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“Right Thinking People” and Suffering  
Through the Politics of Difference in  
Northern Ireland: A Feminist Judgment

Marian Duggan and Julie McCandless

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# “Right Thinking People” and Suffering Through the Politics of Difference in Northern Ireland: A Feminist Judgment

Marian Duggan and Julie McCandless \*

**Abstract:** This paper forms part of the Northern/Ireland Feminist Judgments Project. It comes in two parts: a feminist judgment and an accompanying commentary. The purpose of a Feminist Judgments Project is to rewrite the “missing” feminist judgments in significant legal cases. A driver of the methodology is to put feminist theory and critique into action, and to show how cases could have been reasoned and/or decided differently. The case in this chapter is a clinical negligence claim against a fertility clinic, which carelessly used the wrong donor sperm in a woman’s IVF treatment (*A and B (by C, their mother and next friend) v A (Health and Social Services Trust)* [2011] NICA 28). The consequences of this mistake were that the children born from the fertility treatment had different skin colour to the woman and her husband, as well as each other. The claim was from the children, as the clinic settled out-of-court with the parents. Julie McCandless’ feminist judgment deploys very different reasoning to the original court decisions, and in part reaches a different conclusion. Marian Duggan’s commentary explains and problematizes the approach of the feminist judgment, as well as putting the broader identity issues signalled by the case in context.

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*Background to feminist judging and further details of the Northern/Irish Feminist Judgments Project.*

The Women's Court of Canada ([www.womenscourt.ca/ca](http://www.womenscourt.ca/ca)) and the English Feminist Judgments Project (<https://www.kent.ac.uk/law/fjp/>) inaugurated a critical legal methodology which re-calibrated the internal mechanics of judicial reasoning in order to demonstrate how feminist perspectives can bring new insights to judgment making. The feminist judgment method may take a number of guises. For example, it can challenge distinctions between 'public' and 'private', retell the facts of the case to make women's lived experiences more visible, or incorporate insights from feminist empirical studies (see further: Rosemary Hunter, Claire McGlynn, Erika Rackley (eds), *Feminist Judgments: From Theory to Practice* (Oxford: Hart Publishing, 2010), ch 2). The success of these projects has inspired sister Feminist Judgments Projects in other common law jurisdictions such as Australia, the USA, New Zealand/Aotearoa and in International law. Other critical perspectives have also adapted the methodology, with projects pertaining to environmental and ethical concerns.

The Northern/Ireland Feminist Judgments Project adapts the feminist judging methodology to inaugurate a fresh dialogue on gender, judicial power and national identity within Ireland and Northern Ireland. The Project has involved over 100 academics, practitioners, activists, litigants, students, artists and poets who have worked collaboratively to re-write 27 legal cases from Ireland and Northern Ireland. These cases cover a broad range of substantive legal areas – constitutional, contract, human rights, property, international, children, medical, employment, discrimination, family, animal, tort, criminal, equity – as well as type of court case – from the Northern Ireland County Court to the Irish Supreme Court. By framing judgment as an inherently political activity, the Northern/Irish Feminist Judgments Project has taken the methodology in challenging new directions. Judges play different roles according to their political environment. Ireland and Northern Ireland are separate jurisdictions with difficult and overlapping legal and political histories. Over the past century, both legal orders have been subject to considerable contestation, in which judges have been crucial, if not always nakedly, political figures as legal judgments have articulated ideal national futures. Through the rewritten judgments, the Northern/Ireland Feminist Judgments Project has delineated and challenged the gendered politics of identity in legal decision-making. The rewritten cases, along with a number of framing chapters, will be published in an anthology by Hart in 2016: *Northern/Irish Feminist Judgments: Judges' Troubles and the Gendered Politics of Identity*.

**COMMENTARY ON  
A AND B (BY C) v A (HEALTH AND SOCIAL SERVICES TRUST)**

By MARIAN DUGGAN

INTRODUCTION

This case involves twins, who were born via IVF treatment using donor sperm in Northern Ireland. Their mother and father had requested sperm from a 'Caucasian' donor to ensure any resultant children would appear as racially 'matched'. The clinic's oversight meant that sperm was administered from a 'Caucasian (Cape Coloured)' donor, thus South African in origin with a background comprising of white, black and Malay heritage.<sup>1</sup> The children were born with a different and darker skin colour from their parents and different skin colour from each other. The basis of the children's legal claim was that while growing up in Northern Ireland they had been subjected to 'abusive and derogatory comment' about their skin colour and their mother's implied infidelity. This had led them to question their relationship to their parents and each other, causing emotional upset. The children also expressed concerns over their future prospects as a result of the racial hostility to which they were exposed.<sup>2</sup>

This case may seem like an odd selection for a feminist judgment as it does not obviously raise issues of gendered harm, stereotypes or injustice that feminist analyses of tort law have traditionally focussed.<sup>3</sup> It is also a troubling case for feminist analysis as underpinning the children's complaint is the assumption that they were entitled to inherit and benefit from their parents' Whiteness,<sup>4</sup> raising important questions pertaining to power and privilege associated with the intersection of perceived racial characteristics and family structure. Such assumptions tend to be ripe for feminist and critical race theory critique,<sup>5</sup> prompting the dilemma of how best to respond to the distress and disadvantage experienced as a result of such disruptions. In her feminist judgment Julie McCandless is explicit about her discomfort with the children's claim. However, by foregrounding the children's concerns and experiences she delivers a judgment

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<sup>1</sup> For a history of the term 'Caucasian' and its problematic associations with Whiteness, see: Nell Irvin Painter, *The History of White People* (New York, W.W. Norton and Company Inc, 2010, reprint edition), 72-90.

<sup>2</sup> The case was heard at the High Court and the Court of Appeal, with Gillen J and Girvan LJ delivering judgment in *A and B (by C, their mother and next friend) v A (Health and Social Services Trust)* [2010] NIQB 108 and *A and B (by C, their mother and next friend) v A (Health and Social Services Trust)* [2011] NICA 28 respectively. Morgan LCJ and Sir John Sheil sat with Girvan LJ, but as per the vast majority of Northern Ireland Court of Appeal decisions, no concurring or dissenting judgments were delivered and the presiding judge delivered the 'one voice' judgment of the court. The feminist judgment is a replacement Court of Appeal decision.

<sup>3</sup> Janice Richardson and Erika Rackley (eds), *Feminist Perspectives on Tort Law* (Abingdon, Oxon, Routledge, 2012).

<sup>4</sup> Ruth Frankenberg, *The Social Construction of Whiteness: White Women, Race Matters* (USA: University of Minnesota Press, 1993).

<sup>5</sup> Patricia Hill Collins, 'It's All in the Family: Intersections of Gender, Race and Nation' (1998) *Hypatia* 13(3), 62-82. Indeed, a recent legal case in Ohio involving a white lesbian couple and the mistaken use of sperm from a black, rather than a white, donor has been heavily criticised by eminent critical race theorist, Patricia Collins, who framed the case as a 'wrongful birth' action against a 'black child'. Available at: <http://www.thenation.com/article/value-whiteness/> (accessed 25 August 2015).

that tackles, rather than overlooks, the culturally specific factors of racism and identity in Northern Ireland. In doing so, she challenges the ‘colour blind’<sup>6</sup> approach in the original judgments, as well as the judicial individualisation of racism in Northern Ireland to a ‘misguided’<sup>7</sup> and ‘boorish’<sup>8</sup> minority. While perhaps not asking the ‘woman question’<sup>9</sup> this feminist judgment asks the ‘power question’ in an attempt to rectify the judicial silence in the original judgment on the complexities and operation of racism and structural inequality in society.

