

Secrets and lies

Abby Buckland examines a claim in tort between spouses and its relationship with financial remedy proceedings



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'In the presence of ongoing financial remedy proceedings, and the mandatory requirements under s25, MCA 1973, the husband's claim was fundamentally incompatible with, and amounted to an improper collateral attack on, the court's jurisdiction.'

In the first reported High Court case considering the tort of deceit between spouses, Cohen J's judgment in *FRB v DCA* [2019] followed on from two previous judgments (*AB v CD* [2019] and *AB v CD (No 2)* [2019]) in the same matter.

The subject matter of the earlier judgments was connected with the basis of the claim in tort, and those judgments dealt with when and how a child should be informed that the man they have always believed to be their father is not their genetic father and whether their biological father's identity should be disclosed by the mother. Cohen J considered that it is in a child's interest to know the truth of their paternity, sooner rather than later. He determined this primarily on the evidence of the guardian that the child's age meant it would be easier for the child to accept this now, compared to when they are older. There was also the risk of the child hearing rumours, which needed to be avoided. Cohen J found the issue relating to the disclosure of the biological father's identity much more difficult, because the reaction of that man was unknown and would impact on the child. It would be wrong, the court decided, for the mother to be ordered to disclose the man's identity until his response to the news was known. Therefore the court drafted a letter to be sent to the man by the mother's solicitors to ascertain his reaction.

The most recent judgment related to an application by the wife (the mother in *AB v CD*) to strike out the husband's (the non-biological father's) claim for damages in respect of her alleged deceit.

Background

The parties married in 2003 and had one much-loved son together.

The marriage ran into difficulties leading to the parties' separation in early 2017, with the wife issuing a divorce petition. The following year, the husband heard rumours that the wife had an affair around the time of their son's conception and because of this he asked the wife to agree to a DNA test. Both this test, and a subsequent one the following month, confirmed that the husband was not the child's biological father.

The husband, understandably devastated, reacted by issuing a range of proceedings against the wife for breach of confidence (in the Chancery Division), the repayment of all money that he had spent on the child and damages for his distress (in the Queen's Bench Division), and an application under the Children Act 1989 and financial remedy proceedings (in the Family Division).

With the relationship between husband and wife described as being at 'rock bottom', and proceedings in all three divisions of the High Court, it is perhaps no surprise that the estimated combined costs at the time of this hearing were in the region of £3m.

Application

Within his particulars of claim, the husband set out the material he relied on as to the alleged fraudulent misrepresentation by the wife, ie the representations she made to him that the child was his when, he alleged, she knew or suspected that in fact he was not the boy's biological father.

The husband issued this application in the Queen's Bench Division but the proceedings were promptly transferred to the Family Division by Master Cook, who questioned:

... what this action can achieve given the remedies sought and the nature of the proceedings already underway in the Family Division...

and described the proceedings as 'arguably pointless and futile litigation'.

At that stage, the wife had to either serve a defence to the claim or an application to strike it out. It was her application to strike out the husband's claim that Cohen J needed to determine.

Tort of deceit

The tort of deceit occurs when a person intentionally and knowingly deceives another person into an action that damages them. The husband contended that the wife knew that he was not the biological father of the child and that because of her deceit he had suffered loss and damage as follows:

- the difference between any financial provision payable by him in the financial remedy proceedings when compared with any financial provision payable if those proceedings had commenced at the time of the child's birth;
- all sums paid by him in respect of the education and upbringing of the child;
- all sums paid by him to the wife for her living expenses; and
- the value of all gifts to the wife from the date of the pregnancy until the date on which divorce proceedings commenced.

During the course of an earlier hearing, Cohen J had pointed out to the husband the inconsistencies between his case on the one hand that after many months of deliberating he had decided that he loved and wanted to play a full part in the child's life going forward and on the other hand that he should be reimbursed for all the money that he had spent on the child. The claim in relation to sums paid for the child's education and upbringing was therefore removed by the husband in July 2019, as he accepted it was doomed to fail.

Cohen J needed to determine two issues:

- whether the tort of deceit in respect of intimate matters such as 'paternity fraud' exists between a husband and wife; and
- if it does exist, could it run as a separate action in parallel with

between married couples and he could see:

... no logical reason why the law should encourage honesty between unmarried couples so as to create an obligation which if breached opens the wrongdoer to an action to deceit yet absolves from such liability a wrongdoing spouse...

The husband in FRB v DCA contended that the wife knew that he was not the biological father of the child and that because of her deceit he had suffered loss and damage.

financial remedy proceedings, or was it an abuse of the court's process and/or otherwise likely to obstruct the just disposal of those proceedings?

Paternity fraud

Before the Law Reform (Husband and Wife) Act 1962, there was no ability for a husband or wife to sue each other under tort. Since that time, the majority of the actions brought between spouses have arisen from negligence, for example where one spouse has been injured by the careless driving of the other. Actions for the tort of deceit are unusual and paternity fraud cases are extremely rare.

There is established authority that paternity fraud applies to unmarried couples (*P v B (Paternity: Damages for Deceit)* [2001] and *A v B (Damages: Paternity)* [2007]). Counsel appearing before Cohen J found just three cases where the tort of deceit in respect of paternity had been applied to married couples. None of these were above county court level (para 23). The wife's statement of grounds annexed to her strike out application therefore commenced with the following (para 24):

The law will not recognise or allow actions for deceit between married couples where the representation alleged is as to the paternity of the child of the family...

