

Neutral Citation No. [2011] NICA 28

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*Judgment: approved by the Court for handing down
(subject to editorial corrections)**

Delivered: **24/06/11**

IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

**ON APPEAL FROM THE HIGH COURT OF JUSTICE IN
NORTHERN IRELAND**

QUEEN'S BENCH DIVISION

BETWEEN:

A AND B BY C (THEIR MOTHER AND NEXT FRIEND)

Plaintiffs/Appellants.

-and-

A - HEALTH AND SOCIAL SERVICES TRUST

Defendant/Respondent.

Before: Morgan LCJ, Girvan LJ and Sir John Sheil

GIRVAN LJ (delivering the judgment of the court)

[1] The processes involved in the creation of new life and, in particular in the human context, the conception of a child have always intrigued and inspired human kind. The Psalmist saw the hand of God at work in the conception and development of the unborn child: "You created my inner most being: you knit me together in my mother's womb." (Psalm 139 v. 13). Human knowledge and ingenuity now enable human collaboration in what in the past was the outcome of purely natural processes. The process of in vitro fertilisation ("IVF") enables the impregnation of a female ovum with male sperm outside the mother's womb, thereby creating an organism which, if successfully implanted in the mother's womb, can lead on to the successful development of an embryo, thence to a viable foetus and eventually, hopefully, to the birth of a fully formed and healthy child. IVF accordingly can confer on childless couples the gift of children and confer on the children so conceived the gift of life.

[2] Genetic science demonstrates what now appears obvious, namely that the product of the process of the impregnation of an ovum with male sperm will inherit genetic characteristics from the biological parents. Where the donor's sperm comes from a male other than the non-biological male parent the genetic input on the male side will, of course, come from that donor. The child will thus inherit genetic characteristics which will not be those of the non-biological father.

[3] Errors can occur in the fertilisation process. For example, inadequate and careless screening may result in the use of male sperm from a donor with genetic defects which may result in the child suffering from serious long term conditions that may reduce the quality of life of the child. Such a situation appears to be now governed by the provisions the Congenital Disabilities (Civil Liability) Act 1976 ("the 1976 Act"). Another source of error may be the use of donor sperm coming from a man from a different ethnic background from that of the would-be parents who may want to have a child of their own ethnic background. Such a situation does not fall within the provisions of the 1976 Act because a healthy child born as a result of such sperm cannot be said to suffer from a congenital defect.

[4] In the present case the appellants were twins successfully born to their mother following successful IVF treatment. They are healthy and perfectly normal children born into what appears to be a normal and happy family life. Of what then do they complain? As a result of an error made by the treating Trust the sperm used in the process came from a donor from a different ethnic background from that of the parents. Each parent is of white Caucasian background and they wanted and expected the children produced by the IVF process to have the same ethnic characteristics as their own. This was an entirely legitimate expectation on their part. However, because of a mistake made by the Trust the sperm used in the process came from a donor of a Caucasian (Cape coloured) background. The Cape coloured community in South Africa is derived from races of different skin colouring including whites, black and Malaysian. The appellants have inherited skin colour characteristics of a much darker hue than the skin colouring of their mother and non-biological father.

[5] The appellants suing by their mother and next friend brought proceedings in negligence against the Trust those proceedings being instituted in October 2006 when they were eleven years of age. In their statement of claim they claim to have been subject of abusive and derogatory comments and hurtful name calling by other children causing them emotional upset. They also claim emotional upset because of adverse comments made about the colour of their skin being different from the skin colour of their parents. They assert that their quality of life has been adversely affected in consequence.

The appellants' case

[6] Mr Simpson QC who appeared with Mr McCartney both before Gillen J at first instance and this court sought to argue that the trial judge was wrong in his conclusion that the claim against the Trust should be dismissed. Counsel argued that the Trust breached a duty of care owed to the appellants who had in consequence suffered compensatable damage in the form of emotional upset. Since a wrong was done to them it was argued that they were entitled to at least a conventional award to mark that wrong. The negligence occurred prior to and up to the moment of conception, a time when neither of the children was in being. Counsel argued that the law of negligence was, however, sufficiently adaptable to changing circumstances. In Burton v Islington Health Authority [1993] QB 204 it was held that a child born suffering from disabilities as a result of medical negligence prior to its birth could maintain an action in negligence. The moment when the unborn child sustained injury arising from the negligent act occurred when the child was born even though the damage was caused while the child was in utero. This was a necessary legal fiction the logic of which should be applied to the present situation to cover the manner of impregnation which led to damage eventuating in the birth of the twins. The duty of the Trust was to ensure that their mother's eggs were fertilised by sperm from a white donor. It would be fair, right and just to impose a duty of care in such circumstances. There was sufficient proximity between the Trust and the children. It was foreseeable that the Trust if it used the wrong sperm could damage the resultant child. In Reece v Darlington Memorial NHS Trust [2004] 1 AC 309 the House of Lords concluded that a woman who had undergone sterilisation incompetently carried out and who thereafter conceived was entitled to, at least, a conventional award to compensate her for the legal wrong that was done.

