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Lies and Deception

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Becoming conscious of lies

'O what a tangled web we weave when first we practise to deceive.'

Some people think lying is necessary . . . even a good thing. Do you agree? When was the last time you lied? Do you always notice when you are lying? What lie(s) have you told in the past week? Maybe you said something like, 'I love your new haircut' when you didn't; or, 'It's okay, it doesn't matter that you spilled grape juice all down my new white shirt' when, actually, it was a gift from your girlfriend and she's going to kill you. We all lie for different reasons and with different justifications; however few of us stop to think what a lie actually is.

Favourite lies

Some lies are more common than others.

Can you think of a lie you've told more than once?

Here are some examples:

- The cheque's in the mail
- I didn't do it
- I didn't mean it
- I wasn't there
- I promise
- I'll just be one more minute
- Your call is important to us
- I love you

So what is a lie? A lie has been defined as:

- (1) a statement;
- (2) believed by the speaker to be false;
- (3) made with the intention that the hearer will be deceived by the statement.²

Detecting lies

*'Any fool can tell the truth, but it requires a man of some sense to know how to lie well.'*³

So how can you tell if someone is lying to you? What are some ways to spot a liar? Although we've always been taught that lack of eye contact is a dead giveaway of a liar, it's not necessarily conclusive evidence as we have been conditioned to look another in the eye when it comes to business and sports, in order to psyche-out opponents. We have almost been raised to be good liars. Nevertheless, there may

be some signs that help to determine if someone is lying. Generally, a liar's behaviour tends to be irregular as they are either nervous, feeling guilty, or focused on constructing the lie as they go along.

1. Body language

Clues that someone may be lying include a wide range of physical behaviours such as: crossed arms; constant fidgeting; legs crossed when seated; legs not planted firmly on the ground when seated; holding an object or gripping ankle, knee or skin of a crossed leg when seated; touching the face, such as lips, cheeks, chin or nose; playing with hair; and tugging at an ear. Of course, many of us do these things even when we are not lying (or are we lying more often than we realise?).

It is said that the eyes are the windows to the soul and they signal the mind of a potential liar. Rapid eye movement, eyes focused to the right (which indicates use of the creative side of the brain), eyes focused firmly on an object, rubbing eyes, and eyes either wide open or partly shut all are considered potential indicators that the person may be lying.

2. Verbal clues

Verbal clues are also important when trying to decide whether someone is lying. Repeating the question, hesitating, giving more information than was requested, and small (or big!) inconsistencies may all indicate that someone is being less than truthful.

Then again, perhaps the best way to detect a lie is to simply trust your intuition.

Is lying wrong?

*'By a lie a man throws away and, as it were, annihilates his dignity as a man.'*⁴

The main sources people consult when it comes to their moral compass and issues such as lying are religion and philosophy. Most religions abhor lying (see Box below).

Lies and religion

- 'No man should talk one way with his lips and think another way in his heart.'
Judaism: Talmud, Baba Metzia 49
- 'Do not assert with your mouth what your heart denies.'
Taoism: Tract of the Quiet Way
- 'Dishonesty in business or the uttering of lies causes inner sorrow.'
Sikhism: Adi Granth, Maru Solahe
- 'All things are determined by speech; speech is their root, and from speech they proceed. Therefore he who is dishonest with respect to speech is dishonest in everything.'
Hinduism: Laws of Manu 4.256
- 'You who believe, wherefore do you say what you do not? Very hateful is it to God that you say what you do not.'
Islam: Koran 61.2-3

Ethicist Sissela Bok has written extensively on the morals of lying. She observes that '[t]rust and integrity are precious resources, easily squandered, hard to regain. They can

thrive only on a foundation of respect for veracity.⁵ Bok describes veracity as 'the cornerstone of relationships among human beings'.⁶

Bok goes on to link the concepts of reciprocity, fairness, and morality. She notes that many things we take for granted are made possible by 'trust'.⁷ A lie is effective only if it is believed, that is, in a society where truth-telling is prevalent and people trust what others say. That is why the liar is a 'free-rider'. The liar 'free-rider' lets others, in this case people who tell the truth, pay for the system, while they take advantage. They benefit from the system of truth telling, but do not pay.

