Northern/Irish Feminist Judgments

Judges' Troubles and the Gendered Politics of Identity

Máiréad Enright, Julie McCandless and Aoife O'Donoghue

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11

Commentary on *McGimpsey v Ireland*

RUTH ALICE HOUGHTON

Introduction

McGimpsey v Ireland[1] concerns two men, the Irish Constitution and the law of treaties in international law; it is not an obvious choice for a feminist judgments project. Yet the case raises questions about how the courts in Ireland construct citizenship, how they use ideas of community and the importance they place on the public life of litigants. In 1987, Christopher and Michael McGimpsey, who were members of the Official Unionist Party of Northern Ireland and public figures, challenged the constitutionality of the Anglo-Irish Agreement 1985. The approach taken by the Irish Supreme Court in *McGimpsey v Ireland* provoked Aoife O'Donoghue to question if a Northern Irish housewife, as a metaphor for other marginalised groups and individuals, could bring a similar constitutional challenge in the late 1980s.

This commentary will explore why women or other minority groups might have been dissuaded from bringing a constitutional challenge. First, the commentary will situate *McGimpsey v Ireland* in the political landscape. Secondly, the issue of *locus standi* will be explored, emphasising the way in which the court used ideas of citizenship and the weight that was placed on the public standing of Christopher and Michael McGimpsey, to show the hurdles faced by a potential female litigant. Thirdly, the commentary focuses on the issue of community within the judgment, in particular highlighting how O'Donoghue J uses human rights law to obviate the damage of community.

Understanding *McGimpsey v Ireland*

The Anglo-Irish Agreement 1985, between Ireland and the United Kingdom, provided for an intergovernmental conference and secretariat that would facilitate discussion on the status of Northern Ireland. Unionists, who want Northern Ireland to remain part of the United Kingdom, rejected the involvement of the Irish Government in the governance of Northern Ireland.

[1] *McGimpsey v Ireland* [1990] IR 110.

Christopher and Michael McGimpsey were Unionists. They rejected the territorial claim in Article 2 of the Irish Constitution that the national territory consisted of the whole island of Ireland, and argued that Article 3 did not facilitate the making of laws for Northern Ireland by the Irish Government. The McGimpseys brought a case challenging the constitutionality of the Anglo-Irish Agreement. They argued that the Anglo-Irish Agreement was unconstitutional because it was contrary to the claim of the whole island, it fettered the Irish Government's foreign powers and it prioritised the situation of one community above another. The Supreme Court in 1990 rejected the argument that the Anglo-Irish Agreement was unconstitutional, but decided that Articles 2 and 3 of the Irish Constitution were a 'legal claim of right' by Ireland over Northern Ireland. This finding of the Court played an important part in the amendment of the Irish Constitution in 1998,[2] which removed the territorial claim and modified the jurisdictional claim in Articles 2 and 3 of the Irish Constitution.

Political Context

> If the McGimpseys were correct in their 'legal claim' thesis, Unionist fears of being subsumed within a politically united Ireland would be justified, but at least the hated agreement which was inevitably going to trundle us there more quickly should be deemed unconstitutional and would, we reasoned, have to be abandoned. (Mr Ken Maginnis, Fermanagh and South Tyrone MP)[3]

The Anglo-Irish Agreement was strongly protested against by Unionists, who felt that it had been imposed on them undemocratically. There were rallies protesting against the Agreement, including a rally with 100,000 people at Belfast City Hall.[4] For years, there were political boycotts and demonstrations.[5] The Unionists were angered because Unionist leaders were not consulted on the Agreement,[6] and many felt that they were powerless in its implementation.[7]

The Supreme Court judgment largely ignores the political contestation that had taken place. The courtroom was not the 'place' for political concerns, and strict rules on *locus standi* meant that *actio popularis* were excluded.[8] In contrast, O'Donoghue J, in her concurring opinion, places the particular protests and unrest at the forefront of her decision. In so doing, she signals the importance of this political debate within a legal framework that seeks to temper political disputes. Whilst protests and political disputes are conceptualised as

[2] House of Commons, Research Paper 98/57, 'Northern Ireland: Political Development Since 1972' (11 May 1998).

