Bernadette Richards
Clarifying legal tests: Who a parent is and how to warn of unknown risks
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[author(s)] **Bernadette Richards**

[author details]
B.J Richards
Law School, University of Adelaide
North Terrace, Adelaide, 5005 Australia
e-mail: bernadette.richards@adelaide.edu.au

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Introduction

We live in an increasingly complex world, family relationships are changing, technology is making inroads into medical treatment and what was once seemingly impossible is, at times, now possible. The law often struggles to keep up with medical advances and shifting boundaries of relationships as they give rise to legal questions of increasing complexity, but in the absence of specific regulatory frameworks courts are called upon to apply well established principles to new issues as they come before them. This is not a problem unique to our era, imagine the days when cars first took to the roads, planes to the sky, sounds were transmitted through radio or handheld recording devices were introduced. Humanity and technology are constantly evolving and systems of regulation must also adapt and evolve. The two decisions considered here provide practical examples of how well established legal tests can be applied to new challenges and fill apparent regulatory gaps so that clarity can be found. Whilst the law is often 'in the rear and limping a little' (*Mt Isa Mines Ltd v Pusey* (1970) 125 CLR 383), it can provide answers to new problems, such as: Is a sperm donor a father and how can a doctor provide information about the unknown (and unknowable) risks of innovative medical treatment?

Who is a father: *Masson v Parsons* [2019] HCA 21

Masson v Parsons has the potential to be misunderstood, indeed the headlines surrounding the decision proclaimed 'High Court rules sperm donor is a father' and 'High Court rules sperm donor is daughter's legal father' and 'Can a sperm donor be a legal parent? In landmark decision, the High Court says yes'. The article accompanying the last headline asserted that the 'ruling could impact thousands of couples and single women whose children were conceived with known sperm donors' but the author went on to correctly conclude that the 'implications are limited' (Seery, 2019). Whilst there is some attraction to the proposition that this case 'extended the definition of "legal parent" to a sperm donor' (Seery, 2019), the better view is that the court looked behind the labels placed on the appellant and respondents, preferring instead to ask the time honoured common law questions of fact and nature and degree to appropriately characterise the appellant as the legal parent of the child.

The ‘principal issue’ before the High Court in this case is one that is usually outside of the scope of this journal, it is essentially a procedural and jurisdictional question, and was described by the majority of the High Court in the following terms:

> ‘The principal issue for determination in this appeal is whether s 79(1) of the *Judiciary Act* 1903 (Cth) picks up ss 14(2) and 14(4) of the *Status of Children Act* 1996 (NSW) and applies them to applications for parenting orders made under Pt VII of the *Family Law Act* 1975 (Cth), with the result that the appellant is irrefutably to be presumed not to be the father of his biological daughter. For the reasons which follow, that question should be answered: "no"’ ([1], Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ)

There was, in addition, a question regarding the application of ss14(2) and 14(4) of the *Status of Children Act* as valid laws ‘applying of their own force to applications for parenting orders made under …the *Family Law Act* …as part of the single though composite body of law in Australia’ ([2]). This was also answered in the negative by the High Court. These jurisdictional issues were the core legal questions considered by the court but are not the focus of the present discussion, what is of interest here is how the court addressed the question of legal parentage and what were the relevant factors. In short, does this decision truly represent an extension of the definition of a legal parent and serve to place a potentially unbearable burden on sperm donors? The answer to that question is consistent with the response provided by the High Court to their legal questions: No.

This case was therefore, at its heart, a procedural one covering questions of constitutional law and jurisdiction. Once the jurisdictional questions were answered there was a fact based enquiry, of significance was the fact that the semen was provided to the first respondent before the later de facto relationship with the second respondent and the arrangement was a personal, informal one as opposed to arising under the auspices of a clinic. These two factors are crucial to an understanding of the narrow scope of the decision.

The background facts are set out by the majority judgment ([1]-[2]) and are as follows: the appellant and the respondent had been ‘close friends for many years’ and in 2006 the appellant provided semen so that the first respondent ‘might artificially inseminate herself and as a result conceive a child, which she did’. It is important to note here that at this time the appellant did not view himself as a mere donor, he believed that he was fathering a child and that he would provide parental support and care. He was listed on the birth certificate as the child’s father and whilst he never lived with the child he continued to take the relationship with her seriously and had an ongoing and continuing role in her ‘financial support, health, education and general welfare’. Significantly, the primary judge described the relationship as one of ‘extremely close and secure attachment’. In 2015 the respondents decided to move to New Zealand and take the child with them, the appellant brought proceedings seeking judicial endorsement of his status as legal father of the child.