#### UNPACKING RACISM IN NORTHERN IRELAND

‘Race’ is a socially constructed concept which has – and continues – to underpin significant levels of material persecution based on (mis)interpretations of lesser worth, citizenship and ability.<sup>10</sup> This case poses uncomfortable questions which both illustrate and engage with issues of race and racism in Northern Irish society, as well as the law’s limited role in ameliorating the effects of racism. The children’s alleged emotional upset was caused by comments illustrating the differences in the family’s skin colour; whilst distressing, this does not ordinarily constitute ‘harm’ in a legally actionable sense, regardless as to the past, present and perceived potential impact on the applicant. In his original judgment, Gillen J rejected the children’s argument that the clinic owed them a duty of care, and reasoned that if he was wrong on this point, the children had been born ‘normal and healthy’ and therefore had not suffered any legally recognisable harm. He ventured that to compensate them financially would be to allow the children to grow up believing that their skin colour meant that they were somehow inherently ‘damaged’.<sup>11</sup>

Gillen J therefore does not find the clinic at ‘fault’ for the children’s emotional distress; yet it was the clinic’s error that resulted in the children being exposed to repeated racist victimisation from individuals that caused concern for

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<sup>6</sup> The literature on ‘colour blindness’ relates predominantly to the US (see for example: Michael Brown, Martin Carnoy, Elliott Currie, Troy Duster, David Oppenheimer, Marjorie Shultz and David Wellman, *Whitewashing Race: The Myth of a Colour-Blind Society* (Berkeley, University of California Press, 2003) with some studies countenancing Britain (see: Amy Ansell, *New Right, New Racism: Race and Reaction in the United States and Britain* (New York, New York University Press, 1997) and James Rhodes, ‘Revisiting the 2001 Riots: New Labour and the Rise of ‘Colour Blind Racism’ (2009) 14(5) *Sociological Research Online*: <http://www.socresonline.org.uk/14/5/3.html>. For a related analysis of how the rise of ‘post sectarian’ and ‘good relations’ discourses following the Good Friday/Belfast Agreement have allowed the Northern Ireland state to hide its incapacity to address rising racism and sectarianism see: Robbie McVeigh and Bill Rolston, ‘From Good Friday to Good Relations: sectarianism, racism and the Northern Ireland state’ (2007) 48(4) *Race & Class* 1-23.

<sup>7</sup> Per Gillen J in *A and B (by C, their mother and next friend) v A (Health and Social Services Trust)* [2010] NIQB, para 24.

<sup>8</sup> Per Girvan LJ in *A and B (by C, their mother and next friend) v A (Health and Social Services Trust)* [2011] NICA 28, para 10. On the connection between a state’s commitment to neo-liberal policies and the incumbent emphasis on the individual to a corresponding reduction of focus on structural racism and inequality see: David Goldberg, *The Threat of Race: Reflections on Racial Neoliberalism* (USA, Wiley-Blackwell, 2009).

<sup>9</sup> Defined by Rosemary Hunter as one of the techniques of feminist judging (‘Can Feminist Judges Make a Difference?’ (2008) 15 *International Journal of the Legal Profession* 7).

<sup>10</sup> For a critical consideration of the relationship between nature and culture in ideas about race see: Peter Wade, *Race, Nature and Culture* (London, Pluto Press, 2002). On race as social construction see: David Goldberg (1993) *Racist Culture: Philosophy and the Politics of Meaning* (Blackwell) and Goldberg, above n 8.

<sup>11</sup> Above n 7 at para 24.

their futures. Awarding damages for having the 'wrong' colour of skin is clearly neither desirable nor an effective way in which to address the structural issues informing what is right or wrong. However, Gillen J occupies a site of significant racial (as well as social) privilege; it is perhaps this which informs his comparisons of the children's skin colour to hair and eye colour or intelligence, belying the potential impacts of racism in society.

The children's experiences are reflected by research into racism in schools in Northern Ireland which found that three-quarters (75%) of children from ethnic minority groups had experienced derogatory racist name calling.<sup>12</sup> A significant number (42%) of minority ethnic 16-year-old students reported having been a victim of 'racist bullying or harassment' in their school which can impede academic progress and have a significantly detrimental effect on a victim's economic future. The situation appears to fare just as bad in the workplace, with the report suggesting that racism had supplanted traditional cross-community sectarianism as the main reason for employees being harassed, bullied or threatened in their places of work.<sup>13</sup> Therefore, McCandless LJ is right to question the judicial failure in the original judgments to expand up on the societal source of the racism suffered by the children and the possible longevity of this impact on their wellbeing.

In drawing attention to the operation of racial and other inequalities McCandless LJ indicates the feminist judgment as a broader commentary on social relations and justice and takes the opportunity to consider the role of law – however limited – in ameliorating prejudice and disadvantage. The rewritten judgment also foregrounds the children's concerns in a manner reflective of feminist values in recognising the individual as expert of their own experience, particularly when faced with a counter-narrative that represents the dominant race, class and status.<sup>14</sup> McCandless LJ's invocation of 'the history of structural racism' evident in Northern Ireland importantly addresses the real implications of inequality, unfairness, distress or prejudice incurred by the children (and their parents). A fuller examination of this proves integral to understanding the cultural dynamics of the case.

#### THE IMPACT OF NORTHERN IRELAND'S CULTURAL DYNAMICS

Even if you do not see yourself in a box, others may put you there and close the lid.<sup>15</sup>

At the time of the original ruling, Northern Ireland was over a dozen years into the peace process which signalled an end to the worst of the previous three

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<sup>12</sup> Robbie McVeigh and An Dúchán, *The Next Stephen Lawrence? Racist Violence and Criminal Justice in Northern Ireland* (2005) Research Report for the Northern Ireland Council for Ethnic Minorities.

<sup>13</sup> Ibid.

<sup>14</sup> This approach borrows from the tradition of feminist standpoint theory: Sandra Harding (ed), *The Feminist Standpoint Theory Reader* (New York and London, Routledge, 2004). For critical and reflective discussions see: Susan Hekman, 'Truth and Method: Feminist Standpoint Theory Revisited' (1997) 2(2) *Signs* 341-365 and Sandra Harding, 'Standpoint Theories: Productively Controversial' (2009) 24(4) *Hypatia* 192-200.

<sup>15</sup> Edna Longley, 'Multi-Culturalism and Northern Ireland: Making Differences Fruitful' in Edna Longley and Declan Kiberd, *Multi-Culturalism: The View from Two Irelands* (Cork, Cork University Press, 2001), 2.

decades of cross-community sectarian conflict.<sup>16</sup> Rapid changes occurred within a short period of time, particularly with respect to increasingly visible cultural diversity and difference, as urban areas such as Belfast became popular for economic migrants seeking to resettle in the UK. However, Gillen J's comment about Northern Ireland's 'multicultural' nature<sup>17</sup> is somewhat ambitious given that just 1.8% of the population (32,400 people) belonged to an ethnic minority group in 2011, double the number recorded in 2001 (0.8%).<sup>18</sup>

These cultural changes were not always met with accepting attitudes; several high-profile incidents motivated by racial hostility, particularly against members of the Roma community in 2008,<sup>19</sup> led to Northern Ireland being branded the 'hate crime capital of Europe' and 'race hate capital of UK' in the media,<sup>20</sup> casting doubt on the supposed inclusivity of the 'new' purportedly 'post conflict' and 'post sectarian' Northern Ireland. Surveys on racial integration have unsurprisingly indicated that the majority of people believe that minority ethnic communities face 'a lot' of prejudice in Northern Ireland and an awareness that racial prejudice had increased, rather than abated, over time.<sup>21</sup> These perceptions correlate with official data showing that reports of racially motivated incidents have increased annually.<sup>22</sup> However, just 12 out of 13,655 hate-motivated offences reported to the police between 2008 and 2012 resulted in a successful prosecution.<sup>23</sup> Therefore, whilst it is true to suggest that the children's genes did not render them 'victims' at the hands of the clinic; the clinic's error had indeed put them at greater risk of victimisation from wider society.