[3] HC Deb 14 March 1990, vol 169 cols 641–48.

[4] David McKittrick and David McVea, *Making Sense of the Troubles* (London, Viking, 2012) 192.

[5] ibid, 193.

[6] ibid, 191.

[7] Cathal McCall, 'From Barrier to Bridge: Reconfiguring the Irish Border after the Belfast Agreement' (2002) 53(4) *Northern Ireland Legal Quarterly* 476, 487.

[8] *Cahill v Sutton* [1980] IR 269. See Ann Sherlock, 'Understanding Standing: Locus Standi in Irish Constitutional Law' (1987) *Public Law* 245, 247, 251.

being outside of the courtroom, taking a legal challenge can feed into the political process. This is because the case acts as the initiation of dialogue between the court and political elites.[9] The role of the feminist judge adopted by O'Donoghue J is not only to facilitate that dialogue, but also to alert political elites to the importance of democracy.

Throughout her judgment, O'Donoghue J stresses the importance of listening to all the people in Northern Ireland. Christopher and Michael McGimpsey were not necessarily representative of the people in Northern Ireland; their Official Unionist Party of Northern Ireland membership, as well as their professions as company directors, meant that they did not speak for women, people outside of the party or people from a different socio-economic background. However, O'Donoghue J creates a space for the disempowered. Democracy is built into the Irish Constitution in Article 5 and into the Anglo-Irish Agreement in Article 4(c) and Article 5(c), so that the status of Northern Ireland cannot change without the consent of the majority of Northern Irish people. O'Donoghue J uses these articles to highlight that the Anglo-Irish Agreement will devolve power so that decision-making happens at a more local level. This more localised decision-making would enable the participation of those who had been restricted from visiting Dublin or London, ensuring the increased engagement of women and minority groups.

The *McGimpsey* case is seemingly dominated by men: two male plaintiffs, five male counsel, one male High Court judge and five male judges in the Supreme Court. In the proceedings of the High Court and in the Supreme Court, it would seem that the only woman present in the courtroom was the reporter, Nuala Butler. Such a depiction is an incorrect representation of the political situation in Northern Ireland at the time, as there were grassroots women's movements, support groups and campaigns.[10] To rectify the skewed political landscape within the judgment, O'Donoghue J highlights the role of women within the peace process. The Noble Peace Prize winners and activists, Betty Williams and Mairéad Corrigan Maguire, are mentioned for their work on cross-community campaigning. Williams and Maguire argued that 'the voice of women has a special role and a special soul-force in the struggle for a nonviolent world'.[11] The place of women in the peace process was a role that was ignored by the Supreme Court in *McGimpsey.*

Placing women within the *McGimpsey* judgment redraws the political battle lines. Noting the cross-community work of Williams and McGuire counters the binary distinction drawn between majority and minority communities in the original judgment and the Agreement. By placing women within the judgment, O'Donoghue J highlights the important role women had in the peace process, and the broader impact of this decision on society as a whole.

[9] See Margaret Davies, 'The Law Becomes Us: Rediscovering Judgment' (2012) 20 *Feminist Legal Studies* 167, 171; Kieran McEvoy, 'Law, Struggle and Political Transformation in Northern Ireland' (2000) 27(4) *Journal of Law and Society* 542.

[10] Monica McWilliams, 'Struggling for Peace and Justice: Reflections on Women's Activism in Northern Ireland' (1995) 6(4) *Journal of Women's History* 13.

[11] Betty Williams gave this 1976 Nobel Peace Prize Acceptance Speech on behalf of herself and Máiréad Corrigan Maguire.

Questions of Citizenship and Standing

One of the questions in *McGimpsey v Ireland* was whether a plaintiff needed citizenship to bring a case about Ireland's external relations. In 1988, the general rule for standing in *Cahill v Sutton* was that standing was not restricted to citizenship, but the individual had to show that his or her interests had been adversely affected.[12] In cases concerning the external relations of Ireland, *Crotty v An Taoiseach* provided for an exception to the rule in *Cahill*, such that where a law would affect the community at large, it was not necessary to show any particular effect or impact on the citizen.[13] However, it was not clear whether *Crotty* restricted this exception to citizens.

