Tongue: A Merry Romp Through the Language of Love and Sex (2003), 222.
In each of the four of the cuckold cases discussed here – two each from the UK and Australia – the tort of deceit has been successfully applied at first instance to secure damages against a mother who mistakenly but genuinely believed that their child was the genetic child of their partner. In light of the Australian High Court’s finding in the *Magill* appeal that the tort of deceit is not available with regard to representations of paternity within a marriage-like relationship, these trial judgments may be less doctrinally significant, within Australia however these initial successes nonetheless suggest that claimants have tapped into broader anxieties around fatherhood and the relevance of genetic connection and consent to men’s obligations as fathers. The idea that men should be able to get a “refund” on their financial contributions to a child if their paternity is disproved is also one echoed in statutory provisions, and is a focal point for lobbying by fathers’ rights groups.

Despite its rejection by the High Court, the Magill case prompted the Australian Government to amend the Family Law Act to allow for men to retrospectively reclaim child maintenance or property transferred under a Family Law order if they discover

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5 *A v B (Damages: Paternity)* [2007] 2 FLR 1051; *P v B* [2001] Fam Law 422.


7 Although each court that made a finding on this issue was sceptical about whether this was in fact a genuine mistake by the mother,* Macdonald v Gray* (2005) 41 SR (WA) 22, [74]; *Magill v Magill* (Unreported, Victorian County Court, Hanlon J, 22 November 2002), 2; *A v B (Damages: Paternity)* [2007] 2 FLR 1051, [33]: No finding was made on the facts in *P v B* [2001] Fam Law 422.

8 *Child Support (Assessment) Act 1989* (Cth), s143; *Family Law Act 1975* (Cth), s66x.

they are not the genetic father of a child,¹⁰ and to consider legislation to make it easier for men to obtain DNA testing of children.¹¹

Rather than taking a strictly doctrinal approach, this article uses the discussion by the judges to reflect on broader anxieties regarding fatherhood. In particular, it interrogates the reasoning of the High Court majority in Magill that intimate relationships – and discussions about paternity within those relationships – are protected by a ‘mantle of privacy’ which prevents the tort of deceit from applying. Does such an argument presume that intimate relationships form a ‘private sphere’ immune from legal scrutiny? And how does a ‘private sphere’ argument fit with recognition of other torts within intimate relationships – for example – negligent transmission of a sexually transmitted disease?

Or is the ‘mantle of privacy’ proposed by the court in Magill dependent on the nature of the harm inflicted within the intimate relationship? To tease out this question further, the article focuses on one of the main harms asserted by cuckolded men in these cases – the loss of choice about whether or not to parent a non-genetic child – and compares this with ‘unsolicited parenthood’¹² in a very different context – medical negligence causing conception of a child (eg a negligent vasectomy). By zooming in


¹¹ Patricia Karvelas, ‘Push for fathers’ right to DNA test ’, The Australian 16 November 2006, 3. Since then, the Model Criminal Law Officers Committee has recommended, to the chagrin of Fathers Rights groups, that it be a criminal offence to test or take a DNA sample with the intention of testing it without the consent of the child’s parent / parents. Model Criminal Law Officers’ Committee of the Standing Committee of Attorneys-General, Discussion Paper, Non-consensual Genetic Testing (2008). See, for example, Men’s Confraternity (2003) Submission to Australian Law Reform Commission Inquiry “Essentially Yours”- on Protection of Human Genetic Information.

on how parenting a non-genetic child is construed as a harm, this article seeks to query how these new uses of the tort of deceit might allocate responsibility for conception, birth and child-rearing in gendered ways.

II INTRODUCING THE CASES AND THE CATEGORY QUESTION

Deceit is a civil action (also referred to as fraud or misrepresentation) which emerged in the context of commercial transactions. While each of the cases discussed used deceit only as a tort action, deceit sits on the doctrinal knife’s edge between contract and tort – the same core elements delivering the twin remedies of tort damages and contractual rescission if the misrepresentation induced entry to a contract. Despite these cases making novel use of a primarily commercial law doctrine within the family context, all four cases raising this doctrine were initially successful at the trial level (although the *Magill* judgment was overturned on appeal). These initial successes suggest that these men’s claims resonate with the broader cultural notions of fatherhood and responsibility that underlie our legal system. This article seeks to tease out some of the assumptions about fatherhood which such claims rest upon.

The first in this line of cuckold claims is the UK case of *P v B*, in which a Mr P sought to recover £90,000.00 in payments and additional damages for ‘indignity, mental suffering/distress, humiliation’ from his former de facto partner on the basis that she

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14 I make this observation keeping in mind Conaghan’s argument that tort law “while quick to defend and protect interests traditionally valued by men (such as a good reputation), is slow to respond to the concerns which typically involve women, for example sexual harrassment or sexual abuse”. Joanne Conaghan, ‘Tort Law and the Feminist Critique of Reason’ in Anne Bottomley (ed), *Feminist Perspectives on the Foundational Subjects of Law* (1996) 47 , 48. *Magill v Magill* [2005] VSCA 51

had falsely represented that her son was the claimant's genetic child. The question of whether the tort of deceit applied as between a cohabiting couple was tried as a preliminary issue, so that no conclusion was made on whether the elements of deceit were in fact met in this particular case.\textsuperscript{16} Ms B framed her defence on the basis that deceit should not apply in 'the context of domestic arrangements with no intention to create legal relations'.\textsuperscript{17} Stanley Burton J dismissed this argument on the basis that intention to create legal relations is a limiting mechanism for voluntarily-accepted contractual obligations, not for universal tort obligations.\textsuperscript{18} Despite some obiter hesitations about how damages might be calculated, Stanley Burton J made a preliminary finding that the tort of deceit applied as between a cohabiting couple suggesting that 'the law should encourage honesty between cohabiting couples, rather than condone dishonesty'.\textsuperscript{19}

A year later, in the Victorian County Court in Australia, Liam Magill brought a similarly structured action against his former wife, after discovering several years after their break up that two of their three children (then aged nine, ten and 11) were not genetically related to him. The trial judgment contains no reference to the \textit{P v B} case,\textsuperscript{20} and Hanlon J did not discuss the issue of whether or not the tort of deceit should apply to representations about paternity, but went directly to applying the elements. Finding the notification of birth forms to be false representations by the mother regarding the paternity of the children, Hanlon J held that the elements of deceit had been met, and

\begin{itemize}
\item \textsuperscript{16} It appears that after the preliminary finding, there was no further litigation on the substantive issues.
\item \textsuperscript{17} \textit{P v B} [2001] Fam Law 422, at (14).
\item \textsuperscript{18} \textit{P v B} [2001] Fam Law 422, at (14).
\item \textsuperscript{19} \textit{P v B} [2001] Fam Law 422, at (26).
\item \textsuperscript{20} [2001] Fam Law 422.
\end{itemize}
awarded Mr Magill $70,000, half of that for Mr Magill’s economic losses relating to ‘expenses involved in supporting the two children who are not his’.\textsuperscript{21}

When Mrs Magill appealed to the Victorian Court of Appeal, this judgment was overturned on the basis that the trial judge had erred in finding that all the elements of deceit had been established. This time, Eames J (with Ormiston J agreeing) considered the category question of whether the tort of deceit should apply to paternity representations – and referred to \textit{P v B}.\textsuperscript{22} Eames J seems to have treated this category question as an issue of ‘hard law’ versus social policy, concluding that, ‘it is not the function of this Court to apply social considerations so as to deny a party a remedy which is otherwise open to him or her’.\textsuperscript{23} Because the tort of deceit could apply to representations about sexually transmitted diseases, Eames J could ‘see no impediment’ to its application to paternity representations.\textsuperscript{24}

Also in Australia in 2005, but on the other side of the country in the Western Australian District Court, was the case of \textit{Macdonald v Gray}.\textsuperscript{25} Wisbey DCJ did not address whether deceit could apply to paternity representations, but cited the \textit{Magill} County Court decision and, set about applying the elements. Here, the relationship between the parties had been much more fleeting and casual than that in \textit{P v B} or \textit{Magill} – they had met only a few months before Gray conceived, and had only commenced a sexual

\textsuperscript{21} \textit{Magill v Magill} (Unreported, Victorian County Court, Hanlon J, 22 November 2002) at 4. Hanlon J notes that this amount has been discounted to reflect the fact that for the last five years that Mr Magill contributed towards the expenses of caring for the children (ie from 1995 to 2001) he was aware that Mrs Magill had doubts about their middle child’s genetic parentage.