Montague and Shirlow have described the growth in racist hate crimes in Northern Ireland as often being 'a crude way of "defending" resources coupled with notions of protecting community identity from the "outsider"'.<sup>24</sup> Identity hostility has evidently extended beyond the sectarian divide; the past experiences

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<sup>16</sup> This sectarian conflict, known as 'The Troubles', overshadowed other areas of cultural development at a time in history when elsewhere in the UK civil rights movements were gaining traction for race relations, sexual minorities and women's equality. As a result, the primacy of ameliorating Northern Ireland's pressing sectarian problem meant that addressing other forms of prejudice – such as racism, sexism or homophobia – featured far lower down on the hierarchy of need.

<sup>17</sup> Above n 7 at 23.

<sup>18</sup> Northern Ireland Census, *Key Statistics Summary Report* (2011). Available at: <http://www.nisra.gov.uk/archive/census/2011/results/key-statistics/summary-report.pdf> (accessed 24 June 2015).

<sup>19</sup> BBC News, 'Romanians leave Northern Ireland after attacks' (23 June 2009). Available at: <http://news.bbc.co.uk/1/hi/8114234.stm> (accessed 24 June 2015).

<sup>20</sup> Belfast Telegraph, 'Two racist attacks are taking place every day in Northern Ireland – with fears Belfast is rapidly becoming the race hate capital of the UK' (21 April 2014). Available at: <http://www.belfasttelegraph.co.uk/news/northern-ireland/two-racist-attacks-every-day-in-northern-irelands-racehate-crime-surge-30202329.html> (accessed 24 June 2015).

<sup>21</sup> *Northern Ireland Life and Times Survey* dataset. Available at: <http://www.ark.ac.uk/nilt/results/mineth.html> (accessed 24 June 2015).

<sup>22</sup> Datasets made available by the Police Service of Northern Ireland indicated an increase of 36% to 1,132 incidents and 51% to 796 crimes in the 12 months to June 2014. Available at: [http://www.psn.police.uk/index/updates/updates\\_statistics/updates\\_hate\\_motivation\\_statistics.htm](http://www.psn.police.uk/index/updates/updates_statistics/updates_hate_motivation_statistics.htm) (accessed 24 June 2015).

<sup>23</sup> Ibid.

<sup>24</sup> Richard Montague and Peter Shirlow, *Challenging Racism: Ending Hate* (2010). Available at: <http://www.qub.ac.uk/research-centres/isctsj/filestore/Fileupload,472425,en.pdf> (accessed 24 June 2015).



and future fears expressed in this case may be linked to racism rather than sectarianism, but one cannot be condoned/eradicated only for an alternative to take its place.<sup>25</sup> As traditional sectarian tensions abate, it appears that space has opened up in which other forms of targeted prejudice are recognised.<sup>26</sup> The traditionally Christian-inspired cultural conservatism informing Northern Irish politics and society – poignantly captured by Girvan LJ reciting a Psalm at the start of the original Court of Appeal judgment<sup>27</sup> – has also been a contributing factor in the stagnation of socio-legal progress, such as ensuring equality and rights for racial, religious and sexual minorities and implementing full legal protection from (and redress for) discrimination, persecution and victimisation. This case offered a significant – but missed – opportunity for judges in Northern Ireland to develop the common law in the context of addressing the harms that emanate from identity-based persecution. While the feminist judgment embraces the novelty of the case to develop the legal principles pertaining to substandard fertility treatment, Gillen J and Girvan LJ firmly operated within the law as given,<sup>28</sup> to include a keen deference to Parliament and a straightforward application of ‘wrongful birth’ precedents to a case that quite simply wasn’t about a wrongful birth.

#### SITUATING THE FEMINIST PERSPECTIVE

Feminism has long been critical of the power of law to effect progressive social change<sup>29</sup> and the dilemmas presented by this case are similarly present in other areas of law designed to countenance racial prejudice and victimisation. For example, ‘hate crimes’ and their related legislation are subjective in nature, situating the perception of harm and motive with the *victim*. Taking this stance, the children’s experiences – and fears – are valid, but if addressed accordingly, emulate the problems inherent to ‘hate crime’ legislation – namely, that laws seek to punish the *individual* rather than address broader issues in *society*. An important feminist question to be asked of McCandless LJ’s judgment is whether it achieves a better outcome not just for the individual claimants, but also for wider society through development of the law?

In not holding the clinic fully liable for the emotional distress and disadvantage experienced by the children, the feminist judgment in part reaches the same outcome as the original. However, McCandless LJ deploys significantly different reasoning in reaching this conclusion. First, she holds that a duty of care was owed by the clinic to the children because of their interconnected interests in their parents’ treatment. In doing so, she lends judicial embrace to the feminist-

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<sup>25</sup> Marian Duggan, ‘Sectarianism and Hate Crime in Northern Ireland’ in Nathan Hall, Abbee Corb, Paul Giannasi and John Grieve (eds) *The International Handbook on Hate Crime* (Abingdon, Routledge, 2014) 117-128.

<sup>26</sup> Marian Duggan, *Queering Conflict: Examining Lesbian and Gay Experiences of Homophobia in Northern Ireland* (Farnham, Ashgate, 2012).

<sup>27</sup> Above n 8 at 1.

<sup>28</sup> See further: Stephen Livingstone, ‘And Justice for All? The Judiciary and the Legal Profession in Transition’ in Colin Harvey (ed) *Human Rights, Equality and Democratic Renewal in Northern Ireland* (Oxford, Hart Publishing, 2001) 131-161.

<sup>29</sup> Carol Smart, *The Power of Law* (London, Routledge, 1989).

inspired concept of relational autonomy.<sup>30</sup> This seems to be particularly important given the reproductive and familial context of the case.<sup>31</sup> Second, she subverts judicial reliance on policy-based reasoning that is underpinned by abstract ‘reasonable man’<sup>32</sup> assumptions by rejecting the ‘healthy child’ exemption to the normal principles of recovery<sup>33</sup> and instead developing policy-based reasoning around societal accountability for inequality and class-based injury. Here, she takes inspiration from feminist scholarship which problematises the conventional tort idea of individualised and privatised injury, as well as the dichotomised demarcation between private and public law spheres.<sup>34</sup> While the feminist judgment does insist on holding the clinic accountable for their careless treatment by ordering the payment of a conventional award of £15,000, it also points to the responsibility of public authorities in Northern Ireland to take positive action to ameliorate the effects of racism in society. The possibility of a conventional award was rejected in the original judgments on the basis that the children had not suffered any loss or damage. By teasing out the children’s relational interests in having their parents’ treatment preferences upheld, McCandless LJ retells their story in a way that refuses to dismiss their distress and lived experiences. She also gives judicial notice to feminist critiques of previous conventional awards in cases involving reproduction, by making clear the different context in which this award is granted i.e. not as a pale substitute to an award of full damages which would otherwise have been recoverable ‘but for’ a policy-based exception to the usual rules of recovery.<sup>35</sup> Rather, the award is ordered here in acknowledgment of the substandard treatment and as a way of helping to make the children’s lives better.

An alternative feminist approach could have reasonably seen the complete dismissal of the children’s claim on the basis that it is impossible for conventional tort law doctrine to countenance class-based injury<sup>36</sup> or that to award monetary compensation in the circumstances would be to shore up patriarchal ideas about inheritance, race and family structures.<sup>37</sup> While McCandless LJ appears to accept such critiques in her judgment, she reasons that to so reject the children’s claim entirely would be to attack a ‘symptom’ of patriarchy rather than its root causes. Her approach is marked by sensitivity towards the prevalence of ‘family secrets’ in

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<sup>30</sup> Jennifer Nedelsky, ‘Reconceiving Autonomy: Sources, Thoughts and Possibilities’ (1989) 1 *Yale Journal of Law and Feminism* 7–36. On the use of relational autonomy in a judgment about refusal of life saving medical treatment, see ch 20 by Claire Murray (commentary) and Mary Donnelly (feminist judgment).

<sup>31</sup> For an application of relational autonomy to family law see: Jonathan Herring, *Relational autonomy and Family Law* (London, SpringerBriefs in Law, 2014).