This question remained open after *McGimpsey*, because in the High Court Barrington J found that the brothers were Irish citizens as they were born in Ireland.[14] In the Supreme Court, although they briefly considered whether a non-citizen could bring a claim, the majority assumed that the McGimpsey brothers had citizenship, leaving open the possibility for a person without citizenship to bring a claim. However, in his concurring opinion, Carthy J argued that the brothers did not have *locus standi* because they were not citizens. He argued that it is 'unlikely that a non-citizen would have been allowed' to bring an external relations claim.[15] As the question remained open, O'Donoghue J is able to provide an alternative decision. As a feminist judge, O'Donoghue J argues that citizenship was not a requirement for standing. She then unpacks how citizenship could be claimed in the 1980s and 1990s, highlighting problems that would be faced by women and people from poorer socio-economic backgrounds.

In the Irish Nationality and Citizenship Act 1956 under section 7(1), individuals born in Northern Ireland were entitled to Irish citizenship if they declared themselves Irish citizens. However, the Act did not state how individuals were supposed to declare themselves citizens. The application for a passport, which involved coming forward to the authorities, is a public act and evidence of citizenship. In acknowledging that Christopher McGimpsey had a passport, the Court used visible and public acts when deciding whether someone has citizenship. However, Michael McGimpsey did not have a passport, and had not made a public declaration. O'Donoghue J notes there was no formula for a citizenship declaration, which means that she can consider private acts. She highlights those people who do not or cannot travel and would therefore find it difficult to demonstrate that they had claimed citizenship. O'Donoghue J challenges the public/private divide underlying the Irish Supreme Court's approach to citizenship, making it easier for women and disadvantaged groups of people to claim citizenship.

Even if women, minority groups and people from lower socio-economic backgrounds could overcome the barriers to claiming citizenship, they would be faced with a further barrier: *locus standi*. There is a suggestion in *Cahill v Sutton* that a citizen challenging the constitutionality of an Act has to meet a threshold requirement.[16] The citizen wishing to

[12] *Cahill v Sutton* [1980] IR 269.
[13] *Crotty v An Taoiseach* [1987] IR 713.
[14] *McGimpsey v Ireland* [1988] IR 567, 570 (Barrington J).
[15] *McGimpsey v Ireland* [1990] 1 IR 124 (McCarthy J).
[16] *Cahill v Sutton* [1980] IR 269, 284.

challenge the Act cannot be a 'litigious person, the crack, the obstructionist, the meddlesome, the perverse, the officious man of straw and many others'.[17] In other words, the court must decide whether the plaintiff is a serious person with a serious case. In contrast, when the case concerns external relations, *Crotty v An Taoiseach* provides an exception. In deciding on standing for the McGimpsey brothers, Barrington J conflates the two tests in *Cahill* and *Crotty* when he states, 'the plaintiffs are patently sincere and serious people who have raised an important constitutional issue which affects them and thousands of others … [I]t would be inappropriate for this court to refuse to listen to their complaints'.[18] It is not clear what makes it inappropriate to refuse the case. The question of sincerity and seriousness seems to fall within the *Cahill* test of meeting the threshold of seriousness, and the constitutional issue affecting thousands meets the *Crotty* requirement.

The effect of the conflation by Barrington J is that the courts in external relations cases can continue to construct an idea of the ideal litigant for the purposes of *locus standi*. There are two ways in which the ideal litigant is constructed in *McGimpsey*: first, the ideal litigant is a good citizen who is loyal to the state; and, secondly, the litigant has a public life or good public standing within the community.

The loyalty of the good Irish citizen is derived from Article 9, section 3 of the Irish Constitution 1937. It provides that citizens should show 'fidelity to the nation and loyalty to the State'.[19] However, this loyalty is magnified by the majority in *McGimpsey*, who considered citizens to be no more than 'servants' for the state.[20] The servitude of the citizens effectively removes potential political disagreement. Defence counsel in *McGimpsey* argued that the brothers were not loyal citizens, and therefore lacked standing, because they disagreed with Ireland's national territory claim in Article 2 of the Constitution. McCarthy J agreed that citizens of Ireland were bound by Article 9, section 3 to show fidelity and loyalty. However, even McCarthy J acknowledges that this political duty of fidelity and loyalty did not prohibit disagreement with the content of the Constitution. The McGimpsey brothers could disagree with the Constitution and still be loyal to the state.