\textsuperscript{22} \textit{Magill v Magill} [2005] VSCA 51, at [46] per Eames J.

\textsuperscript{23} \textit{Magill v Magill} [2005] VSCA 51 at [47] per Eames J.

\textsuperscript{24} \textit{Magill v Magill} [2005] VSCA 51 at [50].

\textsuperscript{25} 2005] WADC 251 (19 December 2005).
relationship in the month she fell pregnant. Although they were having unprotected sex, it was apparent at trial that they had very different expectations of the relationship – Macdonald felt it was just a casual thing, and alleged he had told Gray that he was involved with someone else. Gray, however, had thought they had a future together, and alleged that they had discussed having a child.

Wisbey DCJ accepted Ms Gray’s evidence that around the relevant time of conception, she had ‘non-consensual sex’ with an acquaintance, and that, eight or nine days later, she had taken a pregnancy test which gave a negative result. As she had subsequently had sex with Macdonald, Wisbey DCJ held that her belief that Macdonald was the genetic father was honestly held – so that she did not have the requisite state of mind for deceit. Wisbey DCJ was not, however, prepared to leave things there, and went on to consider whether Gray had the requisite state of mind for negligent misstatement. Wisbey DCJ held that Gray had a duty of care ‘not to advise the plaintiff that he was responsible for her pregnancy if the position could be otherwise’ and that her belief that the plaintiff was the genetic father was unreasonable:

> Although, as I have found, the defendant genuinely believed that the plaintiff was responsible for her pregnancy, a reasonable person in her position ought to have concluded that the position might be otherwise. She had a duty to advise the plaintiff of the Quinn encounter, and of the possibility that he might not be the father of her unborn child. In all the circumstances upon [the child]’s

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26 Macdonald v Gray (2005) 41 SR (WA) 22, at [73] per Wisbey DCJ. Whether this is an appropriate application of negligent misstatement is a question deserving further analysis, as Wisbey DCJ did not appear to have addressed the test for known reliance or the assumption of responsibility in order to establish a duty of care to found liability in negligent misstatement as required in Tepko Pty Ltd v Water Board [2001] HCA 19, at [47] per Gleeson CJ, and Gummow and Hayne JJ and at [74] per Gaudron J.
birth she should have undertaken appropriate verification of paternity. In failing
to do so she was negligent.27

Because Macdonald had raised doubts about paternity from before the child was born,
Wisbey DCJ held that the only losses arising from Gray’s ‘negligent misstatement’ were
Macdonald’s travel costs in visiting the newborn child in hospital, and his legal costs
incurred during Family Court proceedings to challenge his paternity.28

By 2006, Mr Magill’s appeal had progressed to the High Court, which held unanimously
that he had not made out the relevant elements of deceit.29 On the category question
of whether the tort of deceit could apply to representations about paternity, Gummow,
Kirby and Crennan JJ (in a joint judgment) and Hayne J found that deceit was not
applicable.30 Heydon J was unconvinced by this reasoning, and, though he felt that the
elements would usually be difficult to establish, held there was no bar to applying
deceit to paternity representations. Gleeson CJ was less clear, holding both that there
were no ‘rigidly-defined zones of exclusion’ but also that attaching liability to paternity
representations might be ‘inconsistent with the ethical context’.31

Last in this grouping of ‘cuckold cases’ is the 2007 UK case of A v B (Damages: 
Paternity).32 In this case it was the mother who had raised the question of paternity

27 Macdonald v Gray (2005) 41 SR (WA) 22, at [74]-[75] per Wisbey DCJ.

28 Macdonald v Gray (2005) 41 SR (WA) 22, at [79]-[80]. This has the curious result of one court in effect determining
cost orders for proceedings in another court.


30 Magill v Magill (2006) 226 CLR 551, at [88] per Gummow, Kirby and Crennan JJ and at [140] per Hayne J. There was
a further issue about whether sections 120 and 119 of the Family Law Act 1975 (Cth) formed a statutory bar to the
action; however this argument was rejected unanimously and is not discussed here.


32 [2007] 2 FLR 1051 - High Court of Justice Queen's Bench Division.
upon break-up of the de facto relationship, and who had succeeded in using Mr A’s lack of a genetic connection to prevent him from obtaining Family Court orders for contact with the child (aged five at the time the relationship broke up). Mr A then claimed against Ms B in deceit, and was awarded £22,400 in damages. In his judgment, Sir John Blofeld relied on *P v B* and *Magill* to dismiss Ms B’s argument that this was a ‘novel claim unknown to English law’.

Of this line of judgments, the High Court of Australia majority judgment is the only one to reject the proposition that the tort of deceit applies to representations regarding paternity, though it is also the only one of two appellate decisions and arguably the only one to be thoroughly argued. All of the judgments discussed, including the two

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33 The way in which these damages were calculated was curious. Because Sir John Blofeld felt bound by Lord Millet’s comments in *McFarlane v Tayside Health Board* [2000] 2 AC 59 that the advantages and disadvantages of parenthood were “inseparable”, he declined to award any damages in regard to expenditure which A had made directly towards the child – such as nappies and nursery school fees. He was prepared, however, to count A’s expenditure on restaurant meals and expensive holidays for himself, Ms B, and the child as damages, as long as these amounts were discounted by half to allow for Mr A’s enjoyment of them at the time (amounting to £14,900). Sir Blofeld also allowed £7,500 as general damages for distress, calculated with reference to the damages originally given in the *Magill* trial judgment, and to the usual allowances for bereavement under the *Fatal Accidents Act 1976* (UK). *A v B (Damages: Paternity)* [2007] 2 FLR 1051, at [54] – [66]. I am heartened at least that Sir Blofeld treats a relationship with a non-genetically related child in a similar way as the House of Lords treated a genetically related child. Other commentators have not been as gracious – “never mind pieties about the value of a healthy baby; it is no actual real benefit to someone who is not related to it and (as was the case here by the time of trial) never even sees it”. Rebecca Fitton-Brown, *Paternity Fraud* (2008) Chambers Blog <www.newwalkchambers.co.uk/blog/labels/paternity-fraud/> at 21 January 2009.

34 *A v B (Damages: Paternity)* [2007] 2 FLR 1051, at [45] per Sir John Blofeld. Sir Blofeld cited the High Court judgment in *Magill* to support this finding, despite four out of six of the High Court justices specifically finding that the tort of deceit did not apply to paternity representations between marriage partners, with three judges indicating that this would extend to any paternity representations within a “continuing sexual relationship, which is personal, private and intimate”, and Hayne J leaving the question of non-marriage domestic relationships open. *Magill v Magill* (2006) 226 CLR 551, per Gummow, Kirby and Crennann JJ at [88] and per Hayne J at [165].

35 *Magill v Magill* (2006) 226 CLR 551, per Gummow, Kirby and Crennann JJ, and Hayne J. Gleeson CJ and Heydon J dissented on this point, at [24] and [231] respectively. It is unclear whether the High Court’s approach is likely to be
Magill appeals, accepted that a negative DNA test was, in itself, enough to establish that a claimant was ‘not the father’ of the child – irrespective of whether a parental relationship had been established with the child.36

As Wikeley and Young point out, ‘Biology, rather than any moral obligation, was accepted, without question, to be the determinant of any claim by the children on Mr Magill’s resources’ – despite the broader recognition within the law that the legal duties of parenthood may be triggered by ‘factors other than biology’.37 Rather than engage with this broader question about how we determine legal parenthood, the judgments centre either on the micro question of whether the elements of deceit have been met, or the macro question of whether the law of deceit should apply to paternity representations. The parenthood question (or, to be more accurate, the fatherhood question) nonetheless lurks beneath the surface of these judgments, having an ambiguous effect on many of the assumptions made and paths of reasoning taken.

