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# Comment

## Is it a harm to be born with different skin colour to your parents?

18 July 2011

By *Professor Sally Sheldon*

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Appeared in BioNews [616](#)

The Northern Ireland Court of Appeal last month ruled on the case of A and B brought by twins born with different skin colour to their parents and to each other (1). Upon their birth, it had been discovered that their mother had been mistakenly inseminated with [sperm](#) from a 'Caucasian (Cape-coloured)' donor. While the donor had been white, there was no guarantee that his children would be (2).

Acting through their mother, the twins sought compensation on three grounds: first, they had experienced hurtful racist abuse; and, second, upsetting comments were made about their physical dissimilarity from each other and their parents, leading them to question whether they were adopted. Third, should either twin have a child with a mixed-race partner, this child could have a different skin colour from either parent.

Unsurprisingly, given existing law, the courts found against the twins. Not all harms attract legal compensation. Moreover, there are powerful public policy arguments against awarding compensation. And, while the Northern Irish courts oddly did not consider McKay (the leading authority on actions in wrongful life), by analogy with that case: how could the courts accept the claim that it is better not to be born than to be born non-white to white parents? (3)

Yet, while this outcome seems inevitable, the thin description of the twins' injury gives me pause. The Hon Mr Justice Gillen in the High Court of Northern Ireland, notes: 'In a modern, civilised society the colour of their skin - no more than the colour of their eyes or their hair or their intelligence or their height - cannot and should not count as connoting some damage to them'.

And further: '[t]he children ... have entered the rich tapestry of childhood where children of all colours, shapes and sizes must be afforded equality of opportunity free from the burdens of racial or ethnic discrimination. It would be contrary to the principles which underlie our multi-cultural society to suggest the [genes](#) they carry somehow render them 'a victim' at the hands of the defendant' (4).

Yet this proud reference to 'our multi-cultural society' will have rung hollow to the complainants in this case.

Northern Ireland is over 99 percent white and there is evidence of significant racism, disproportionately affecting children (5 a,b,c).

While Craig Venter is correct that race is a 'social concept not a scientific one' (6), it nonetheless has real and painful consequences; consequences keenly experienced by these twins. A different couple treated in Northern Ireland also mistakenly received semen from a Caucasian (Cape-coloured) donor. That father notes:

'They are gorgeous kids and I'd rather die than not have them, but this mistake has devastated our family and almost destroyed our marriage. We can't go out together because people openly stare at us. My wife has been asked if she's had an affair with an Indian man on holiday. In public, she'll shrug it off. But in private, she's often in tears...

... As he's growing older, [my son is] becoming more and more confused, and he's suffered racial taunts in school, with other pupils asking: 'Where's your father from?' He's been called a 'n\*\*\*\*r' and a 'P\*\*i'. He can see I look completely different from him and knows something is wrong, but doesn't know what. We live in a small community, which is predominantly white, so people notice and make assumptions, which is stressful and hurtful. Our lives have been ruined by this mistake' (7).

The courts focused almost exclusively on the first harm alleged by A and B, ignoring their complaint regarding their physical dissimilarity from their parents and each other. Yet this father's quote above emphasises the twins' second alleged harm. This second alleged harm also raises interesting questions about racial matching in UK clinics.

Racial matching is a routinely-practised form of selective reproduction that is less controversial than most selection, presumably because its purpose appears benign. It aims merely to let children 'fit in' with their families and to maintain the privacy of people who have chosen donor conception (8).

Yet how does racial matching's aim to maintain secrecy sit with the shift towards greater openness in [gamete](#) donation. For example, parents being urged to tell their children how they were conceived, and concerns expressed regarding state collusion in the deception said to be implicit in current practices of birth certification?

There is clear blue water between encouraging greater openness to donor-conceived children and forcibly 'outing' parents by refusing to match them with a donor of similar skin colour. Yet, if this is true, is the law too swift to discount the possibility that the twins might have suffered real harm?

It is also disappointing that the Northern Irish courts failed to discuss the implications of the Human Rights Act. A consideration of the relevance of privacy rights as formulated in Article 8 of the European Convention on Human Rights might have enabled a fuller and more nuanced appreciation of this question, even if this is unlikely to have affected the final outcome.

#### SOURCES & REFERENCES

1) [A and B by C \(their mother and next friend\) v A Health And Social Services Trust](#) [2011] NICA 28; [2010] NIQB 108 |

2) [The Cape Coloured community, hailing from the Cape Province in South Africa, arose from unions between white European settlers, native black South Africans, and slaves from Madagascar, the Malayan archipelago, Sri Lanka, and India. The term is itself a controversial classification used during the infamously and explicitly racist Apartheid era](#)  
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3) [McKay v Essex AHA](#) [1982] QB 1166; [1982] 2 All ER 771 (CA) |

4) [At 18, 23](#)  
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**5a) Key Statistics Report**

Northern Ireland Census | 2001

**5b) P. Connolly 'Race' and Racism in Northern Ireland: A Review of the Research Evidence**

Office of the First Minister and Deputy First Minister | 2002

**5c) N. Jarman 'Victims and Perpetrators, Racism and Young People in Northern Ireland'**

Child Care in Practice 129 9(2) | 2010

**6) See the discussion in earlier issues of BioNews on this question, starting with Jess Buxton on 'Is there a place for race in biology?' in BioNews**

BioNews | 11 April 2011

**7) 'Why am I dark, daddy? The white couple who had mixed race children after IVF blunder'**

Daily Mail | 13 June 2009

**8) By 'selective reproduction', I mean that it represents an 'attempt to create one possible future child rather than a different possible future child ... normally [because] one possible future child is, in some way, more desirable than the alternatives'**

Wilkinson, S. Choosing Tomorrow's Children, at 2 | 2010

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