For the feminist judge, the idea that a citizen's loyalty to the state effectively amounts to servitude is problematic. O'Donoghue J highlights how Article 46 of the Constitution, which provides for changes to the Constitution via referenda, allows for disagreement with the content of the Constitution. In pointing to Article 46, O'Donoghue J facilitates views and opinions that challenge the Constitution, without there being any repercussion for the individual's *locus standi* claim. Whilst this reemphasises the importance of contestation and evolution within the Constitution, referenda offer limited and marshalled space for disagreement. Moreover, direct forms of democracy have the potential to remove the protection of minority rights in favour of a majority.[21]

The Court's idea of the ideal litigant and the good citizen includes public standing within the community. The public life of the McGimpsey brothers is discussed at length in the High Court and Supreme Court. Although to some extent these comments are *obiter dicta*, the facts of the brothers' public lives were influential in the decision of the Court to grant

[17] *Cahill v Sutton* [1980] IR 269, 284.
[18] *McGimpsey v Ireland* [1988] IR 567, 580 (Barrington J).
[19] Art 9, s 3 of the Irish Constitution 1937.
[20] *McGimpsey v Ireland* [1990] 1 IR 110, 122 (Findlay CJ).
[21] Anne Phillips, *Engendering Democracy* (University Park, PA, Penn State Press, 1991) 144.

standing. The decision of the High Court was premised in the finding that 'the plaintiffs are patently sincere and serious people'.[22] This focus on seriousness, sincerity and public life raises concerns for marginalised individuals in the 1980s and early 1990s if they attempted to bring a case.

The importance of public life would have made establishing *locus standi* difficult for women. Women did have public lives in the 1980s and 1990s, in particular there were grassroots women's movements.[23] However, there were few female representatives: only 60 out of 566 councillors were women following the 1989 elections in Northern Ireland,[24] and there were no female representatives for Northern Ireland in the Houses of Parliament in Westminster.[25] The McGimpseys' public life in politics was evidence to suggest that their claim was serious, but in the 1980s the women's movement was marginalised in national politics; women's concerns were deprioritised and not taken seriously during the disagreements following the Anglo-Irish Agreement.[26] Women in the public sphere would find it difficult to show they were 'sincere and serious' when the popular depiction of 'politicised' women was of the hysterical or emotional female.[27] As late as 1996, women in politics were still 'treated with derision'.[28] This attitude towards women and women's movements would make it difficult to demonstrate seriousness or sincerity. This might have made it difficult for women to get standing in the court.

In deciding that citizenship is not a requirement for *locus standi* in external relations cases, O'Donoghue J implicitly rejects the construction of the ideal litigant. Given that the majority decision in the Supreme Court does not challenge the use of seriousness and public standing by the High Court, the role of the feminist judge would have been to expose the dangers of the approach taken by the court.

From One or Other Community

> They say that am not I
>
> but some kind of we, that I do not know
>
> where I end—sometimes there is no one
>
> to ask …[29]

The Anglo-Irish Agreement 1985 had a profound effect on the identity of people within Northern Ireland. The Ulster Unionist Party MP Harold McCusker stated that his

[22] *McGimpsey v Ireland* [1988] IR 567, 580, cited *McGimpsey v Ireland* [1990] 1 IR 110, 114.

[23] McWilliams, above n 10.

[24] Rick Wilford, Robert Miller, Yolanda Bell, Freda Donoghue, 'In Their Own Voices: Women Councillors in Northern Ireland' (1993) 71(3) *Public Administration* 341, 342.

[25] McWilliams, above n 10, at 30.

[26] ibid, 30–31.

[27] Bill Rolston, 'Mothers, Whores and Villains: images of women in novels of the Northern Ireland Conflict' (1989) 31(1) *Race and Class* 41, 50.

[28] Mark Simpson, 'Women Treated with Derision', *Belfast Telegraph*, 2 August 1996, cited in Cornelia Albert, *The Peacebuilding Elements of the Belfast Agreement and Transformation of the Northern Ireland Conflict* (Frankfurt am Main, Peter Lang, 2009) 66.