Much of the judgment is occupied with consideration of the relevant legislation. The *Family Law Act* has, of necessity, been regularly amended to adapt to the changing nature of the family and different forms of conception. S60H of the Act focusses specifically on situations of ‘artificial conception procedure’ which is defined by s4(1) of the Act as ‘including artificial insemination and the implantation of an embryo in the body of a woman’ ([6]). It is a detailed section seeking to cover the field, and where conception is achieved by using biological material provided by those other than the ‘intended parents’ then the child is deemed not to be a child of that person. The respondents argued that this was a narrow provision, serving to limit

who can be characterised as a parent thus precluding the appellant from being defined as the legal father of the child. The court rejected this proposition, preferring instead to endorse the primary judge's conclusion that whilst the appellant may not qualify as a parent under s60H of the *Family Law Act* it is possible to otherwise qualify. Importantly, as reasoned by Cronin J in the earlier decision of *Groth v Banks* (2013) 49 Fam LR 510, the section is not aimed at reducing or limiting parental rights, rather it is 'properly to be understood "as expanding … the categories of people who can be parents"' ([24]).

The enquiry then became one of fact, requiring the court to look behind the concept of 'sperm donor' and consider the true nature of the relationship. At first instance emphasis was placed on the expectations of the donor who, being unaware of the relationship between the first and second respondents (who were not, at the time of donation in a de facto relationship), 'provided his genetic material for the express purpose of fathering a child whom he expected to help parent by financial support and physical care, which he had since done' ([24]). In short, he was characterised as a parent of the child in the ordinary meaning of the word, and therefore for the purposes of the Act.

On appeal to the Full Court of the Family Court, Thackray J (Murphy and Aldridge JJ agreeing) came to the opposite conclusion and determined that he was not the legal father of the child. Whilst his Honour agreed that s60H was not an exhaustive provision 'because the matter was one within federal jurisdiction, s 79 of the Judiciary Act picked up s 14 of the Status of Children Act and applied it as a law of the Commonwealth, and that, perforce of s 14 of the Status of Children Act as so picked up and applied, the appellant was to be irrebuttably presumed not to be the parent of the child.' ([25]). He therefore came to a different jurisdictional, and therefore legal conclusion, which was later rejected by the High Court.

As explained above, the High Court rejected this jurisdictional determination and held that the *Family Law Act* was the appropriate legislation. They also made some important observations regarding the determination of a legal parent. Of significance was the conclusion that the process requires the court to look behind any labels and focus on the true nature of the relationship and accept, as explained by Baroness Hale in *In re G (Children)* [2006] 1 WLR 2305, 2316-2317: '[t]here are at least three ways in which a person may be or become a natural parent of a child" depending on the circumstances of the particular case: genetically, gestationally and psychologically' ([29]). To determine legal parentage is therefore a 'question of fact degree to be determined according to the ordinary, contemporary Australian understanding of "parent" and the relevant circumstances of the case at hand' ([29]). Therefore, this decision does not conclude that a sperm donor *is* a father, rather it determines that in these circumstances, the appellant was more than a mere sperm donor, he donated his biological material with an expectation that he would be a father, and it was an expectation that had, until the decision was taken to relocate, come to fruition. It is not a decision of broad application beyond the identification of the appropriate process, which is to scrutinise the facts of the case, and to pay attention to the story of the relationship and it is in the nature of the story that the legal relationship can be identified.

How to warn of the unknown: *Mills v Oxford University Hospitals NHS Trust* [2019] EWHC 936 (QB)

The law must be both coherent and clear if it is to be meaningful, equally it needs to be adaptable if it is to be fair, it can be neither static nor inflexible. This can present a significant

challenge when questions arise in the context of innovation and technology. This is an ongoing issue in the realm of healthcare which is constantly evolving with increasing use of new techniques and technologies and one specific perplexing question is how can a treating doctor advise patients about new treatment options when they themselves are unaware of the specific risks and benefits of new and emerging treatments. This was part of the challenge facing the court in *Mills v Oxford University Hospital.* The existing, and well established test of appropriate information is that of 'material information', in Australia the authority is *Rogers v Whitaker* (1992) 175 CLR 479 and more recently , in the UK, *Montgomery v Lanarkshire Health Board* [2015] UKSC 11. The test of whether a risk is material, as stated in *Montgomery* is to ask, 'whether, in the circumstances of the particular case, a reasonable person in the patient's position would be likely to attach significance to the risk, or the doctor is or should reasonably be aware that the particular patient would be likely to attach significance to it' [87]. The issue where the treatment is innovative is how can this test be satisfied when there is no comprehensive knowledge of either the risks or benefits of a treatment?