<sup>32</sup> Leslie Bender, ‘A Lawyer’s Primer on Feminist Theory and Tort’ (1988) 38 *Journal of Legal Education* 3.

<sup>33</sup> *McFarlane and another v Tayside Health Board* [1999] UKHL 50; *Rees v Darlington Memorial Hospital NHS Trust* [2003] UKHL 52. See Nicolette Priaulx, *The harm paradox: tort law and the unwanted child in an era of choice* (London, Routledge-Cavendish, 2007).

<sup>34</sup> Adrian Howe, ‘The Problem of Privatized Injuries: Feminist Strategies for Litigation’ in Martha Fineman and Nancy Thomadsen (eds), *At the Boundaries of Law: Feminism and Legal Theory* (New York, Routledge, 1991) 148-168. Leslie Bender, ‘Feminist (Re)Torts: Thoughts on the Liability Crisis, Mass Torts, Power, and Responsibilities’ (1990) 39(4) *Duke Law Journal* 848, 864-72.

<sup>35</sup> Nicolette Priaulx, ‘Damages for the “unwanted” child: time for a rethink?’ (2005) 73(4) *Medico-Legal Journal* 152-163.

<sup>36</sup> See further Regina Graycar ‘A Feminist Adjudication Process: Is There Such a Thing?’ in Ulrike Schultz, Gisela Shaw (eds), *Gender and Judging* (Oxford, Hart Publishing, 2013) 436-457.

<sup>37</sup> See again, Hill Collins, above n 5.

the context of reproduction and fertility treatment.<sup>38</sup> This is perhaps controversial in a national context haunted by the brutality of what James Smith has conceptualised as 'an architecture of containment' whereby state institutions 'concealed' marginalised citizens, typically 'fallen women' who transgressed social mores and dominant morality.<sup>39</sup> A criticism that could therefore be levied at the feminist judgment is that it smacks of 'keeping up appearances' in order to ensure the cultural primacy of the biological family,<sup>40</sup> akin to the political refusal to extend abortion provision in Northern Ireland while hundreds of Northern Irish women travel abroad each year for pregnancy termination.<sup>41</sup> However, McCandless LJ's concern with family secrets and 'passing' does not seem motivated by shame or containment discourses, but rather with acknowledging the family's interests in having the parents' legitimate expectations upheld in a reproductive context whereby people must necessarily articulate choices and preferences that often go unspoken. In doing so, she hints at an alternative way that this case could have been argued by counsel; that of the clinic interfering with the privacy interests of both the children and the parents.<sup>42</sup>

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<sup>38</sup> Carol Smart, *Personal Life* (Cambridge, Polity Press, 2007); Petra Nordqvist and Carol Smart, *Relative Strangers: Family life, genes and donor conception* (Basingstoke, Palgrave Macmillan, 2014).

<sup>39</sup> Smith writes in the specific national context of Ireland rather than Northern Ireland, but it seems likely that the women incarcerated in Magdalene Laundry institutions in Northern Ireland shared similar experiences to women in Ireland: see [https://www.amnesty.org.uk/sites/default/files/doc\\_23218.pdf](https://www.amnesty.org.uk/sites/default/files/doc_23218.pdf) (accessed 25 August 2015). The Historical Institutional Abuse Inquiry currently taking place in Northern Ireland is only taking evidence from persons who were under 18 when they were in a residential institution, precluding many women who would have been incarcerated in Magdalen Laundries or similar institutions: <http://www.hiainquiry.org/> (accessed 25 August 2015).

<sup>40</sup> Martha Fineman, *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies* (Oxford, Routledge, 1995); Alison Diduck, *Law's Families* (London, LexisNexis, 2003); Julie McCandless and Sally Sheldon, 'The Human Fertilisation and Embryology Act (2008) and the Tenacity of the Sexual Family Form' (2010) 73(2) *Modern Law Review* 175-207.

<sup>41</sup> Ann Rossiter, *Ireland's Hidden Diaspora: The Abortion Trail and the Making of a London-Irish Underground, 1980-2000* (London, IASC Publishing, 2009).

<sup>42</sup> This argument was not developed in the feminist judgment as it was not introduced by counsel. While appellate courts can introduce new matters of law, they must restrict their decision to arguments that have been presented. On framing the case in terms of privacy, see Sally Sheldon, 'Only Skin Deep? The harm of being born a different colour to one's parents' 19(4) *Medical Law Review* 657-668.

## JUDGMENT

By JULIE MCCANDLESS

A and B (by C, their mother and next  
friend) v A (Health and Social  
Services Trust)

[2011] NICA 28

QUEEN'S BENCH DIVISION  
GILLEN J  
13 OCTOBER 2010

COURT OF APPEAL  
MORGAN LCJ, McCANDLESS LJ, SIR JOHN SHEIL  
9 MARCH, 24 JUNE 2011

24 June 2011. The following judgment of the court was delivered.

**McCANDLESS LJ.**<sup>43</sup>

### INTRODUCTION

[1] At the heart of this case are a family who have suffered distress following negligent treatment at a licensed fertility clinic. The clinic operates under the auspices of the respondent Health and Social Services Trust. The appellants, A and B, are the children of the family; twins, now aged almost sixteen. They were eleven years old when the proceedings began in October 2006. The issue is whether they can recover damages against the clinic.

[2] The family's distress follows from the clinic's careless selection of donor sperm for the mother's IVF treatment. The parents are both White and, in line with accepted clinical practice at the time of treatment – and indeed, formal guidance from the Regulator, the Human Fertilisation and Embryology Authority (HFEA) – they requested that the mother's eggs be inseminated with sperm from a donor classified as 'Caucasian' so that any children born through her IVF treatment would, with all probability, appear racially similar. Instead, and unbeknownst to the parents, sperm from a donor classified as 'Caucasian (Cape Coloured)' was used. As a result, the children have different and darker skin colour from their parents. Their skin colour is also markedly different from each other.

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<sup>43</sup> I would like to thank Máiréad Enright, Sarah Keenan and Sally Sheldon for their very helpful comments on earlier versions of this judgment, as well as Antony Blackburn-Starza for discussing his doctoral research with me.

[3] As a result, the children allege in their statement of claim that they have suffered distress and emotional upset following abusive and derogatory comments from other children and adults. These comments have been about their difference in appearance from each other, and from their parents. Some comments were racially abusive. They further assert that their quality of life has been adversely affected and that they may suffer future loss and damage. Finally, if either twin goes on to have a genetically related child with a mixed race partner, any child born to them is likely to be of different skin colour than either parent.

[4] At the High Court, my colleague Girvan J dismissed the claim in its entirety.

#### SIGNIFICANCE OF THE CASE

[5] The points raised in this case are novel and important. There are few cases pertaining to negligence in this context, and indeed, this is the first action to be brought by children conceived through negligent treatment. The case therefore provides a valuable opportunity for an appellate court to publicly consider, clarify and question the legal principles in this area, in contrast to the more usual 'out of court' settlements following substandard care or treatment provision.

[6] The case is also significant because the appellants' emotional distress emerges from a situation that no court in this jurisdiction – and possibly no other jurisdiction – has yet considered in the context of a negligence claim: that to be born a different skin colour from your parent(s) and sibling(s), and to receive racist and other derogatory abuse because of these differences, constitutes legally actionable harm against a negligent provider of fertility services whose carelessness caused you to be so born. This is not only a novel question but also a deeply uncomfortable and difficult one, for it simultaneously relies on and challenges racism in society. Gillen J, in determining that the appellants "do not carry the seal of another person's fault" [28], articulated something that I do not think he intended; for it is potentially problematic to attribute the distress that the appellants have suffered to the 'fault' of any one person, when the reality is that the mistake only matters because of the pervasiveness of racism in society. I have found it difficult to consider these important issues of public policy and accountability in the context of a negligence claim, the strictures of which petition me to individualise fault. While it seems important to hold the clinic accountable for substandard treatment, whether this can or should translate into damages for emotional distress because of racist and other derogatory abuse is far from straightforward.