[29] Medbh McGuckian, 'The Appropriate Moments', *Captain Lavender* (Co Meath, Gallery Press, 1994).

constituents had become 'Irish-British hybrids'.[30] The construction of a hybrid identity is mirrored in the words of Medbh McGuckian's poem. Here the words indicate that the individual's identity was both lost and then reconstructed in The Troubles in Northern Ireland as the conflict was shaped by community divides.[31] Individuals were placed within a community, irrespective of whether they chose to be part of that community. Medbh McGuckian is a Northern Irish Catholic whose work comments on the 'Northern [Ireland] political situation'.[32] Her invocation of the obliterated yet reconstructed self within the poem acts as a reminder of the role of the judge in the construction of identities and communities in the *McGimpsey* judgment.

The Anglo-Irish Agreement and the majority of judges in *McGimpsey* do not focus on individuality. Within the judgment, there is a merging of identity into citizenship and ideas of community. In the Supreme Court judgment, 'citizens' are treated by McCarthy J as a homogeneous 'People', which obfuscates any individual identities or concerns.[33] O'Donoghue J's decision that citizenship is not a requisite for standing allows Michael McGimpsey, in particular, to maintain his identity.

Within this 'People', citizens are assigned to either the majority or minority community as defined in ethno-national (sectarian) terms.[34] The binary distinction between the majority and the minority communities excluded other minority groups that did not align with either side of the political debate, or which were excluded from participating in the debate by these communities. For example, some Unionists excluded the LGBTQ community. In response to the 1978 draft Homosexual Offences (Northern Ireland) Order, which sought to decriminalise homosexual acts between consenting adults, the Democratic Unionist Party, led by Ian Paisley, started a petition to 'Save Ulster from Sodomy'.[35] This petition collected nearly 70,000 signatures, showing the extent of the exclusion supported by Unionists and others.[36]

In response to the binary distinction drawn between the majority and the minority in the judgment and the Agreement, O'Donoghue J adopts a liberal feminist approach and repositions the discussion in human rights and anti-discrimination law. She uses Ireland's international human rights obligations, in particular those obligations under the European Convention on Human Rights, to focus on the individual and show that people cannot be discriminated against. To some extent this facilitates the protection of individual identity in a political environment dominated by sectarian divides.

However, the focus on human rights has limitations for women and minorities,[37] not least because it isolates individuals from their particular social context.[38] Restricted by

[30] McKittrick and McVea, above n 4, at 192.

[31] Elmer Kennedy-Andrews, Writing Home: Poetry and Place in Northern Ireland 1968–2008 (Cambridge, Boydell and Brewer Ltd, 2008) 228; Jonathan Hufstader, Tongue of Water, Teeth of Stones: Northern Irish Poetry and Social Violence (Lexington, KY, University Press of Kentucky, 2015) 271.

[32] Kathy Cremin, 'Book Review' (1996) 4(14) *Irish Studies Review* 40, 49.

[33] *McGimpsey v Ireland* [1990] 1 IR 110, 124 (McCarthy J).

[34] ibid, 122.

[35] *Dudgeon v The United Kingdom* [1981] 4 EHRR 149, para 25.

[36] ibid.

[37] Celia Romany, 'Women as Aliens: A Feminist Critique of the Public/Private Distinction in International Human Rights' (1993) 6 *Harvard Human Rights Journal* 87.

[38] Reg Graycar and Jenny Morgan, 'Equality Rights: What's Wrong?' in Rosemary Hunter (ed), *Rethinking Equality Projects in Law: Feminist Challenges* (Oxford, Hart Publishing, 2008) 109.

legal methodology, O'Donoghue J had to rely on international obligations that are premised on formal equality. This formal equality does not appreciate structural inequalities.[39] Alternatively, O'Donoghue J could have reinterpreted the legislation to achieve substantive rather than formal equality. However, this is not always possible,[40] and it has been suggested that some political methods can be a better mechanism for discussing 'concerns about substantive inequality'.[41] Reg Graycar and Jenny Morgan have explored whether it is possible to 'engage with the notion of equality for women without necessarily doing so via a constitutional/statutory provision'.[42] Whilst O'Donoghue J could have discussed equality more broadly, a court judgment is constructed using legal authority (such as legislation and cases) so as to be persuasive,[43] coercing her to rely on the formalistic notions of equality found in human rights law.