Justifying the lie

Is it wrong then to lie? Are *all* lies wrong? Surely there are times when a lie can be justified. If so, where do we draw the line as to what is acceptable and what is not? Bok explores this notion beginning with Thomas Aquinas, who believed that there are different types of lies, some of which are worse, but all of which are wrong. Bok rejects this absolutist view, citing the philosopher, Grotius, who revived the idea that lies can be justifiable. He argued that a lie is only a lie if it conflicts with a right of a person to whom it is addressed.

Many people today would argue that the act of lying can be justified in some circumstances, that lying is even in some situations necessary. There can be many reasons for lying; some lies may seem more justified than others. Can one be excused for deceiving loved ones to comfort or protect; for example, to pretend they are in good health, or in a happy marriage, or to keep a child out of danger?⁸ Is a lie justified where force would be justified; for instance, telling a murderer that their quarry ran in the other direction?

'White lies' are the most common type of lies. They cover anything from a compliment you may give someone that you don't really mean to letters of recommendation. Most white lies are not meant to harm – often they are told for the very reason of avoiding telling a person a truth that may upset them. Some consider that white lies, however innocent their intention, still undermine the truthfulness and trust that are crucial to the fabric of society, and they suggest alternatives such as silence and discretion.⁹ Others, such as utilitarians, believe that white lies are a necessary part of life. It is certainly difficult to imagine life without the odd white lie to a friend or co-worker.

There are ethical dilemmas to lying in many professional pursuits; for example, in the medical profession. The Hippocratic Oath requires doctors to 'help the sick ... never with a view to injury and wrong-doing'.¹⁰ This duty seems to

transcend the value of truth.¹¹ Consider also the patient's perspective. When and how does a patient want to receive bad news? Are patients always able to understand and to make use of information? What if the information might actually do harm to their well-being? How would this link back to the doctor's duty to do everything necessary to prevent harm? Consider also that the uncertainties inherent in diagnosis and medical practice generally make lying and 'half-truths' difficult concepts with which to grapple.

In the academic world there are also problems relating to lies and deception. Every year there is news of Year 12 students cheating on their final exams in order to achieve better grades. People lie about their marks and work experience in order to get jobs, while some academics may complete fraudulent research.

Lies, deception and the law

However one may justify lies and deception, these concepts have played an important role in shaping legal systems around the world. Here in Australia one need look no further than s 52 of the *Trade Practices Act 1974* (Cth) to realise how concerns about lies and deception have been incorporated into the legal system.¹² In addition to that sweeping provision and related provisions of the TPA there are many other laws that require disclosure and prohibit fraudulent activity in commercial contexts.

Another area where there is concern about deception and lies is family relationships. Three different cases dealing with lies and deception in this context will be discussed below. Each case raises interesting and important ethical questions in relation to deception, privacy, and the rights of parents.

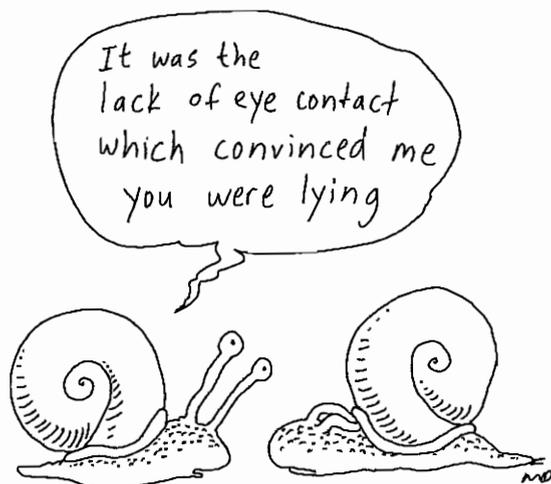
Deceit in family relationships

1. *Smith v Malouf*

The case of *Smith v Malouf*,¹³ decided in a Mississippi (USA) court, involved an unwed father suing the mother for intentional infliction of emotional distress after she put their baby up for adoption. The father sought a declaration of paternity, a custody order, and an injunction to stop adoption proceedings. A temporary order restraining the proceedings was served on the mother. However, the mother and her parents arranged a secret adoption.