Cohen J disagreed. His view was that the tort of deceit can exist

adding 'It seems to me contrary to public policy that the law should be so interpreted' (para 26).

He determined that there is nothing in the Law Reform (Husband and Wife) Act 1962 that restricts which torts are actionable and the court should not impose a limitation which cannot be found in that Act. Cohen J went on to agree that while in most cases there may be ongoing financial remedy proceedings where the alleged wrong can be taken into account, there will be cases where that remedy is not available and an action for damages under the tort of deceit between a married couple may be appropriate in such cases.

A matter for another day?

Cohen J was unclear however as to how a claim in tort could fit *alongside* financial remedy proceedings. Counsel for the husband believed it was possible to do so and that there must be an assessment of the award the wife would have received if divorce proceedings had commenced at the time of the child's birth and a further assessment of the value of her current claim. He said that the difference between the two should be taken as the level of damages and that any sums spent by the husband on the wife's living expenses and all gifts to the wife from him should be calculated as additional damages.

This proposed method, of carrying out hypothetical calculations, was one which Cohen J said there was simply no authority for (para 34)

and would require evidence of asset values both now and at the time of the child's birth, as well as hypothetical calculations of household expenses over a number of years and an assessment as to the proportion of those sums to attribute to the wife and child. This, Cohen J said, displayed

The claim in deceit could not survive, the particulars of claim contained no reasonable grounds for the claim and it was an abuse of the court's process or likely to obstruct the just disposal of the proceedings.

the problem with the husband's approach. In addition, there had been no directions sought at any of the previous hearings for this evidence to be assembled and presented. He highlighted that this approach also ignored the length of the marriage and the existence of a child, and the husband's approach was therefore 'plainly inappropriate' (para 42).

The wife argued that whatever Cohen J's conclusion in respect of the first limb of the test, the husband's claim was an abuse of the court's process or otherwise impermissible. Her reasoning was that in circumstances where financial provision was sought under the Matrimonial Causes Act 1973 (MCA 1973), a claim running alongside was (para 27):

... fundamentally incompatible with, and amounts to an improper collateral attack on, the court's jurisdiction... with regard to the mandatory requirements of s25 [MCA 1973]...

Section 25, MCA 1973 sets out the matters the court must have regard to in deciding how to exercise its powers to make financial remedy orders. Section 25(2)(g), MCA 1973 requires the court to have regard to:

... the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it.

Bad behaviour by a party therefore falls to be considered if it

crosses the line set out in s25(2)(g), MCA 1973.

The court therefore has the power (and duty) to fully investigate a spouse's conduct to see if it crosses the threshold required. Cohen J acknowledged that as part of the financial remedy proceedings he

would have to determine whether the wife's conduct crossed that threshold. If it did, he would have to determine what the financial consequences should be. Importantly, he was clear that these were 'all matters for another day' (para 43).

Counsel for the husband persevered, encouraging Cohen J to determine that there still remained the ability to set out the precise gifts that the husband had given to the wife over the years and for which damages could easily be awarded pound for pound. The judge acknowledged that the scale of the parties' wealth meant that these gifts may have been very substantial, but said that this assessment was one he could make and deal with under the MCA 1973. He was clear that this was not a reason for allowing the tort claim to survive.

Cohen J concluded that he was of the clear view that the claim in deceit could not survive, the particulars of claim contained no reasonable grounds for the claim and it was an abuse of the court's process or likely to obstruct the just disposal of the proceedings.

In the presence of ongoing financial remedy proceedings, and the mandatory requirements under s25, MCA 1973, the husband's claim was fundamentally incompatible with, and amounted to an improper collateral attack on, the court's jurisdiction.

Costs

There was no doubt that the wife was the successful party in this particular

round of the litigation, and therefore under Pt 44, Civil Procedure Rules 1998 she was entitled to her costs. Unsurprisingly, she invited the court to make an order for indemnity costs, while the husband sought an order on the standard basis.

In a separate judgment (*FRB v DCA (No 2)* [2019]), Cohen J's view was that as this was not a classic fraud case and he had not come to any conclusions about the underlying subject matter of the action (ie, whether or not the wife had misled the husband in relation to the paternity of the child), therefore costs should be ordered on a standard basis. The husband was ordered to pay 80% of the wife's costs of the action, including the application to strike-out, and the amount was rounded to £200,000 inclusive of VAT.

Conclusion

Unless the parties in *FRB v DCA* reach an agreement in the financial remedy proceedings, Cohen J will be determining the outcome for them and with it the interesting question of whether the wife's conduct is 'conduct that it would in the opinion of the court be inequitable to disregard' and if so, what effect that should have on her award. The main financial remedy proceedings have been listed with a time estimate of 15-20 days.

While this case is unusual, the message is clear and far reaching, ie that s25(1), MCA 1973 imposes a duty on the court, when deciding how to exercise its powers, to have regard to all the circumstances of the case. And this case reminds us that it will therefore be rare for the court to deal with a separate financial claim by one spouse in isolation, particularly where there are children of the family, when there are ongoing financial remedy proceedings. ■

A v B (Damages: Paternity)
[2007] EWHC 1246 (QB)

AB v CD
[2019] EWHC 1695 (Fam)

AB v CD (No 2)
[2019] EWHC 2244 (Fam)

FRB v DCA and FRB v DCA (No 2)
[2019] EWHC 2816 (Fam)

P v B (Paternity: Damages for Deceit)
[2001] 1 FLR 1041