#### DISTINGUISHING WRONGFUL LIFE AND WRONGFUL BIRTH CASES

[7] That the claim comes from the children, rather than the parents, signifies it as what has become known in legal terms as a 'wrongful life' claim i.e. where a child alleges that, but for the defendant's negligence, she would not have been born and, hence, the harm she now suffers would have been avoided. The last time a claim like this was considered in this jurisdiction was almost thirty years ago by the English Court of Appeal in *McKay v Essex Area Health Authority* [1982] QB 1166.

*McKay* determined that disabled children can have no reasonable cause of action in ‘wrongful entry into life’ claims following negligent pre-natal screening which failed to diagnose the cause of the injury. This was on the policy basis that the alternative was non-existence by affording the mother an opportunity to terminate her pregnancy. The framing of such actions as being about existence *per se* has been heavily criticised on the basis that it fails to capture the reality of the issue, which is that the claimant is alive and suffering because of another’s negligence (JK Mason (2007) *The Troubled Pregnancy: Legal Rights and Wrongs in Pregnancy* (Cambridge University Press)). This policy decision to prohibit such claims means that justice becomes highly elusive for child claimants who must bear the brunt of the consequences of substandard treatment without any possibility of recovery of damages. A few courts have permitted wrongful life claims, reasoning that a claimant can be both benefitted (born) and harmed (injured) at the same time (*Curlender v Bio-Science Laboratories* (1980) 106 Cal App 3d 811) or that an award of damages would appeal to justice in helping the claimant lead a more bearable life (*Leids Universitair Medisch Centrum v Kelly Molenaar*, no C03/206, RvdW 2005, 42 (18 March 2005)). However, despite powerful dissenting judgments which frame the actions as being about ‘wrongful suffering’ (Kirby J in *Harriton v Stephens* [2006] HCA 15), the development of the law in most jurisdictions has proceeded along the same lines as *McKay*. While an appropriate time may yet come for *McKay* to be reconsidered, the case before us does not present such an opportunity. The preponderance of analogous authority makes it impossible to contend that the *McKay* decision was given *per incuriam*. The reality that potentially unjust doctrine reinforces itself – because cases in other jurisdictions have relied heavily on *McKay* in their reasoning – does not go unnoticed by this court.

[8] Gillen J did not consider the applicability of *McKay* to the present case and neither counsel for the appellants or the respondent has referred to it in their arguments. However, given that *McKay* is still good law and could potentially bar a negligence claim such as this from proceeding, I will make clear how the case before us is distinguishable.

[9] In *McKay* the child, Mary, was born disabled because her mother, Jacinta, contracted rubella during her pregnancy, which the defendant doctor negligently failed to diagnose. Ultimately the rubella, rather than the negligent diagnosis, caused the child’s dreadful injuries. This was why Mary had no claim under the Congenital Disabilities (Civil Liability) Act 1976, which imposes liability when a careless action of a defendant causes a child to be born with disabilities. In Mary’s case, the negligence meant that her mother continued with her pregnancy, when she might otherwise have not, had the diagnosis been correct. In the case before us, the respondent’s negligence – the incorrect selection of donor sperm – is the *direct* cause of the children being born mixed-race instead of White, as their parents intended. While different – presumably White – children would have been born had the respondent not been negligent, the appellant children’s suffering stems directly from their careless actions. It is not the case that the respondent’s negligence deprived the appellants’ mother of an opportunity to terminate her pregnancy; and indeed, even if the respondent’s mistake had come to light during

their mother's pregnancy, a termination would not have been available to her in this jurisdiction given the restrictive conditions in which abortion is legally available in Northern Ireland.

[10] For these reasons, the appellants' claim is distinguished from *McKay* and is therefore permitted as a free standing action, rather than only being arguable through a proxy 'wrongful birth', or some other, claim by their parents. To allow a free-standing action from the children is important as it means that the ability to recover damages is not reliant on an action from the parents that effectively requires them to portray their children as a burden; something which most, if not all, parents would find objectionable.

[11] So that the children's claim can be considered on its own terms, I also want to make clear how it is distinguishable from precedent relating to wrongful birth claims from parents. In *McFarlane and another v Tayside Health Board* [1999] UKHL 50, the House of Lords determined that the parent(s) of an unintended but healthy child may no longer recover damages for the child's upkeep from a negligent defendant. This exception to the ordinary principles of recovery for negligence was reaffirmed in a subsequent wrongful birth case of *Rees v Darlington Memorial Hospital NHS Trust* [2003] UKHL 52. Gillen J interpreted these cases to mean that as a matter of legal policy, no damages may be recovered where a child is born healthy and without disability or impairment [21]. For whatever reason, counsel for the appellants presented no arguments to the contrary. However, and with respect, to interpret the ratio of these cases so widely would mean that the common law would be forever fossilised. The law would be unable to develop incrementally in response to new forms of damage, for all future cases involving healthy children would simply be barred, even where they suffer from some novel type of personal injury or loss. This cannot be what the House of Lords intended.

[12] While the children in this case are healthy, their claim is substantively different from the claims in *McFarlane* and *Rees*, which were claims from parent(s) for the upkeep of their unintended child, where the defendant's carelessness caused the child to be born. In the case before us, the parents sought medical treatment in order to help them try and have children, rather than prevent conception and pregnancy. The context of fertility treatment, and the reproductive choices which it makes explicit, renders the appellants' parents' situation very different from Laura and George McFarlane – who sought to avoid the birth of a fifth child which they felt they could not afford – and Karina Rees – who sought to avoid having children at all because of her own physical disabilities. As the appellants' parents have negotiated settlement out of court with the respondent trust, we do not know if a legal claim from them against the respondent trust would have been successful, given the fertility treatment, as opposed to sterilisation context. However, what we do know is that the case before us is a claim from children – not parents – in relation to their emotional distress – not existence *per se* – which they would not have suffered had the respondent not been careless. They are not seeking to recover for their lifetime's upkeep, and although it is unclear precisely what level of damages they do seek should their claim be successful, their counsel's argument that they are at least entitled to a conventional award, as was

permitted in *Rees* (£15,000), signals something more modest. For these reasons, I determine that the present case is distinguishable from *McFarlane* and *Rees* and that the policy exception developed in these cases does not prevent the children from having an arguable case.

#### DUTY OF CARE

[13] Whether a duty of care exists on given facts is a question of law. For a claimant to be owed a duty of care by the defendant there must be sufficient proximity of relationship between the parties and the damage must be reasonably foreseeable (*Donoghue v Stevenson* [1932] AC 562; *Caparo Industries Plc v Dickman* (1990) 2 AC 605). In this case, we must determine whether the clinic owed the children a duty of care not to harm them. Gillen J framed the question to be asked as: “Was there a duty owed to the cells that the eggs would not be so fertilised?” and concluded that it would be inappropriate for a first instance judge to vest human cells with the relevant status for a duty of care to be owed. He determined that this was an issue for Parliament as it would involve the court venturing “into the complexities of the creation of life involving a unique physical and scientific process”.

[14] With respect, the court is not being asked whether fertility clinics owe duties to human reproductive cells – for such would be absurd – but rather, whether they owe a duty of care to the children born from the treatment services that they provide. Such duty is clearly owed. As counsel for the appellants quite rightly submitted at trial, the respondent is a provider of fertility treatment; the very purpose of which is to help patients conceive and have children. The duty, therefore, is not properly reflected in the summoning of an image of a cluster of cells, but must instead be considered in the broader context of the purpose of the service and the class of persons countenanced through the provision.