The father and his parents then sued the mother for intentional infliction of emotional distress. This claim was dismissed by the trial court as Mississippi law did not recognise unwed fathers as parents. On appeal, however, the Mississippi Supreme Court found the statute declaring an unwed father to be a non-parent unconstitutional as applied to the father because he had tried promptly to establish a substantial relationship with the child.

The question remained as to whether the mother and her family could be liable for the father's emotional distress. The mother argued that she could not be liable because she was exercising her right to surrender the child for adoption, just as she would have been entitled to have an abortion. The court rejected the argument, reasoning that once the mother decided to carry the child to term, the father's constitutional rights crystallised. The father could sue for intentional infliction of emotional distress because the maternal family acted intentionally, and could foresee that their actions would render the father unable to veto the adoption. In turn, they could



foresee that this would cause the father, who had promptly asserted his parental rights, to suffer emotional distress when the child was placed for adoption.¹⁴

2. *Magill v Magill*

*Magill v Magill*¹⁵ is an Australian case involving a husband and wife with three children born in 1989, 1990 and 1991. After the parents separated the husband made payments under the *Child Support (Assessment) Act* 1989 (Cth). It was later discovered through DNA tests that the husband was not the father of the two younger children. He was entitled to an adjustment of child support payments to allow for past over-payments and an extinguishment of arrears pursuant to s 143 of the *Child Support (Assessment) Act*.

Perhaps the more interesting aspect of the case, however, is that the husband also alleged deceit, and claimed damages that included personal injury in the form of anxiety and depression as a consequence of the respondent's fraudulent misrepresentations as well as financial loss.¹⁶ He also claimed exemplary damages. At first instance the husband was awarded damages of \$70,000 (no exemplary damages were awarded). This was reversed by the Court of Appeal of the Supreme Court of Victoria which held that the husband had failed to establish the essential elements of the tort of deceit. The husband then appealed to the High Court of Australia, seeking restoration of the original award of damages. The High Court held that the appeal should be dismissed, but the complexity of the case is reflected in the reasoning of the judges.

• Chief Justice Gleeson

Gleeson CJ determined that marital relations were not a 'tort-free zone' and actionable deceit could exist, but in this case Mr Magill failed to establish the elements of the tort of deceit, namely:

- (1) a representation by words or acts;
- (2) knowledge both that the representation was false and would be acted upon; and
- (3) damage flowing to another person as a result.

Mr Magill failed to satisfy the second element of the tort of deceit, as it was not clear that his wife knew that the representations of paternity she made to him were false. Even up to the time of the paternity tests, Mrs Magill only had suspicions that her husband was not the father. She did not know unequivocally that this was the case.

Furthermore, Gleeson CJ considered that the matters which an individual party to a marriage might properly regard as private were not limited to questions of paternity, sexual fidelity or to events that occurred during the marriage. A duty to disclose the truth about some matters would be inconsistent with the ethical context in which such a judgment was to be made.

• Justices Gummow, Kirby and Crennan

Gummow, Kirby and Crennan JJ held that the articulation of the tort of deceit was established and uncontroversial. Accordingly, where a defendant made a false representation, knowing it to be untrue, or being reckless as to whether it was true, and intended that the claimant should act in reliance on it, then in so far as the latter did so and suffered loss, then the defendant was liable for it. As such, they judged that Mr Magill succeeded in establishing the elements of the tort of deceit.