Mr Magill’s social parenting was treated by High Court, not as an alternative basis for his status as ‘father’ but as a cost incurred by him as a result of Ms Magill’s alleged deceit. The court instead directed its attention to the question of whether that cost was recoverable against Ms Magill using the tort of deceit. Unlike in cases where men are asserting parental rights in regard to children, in which the courts have recently tended


36 Often “father” was used interchangeably with “natural father” or “biological father”. P v B [2001] Fam Law 422, 5, following a consent order made by the local County Court under the Children Act 1989 determining that the claimant was not the father of the child. Magill v Magill (Unreported, Victorian County Court, Hanlon J, 22 November 2002), 1; Magill v Magill [2005] VSCA 51, [10], [13], [15]; A v B (Damages: Paternity) [2007] 2 FLR 1051, [8], [12], [17]; Magill v Magill (2006) 226 CLR 551, eg at [1], [2]; Macdonald v Gray (2005) 41 SR (WA) 22 eg at [1], [13], [28].

to ‘fragment’ fatherhood in order to grant more than one man a parental interest in the same child.38 in the paternity deceit claims discussed here, courts tend to use an all-or-nothing idea of fatherhood which hinges on genetic paternity.39 There seems to be some asymmetry between how “fatherhood” is defined for the purposes of men claiming contact with children via multiple alternative bases (e.g., genetic connection, social parenting, intention to parent) and how it is defined for the purposes of men denying obligations towards children (usually solely focused on DNA), which deserves further analysis.

III USING THE ‘MANTLE OF PRIVACY’ TO SHIELD PATERNITY REPRESENTATIONS FROM DECEIT ACTIONS

This article focuses on the joint judgment of Gummow, Kirby and Crennan JJ who held that the tort of deceit should not apply to representations about sexual fidelity and paternity within the context of ‘personal, private and intimate’ relationships using what I have dubbed the ‘Mantle of Privacy’ argument:40


39 Here, cuckold claimants appear to be bucking the trend observed by Sally Sheldon towards “men increasingly asserting rights, rather than seeking to evade responsibilities, with regard to their children”. Sally Sheldon, ‘Reproductive Technologies and the Legal Determination of Fatherhood’ (2005) 13 Feminist Legal Studies 349, 355.

40 Magill v Magill (2006) 226 CLR 551 at [88] per Gummow Kirby and Crennan JJ. The fourth judge, Hayne J held that the tort of deceit did not apply to representations regarding paternity within intimate relationships because there was no intention to create legal relations. See Magill v Magill (2006) 226 CLR 551, per Hayne J at [161]. Gleeson CJ seems to draw a similar conclusion at [48], though he does not rule out the possibility of the tort of deceit applying in some “exceptional” cases (at [24]).
There is currently no recognised legal or equitable obligation, or duty of care, on a spouse to disclose an extra-marital sexual relationship to the other spouse during the course of a marriage. There is a mantle of privacy over such conduct which protects it from scrutiny by the law. However, that mantle does not cover conduct between spouses involving duties recognised by the law such as the duty of disclosure in certain contractual negotiations or a duty of care. The rationale for that position is easily appreciated by comparing commercial transactions which are the province of the law, with the private aspects of a relationship such as marriage which are not the province of the law.41

At a policy level, the ‘Mantle of Privacy’ reflects the no-fault approach of the Australian family law system – the majority are reluctant to allow an alternative civil forum for unhappy ex-partners to cast blame for the failure of their relationship42 - despite this being ‘an attraction’ for some litigants.43

What are the difficulties with using ‘Mantle of Privacy’ reasoning to reject the application of the tort of deceit to paternity representations? First, it is worth examining what kind of notion of privacy the High Court judges are using. Are they reinforcing the ideology of a separate and unregulated ‘private’ sphere surrounding marriage and family relationships?

If we conceive of the mantle of privacy simply as an impermeable cloak preventing liability between spouses or intimate partners, then, as Heydon J points out, such a position can leave us with ‘innumerable anomalies’, so that the mantle begins to look


like a cloak with lots of holes. For example, the majority are at pains to clarify that the mantle doesn’t cover ‘conduct between spouses involving duties recognised by the law such as the duty of disclosure in certain contractual negotiations or a duty of care’.  

The majority explains most of these anomalies by narrowing the coverage of the mantle of privacy from everything done to one another by partners within an intimate relationship (ie focusing on the relationship status of the actors) to only those things falling within the ‘private aspects’ of the relationship (ie focusing on the subject matter of the acts). Though the majority do not elaborate, presumably ‘private aspects’ means anything to do with sex, paternity, fidelity and emotional commitments.

What then, about cases establishing civil liability for failure to tell a partner about a sexually transmitted disease or criminal liability for HIV transmission? Surely such disclosures fall squarely within the ‘private aspects’ of a relationship. The majority explain this further anomaly by reference to an established ‘duty of care on one spouse

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44 Magill v Magill (2006) 226 CLR 551 at [221] to [230]. Heydon also suggests (at [219]) that the majority’s use of privacy reasoning may be a misapplication in Australia because it relies on a constitutional protection of privacy which Australia does not share with the US.

45 e at [130] per Gummow, Kirby and Crennan JJ.

46 I thank my Newcastle colleague Neil Foster for this key point.

47 See, for example, BM v AR [2007] VCC 223 (Unreported, Strong J 22 March 2007).

48 Either under general criminal offences prohibiting causing ‘grievous bodily harm’ such as s33 and 35 of the Crimes Act 1900 (NSW) – used to prosecute HIV-transmission in Kanengele-Yondjo v R [2006] NSWCCA 354, or under provisions prohibiting intentionally transmitting a serious disease such as s19A Crimes Act 1958 (Vic) or s317(d) Criminal Code Act 1899 (Qld).
to disclose to the other any matter which will cause physical injury, such as one spouse having a sexually transmitted disease’. ⁴⁹

Yet the lack of reasoning around which particular duties will pierce the mantle of privacy means that for some, the majority’s policy reasoning for rejecting deceit claims in the paternity context is ‘unconvincing’. ⁵⁰ Handley AJA, writing extra-judicially, finds it anomalous that the majority found that ‘a mantle of privacy protected a spouse’s extra-marital sexual conduct but excepted duties of care for health and safety (at [130]) but why not the “universal” duty of honesty?’ ⁵¹ While the majority treats the duty of care not to negligently infect a partner with a sexually transmitted infection rather matter-of-factly as an exception to the mantle of privacy, I would argue that this exception tells us something significant about the notion of privacy which the majority use in the judgment. The mantle of privacy, rather than making intimate relationships, or even the ‘private aspects’ of a relationship a ‘tort-free zone’, ⁵² merely raises the fence, so that the law can still peer over and determine liability, but only when those intimate acts, lies or failures to disclose cause physical harm. Such an approach provides an answer to Handley AJA’s pertinent question – ‘if legislation for no fault divorces does not bar an


⁵² This is Gleson CJ’s term: “The appellant was attempting to press into service, in support of a private and domestic complaint, a cause of action that was unsuited for the purpose. This is not because marital relations are a tort-free zone, or because actionable deceit can never occur between cohabiting parties or in respect of questions of paternity or marital or extra-marital relations. It is because the law of tort, like the law of contract, is concerned with ‘duties and rights which can be dealt with by a court of justice’ and the appellant’s case was difficult to accommodate to that setting.” Magill v Magill (2006) 226 CLR 551 at [42].
action for battery, why should it bar an action for this form of deceit?$^{53}$ Using a harm-
dependent notion of privacy it is clear that the ‘harm’ involved in battery (or in being
negligently infected with a sexually transmitted infection) is physical and unequivocally
harmful, whereas the ‘harm’ involved in paternity deceit may depend on your moral
perspective and your beliefs about fatherhood and fidelity.

