

Paternity fraud punishes the blameless

Husbands have no protection from paternity fraud, thanks to legal rulings by the Family Court and High Court, writes **Charles Francis QC**.

At a public function where Sir Owen Dixon, then Chief Justice of our High Court, was present, a guest remarked to him that he must feel very proud to have administered justice for so many years. Sir Owen replied, a little cynically, "I don't administer justice, I administer law".

Sir Owen, probably our greatest jurist ever, knew that judges should determine cases in accordance with whatever our law was, and that did not always mean the decision was a just one. If the law is permitting injustice in a particular area, it is for members of parliaments, not the judges, to rectify the relevant law. Sometimes they don't.

Widespread interest

The case of *Magill v. Magill*, first heard in November 2001 in the Melbourne County Court, illustrates how remote the final judgment of the High Court was from what most people would consider to be justice.

The case concerned paternity fraud and attracted widespread interest, both in Australia and overseas. It led to the publication in the United States of Lea Anna Cooper's book *Days of Tempest: The Liam Magill Story*, a compendium of the facts and matters surrounding the case.

Liam Magill was born in South Melbourne in 1950, the only child of Ralph and Phyllis Magill. The Magills were a very devoted and happily married couple, attending the Methodist Church regularly. Liam was brought up in what was a very happy Christian home. By the time Liam married Meredith McClelland in 1988, both his parents were already

dead. He owned his own house and car, and held a good job with the Commonwealth Government.

Almost from its inception the marriage of Liam and Meredith proved a total disaster. Their first child, a son, Arlen, was born in April 1989. Two further children, Heath and Bonnie, were born in July 1990 and November 1991 respectively.

Unknown to Liam, Meredith in 1989 had commenced an affair with Derek Rowe, and Rowe was the father of both these children. In 1992 Meredith deserted Liam, taking the children with her and, in November that year, obtained an order for child support in respect of all three children.

At a time which the Court found was probably 1995, Liam came to the opinion that Heath was not his child. Subsequently, in 2000, DNA established that neither Heath nor Bonnie was Liam's child. In the County Court, Liam claimed damages against Meredith for monetary loss and for his psychiatric disorder suffered as a result of her conduct.

By the time the case was heard, this disorder had kept Liam off work for a period of three years. Liam had poor concentration, low energy levels, severe anxiety and depressive symptoms.

The case was brought on the basis that Meredith had committed the tort of deceit by representing to Liam that

Heath and Bonnie were his children. One important matter, alleged to constitute the deceit, was Meredith's filling in of the two birth notification forms naming Liam as the father, which she gave to him to sign.

On November 22, 2002, Judge Hanlon found that Mrs Magill had had no genuine belief that Liam Magill was the father of Heath and Bonnie, or at the very least was reckless as to that belief. He awarded \$70,000 damages in Liam's favour. Having regard to the evidence, the award seemed moderate. It would be difficult to assert that any injustice had been done to Meredith Magill.

However, on appeal, the Court of Appeal held that Liam Magill did not rely sufficiently on the notification forms for the purposes of the law of deceit. It overturned Judge Hanlon's award of damages and ordered Liam to pay Meredith Magill's costs.

From this decision, Liam appealed to the High Court. Three of the learned judges decided that the tort of deceit cannot be applied to marital conduct. The remaining three decided it could, but that *Magill v. Magill* did not represent such

an instance. Consequently, the law relating to paternity fraud in Australia has been left in a totally unsatisfactory state and cries out for appropriate legislation. Liam Magill had a further order for costs made against him.

Cooper's *Days of Tempest* enables the reader to be taken right to the heart of the saga. The book includes interviews with Liam himself and his present partner, Cheryl King, and such items as the results of the DNA tests. It also includes the entire transcript of the County Court proceedings, copies of letters of support written to Liam, including a number from women, and newspaper articles analysing the issues. It enables the reader to become very fully informed and to consider what solutions there can be for paternity fraud.

DNA specialists estimate that 10



Meredith McClelland and Liam Magill

per cent of men in the wider community are unknowingly acting as fathers to illegitimate children. This raises the question of whether there should be routine testing of all babies.

A recent survey showed that 50 per cent of women said that if they had a child from an affair they would conceal it from their husband. However, there are sound medical reasons for an accurate genetic history for every individual. Furthermore, children have a right to know who their biological parents are. It is inconsistent, when such rights are being granted to children born of IVF and donor gametes, that such rights are not available to all children through DNA-testing at birth.

No-fault divorce has led to a situation in which moral behaviour has been largely eliminated from all family law discourse. For the damage done to Liam and the three children, Meredith has in no sense been held accountable.

Neither the court nor the Child Support Agency properly addressed the parentage of a child when making a determination. As Janet Albrechtsen said: "By denying men the right to know and by not penalising the mother for deceit, we end up giving women the right to deceive." (*The Australian*, March 23, 2005).

Lionel Murphy's Family Law Act of 1975 was intended to reduce bitterness between the parties when a marriage was terminated, but we may well think we have created something far worse.

The Magill case emphasises the need for us to rethink much of what we do today, but the nature of the amendments which the legislature must make to the Family Law Act can hardly fail to be a very divisive issue. Inevitably, feminists in parliament and in our community will fight against any attempt to give men the traditional Australian "fair go".

— **Charles Francis, AM, QC, is a barrister and former member of the Victorian state parliament.**