The problem for these judges was that not only did the cases themselves show that an action for deceit had historically been associated with commercial and economic matters, and particularly with inducing contractual relations, but also the method by which damages in deceit were assessed reflected that link. Further, the *Family Law Act* 1975 (Cth) and the *Child Support (Assessment) Act* provided a comprehensive statutory framework for dealing with marital breakdown and collateral issues affecting children. An action in deceit, as pursued in this case, cut across specific provisions of that legislation.

The judgment of Gummow, Kirby and Crennan JJ, together with that of Gleeson CJ, indicates that the facts of the case produced a problematic application of the tort of deceit. Their Honours held that marriage was a relationship of trust and confidence, and that representations made within such a relationship would have to be assessed with that reality in mind. They determined that there was no recognised legal or equitable obligation, or duty of care, on a spouse to disclose an extra-marital sexual relationship during the course of a marriage. There was a mantle of privacy over such conduct protecting it from scrutiny by the law. As such, false representations concerning an extra-marital sexual relationship or its consequences (that is, excluding circumstances involving either a duty of care or a duty of disclosure) could not be actionable in deceit.

• Justice Hayne

Hayne J expressed the view that it was difficult conceptually to identify the elements of the tort of deceit in the continuing relationship between parties to a marriage. In particular, it would not be easy to identify what was later said to have been a misrepresentation upon which the opposite party relied. Based on this he determined it was not possible to conclude that there were statements made by Mrs Magill about the paternity of either child which amounted to a misrepresentation upon which Mr Magill relied to his detriment.

Further his Honour doubted that the law could satisfactorily prescribe parameters of a personal relationship. Trust and confidence between marriage partners was based on much more than considerations of sexual fidelity. Hayne J reasoned that the tort of deceit could find no application in the present context because it depends upon the application of objective and generalised standards to a particular and personal relationship in which the parties themselves mould the way in which their relationship is ordered and conducted.

• Justice Heydon

According to Heydon J, although there were obvious and general difficulties with pleading the tort of deceit in a non-commercial context, that was not of itself a bar to recovery. In his Honour's assessment, if all the ingredients of the tort were made out, then a deceived spouse could bring an action for paternity fraud. However, the *Magill* case was a poor vehicle for deciding the scope of the tort. The problem with the case was that the representation upon which Mr Magill relied was not pleaded at first instance.

3. *MacDonald v Gray*

Another interesting Australian case regarding paternity fraud, heard in the District Court of Western Australia, is *MacDonald v Gray*.¹⁷ Though the husband in this case failed to prove that the mother's behaviour was fraudulent (as her

belief that he was the father of her child, though wrong, was honestly held), it was held that a pregnant woman owes a duty of care and must not tell a sexual partner he is the father of her unborn child if it is possible another man is the real father.¹⁸

The mother's dilemma

The cases discussed above open a range of ethical and social questions for people in relationships, particularly as many children are not biologically related to their mothers' spouses for any variety of circumstances (rape, one-night stands, long-term relationships with lovers). Moreover, there is now effectively a legal obligation for a woman to advise her spouse of the possibility that he is not the biological parent of the child. A mother will not necessarily know the truth as to paternity – so should she tell her spouse of every possibility without knowing the truth, given the devastating effects this might have on their relationship and on any children they may have even if the father turns out to be the parent? If liability in deceit provides an incentive to mothers to disclose infidelity, it can interfere in the domestic relationship of the couple and jeopardise that very relationship.

And what of a husband's infidelity? If a man fathers a child to a woman other than his spouse, the female spouse would not necessarily know about it, let alone be able to force a DNA test. If she found out, would she be able to sue him for deceit, based on any loss she might have suffered as a result of this fact (for example, where he has provided support to the other child, which money could have instead benefited the female spouse and their children)? If the man mentions nothing to his wife, what representations has he made to her? As the *Magill* case shows, lies about fidelity and paternity can have financial and emotional consequences for the families involved.

