

Judicial Communications Office

Wednesday 13 October 2010

JUDGE DISMISSES CLAIM FOR DAMAGES FOR CHILDREN BORN AS A RESULT OF IVF TREATMENT

Summary of Judgment

Mr Justice Gillen, sitting today in the High Court, dismissed claims by two children for damages for personal injuries and alleged negligence by a Health and Social Services Trust in respect of IVF treatment provided to their parents.

The children's parents, who are Caucasian, underwent IVF treatment in 2003. The parents were anxious that any children born would have the same skin colour as them. The Trust assured the parents that only sperm from "Caucasian" or "white" donors would be requested. At the time of the IVF treatment the Trust used mislabelled donor sperm to inseminate the mother's eggs as a result of which the children have a different skin colour from their parents. The children also have a different skin colour from each other.

The children in their claim allege they have suffered injury as a result of abusive and derogatory comments made by others about the differences in their skin colour and that of their parents.

The judge in reaching his decision considered a number of factors including whether the Trust had a duty of care towards the children prior to and at the time of fertilisation and, if there was a potential duty of care, did the children suffer any legally recognisable "loss and damage" as a consequence.

On the question of whether the Trust owed children who had not yet been conceived a duty of care, Mr Justice Gillen said the court was being asked to develop the law to deal with an instance where harvested eggs were fertilised with mislabelled sperm. He acknowledged that the case raised difficult legal issues and stated:

"It seems to me that it is for Parliament to grasp the nettle of whether there ought to be a duty of care owed in the circumstances ... in this case.

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... It is for Parliament, after the appropriate social, moral, medical and ethical arguments have been aired, to define the limits of protection which should be accorded in such circumstances.”

The judge concluded that it was not appropriate for him to find that the children had sufficient status to be owed a duty of care. He then went on to consider the other issues in the case as they were not dependant on this point.

In considering whether the children had suffered loss or damage Mr Justice Gillen commented:

“...these are healthy and normal children. 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 It would be contrary to the principles which underlie our multi-cultural society to suggest that the genes they carry somehow render them “a victim” at the hands of the defendant (the Trust).”

He concluded that their colour presents them with no disadvantage for which they can receive compensation:

“It would be wrong to allow these children to grow up believing that they suffer from some damage for which they have had to be compensated financially. The presence of persons sufficiently misguided and cruel as to issue racist comments directed to these children is no basis for a conclusion that they are somehow damaged”.

The judge also ruled that the parents were not entitled to compensation as the children were born healthy and normal. He noted that the Trust has long since admitted liability to the parents and is willing to negotiate a settlement.

Mr Justice Gillen concluded that while the circumstances of the case could not fail to engage both sympathy and concern for the parents, he could find no basis for the Trust owing a duty of care to the children or that the children had suffered any loss or damage as a result.

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NOTES TO EDITORS

1. This summary should be read together with the judgment and should not be read in isolation. Nothing said in this summary adds to or amends the judgment. The full judgment will be available on the Court Service website (www.courtsni.gov.uk).
2. Mr Justice Gillen sought comment from the parties on the issue of anonymity in advance of delivering his judgment. He said the court had to weigh the competing claims of the family under Article 8 of the ECHR against those of public interest and the press under Article 10. He concluded that providing there is no reporting that would directly or indirectly identify the children, their parents, any member of their family or the Trust, there is sufficient general public interest in publishing the judgment.

ENDS

If you have any further enquiries about this or other court related matters please contact:

Alison Houston
Judicial Communications Officer
Lord Chief Justice's Office
Royal Courts of Justice
Chichester Street
BELFAST
BT1 3JF

Telephone: 028 9072 5921

Fax: 028 9023 6838

E-mail: alisonhouston@courtsni.gov.uk