O'Donoghue J's use of human rights and anti-discrimination law is also constrained by the role of the judge. O'Donoghue J cannot ensure that minority rights are actually protected outside of the courtroom; rather, she can only comment *obiter* on the need to bring legal cases to protect rights: 'the presumption of constitutional compliance in Government action ought to, as the plaintiffs have done here, be vigorously contested'. Yet, as explored above, there are financial and legal hurdles for women and other marginalised groups when bringing such cases.[44] In these respects, focusing on human rights and anti-discrimination law has limitations when protecting minority groups.

Concluding Remarks

In rewriting *McGimpsey v Ireland*, O'Donoghue J asked whether it would have been possible for an Irish or Northern Irish housewife, as a metaphor for marginalised and excluded individuals, to bring a similar constitutional claim in Ireland in the 1980s and early 1990s. This commentary has highlighted issues with the judgments of the High Court and the Supreme Court, to show that it would have been difficult for a woman or a person from a minority group to bring the sort of constitutional claim that the McGimpseys did in 1988. The comments on citizenship and *locus standi*, as well as the failure of the Supreme Court to challenge the remarks of Barrington J in the High Court in relation to the public standing of the McGimpsey brothers, could have disadvantaged women and other minority groups, who might have been dissuaded or even prevented from bringing a case.

[39] Rosemary Hunter, Clare McGlynn and Erika Rackley, 'Feminist Judgments: An Introduction' in Rosemary Hunter, Clare McGlynn and Erika Rackley (eds), *Feminist Judgments: From Theory to Practice* (Oxford, Hart Publishing, 2008) 24.

[40] ibid, 15.

[41] Graycar and Morgan, above n 38, at 124.

[42] ibid.

[43] Hunter, McGlynn and Rackley, above n 39, at 16.

[44] Graycar and Morgan, above n 38, at 109.

Christopher McGimpsey and Michael McGimpsey, Plaintiffs v Ireland, An Taoiseach and Others, Defendants

[S.C. No. 314 of 1988]

Supreme Court 1st March, 1990

O'Donoghue J. 1st March, 1990

The issues raised in this appeal are of fundamental import to all those living on this island and in Great Britain. The significance of the Anglo-Irish Agreement is evident in its Preamble in which both the Irish and UK Governments reaffirm:-

> "their commitment to a society in Northern Ireland in which all may live in peace, free from discrimination and intolerance."

Both Governments in attempting to resolve the conflict in Northern Ireland have negotiated an agreement that will impact upon all individual lives on both islands. The Agreement aims to establish good governance on a non-discriminatory basis in Northern Ireland. Whether the Agreement will have the impact sought remains unknown, however, the immediate impact of the Agreement upon all those living in Northern Ireland is evident. The repeated public demonstrations and the various opinions that have been put forth, both pro and anti the negotiations, demonstrate the ongoing importance that these matters have in Northern Ireland and the level of disquiet amongst the population regarding the settlement. In taking this case Christopher and Michael McGimpsey demonstrate the concerns shared by many in Northern Ireland that this international treaty will have a negative impact upon their daily lives and their sincerely held view that its implementation will ultimately be negative. Christopher and Michael McGimpsey claim that in concluding the Anglo-Irish Agreement the Irish Government is in violation of the Constitution.

Christopher and Michael McGimpsey were both born and are resident in Northern Ireland and bring their appeal as individuals who believe that they will be affected by the terms of the Anglo-Irish Agreement. Both complain, as was well summarised by Barrington J in his judgment in the High Court:-

> "that the Irish government, in entering into the Anglo-Irish Agreement, neglected its duty to the majority community in Northern Ireland and violated the provisions of its own Constitution."