Opening the floodgates?

Magill v Magill raises the question as to whether and when deception should apply to lies spouses tell, not just those that involve the birth of a child. For example, many spouses would say that if they were told of an infidelity, they would end the relationship. No doubt partly because of this, many spouses lie about fidelity. One can easily imagine circumstances in which a parent could argue a compensable loss arising out of such a lie (including suffering emotionally from learning of the infidelity). In light of *Magill* one could argue that it is equally appropriate to compensate would-be-mothers who have been lied to about their spouses' intentions as to fatherhood and have thereby been deprived of the opportunity to have children.

Lying can help us get out of sticky situations, and some argue that it can be justified, but remember the words of Samuel Butler, 'Lying well takes skill.'¹⁹ So it may be that the worst thing about lying is that it's more difficult and more complicated than truthfulness. Lying comes at a price. Perhaps the most important question we should ask ourselves is this: Is it worth it?

References

- ¹ Sir Walter Scott (1771–1832), *Marmion* (Canto vi, Stanza 17).
- ² Sissela Bok, *Lying: Moral Choices in Public and Private Life* (1980) 14, 17.
- ³ Samuel Butler (1835–1902), *Samuel Butler's Notebooks* (1951), 114.
- ⁴ Attributed to Immanuel Kant (1724–1804).
- ⁵ Bok, above n 2, 249.

⁶ Ibid 77.

⁷ By which is meant firm reliance on the integrity, ability, or character of a person or thing.

⁸ Bok, above n 2, 205.

⁹ Ibid.

¹⁰ The text of the Hippocratic Oath is available at http://www.pbs.org/wgbh/nova/doctors/oath_modern.html.

¹¹ Bok, above n 2, 223.

¹² Section 52 of the TPA provides: 'A corporation shall not in trade or commerce engage in conduct that is misleading or deceptive or is likely to mislead or deceive.'

¹³ 722 So 2d 490 (Miss 1998).

¹⁴ Since this case was decided, Texas and many other US states have enacted putative father registries to prevent natural fathers from disrupting adoptions. However, the effects of the registries are debatable. Ohio, for instance, has seen a case a year in its appellate courts since its putative father registry was enacted. In almost half of those cases, the natural father, despite not signing the registry, succeeded in overturning the adoption after extended litigation.

¹⁵ [2006] HCA 51.

¹⁶ Including loss of earning capacity by reason of his mental or psychological problems, and loss relating to the time he had spent with, and money he had spent on, the children under the mistaken belief that he was their father.

¹⁷ [2005] WADC 251.

¹⁸ In the English case of *P v B* [2001] 1 FLR 1041 it was held that the tort of deceit applies between cohabiting couples, entitling the claimant to seek recovery (as damages) of payments alleged to have been made by him in respect of a child of whom the defendant had fraudulently misrepresented that he was the father. The court noted in this case that there was no good legal or policy reason why actions for damages in deceit should not apply to cohabiting couples, observing that '[t]he law should encourage honesty between cohabiting couples rather than condone dishonesty'.

¹⁹ Above n 3.

Consider and discuss:

Some questions to ask yourself after reading this article ...

- *How do you feel about lying?*
- *What are your habits when it comes to telling the truth (or not)?*
- *How often are you caught lying?*
- *Do you lie to yourself?*
- *Are people generally honest?*
- *Is it easier to lie to an individual or to a group of people?*
- *Can you look someone in the eye while you are lying to them?*
- *Have you lied to authority figures in order to protect a friend?*
- *Do you rehearse your lies?*
- *How often do you think people lie to you?*
- *Is it acceptable for a government to lie to its citizens in order to protect them?*
- *Do you consider bias in the media to be a form of deception?*
- *Have you ever lied to impress someone?*
- *Do you think that men or women tell more lies?*
- *Are you more likely to lie to persons of your sex or the opposite sex?*