A harm-dependent approach to privacy aligns surprisingly well with the notion of
privacy put forward by Nicola Lacey, and other feminist legal theorists - valuing privacy
as an important aspect of individual autonomy$^{54}$ – but also willing to pierce the mantle
of privacy where it shields what Lacey calls ‘seriously autonomy-reducing’ practices.$^{55}$
On this analysis, the question of when the law should transgress the mantle of privacy
becomes a qualitative inquiry about the nature of the harm inflicted behind that mantle,
and whether the activities go beyond a mere exercise of individual autonomy (or mutual
autonomy), and prevent another party from exercising their own autonomy. Lacey
gives the example of rape as an autonomy-reducing practice which would sit outside
this autonomy-model of privacy – justifying legal intervention into an otherwise ‘private’
activity between individuals.

Heydon J, in dissent on this issue in *Magill*, objects to the majority’s exception for
physical harm as another reincarnation of the distinction between physical and
psychological harms:

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$^{54}$ See, for example, Iris Marion Young’s reconstruction of privacy as ‘what the individual chooses to withdraw from

$^{55}$ Nicola Lacey, ‘Theory into Practice - Pornography and the Public/Private Dichotomy’ (1993) 20 Journal of Law and
Society 93, 110. See also discussion in Susan B Boyd, ‘An Overview’ in Susan B Boyd (ed), *Challenging the
Public/private Divide: Feminism, Law, and Public Policy* (1997) 3, particularly 17, and in Reg Graycar and Jenny
While a distinction between recovering for ‘physical’ injury and non-recovery for hurt feelings caused by betrayal is intelligible, a distinction between ‘physical’ injury and mental disorder caused by deceit is much less sound.56

Yet, part of the difficulty with the ‘category’ approach – asking whether the tort of deceit should apply to representations between intimate partners - is that it ends up lumping many disparate forms of harm together – treating the harm of an ectopic pregnancy (experienced by a woman who went through a ceremony of marriage and became pregnant on reliance on a man’s representation that he was not married)57 as comparable to Mr Magill’s distress and worsening mental health upon learning that he was not the children’s genetic father. A focus on harm, rather than the categories of torts (or whether the mantle of privacy applies or not) also helps reveal and destabilize the ‘gendered content’ of tort law.58

If, as this article suggests, the notion of privacy used by the court is much more coherent if reconceptualised as an autonomy-based idea of privacy, does the harm complained of by Mr Magill amount to ‘seriously autonomy-reducing’ harm sufficient to justify piercing the mantle of privacy?59

56 Magill v Magill (2006) 226 CLR 551 per Heydon J at [220].
57 In the Canadian case of Beaulne v Ricketts (1979) 96 DLR 550. See also Graham v Saville [1945] 2 DLR 489, in which a married man who falsely represented to the plaintiff, a spinster, that he was unmarried was ordered to pay general damages for the prejudice to her chances of marriage and the pain associated with the birth of her child, as well as special damages.
59 Here I also take up Joanne Conaghan’s challenge to examine “Who are the winners and losers in the legal colonisation of harm?” Joanne Conaghan, ‘Law, Harm and Redress: A Feminist Perspective’ (2002) 22 Legal Studies 319, 323.
IV EXAMINING THE HARMS CLAIMED ARISING FROM ‘PATERNITY DECEIT’

There are three main categories of harms which the claimants in cuckold cases raise:

a) harms arising from the distress of discovering genetic non-paternity. Claimants have expressed this as a spectrum of harms from distress through to psychological injury.60

b) harms arising from the creation of a parenting relationship with a non-genetic child without fully informed consent (including the financial costs involved in such a parenting relationship); and

c) financial harms flowing purely from the assumption that there is a genetic connection – such as liability for child support or maintenance in the absence of a functional parenting relationship.

In this article, the main focus is on the second set of harms because, as I argue below, there are strong reasons why the law should not compensate for distress-related harms, and why purely financial harm arising from paternity misattribution should be

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60 For example, in *P v B* [2001] Fam Law 422, it was expressed as “indignity, mental suffering/distress, humiliation” at [2]. In *Magill v Magill* (2006) 226 CLR 551, Mr Magill sought damages (and exemplary damages) specifically for “personal injury, namely severe anxiety and depression” at [62] per Gummow, Kirby and Crennan JJ. The trial judge relied on the following statement from one of the psychiatrists who gave evidence regarding Mr Magill’s psychiatric injury: “As a result of the marriage break up I think he will always be left with some mild adjustment disorder problems and some mild anxiety and depression. I think it will always have been a blow to his ego that the marriage broke up, and particularly now in these circumstances.” *Magill v Magill* (Unreported, Victorian County Court, Hanlon J, 22 November 2002), at 3. Sir John Blofeld in *A v B (Damages: Paternity)* [2007] 2 FLR 1051 at [57] awarded £7,500 for distress on the basis that A’s distress was “not as great, or has not had such unhappy consequences as in the case of McGill (sic), nor is it as severe as a bereavement”. In *Macdonald v Gray* (2005) 41 SR (WA) 22 at [77], Wisbey DCJ held that the plaintiff “failed to establish any compensable psychiatric or psychological consequences caused by the misrepresentation as to paternity.”
treated differently to the these 'non-consensual parenting' harms which seem to form
the core complaint of men making paternity deceit claims.

A Distress-related Harms

An immediate problem with distress-related harms in the paternity context is that they
are impossible to separate from the distress involved in discovering that a female
partner has been unfaithful. Without going into the arguments here, it is clear that
neither British nor Australian law currently allows for compensation for the heartbreak
of infidelity in itself. Gleeson CJ in Magill points out that this is not merely a situation
in which harm stemming from a compensable injury has to be estimated separately to
harm from a non-compensable injury (eg when someone injured in a negligent driving
incident aggravated their injury in a second, unrelated accident). Rather, because the
infidelity and the non-paternity are two sides of the same coin, the harm really
stemmed from the infidelity, rather than the mother’s ‘failure to admit it’:

Without doubt, the appellant’s wife deceived him, but the hurtful deception was in her
infidelity, not in her failure to admit it. The devastation he mentioned resulted from his
knowledge of the truth when finally it was made known to him.

61 As also observed by Bagshaw: Roderick Bagshaw, ‘Deceit Within Couples’ (2001) 117 Law Quarterly Review 571, 573.

62 Gummow, Kirby and Crennan note at [100] that “actions for any solace in respect of sexual infidelity have been
abrogated.” Magill v Magill (2006) 226 CLR 551. See also, Family Law Act 1975 (Cth), s120. Regarding the UK, see
Law Reform (Miscellaneous Provisions) Act 1970 (UK) c 33, subtitled, An Act to abolish actions for breach of promise of
marriage and make provision with respect to the property of, and gifts between, persons who have been engaged to
marry; to abolish the right of a husband to claim damages for adultery with his wife; to abolish actions for the enticement
or harbouring of a spouse, or for the enticement, seduction or harbouring of a child; to make provision with respect to
the maintenance of survivors of void marriages; and for purposes connected with the matters aforesaid. “

63 Magill v Magill (2006) 226 CLR 551, at [7].
Therefore, from a causation point of view, the fact that the infidelity resulted in a child and a misrepresentation about the child’s genetic origin, and that there was a delay in finding out the unpleasant truth about the infidelity only compounded the distress of the infidelity. Neither the child’s genetic heritage nor the misrepresentation delaying discovery of the infidelity was an independent cause of Mr Magill’s distress.

For example, if we imagine the case of a couple who have tried for many years to conceive with no success, and in which the woman inseminates herself with anonymous donor sperm – keeping it secret from her partner so as not to confront him about his impotence. The man would still, from a genetic point of view, be ‘raising someone else’s child’ due to a misrepresentation or an omission by his partner - but the distress of that discovery, we might imagine, could be very different to that of someone in Mr Magill’s position.

Even if we allow for argument’s sake that the tort of intentional infliction of emotional distress operates in Australia, it is still highly contentious whether such a tort would extend to emotional distress stemming from infidelity or sexual betrayal. Within the US, there has been no consensus on this point, with some courts finding that such conduct ‘does not rise to the level of outrageousness required’. Also, there is wariness that if third parties are joined to the tort proceedings, they could easily become ‘alienation of...