The trial judge's approach

[7] The trial judge analysed the question whether the appellant had a sufficient status to be owed a duty of care. He noted the effect of the 1976 Act which came into force on 21 July 1976. This conferred a cause of action on a child born with disabilities because of an occurrence which affected the parents ability to have a normal child or affected the mother during pregnancy. In the present instance the judge concluded that the appellants had not suffered any disability. An unborn child might by virtue of the approach adopted in Burton have a cause of action for injuries done to the child while in utero but in the present circumstances no damage had been caused to the appellants and they suffered from no disability, loss or damage. The colour of their skin was not damage. The judge considered that he should follow the approach of Lord Millett in McFarland v Tameside Health Board [2000] 2 AC 59 who said:

“It is morally offensive to regard a normal healthy baby as more trouble and expense than it is worth.”

Variations of colour with random mutation can and do occur as genes are generationally dormant or active with skin colouring occasionally jumping generations. Skin colouring could not constitute a form of damage. The presence of a person sufficiently misguided as to make racist and unpleasant remarks directed to the children was no basis for a conclusion that they were somehow damaged. Whatever the position of the parents, the appellants had suffered no legal wrong demanding a remedy. Whatever rights an unborn child may have they do not include a right to be born with a certain colour, size, sex or intelligence.

Discussion

[8] Whether the defendant is liable in negligence involves a consideration of four requirements. Firstly, the question arises as to whether there existed a duty of care to the class of persons of whom the plaintiff is one. Secondly, a breach of the duty of care must have occurred. This necessitates proof of a failure to measure up to a standard set by law. Thirdly, there must be a causal connection between the defendant’s conduct and resultant damage. Fourthly, the particular kind of damage must not be so unforeseeable as to be too remote in law.

[9] The appellants’ claim must fail for the simple reason that they cannot point to any damage or injury as a result of the error made by the Trust, the appellants having suffered no compensatable wrong, damage, injury or consequential loss as a result of the mistake made by the Trust. They have a normal and healthy existence having been born successfully and without mishap. They cannot point to any physical or mental defect as a result of the process which led to their existence. As the judge correctly pointed out, they have no claim under the 1976 Act because they are healthy and normal children. Having a different skin colour from the majority of the surrounding population and their parents’ cannot sensibly be regarded as damage or disability just as the adoption of a child of a colour different from that of the adopting parents could not by any stretch of the imagination be described as subjecting the adopted children to some form of detriment, injury or damage. Furthermore, as the judge pointed out, a genetic inheritance carried from previous generations may manifest itself in a different skin colour in a child born to parents of an apparently different skin colour from that of the child. It would be perverse and objectionable to suggest that a child so born was in some way damaged, disabled or injured.

[10] The fact that the appellants have been subjected to abusive comments because of their skin colouring arises as a result of boorish and unacceptable behaviour of others. In the pluralistic, compassionate and tolerant society in

which we aspire to live there should be no room for such behaviour which flows from the inability of some to accept and tolerate differences in others. In the imperfect world in which we do live there will inevitably be some who will make unpleasant comments in relation to matters of differences in others whether it be in respect of skin colour, religion, the colour of an individual's hair, the clothes they wear and their family background. The fact that such intolerant and offensive remarks are made does not mean that the recipient of the comments is damaged, injured or disabled by the factors which led the intolerant to make the comments.

[11] An error which results in the birth of a child suffering from real genetic defects raises quite different questions from those raised in the present case. Such a case would raise issues to which the 1976 Act is directed. Since in the present instance the appellants suffer from no disability and no damage in law it is unnecessary to consider further the question of whether in the circumstances a theoretical duty of care arose as between the Trust and the children who are born as a result of the IVF process carried out in this case.

[12] In the circumstances the appeal is dismissed.