The court addressed this question, among others, in *Mills* and came to an elegant, yet simple conclusion: the characterisation of the treatment as innovative, is, of itself, a material risk. All that needs to be done is to adjust the existing and well established test and apply it to the facts before the court. Adrian Mills was a 45 year old Firefighter in the London Fire Brigade who had been suffering from headaches but was otherwise in relatively good health when he attended the hospital with chest pains in 2012. He informed the hospital of his ongoing headaches and as a part of the testing procedures a magnetic resonance imaging (MRI) and computerised tomography (CT) scans were taken. The CT scan was reported as 'normal' but the MRI scan revealed a lesion on the frontal left lobe. His case was then reviewed by a multi-disciplinary team (MDT) and he was referred to Mr Plaha (consultant surgeon) for treatment. The MDT was aware that Mr Plaha was involved in a study of endoscopically assisted resections but the referral note was silent on the technique to be employed. During the surgery there was 'torrential bleeding' which Mr Plaha was unable to control, he sought assistance on two separate occasions during the lengthy procedure and Mr Mills lost approximately 5 litres of blood and suffered a stroke. He subsequently suffered from significant physical and cognitive disabilities and was medically retired from the Fire Brigade in 2013 (facts summarised from the decision, [1]-[11], [40]-[46]. Judgment delivered by Karen Steyn QC sitting as a Deputy High Court Judge).

There were a number of claims arising from these events including negligent treatment and advice. The negligent treatment case did not stand but Mr Plaha was found to have failed in his duty to provide material information prior to treatment. The material facts with respect to this particular treatment were that in 2012, there was no other surgeon in the UK using the minimally invasive endoscopically–assisted technique to resect frontal glomas as was being trialled by Mr Plaha, although there were some other surgeons around the world opting for this treatment path ([97]). In 2014 Mr Plaha was the lead author on a paper discussing the introduction of the less invasive surgical technique, the paper reported that in the '*21-month period between December 2011 and August 2013, 50 consecutive endoscopic resections of intraparenchymal brain tumors were performed on 48 patients,*"([97]). Mr Mills was the 27th patient in the series.

It is indisputable that this treatment was innovative but the court concluded that it was appropriately conducted and that there was nothing negligent in the choice and provision of the treatment. There was, however, significant discussion around what ought to have been disclosed to Mr Mills, and the conclusions with respect to what is material in the circumstances

are worth reproducing in full as it provides insight into what a court will deem to be appropriate information. The following evidence of what Mr Plaha should have disclosed to Mr Mills was accepted as appropriate:

> "The minimally invasive endoscopically assisted technique:
>
> i) Was a novel technique, still in its evolution and not well established;
>
> ii) Was not an approach that, as yet, was used by many neurosurgeons other than Mr Plaha;
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> iii) The standard open resection technique which was adopted by other neurosurgeons involved using a microscope;
>
> iv) The endoscopic technique would involve a smaller craniotomy;
>
> v) The standard open craniotomy using a microscope would give the surgeon direct line of sight, which the endoscopic technique would not;
>
> vi) The endoscopic technique would give more limited access and it is possible that this could pose a greater risk to structures and vessels that were not within the surgeon's direct line of sight;
>
> vii) If untoward bleeding were to occur, the endoscopic technique would make visualisation and controlling the bleeding more difficult and may result in the need to extend the opening; and
>
> viii) The risks and benefits of using the endoscopic technique were unclear." ([197]).

Therefore, we see once again, the court adopting a pragmatic approach to the application of existing law to new situations. Whilst it is a challenge to keep up with the pace of change, it is possible to apply existing legal tests to new and emerging problems, the judiciary is interested in maintaining flexibility at the same time as protecting a level of certainty.

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