[15] Support for this position can be derived from both statute and the common law. There is legislative direction relating to the establishment of a duty of care in the context of fertility treatment. The Human Fertilisation and Embryology Act 1990 inserted section 1A into the Congenital Disabilities (Civil Liabilities) Act 1976. The effect of this provision is to extend liability under the 1976 Act to injuries suffered as a result of fertility treatment because of, for example, negligent storage of gametes or embryos, or, as in this case their negligent selection. Gillen J correctly states that the 1976 Act does not apply to the children in this case given that they have suffered no congenital disability as a result of the clinic’s negligence. However, the 1976 Act does afford for the possibility of recognising that fertility practitioners owe a duty of care to children born through the provision of fertility treatment. I cannot agree with Gillen J that the 1976 Act “settled” [10] the question of when “a foetus” has sufficient status to be owed a duty of care. This is for two reasons. First, the 1976 Act did not establish any duty of care towards fetuses. A foetus does not have legal standing to make a claim, whether in negligence or some other area of law. Instead, the 1976 Act afforded such standing to children born with a congenital disability because of an “occurrence”



which affected either parent's ability to have a non-disabled child, or affected the mother during pregnancy. The claim is brought against the person responsible for the occurrence. Section 1A extends this provision to encompass negligently provided fertility treatment. If, following such an occurrence, a woman terminated her pregnancy because foetal abnormalities were detected in pre-natal screening – an option that I note is not available to women in Northern Ireland unlike women in Great Britain and many other jurisdictions – there would be no possibility of a claim under the 1976 Act, because no child suffering injury would be born. Second, it would be overly rigid to conclude that, in limiting this provision to cases involving congenital disability, Parliament was signalling its intent to forever limit the scope of the duty so that only children born with congenital disabilities could recover damages. It is credible that the type of case before us was simply not contemplated by Parliamentarians in the process of reforming a piece of legislation designed to deal with the consequences of congenital disability, and originally enacted before the dawn of IVF and at a time when donor insemination was only beginning to be accepted as routine clinical practice. In this court's view the 1976 Act does not preclude courts from incrementally developing the common law in the face of novel situations such as the appellants' claim; healthy children alleging a different type of harm following negligent fertility treatment.

[16] What is more helpful to consider is when the 1976 Act countenances the existence of a duty between the providers of fertility treatment and the children born from the treatment, so that we can draw parallels to the present novel situation. Section 1A (2) makes clear that the 'defendant' will be answerable to the child if he or she was liable in tort to one or both of the parents. For the purposes of this section it does not matter whether or not the parents have suffered any actionable injury. All that needs to be made out is that a duty of care was owed to the parents of any child making a claim against the defendants. In the case of fertility treatment, as with other medical treatments, this is straightforward.

[17] The common law also signals the existence of a duty of care. *Burton v Islington HA* [1992] EWCA Civ 2 decided that a duty of care can 'crystallise' at birth, for it is at birth that the child sustains injuries as a living person. As with the 1976 Act, this ruling related to the specific context of congenital disability caused by pre-natal – rather than pre-implantation – injury caused by the defendant. However, the principle established in relation to when a duty of care exists is likewise instructive. This case also appropriately limits any duty on the part of the respondent clinic to children that are born and suffer harm as a result of negligently provided treatment, allaying Gillen J's concern that he would be establishing a duty of care between fertility providers and human cells. Such a development would indeed be concerning, for extending legal duties in this way would attribute the same legal personality to cells, embryos and fetuses as living persons; rather than it being clear that legal rights of action only come into existence at birth (*Re MB* [1997] EWCA Civ 3093). However, that is not what the court is being asked to determine in this case. The actual question is much more limited: do the appellant children have sufficient status to be owed a duty of care by the respondent clinic?

[18] The respondent clearly owed the children's parents a duty of care to provide treatment that did not fall below the requisite standard. This court therefore determines that the respondent owed the appellants a duty of care to avoid acts or omissions that would be likely to harm them. The reproductive nature of the treatment provided by the respondent means that the relationships involved fall squarely within the well-established 'neighbourhood' paradigm.

#### BREACH OF DUTY

[19] In October 2003 the respondent sent a letter to the appellants' parents detailing the mistake that had been made in the careless selection of donor sperm. This letter detailed the potential effects of using sperm from a 'Caucasian (Cape Coloured)' donor and confirmed that the usual clinical practice would be that only sperm from a 'Caucasian' donor would be used in treatment as this was what had been agreed with the parents. In using the wrong sperm the respondent's actions fell below the reasonably expected standard of care in the provision of fertility treatment. For avoidance of doubt, and because this issue was not specifically addressed by the High Court, the effects of using sperm from a 'Caucasian (Cape Coloured)' donor were either known, or should reasonably have been known, by the respondent. This is not a case where scientific evidence has come to light since the mistake was made. Nor is it a case where it fell within the parameters of reasonable clinical practice for the respondent to use sperm from a donor other than a 'Caucasian' donor. This is because, and as the evidence makes clear, the use of sperm from only a 'Caucasian' donor was a crucial component of the parents' consent to the mother's IVF treatment.

[20] I conclude that this is sufficient to establish breach of duty for the purposes of the appellants' claim. However, I offer further reasons as to why this violation of the appellants' parents' consent to treatment means that the respondent's actions fell below the reasonably expected standard of care towards the appellants.

[21] Reproductive technology and genetic screening allow for selections which we might not otherwise be able to make. For example, pre-implantation genetic diagnosis (PGD) can be used to select embryos which are not affected with a particular genetic condition, or embryos of a particular sex. Fertility treatment also makes explicit preferences that we do not necessarily articulate in other reproductive contexts. If the appellants' parents had been able to have children who were genetically related to both of them it seems unlikely that they would at any stage have had to articulate their preference of having a racially similar child. However, the need for donor sperm in their treatment meant that this preference had to be expressed. It is important to note that this was not done in a regulatory vacuum. The regulatory framework gives guidance on certain preferences. In relation to the sex selection of embryos, guidance in the Regulator's Code of Practice, and since 2008 the legislation itself (Human Fertilisation and Embryology Act 1990 (as amended), Schedule 2 para 1ZB), only permits such for medical reasons, as opposed to those that are regarded as non-medical or social. The racial matching of gamete donors and prospective parents is not referred to in the

legislation, but the Code of Practice gives guidance to fertility clinics. At the time of the appellant parents’ treatment – 1995 – the Code of Practice stated the following:

“When selecting donated gametes for treatment, centres should take into account each prospective parent’s preferences in relation to the general physical characteristics of the donor which can be matched in accordance with good clinical practice.” (3.20, Code of Practice, 2nd Edition, revised June 1993)

At the time of the relevant treatment, ‘good clinical practice’ included racial matching, as confirmed by the new wording of the revised Code of Practice of December 1995 (a few months after the treatment):

“When selecting donated gametes for treatment, centres should take into account each prospective parent’s preferences in relation to the general physical characteristics of the donor. This does not allow the prospective parents to choose, for social reasons alone, a donor of a different ethnic origin(s) from themselves.” (3.22, Code of Practice, 3rd Edition, revised December 1995)

[22] We may agree or disagree with this guidance. But for the purposes of this claim it is important because it makes clear that the appellants’ parents would have had strong expectations that their preference would be upheld, given the regulatory framework. For sake of clarity, the respondent’s carelessness is not covered by the warning in the guidance that any attempt at matching physical characteristics cannot be guaranteed for this is clearly referring to the fact that genes are far from determinative, whether in relation to physical, or indeed other, characteristics. The appellant children were not born mixed-race because of genetic variation: they were born mixed race because the respondent’s carelessly used the wrong donor sperm. It is for this reason that I must disagree with Gillen J who gave considerable weight to the argument presented by counsel for the respondent – that because we are all the product of a mixed gene pool where variations and random mutations are ever possible – in determining that the appellant children could have no legitimate expectation to be born with certain racial characteristics.