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affections or criminal conversation under a different name’ – torts which have been abolished in most US jurisdictions as well as in Australia and the UK.\textsuperscript{66}

### B Purely Financial Harms

In carving off purely financial harms, I would argue that the financial contributions which are connected to a parenting relationship (for example, buying food for a child, paying child support for a child which you actively parent) should be treated differently to financial contributions made where there is no parenting relationship at all (for example, paying child support for a child you have never met). Much of these purely financial harms can be addressed through the statutory provisions allowing for repayment of Child Support and maintenance payments / property transfers which were made under an incorrect assumption about parentage.\textsuperscript{67}

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\textsuperscript{66} Robert G. Spector, ‘Marital Torts: The Current Legal Landscape Domestic and International Legal Frame Work of Family Law ’ (1999) 33 Family Law Quarterly 745, 750. Regarding abolition of criminal conversation, damages for adultery, or for enticement of a party to a marriage, see Family Law Act 1975 (Cth) s 120 and Law Reform (Miscellaneous Provisions) Act 1970 (UK) c 33. This may explain, perhaps, why the genetic fathers have not been joined to any of the paternity deceit proceedings discussed here, though this is a much more logical approach to the financial harm aspect.

\textsuperscript{67} See, for example, Child Support (Assessment) Act 1999 (Cth), s143 (Amounts paid where no liability to pay exists etc.); Family Law Act 1975 (Cth), s 66X (Recovery of amounts paid, and property transferred or settled, under maintenance orders). Whether strict child support liability for genetic parentage is a desirable policy is another question for discussion, but is outside the scope of this paper. See, eg Sally Sheldon, ‘Unwilling Fathers and Abortion: Terminating Men's Child Support Obligations?’ (2003) 66(2) Modern Law Review 175. But there may theoretically be instances where financial contributions beyond child support had been made purely on the basis of a presumed genetic relationship, which are not grounded in any parenting relationship. For example, if a trust fund paid out funds to a person Y on the basis that they were a beneficiary defined as “a genetic child of X”, and it was found that Y’s mother had misrepresented person Y’s paternity in order to make the trustees believe that Y was a beneficiary, such a situation may be better resolved under trust principles rather than tort law.
C  Harm arising from parenting a non-genetic child without informed consent

Once we hive off purely financial harms, and distress related harms, that leaves what I have broadly defined as ‘parenting harms’ – harms arising from parenting a non-genetic child without informed consent. In one US decision, the fact that such harms are at the heart of paternity deceit claims was enough for the court to reject the claim, stating that it did ‘not believe that having a close and loving relationship ‘imposed’ on one because of a misrepresentation of biological fatherhood is the type of ‘harm’ that the law should attempt to remedy’.68

V  Comparing ‘Paternity Deceit’ parenting harms with ‘Wrongful Birth’

Is non-consensual parenting a harm which our law recognises in any other context? Damages for the costs of raising a child born as a result of medical negligence remain contentious. By framing cuckold cases in terms of loss of choice about whether or not to parent, a number of advocates and judges have aligned paternity deceit with wrongful birth – some explicitly and others more implicitly. In P v B, Stanley Burton J drew a number of distinctions between the losses experienced as a result of misattributed paternity and those as a result of wrongful birth but concluded that he had ‘considerable sympathy’ for the analogy because ‘what may be common to this case and McFarlane v Tayside Health Board [2000] 2 AC 59 is a reluctance to regard a human relationship as loss, and a reluctance to place a financial value on such a relationship.’69

68 Day v Heller 653 NW 2d 475 (Neb, 2002), 479.

69 P v B [2001] Fam Law 422, [40].
Where Ms Magill raised similar policy arguments against treating Mr Magill’s parenting relationship with his non-genetic children as a loss, Heydon J in *Magill* dismissed those arguments on the basis that the same reasoning had been rejected by the majority in *Cattanach v Melchior* – a case establishing that damages for wrongful birth are recoverable in Australia.\(^{70}\) In the UK, on the other hand, following the *McFarlane v Tayside Health Board* decision\(^ {71}\) such costs have been excluded from damages calculations on the basis that ‘the birth of a normal healthy child cannot be regarded as a legal harm or injury for which damages may be awarded’.\(^ {72}\) In *A v B*, Sir John Blofeld applied the *McFarlane v Tayside Health Board* reasoning to find that although Mr A had established deceit, he was unable to recover special damages for amounts expended for the sole benefit of the child, such as nursery furniture and nursery school fees because at the time Mr A was deriving “great enjoyment” from his relationship with the child.\(^ {73}\)

Feminists have argued strongly for recovery of damages for wrongful birth on the basis that the work and loss of autonomy involved in raising a child born as a result of

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\(^{70}\) *Magill v Magill* (2006) 226 CLR 551, [217]; *Cattanach v Melchior* (2003) 215 CLR 1. Heydon considers the impact of *Cattanach* in *Magill v Magill* (2006) 226 CLR 551 at [216]. For simplicity, this article refers to such claims as “wrongful birth” claims, while acknowledging that the complexity around terminology in this area. See, for example, Reg Graycar, ‘Judicial activism or ‘traditional’ negligence law? Conception, pregnancy, and denial of reproductive choice’ in Ian Freckelton and Kerry Peterson (eds), *Disputes and Dilemmas in Health Law* (2006) 436, 439-440. Another apt equivalent group of negligence cases may be the IVF mistake cases (eg where the wrong sperm / embryo is implanted) See *Leeds Teaching Hospitals NHS Trust v Mr A, Mrs A* [2003] EWHC 259 (QB) , though these are beyond the scope of this current article.

\(^{71}\) *McFarlane v Tayside Health Board* [2000] 2 AC 59.

\(^{72}\) *Cattanach v Melchior* (2003) 215 CLR 1, 3.

\(^{73}\) *A v B (Damages: Paternity)* [2007] 2 FLR 1051, at [63].
professional negligence are harms borne primarily by women, and which deserve compensation, despite the benefits a child may also bring.74

Does the harm of unknowingly parenting a non-biological child fit within the same category of ‘unsolicited parenthood’ as Nicolette Priaulx characterises wrongful birth harms?75 Is the loss of choice whether or not to avoid responsibilities towards a non-genetic child comparable to the loss of choice about whether or not to conceive, bear and raise a child? Without reverting simply to the public / private distinction, I would suggest there are two key points of tension because a wrongful birth situation involves:

a) a clear right to bodily integrity on the behalf of the patient (which may be affected by the diagnosis, advice or treatment) and to informed consent to any course of treatment; and

b) existence of a professional duty owed by a medical professional towards his or her patient to exercise due care and skill in diagnosing, advising or treating the patient.

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If paternity deceit does address a similar harm to wrongful birth (ie, unsolicited parenthood), then what are the equivalent rights and duties at play? Because of the nature of the reproductive process, paternity deceit claims by definition involve men as plaintiffs and women as defendants. Paternity deceit involves no infringement of the bodily integrity of the putative father – yet by framing their loss in terms of a loss of choice about parenting, claimants inevitably invoke the idea of a violation of the reproductive autonomy. Yet this is an ‘autonomy’ concerned not with their own bodies, but with the reproductive processes occurring within his female partner’s body, and his perceived loss of control or knowledge over those processes.

Therefore, the rights and duties to be considered are inevitably gendered ones: What right does a man have to informed consent before parenting (or becoming financially responsible for) a non-genetic child and what duty does a woman have to disclose any doubts she has about the genetic paternity of a child?

76 There could conceivably be a claim by a non-biological mother against a biological mother within a same-sex relationship (eg if the child was conceived as a result of heterosex instead of sperm donation) but as this situation doesn’t appear to have arisen, and if it did it would raise its own unique issues, it won’t be considered here.

77 It is important to note that there is a big difference between acknowledging that parental obligations may be vitiated if a man did not consent to parent a non-genetic child, and the proposition that the parenting of the non-genetic child is a legal harm in itself compensable in tort. The first is an issue about whether parental obligations towards a child will continue once genetic paternity on which those parental obligations ostensibly were based is disproved – do men in this position have to elect whether to avoid all parental responsibilities and relinquish all parental rights, or has their functional parenting during the interim created a supplementary basis for imposition of parental rights and obligations?