[23] Finally, the appellants’ parents would have been offered counselling on the basis of receiving treatment using donor sperm from a ‘Caucasian’ donor only. In the Human Fertilisation and Embryology Act 1990 there is a statutory requirement that fertility clinics provide patients with suitable opportunities for counselling before any treatment takes place (section 13(6); Schedule 3 para 3(1)a). This means that although counselling is not compulsory for fertility patients an opportunity for counselling must be provided by licensed clinics. The Code of Practice draws particular attention to what is known as ‘Implications Counselling’ (see sections 6.10-6.15 of the 2nd edition, which was the version in place at the time of the appellants’ parents’ treatment) whereby counsellors should invite patients to consider, inter alia, “the implications of the procedure for themselves, their family and social circle, and any resultant children” (section 6.10(b)) and where treatment will involve the use of donated gametes, “their perceptions of the

needs of the child throughout his or her child and adolescence” (section 6.12(b)). We do not know in this case whether the appellants’ parents availed of this counselling. However, it is clear that the statutory framework signals the importance of affording fertility patients an opportunity to think through the consequences of possible fertility treatment, not just for their own benefit, but for the benefit of existing and future familial relationships. This reflects the reality that any breach of duty relating to the mistaken use of donor sperm is interconnected: as well as interfering with the parents’ autonomy to make reproductive decisions, it has a broader impact on the family and personal life of children born from the fertility treatment, as well as on existing family members such as older siblings and grandparents. Gillen J was of the opinion that the appellant children could have no legitimate expectation other than to be born healthy and well [34]. I disagree on this point. As children born from legally regulated fertility treatment, the appellants are entitled to expect that factors crucial to their parents’ consent to fertility treatment should have been upheld by the respondent. This is because these factors have a fundamental and interconnected impact on their personal and familial existence in the world.

[24] This means that the duty of care owed to the appellant children by the respondent was clearly breached.

#### LOSS AND DAMAGE

[25] The court must next address whether the appellants have suffered any legally recognisable loss and damage. Here, the court is not considering in general terms whether it is harmful for there to be racial difference between family members, or whether it is harmful to receive racist and other derogatory abuse because of one’s skin colour. Nor is it considering whether it is inherently harmful to be born a particular race. It must consider a much more specific question as to whether the appellant children have suffered legally recognisable harm because of the frustration of their parents’ gamete donor preference by the respondent.

[26] I lay the question out in precise terms as the appellant children’s claim seems incorrectly framed in the High Court judgment, particularly in the determination that because the children have been born healthy they cannot have suffered any legal harm. Race and racial discrimination are difficult and sensitive issues and Gillen J has been studious in making clear that racial or ethnic discrimination in society is wrong [23]. On this point I agree. He has also been careful to make clear that to be born a particular race does not equate with being born ‘damaged’ or disabled [23-24]. This is also correct. However, with respect, the conflation of these general issues with the children’s claim has resulted in an inappropriate framing of their case, which is actually about whether they have suffered harm because of the respondent’s carelessness. In a rush to dissuade the children from seeing themselves as ‘victims’ because of the respondent’s carelessness, my colleague has failed to give adequate emphasis to both the role of the clinic in bringing this situation about and the specific circumstances which the children and

family find themselves in. He also, unfortunately, minimises the impact that the children's skin colour has, and will continue to have, on their life.

[27] However, while I disagree with much of Gillen J's judgment, the question of whether the children have suffered legally recognisable harm is a difficult one, and without the benefit of my colleague's initial judgment, I might have found it even more so. In reaching a decision, it is important for this court, as a public forum, to give an appropriate account of the difficulties that the children have experienced and are likely to continue to experience.

[28] The children have received abuse for two main reasons: first, because their skin colour marks them as racially different from their parents and each other in a way that draws into question the assumed legitimacy of their family unit; and second, because their skin colour does not confer White privilege in a racist society. If the case before us involved non-White parents having a White child, when their preference was for a racially similar child, the issue of racist abuse – as opposed to familial dissimilarity – would likely be very different in their situation, if it was an issue at all. While Gillen J draws our attention to the principles which underlie multi-culturalism and the cruelty of members of society who would levy racist and other abuse at the appellant children, it would be unfortunate for a court to give the impression that racism was purely down to individual meanness and the crass behaviour of a minority in society who do not abide by the values of multi-culturalism. Given the often invisible and pervasive systems and structures which confer racial dominance on some members of society and not others, the values of multi-culturalism remain elusive and aspirational, rather than in any sense real. Northern Ireland is no exception here and we are increasingly seeing divisions, intolerance and violence being practiced in terms of racial, as much as sectarian and other political difference (Paul Connolly (2002) *'Race' and Racism in Northern Ireland: A Review of the Research Evidence*, Equality Directorate of OFMDFM). While racism can manifest in exceptional, dramatic and often violent ways, it is important to remember that it is also present in ordinary and everyday life; and for some, it may well be saturating. The challenge for a non-White person of dealing with racism in a society where almost 98% of the population identify as White in the national census – whether White-British, White-Irish or White-Other – is not to be underestimated.

[29] To not be White in Northern Ireland is a very visible thing indeed and the appellant children's experiences may be compounded by the fact their parents and wider family network – which as far as I know all identify as White – will be unlikely to have faced similar challenges and may therefore find it difficult to provide support and guidance; however loved the children are and however well-meaning the actions of their parents and other relatives. Furthermore, the challenge of being racially different to their parents may be further exacerbated by the fact that their parents never set out to create or raise children who were racially different from them. This family's situation is therefore in contrast to mixed-race couples who have genetic offspring, or families where a child is adopted or fostered by a parent or parents who are a different race: in the former, the child reflects the 'mixing' of the parents' genetic material, while in the latter, the

parent(s) make a deliberate decision to raise – rather than avoid raising – a child who is not a genetic reflection of them. Likewise, a couple or an individual may, for whatever reason, not select a gamete donor who is racially similar. In these examples, the parent(s) may feel better equipped and prepared to cope and support their children through any incumbent challenges, in contrast to the appellants' parents who were concerned that only sperm from a 'Caucasian' donor would be used in the mother's IVF treatment.

[30] As such, the distress that these children have experienced is simultaneously indicative of the wider ills and prejudices in society and particular to their family circumstances. Although race and racism are social constructs, they are understood in a way that materially connects to ancestry and inheritance. Racial markers such as skin colour have long been conceptualised in terms of 'blood' and are seen as fairly rigidly determined by nuclear DNA. Yet the 'genetics' of race are clearly socially constructed, for although these children are mixed-race, they will be regarded in society as non-White and potentially also as 'not from' Northern Ireland. In seeking to ensure that only sperm from a racially matched donor was used, the appellants' parents were trying to ensure that their family would 'pass' in society as genetically related. Of this, they must surely have been conscious given the widespread stigma that is attached to male-factor infertility. At the time of the mother's IVF treatment donor anonymity was a cultural and clinical norm and fertility treatment was not as routine and familiar as it may seem today. Secrecy around the use of donated gametes was – and still is – common. I do not know if the appellants' parents were also conscious of trying to pass on racial privilege to their children. The thought they were may make many of us feel uncomfortable; yet our discomfort seems misplaced given the regulatory framework within which they indicated their preference and as against the backdrop of racial privilege being passed on every day in human reproduction. Likewise, to criticise these parents for wanting to 'pass' as a genetically related family when so many other families are afforded less or no cultural legitimacy or legal recognition, seems to attack a symptom rather than a cause of the privileging of certain types of family structure in society. It seems therefore right to have sympathy with this family's predicament, while at the same time being attentive to the broader political structures which inform our sympathy. The material consequences of oppressive hierarchies in society are not as easy to escape as some might like to believe.

[31] On one level, because the distress suffered by the appellant children is both general and particular to their family situation, it is reasonable to conclude that their distress has been caused by the respondent; for if they had not been careless, the children would not be suffering as they are (the 'but for' test of causation: *Barnett v Chelsea and Kensington Hospital* [1968] 1 All ER 193 (HL)). To experience derogatory abuse because of the colour of their skin and the assumed lack of relatedness to their parents and each other is also a reasonably foreseeable consequence of the respondent's carelessness (*Wagon Mound (No 1)* [1961] 1 All ER 404 (PC)). A legal wrong has therefore been done against the appellant children and it would seem just for our system of civil liability to hold the

respondent accountable for their carelessness. However, three factors prevent me from making this finding.