In Australia, this would be a question dealt with by the Family Courts under the Family Law Act 1975 (Cth), whereas the second question of tortious liability comes under the general jurisdiction of the State courts. For an analysis of whether parental rights and obligations continue in cases of misattributed paternity in Canada see Nicholas Bala and Meaghan Thomas, ‘Who is a "Parent"? "Standing in the Place of a Parent" & Canada’s Child Support Guidelines s.5’ (Accepted Paper No. 07-11, Queen’s Faculty of Law, 2007).
A Unsolicited Parenting as infringement of a right to reproductive autonomy

Cuckold claimants frame paternity deceit as harm which primarily impacts on their autonomy in terms of their ability to make an informed decision about whether to accept the obligations of parenthood. For example, Mr Magill’s counsel suggested that:

[T]o ordinary members of the community … 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.\(^78\)

In Heydon J’s judgment (dissenting on the issue of whether the tort of deceit should be available for representations about paternity), it becomes clear that this idea of informed consent applies specifically to non-genetic children:

A husband who thinks he is a father does more than provide material support for the child: typically he endeavours to love it, to build an emotional bond with it, to ready it for life in the years ahead in a hostile world in the way he judges best — because it is his child. A husband may behave in the same way towards a child of his wife’s whom he does not believe he fathered, but he has a choice whether or not to do so. If a lie affects the choice a husband makes to support a child born to his wife financially and in every other way, he has lost the chance to make an informed choice about his own role in relation to the child.\(^79\)

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\(^{78}\) Transcript of Proceedings, Magill v Magill (High Court, Mr Lucarelli, 7 April 2006).

\(^{79}\) Magill v Magill (2006) 226 CLR 551 at [218] Emphasis original. Similarly, in a number of ART cases, UK courts have found that where there is no genetic link, courts will construe consent or deemed parentage provisions very narrowly — to the extent that written consent to ART treatment generally did not extend to consent for the purposes of a non-genetically related child — eg in Leeds Teaching Hospitals NHS Trust v Mr A, Mrs A [2003] EWHC 259 (QB); and in In re R (A Child) (IVF: Paternity of Child) [2003] EWCA Civ 182 particularly at [11] per Hale LJ.
Loss of autonomy is also at the heart of wrongful birth claims. Baroness Hale, writing extra-judicially in 2001 framed wrongful birth as primarily a harm to autonomy – and particularly to the mother’s autonomy:

… I would not regard the upbringing of a child as pure economic loss, but loss which is consequential upon the invasion of bodily integrity and loss of personal autonomy involved in an unwanted pregnancy. … Secondly, I would regard that loss of autonomy as consisting principally in the resulting duty to care for the child, rather than simply to pay for his keep.

The point about pregnancy and childbirth is that it brings about profound and lasting changes in a woman’s life. Those changes last much longer than the pregnancy, birth and immediate aftermath. Whatever the outcome, happy or sad, a woman never gets over it. There are, of course, many men who never get over becoming a father, but the consequences may be rather different.

But are these invasions of reproductive autonomy comparable with what is experienced by a man who discovers he is not his child’s genetic father? To treat reproductive autonomy as gender-neutral ignores the realities of gendered bodies – that, as Craig Lind puts it, men can ‘walk away’, and even if women can technically ‘walk away’ from motherhood, the physical and emotional costs are much higher. The men claiming


82 Craig Lind, ‘Evans v United Kingdom - judgments of Solomon: n1 power, gender and procreation' (2006) 18(4) Child and Family Law Quarterly 576. As Alison Diduck notes, “it is often by reducing mothers to abstract parents or by
paternity deceit have not had to experience a pregnancy or any other invasion of their bodily autonomy against their will, and while they may or may not have planned to become parents, they voluntarily begun parenting their partner’s child – though under an assumption about the child’s genetic connections which turned out to be false.\(^{83}\) To treat this as an infringement of their reproductive autonomy is to expand reproductive autonomy beyond one’s own body and into the (inevitably female) terrain of reproduction of your genes (or perhaps not your genes) occurring within someone else’s body.

Claimants in wrongful birth cases have enlisted medical assistance to effect a decision not to have a child, and have therefore become parents of a child against their will, whereas the reproductive decisions made by cuckold claimants are far less clear. Most had voluntarily accepted a role as a parent on the basis that they believed that their voluntary acts had brought the child into existence. Does the fact that someone else’s sperm got to the egg first mean that they did not choose to become a parent or that the mother has impinged on their reproductive autonomy? Again, this is not a question of their bodily integrity, but of their lack of knowledge and control regarding the reproduction of their female partner. Arguably, the fact that these men have the option of obtaining a court ordered DNA test, and challenging paternity (and therefore their parental obligations) means that their autonomy regarding parenting a non-genetic child is in their own hands.

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83 Men have also been successful in claiming damages for wrongful birth – both directly, as patients who experienced botched vasectomy operations (and whose partners became pregnant as a result) and indirectly as partners of women whose tubal ligation procedures were defective. For example, see Thake v Maurice [1984] 2 All ER 513. In these cases, medical negligence resulted in them becoming a legal parent against their express decision, though they have not experienced the same invasion of bodily autonomy as the mother.
For something to happen to your body against your express wishes is something which our law recognises as a violation of the self – a harm which attacks our basic right to our own bodies – our bodily integrity. For a child to be produced from your genetic material against your express wishes but outside your body is less clearly recognised as a harm, perhaps because, unlike a forced pregnancy, you may be unaware that it is happening – and until the arrival of DNA testing and Child Support obligations, it may have had no practical impact on you. In disputes over embryos and parentage flowing from assisted reproductive technologies (‘ART’), a number of judges have compared the non-consensual use of genetic material with forced pregnancy to argue that it should be treated similarly – however as Millbank and Lind have argued, this remains a problematic analogy which ignores the differential impact of reproductive autonomy on men and women.84 Yet our laws surrounding consent for sperm or egg donation and ART, and damages payouts for men who have experienced negligent vasectomies suggest that the law does recognise creation of a child from your genetic material outside your own body against your express wishes as a harm in some (particularly medical) circumstances.85 Cuckold claims attempt to stretch men’s reproductive autonomy even further – to a situation where it is not their bodily integrity, nor their genetic material which has been violated, but rather their expectations as to their female partner’s fidelity, and the paternity of her child as a result.


85 Though generally not in circumstances where the conception was via some sex act, even if this was without the man’s consent. For further discussion, see Sally Sheldon, ‘Sperm Bandits: Birth Control Fraud and the Battle of the Sexes ’ (2001) 21(3) Legal Studies 460.
If the key harm which cuckold claimants complain of is breached expectations regarding paternity, rather than violation of a right, then is this effectively a contract claim masquerading as a tort claim? Remembering that an action in misrepresentation or deceit gives rise to both tort damages for deceit and/or a contractual right to rescind, what cuckold claimants seek is, in effect, a rescission of their agreement to parent, and a refund of their contributions towards the parenting exercise. This suggests a notion of parenting as a contract between mother and father – in which she provides a genetically related child in return for his financial and parenting contributions. The child, therefore, is treated merely as the object of the transaction rather than as a legal person in themselves. I would suggest that this model exemplifies Martha Fineman’s theory of the ‘sexual family’ which tends to dominate western models of the legal family - a model which defines legal family by the heterosexual connections between the mother and father, rather than by the nurturing relationships by which family members care for one another.

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87 Bagshaw, in his analysis of the *P v B* case, notes that extending the tort of deceit to representations between intimate partners could “stretch the tort of deceit still further ... to cover nonfulfilment of promises made before or during relationships”. Roderick Bagshaw, ‘Deceit Within Couples’ (2001) 117 *Law Quarterly Review* 571, 572.

88 This may also fit within the phenomenon observed by Smart and Neale whereby fathers (much more than mothers) emphasise their “rights” regarding children, as though it were a “kind of proxy which stood in the place of a relationship”. In other words, because fathers did not have relationships which provided a lasting bond, they had to have rights instead “ . Smart, Carol and Bren Neale (1999) *Family Fragments* 166, cited in Julie Wallbank, ‘The role of rights and utility in instituting a child's right to know her genetic history’ (2004) 13(2) *Social & Legal Studies* 245, 249.