[32] First, the issue of causation is not as straightforward as indicated above. While it is clear that the respondent’s carelessness caused the children to be born with the skin colour they have, their distress is simultaneously caused by the wider prejudices and structures of society. So while I have no doubt that the children’s situation causes them difficulty and emotional distress – along with their parents – it seems neither appropriate nor proportionate to hold the respondent trust entirely liable for the consequences of societal inequality.

[33] Second, I find that it would be contrary to public policy to require the respondent to compensate the appellants for the emotional distress they have experienced, for to do so risks individualising the responsibility of dealing with racism and other inequalities in society. Compensation through our civil liability system is heavily individualised, given that it rests on individual litigants identifying fault against defendants. It redistributes the costs associated with injury – whether caused intentionally or by omission – amongst a limited pool of persons. Other systems are possible, but the current system is what the courts must operate under, and such does not countenance compensation for the general effects of structural inequalities. While similar arguments can clearly be made in terms of compensating claimants for disabilities, we can point more directly to the costs of medical and other care, treatment and equipment that a person with disabilities may require, whether to survive on a day to day basis, or to partake generally in societal activities or earn a living. Nor should anything in this judgment be taken to indicate that there isn’t a need for society to become more accommodating of disability. However, while a person’s skin colour is a physical characteristic, there is nothing physically determinative of a non-White person having higher living costs, or experiencing discrimination or racist violence. Instead, such happens because of societal prejudice and in my view courts should be wary of signalling individual defendants such as fertility clinics, rather than our public authorities, as primarily responsible for ameliorating the harms caused by inequality and prejudice. These issues must be addressed by our public institutions and measures put in place to address the very real, often saturating effects of racism, sexism, class prejudice, homophobia and the myriad of other intersecting inequalities that make some lives more difficult than others.

[34] In making this policy determination I have sought to resist the familiar reasoning that this is what “right thinking people” or the “common man on the Clapham omnibus” might think fair or reasonable, for I doubt either would want to find themselves in this family’s predicament or walk in the appellant children’s shoes. Instead, my decision is based on where I think the responsibility for making the appellant children’s lives more bearable.

[35] Finally, I think the appellants’ claim for damages must fail because emotional distress is not actionable damage, however upsetting and real this distress may be. Negligence claims tend to derive from actionable loss – such as physical or psychiatric injury – rather than loss of preference, which results in difficult or

upsetting circumstances for the person or persons affected. This court has already made clear how the respondent's frustration of the appellants' parents' gamete donor preference was a relational obligation to the appellants. However, while claimants can now recover for pure psychiatric injury – as opposed to psychiatric harm only being recoverable if accompanied by physical injury – the claimant must suffer from a recognised psychiatric injury, of which emotional distress or upset, as well as fear and grief, does not qualify: *Grieves v FT Everard & Sons* [2007] UKHL 39; *White v Chief Constable of South Yorkshire Police* [1999] 1 All ER 1. No evidence has been presented to indicate that the appellant children are suffering from a recognised psychiatric illness, however distressed they may feel at the abuse that has been directed towards them and their family. I have also heard no arguments from counsel to advance the proposition that the appellants' emotional distress should constitute legally recognisable harm in the context of this novel scenario. This will be because such is very difficult, for even in those jurisdictions which permit claims for negligently inflicted emotional distress, some criteria or restriction other than reasonable foreseeability of the damage must also be satisfied, such as the distress being directly associated with: 1) a physical injury negligently inflicted on the victim; 2) defamation of the victim; or 3) witnessing an injury caused to others.

[36] Even if the appellant children were suffering from recognised psychiatric illness – and we should not rule out the possibility that they may go on to suffer from psychiatric illness because of their distress – their claim would still be difficult to make out given the “patchwork quilt of distinctions” that is the law on the recovery for pure psychiatric harm (per Lord Steyn in *White*, at 500). For example, the conventional starting point of a claimant having to categorise themselves as a primary or secondary victim is nonsensical for the appellants in this case, for they would have to argue that they are primary victims who are suffering psychiatric injury because their skin colour is a physical injury (*Alcock v Chief Constable of South Yorkshire Police* [1992] 4 All ER 907 (HL)). It would be erroneous and problematic for any court to determine that to be born a particular race constitutes physical injury, as this would distract from the reality that racist abuse is levied on the basis of socially constructed difference; however material in its affect. To Gillen J's perceptive comment that claims for personal injuries, loss or damage do not fit easily into situations which relate to human reproduction [19], I would add that neither do claims for emotional distress or psychiatric injury (see also: Law Commission (1998) *Report on Liability for Psychiatric Illness*).

[37] For these three reasons, the appellants' claim that they have suffered legally compensable loss or damage connected to the respondent's breach must fail. The final issue for the court to consider is whether the appellants may be entitled to what has become known as a conventional award.

#### CONVENTIONAL AWARD

[38] Gillen J rejected the appellants' counsel's argument that the children should be awarded a conventional award in recognition of the legal wrong done by the



fertility clinic, in accordance with the conventional award given to Katrina Rees in *Rees*, as well as a series of other modern negligence cases such as *Chester v Afshar* [2004] UKHL 41 and *Fairchild v Glenhaven Funeral Services Ltd* [2002] UKHL 22. Counsel argued that this litany of cases represents a modern legal policy that where a wrong has been done a remedy will be provided. Gillen J was of the opinion that while there was merit in the argument that the appellants' parents had had a legitimate expectation frustrated by the respondent's carelessness, no such argument could extend to the children [33-34]. As indicated above, this court has found that the children were owed a duty of care by the respondent and that this duty included respecting their parents' gamete donor preference, given the relational impact of this preference on the entire family and the regulatory strictures in which their decision was made and supported by the respondent. The appellants therefore had a legitimate expectation that their mother's IVF treatment should have proceeded in accordance with the wishes of their parents. I therefore disagree with Gillen J that the children cannot be entitled to a conventional award.

[39] While there is much merit in the argument that conventional awards are a less than satisfactory means of compensating claimants whose action would otherwise have succeeded had it not been for policy departures to the usual principles of recovery (Nicolette Prialx (2005) 'Damages for the "unwanted" child: time for a rethink?' *Medico-Legal Journal* 73(4), pp 152-163), the development of conventional awards does provide a route into compensating claimants for a loss of preference or autonomy when the conventional categorisations of damage – as deriving from actionable loss – simply do not countenance a novel case, but where some compensation seems just. So while counsel should be wary of shying away from challenging and creative legal arguments – for the development of the common law relies on such – and short circuiting to arguments for a conventional award for their clients in an effort to secure 'at least' some compensation, there is scope for a conventional award to recognise an interference of personal rights and autonomy that are not otherwise contemplated by conventional doctrine. Due to the carelessness of the respondent, the appellant children have, and will continue to face difficulty. While the cause of that difficulty is wider than the respondent's negligence, it is clear that they would not be suffering had the fertility clinic not been careless. A modest conventional award of the amount permitted in *Rees* (£15,000) goes some way to acknowledging that wrong and the court, as a public institution, encouraging accountability for substandard treatment which relates to the expectations that legally regulated fertility clinics generate. The children and their parents may well incur costs in accessing counselling or support networks to help them with their distress. While other legal avenues for redress will be open to the appellant children should they find themselves victims of discrimination or a racially motivated hate crime, such are far from perfect and will once again require individual litigation. It seems fair, just and reasonable that the respondent should in some way contribute to these potential burdens by providing the appellants with a modest, but life changing amount of compensation.

[40] The court orders that the appellants are each entitled to a conventional award payment of £15,000 from the respondent.

#### PRIVACY ARGUMENT

[41] I was surprised not to hear any argument from counsel pertaining to the privacy interests of the children under Article 8 of the European Convention of Human Rights, given that the actions of the respondent Trust have clearly impacted on the privacy of this family unit. Such may have been a valuable line of argumentation.