89 “The reflection of the sexual family that is ensconced in law may be a distortion or a mere fragment of social reality, but that legal image constitutes the legal reality and forms the basis for state regulation. Because this legally constructed image expresses a vision of the appropriately constituted family, it defines the normal and designates the deviant.” Martha Fineman, *The Neutered Mother, the Sexual Family, and other Twentieth Century Tragedies* (1995), 144.
For the children within such families, the security of their legal connection to a father is at the mercy of not just a DNA test, but, if the DNA test proves non-paternity of a social father, at the mercy of the social father’s discretion. What is apparent is that many men seem able to live with suspicions of non-genetic paternity while the relationship with the mother is subsisting and they are enjoying the benefits of family life, but that upon breakdown of the relationship with the mother genetic paternity becomes an issue. Treating fatherhood as contingent on a DNA test can leave children in a very vulnerable position – like the Magill children, their entire world can be turned upside-down with one DNA test. Where a putative father has reclaimed from the mother child support payments made in respect of the children under s 143 of the Child Support (Assessment) Act 1989 (Cth), it is not possible for any retrospective claim to be made against the genetic father – for this period the children can only look to their mother for financial support. For these children, they are the same children they have been since they were born, yet the man who acted as their father, who actively parented them and cared for them, suddenly distanced himself. Liam Magill explained in a newspaper interview in 2002 ‘I love the kids dearly. I don’t want the children to see

90 For example, in P v B [2001] Fam Law 422, the social father had had a vasectomy 12 years before the child’s birth, but did not raise any questions of paternity until after the relationship with the mother broke down.


92 According to newspaper reports, Mr Magill no longer has any contact with any of his three children, including his oldest son, who was found to be his genetic offspring. Ian Munro, ‘Man sues former wife over children’, The Age (Melbourne), 15 November 2002 2002, 1. “The three children say their father has refused to see them since the results of the paternity test became known.” Julie-Anne Davies, ‘Fathers in law’ (2007) 125(12) The Bulletin .
their father in this state. The legal, economic and emotional vulnerability which cuckold claims exacerbate for these children is akin to a new version of illegitimacy – making the child’s legal status contingent on judgments of the mother’s sexual behaviour.

### B Unsolicited Parenting as breach of duty

If paternity deceit claims presume that men have a right to informed consent before parenting a non-genetic child, what consequent duties would such a right throw onto women? At one extreme, such a view suggests that women should be liable for even negligent misrepresentations or omissions about the potential paternity of their child. For example, in *MacDonald v Gray*, Wisbey DCJ held that:

> Because of the special relationship that existed between the parties as sexual partners, there was a duty of care on the defendant not to advise the plaintiff that he was responsible for her pregnancy if the position could be otherwise. A false assertion, particularly if maintained over a period of time, had the capacity to result in foreseeable damage.

Wisbey DCJ’s reasoning might be explicable if the misrepresentation was about carrying a sexually transmissible disease, as this would trigger a duty to disclose a

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95 *Macdonald v Gray* (2005) 41 SR (WA) 22, at [74]. Wisbey DCJ found that the defendant had honestly held the belief that the baby was the genetic child of the plaintiff because she had had a negative pregnancy test after non-consensual intercourse with another man. Her behaviour was therefore held not to be fraudulent because she honestly believed her representation was true. She was, however, found to be liable for negligent misrepresentation, though the losses associated with this liability were limited to the plaintiff’s legal costs in the family law proceedings to have the child DNA tested, and legal parentage determined.
known risk of physical harm, or if Gray bore some kind of professional duty of care and skill to accurately discern the likely paternity of her future child. As it is, this is at odds with the High Court majority’s approach in *Magill*:

In the absence of a clear need for the common law to impose a legal or equitable duty of disclosure of such matters they should be left, as they are now, to the morality of the spouses, encouraged by the legislature’s support for truthfulness about paternity in the various provisions of the Family Law Act which have been mentioned.

Hayne also found against the existence of a duty to disclose doubts regarding paternity on the basis that such a duty would be too open-ended, and that it would not make sense to impose such a duty regarding doubts re paternity, and not for other matters ‘that may affect the degree of trust and confidence the parties to a marriage have in each other’.

Gummow, Kirby and Crennan explained their reluctance to find a duty to disclose by again using the ‘mantle of privacy’ which shields intimate relationships from a level of legal intervention:

Private matters of adult sexual conduct and a false representation of paternity during a marriage are not amenable to assessment by the established rules and elements of deceit. … this would appear to apply to other relationships such as ‘long term and publicly declared relationships short of marriage’ although that question does not fall to be determined in this case.

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Yet, even the traditional definition of the tort of deceit puts some limits on the universal
duty of honesty on which it rests:

*If a man intervenes in the affairs of another he must do so honestly, whatever*

be the character of that intervention. If he does so fraudulently and through that
fraud damage arises, he is liable to make good the damage.\(^{100}\)

Gleeson CJ, in a separate judgment to the majority, considered this limitation to
‘intervention in the affairs of another’ as a reflection of the ‘business context in which
the action on the case for deceit emerged’.\(^{101}\) Yet, the idea of ‘intervention’ also implies
that honesty in your own affairs (as opposed to the affairs of another) is a matter for
you to decide – and while there are a range of moral and ethical positions available to
guide you, no legal liability attaches if you are dishonest within your own affairs. How
do we tell the difference then, between an ‘intervention’ in the affairs of another, and
statements purely about our own affairs? Presumably when we say things in our
professional capacity, or in a formal setting such as a commercial negotiation or public
statement, we are intervening in the affairs of another.

Statements about a child’s paternity, on the other hand, are unavoidably statements
about a woman’s own sexual history, and about who she hopes will parent the child
with her. As such, they are personal, private statements, which touch the core of her
‘own affairs’. An autonomy-based notion of privacy would suggest that the law has no
business regulating the truth of such statements, except where – for example, in the

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\(^{100}\) *Nocton v Lord Ashburton* [1914] AC 932 at 954, cited in The emphasis is Gleeson CJ’s. As Wikeley and Young point
out, at the time Lord Haldane characterised honesty as a “duty of universal obligation” he “had no need to consider an
exception for spouses; there already was one” in the form of spousal immunity from all torts. Nick Wikeley and Lisa

appropriate limiting mechanism for the tort of deceit – at [22]-[23].
case of sexually transmitted diseases – telling a lie amounts to deliberately putting someone’s life and or physical health at risk. To treat the risk of misattributed paternity in the same way would amount to placing a universal duty on women to disclose any potentially procreative encounters to all male partners. I suggest there are three key policy arguments against imposing such a gendered duty – inequality, impact on women’s autonomy, and impossibility.

1 Inequality

First, such a duty would further gender inequality because it imposes on women a burden which is not imposed on men. This burden would go far beyond any equivalent to men having financial duties towards children they father – women already have at least the same legal parenting obligations.102

In none of the four cases discussed has the genetic father of the child been joined to the proceedings. This is likely to be for two technical reasons – first, because any such action against a third party for adultery has been specifically abolished in both Australia and the UK,103 and second, because it is unlikely that the other man made any direct representations towards the mother’s male partner which could found a deceit action. The practical result of this, however, is that although she may seek child support from

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102 Richard Collier, 'A Hard Time to Be a Father?: Reassessing the Relationship between Law, Policy, and Family (Practices)' (2001) 28(4) Journal of Law and Society 520. A number of cases in Canada and more recently, in Ireland have held, however, that damages may be payable for a man’s fraudulent representation that he is free to marry (ie that he is single): Beaulne v Ricketts (1979) 96 DLR 550; Graham v Savile [1945] 2 DLR 489; K (C) v K (J) [2004] IESC 21 (31 March 2004).

the genetic father in the future,\textsuperscript{104} the mother bears the sole responsibility for any tort damages arising from the paternity misattribution and from the infidelity. Is it equitable that a woman can be sued for the effects of an adulterous liaison, whereas her ‘partner in crime’ cannot?

I would suggest that this leaves the mother in the position of a reproductive services provider – yet one who, in practice, already carries out the majority of parenting responsibilities. Where a doctor is ordered to pay damages to compensate for the costs of raising a child born due to his or her medical negligence, he or she (or, in reality, his or her insurer) pays, and the parents do the caring. In a successful paternity deceit case, the mother both pays, \textit{and} does the caring.

Under this particularly gendered model of parenting, the mother could stand to be liable to every party left dissatisfied by the turn of events – to her child for causing emotional distress and uncertainty in legal relationships, to her former lover for depriving him of the opportunity of forming a parenting relationship with his genetic child, as well as to the putative father.\textsuperscript{105}

\section*{2 Impact on autonomy}

Such a duty would conflict with women’s rights to sexual and reproductive autonomy, and to privacy. As Gleeson CJ notes in \textit{Magill},\textsuperscript{106} the mother may feel conflicting responsibilities – any potential duty of disclosure to her male partner may conflict with

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{104} In Australia at least, a Child Support Assessment only creates a liability from the date the application for Child Support against an individual is lodged – therefore the mother cannot get any retrospective contribution from the genetic father.
\item \textsuperscript{105} I thank Craig Lind, and other discussants at the Gender, Family Responsibilities and Legal Change conference at Sussex for raising this point.
\item \textsuperscript{106} \textit{Magill v Magill} (2006) 226 CLR 551, at [48].
\end{itemize}
\end{footnotesize}
her concerns for the unborn child and any other children in the relationship, as well as for the preservation of the relationship with her partner. While being unfaithful or dishonest with your partner may not be an admirable thing to do from a point of view outside the relationship, the reality is that intimate relationships are complex, and women don’t disclose their doubts about paternity for a wide range of reasons, including in some cases, fear of how a controlling or abusive partner might respond.107

3 Impossibility

Finally, such a duty would presume that women have complete control over and knowledge of the conception processes occurring within their own bodies. In most of the paternity deceit cases discussed here, the mother has given evidence that she thought that the child was in fact the genetic child of the plaintiff. In Magill, Hanlon J at first instance, found this evidence ‘unconvincing’ and concluded that ‘the evidence points very strongly in favour of the conclusion that she did know her husband was not the father of either of her children’.108 Hanlon arrived at this conclusion on the basis of Mrs Magill’s admission that she had unprotected intercourse with her lover, reasoning that ‘this must have happened at a time which she was able to identify, at the birth of her child as the time of the conception’.109 With respect, perhaps Hanlon J is unfamiliar with the difficulties involved, even for an obstetrician, in calculating the exact date of conception for any given birth – given the variability of menstrual cycles, length of gestation and the possibility that, no matter how infrequent intercourse was, if intercourse with two men occurred during the same fertile period, then either could potentially be the genetic father.

Hanlon J preferred Mr Magill’s evidence that ‘the sexual relationship between his wife and himself had by the time Bonnie came to be conceived, fallen away to almost nothing’, and found that the ‘greater likelihood is that she was having more frequent sex with her lover than she was with her husband’. ¹¹⁰ Yet conception is a matter of timing rather than frequency, so that even if we accept Mr Magill’s evidence as more accurate, it doesn’t necessarily mean that Mrs Magill could have any certainty as to paternity. Unless intercourse with Mr Magill had ceased completely at that time, then it would be impossible for Mrs Magill to know either way. And if intercourse had ceased completely at that time, then one wonders why it is only Mrs Magill who is supposed to be calculating conception dates – how could Mr Magill argue reliance on any representation that he was the father if he was aware (or should have been aware) from the lack of intercourse that this couldn’t be physically possible?

Hanlon did not have to go into such detail as he used the broader intention element of deceit to hold that ‘if she did not know for a positive fact that Mr Magill was not the father, she at least was at least being reckless as to the truth of her assertion, that he was and had no genuine belief in it.’ ¹¹¹

In P v B, this question was not addressed because the judgment only engaged with the preliminary question about the availability of the tort of deceit. Yet in that case, the man had had a vasectomy some 12 years prior to the birth of the child¹¹² – begging the question of why he should be expected to rely on a representation from his partner about paternity rather than making his own inquiries.

¹¹⁰ Magill v Magill (Unreported, Victorian County Court, Hanlon J, 22 November 2002), 2.
¹¹¹ Magill v Magill (Unreported, Victorian County Court, Hanlon J, 22 November 2002), 2.
¹¹² P v B [2001] Fam Law 422at (3).
More recently, in A v B, Sir John Blofeld concluded that B’s representations that A was the father were made ‘knowing them to be untrue, or wilfully as the authorities put it in the cases’. Sir Blofeld did not accept B’s evidence that she had ‘put the chance encounter with the other man out of her mind’ and held that:

I am satisfied that throughout the marriage [sic] when this was raised she had what she describes as a nagging doubt, although I do not consider that phrase adequately explains her state of mind. I am quite satisfied that she intended that A should rely on these fraudulent representations as she herself said in evidence, and I am quite satisfied that as a result of those fraudulent representations he has suffered damage.

Taken together, these cases suggest a pattern in which women are attributed far greater knowledge of the procreative processes occurring within their own bodies than they are subjectively aware of, or which I would argue is medically possible. The falsity at the heart of these claims, therefore, is not the genetic identity of the child, but rather, the risk that the child may not be the genetic child of the plaintiff. This possibility arises from, and is impossible to separate from, the fact of the infidelity. A duty to inform a male partner regarding a risk of non-paternity will always open up into a duty to disclose any heterosexual infidelity.

**VI Conclusion**

I have argued here that allowing recovery in tort for the harm of parenting a non-genetic child without informed consent as a result of a mother’s misrepresentation about paternity relies on particularly gendered notions about the rights of fathers and the duties of mothers, and is therefore an unsound basis for liability. Now that a

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113 A v B (Damages: Paternity) [2007] 2 FLR 1051 at [49].

114 A v B (Damages: Paternity) [2007] 2 FLR 1051 at [49]. The parties were never married.
majority of the Australian High Court has rejected the applicability of deceit to paternity representations, such a conclusion may be moot (at least within Australia). If however the ‘mantle of privacy’ reasoning used by the court is understood as treating intimate and marriage-like relationships as a private sphere immune to deceit actions, that rejection may be vulnerable to a number of objections.

This article suggests that the ‘mantle of privacy’ reasoning becomes much more coherent if account is taken of the type of harm, rather than just the relationship context. On this approach, individual autonomy is both the basis for law’s exclusion from ‘private’ matters, as well as the basis for exceptions to this exclusion where an ‘autonomy-reducing harm’ occurs in private. Legal sanctions for rape within marriage, or negligent transmission of HIV then become illustrations of the centrality of autonomy to privacy rather than anomalies.

On this approach, it becomes clear that the key harms complained of within cuckold claims are less about a violation of autonomy than about breached expectations about a relationship and the sexual and parenting conduct to occur within it. When a father feels that he has been ‘taken for a ride’ – and that the money he contributed towards a child thinking it was his genetic child should be returned, he relies on an unspoken expectation that parenting is a gendered transaction in which a man offers financial support to a woman and her child in return for a genetic connection. These expectations carry a heavy cultural weight within our society, however, for courts to transform these expectations into universal legal duties is to impose a particularly gendered model on all relationships, without asking whether the individuals within


116 A v B (Damages: Paternity) [2007] 2 FLR 1051, at [20].
these relationships intended these expectations to be legally binding, or even whether they subjectively hold these expectations.\textsuperscript{117}

This gendered understanding of parental rights and responsibilities has the side-effect of treating children as objects of sexual/legal transactions between parents, rather than as legal subjects in themselves. It is clear that as DNA technologies improve and the diversity of family forms continues to evolve, genetic paternity will continue to be an area of conflicting expectations. Those conflicts – and associated breakdowns in family relationships – are likely to be exacerbated rather than resolved by applying the laws of deceit.

\textsuperscript{117} Hayne’s judgment goes so far as to suggest that the “intention to create legal relations” test for contract should be applied in the context of deceit within intimate relationships. See \textit{Magill v Magill} (2006) 226 CLR 551, at [162]-[164] per Hayne J.