In their appeal from the High Court Christopher and Michael McGimpsey argue that the Anglo-Irish Agreement, specifically Articles 2, 3, 29 and 40 are contrary to Articles 2, 3, 29 and 40 of the Constitution. Their complaint may be further broken into three parts: first, the Anglo-Irish Agreement is inconsistent with the Constitutional claim to state territory extending to the entire island, second, it fetters Governmental external powers, third, and significantly, that the Agreement requires the Irish Government to consider the situation of one community above others. The defence contest these claims while also raising the issue of the plaintiffs' *locus standi.*

Locus Standi

In the High Court, Barrington J. found that both plaintiffs, having been born on the island, were citizens and the defence has not sought to challenge this here. My colleague Finlay C.J., for the majority, following the High Court, has also assumed that both plaintiffs are citizens albeit my colleague McCarthy J. disagrees on this point. The nature of how citizenship was attained and the substantive claims of the plaintiffs are linked and, as such, it is necessity to consider whether, in this instance, citizenship is a requirement of *locus standi*, whether the plaintiffs are in fact citizens and, if so, how this was attained.

The ability of non-citizens to make constitutional claims was affirmed in *Kostan v. Ireland* [1978] I.L.R.M. 12, while in *Cahill v. Sutton* [1980] I.R. 269 this Court stated that to claim *locus standi* persons must be able to assert that their interests have been adversely affected again not restricting standing to citizens:-

> "standing in constitutional matters is that the person challenging the constitutionality of the statute or some other for whom he is deemed by that court to be entitled to speak, must be able to assert that because of the alleged unconstitutionality, his or the other person's interests have been adversely affected, or stand in real or imminent danger of being adversely affected … subject to expansion, exception or qualification when the justice of the case so requires."

Under *Crotty v. An Taoiseach* [1987] I.R. 713 citizenship provides a basis for *locus standi*. The question is whether *Crotty v. An Taoiseach* [1987] I.R. 713 restricts external relations claims to citizens or, in circumstances where the impact is upon all on the island, notwithstanding a failure to prove the threat of any special injury or prejudice, the claimants have *locus standi* irrespective of citizenship. It could be argued that the nature of this appeal requires the plaintiffs to be citizens. In *Boland v. An Taoiseach* [1974] I.R. 338 and *Crotty v. An Taoiseach* [1987] I.R. 713 this Court accepted that a constitutional claim regarding Governmental external powers was justiciable. In the latter case this Court stated that it was satisfied:-

> "in accordance with the principles laid down by the Court in *Cahill v. Sutton* [1980] I.R. 269, that in the particular circumstances of this case where the impugned legislation, namely the Act of 1986, will if made operative affect every citizen, the plaintiff has a *locus standi* to challenge the Act notwithstanding his failure to prove the threat of any special injury or prejudice to him, as distinct from any other citizen, arising from the Act."

It is with specific regard to Northern Ireland that the Agreement is said to have an adverse effect or be in real or imminent danger of adversely effecting, the plaintiffs and the majority community. My colleague McCarthy J. argues that those from Britain would not be allowed to take this case and that is correct. Nonetheless, Articles 2 and 3 of the Constitution, the statutory entitlement to citizenship for those born in Northern Ireland, as well as the Anglo-Irish Agreement's focus on Northern Ireland, places the plaintiffs, like Mr Crotty, in a position where the impugned treaty affects all those living on the island, including the plaintiffs, and enables them to hold *locus standi* irrespective of their citizenship. As such, citizenship is not a prerequisite for *locus standi*. The defence argued that neither plaintiff would suffer injury or prejudice, however, as per the reasoning in *Crotty v. An Taoiseach* [1987] I.R. 713, the Anglo Irish Agreement will, like the Single European Act, impact upon all those living in Northern Ireland in a substantive

fashion thus entitling the plaintiffs to standing even if they cannot show special injury or prejudice.

Citizenship arises under Articles 2 and 9 of the Constitution and has been implemented under ss. 6(1) and 7(1) of the Irish Nationality and Citizenship Act, 1956. Under the Act, citizenship is accorded to individuals born on the island of Ireland before 6 December 1922, in the territory which currently comprises the Republic of Ireland, or in Northern Ireland on or after 6 December 1922 with a parent who was an Irish citizen at the time of birth. In the alternative, under s. 7(1), individuals are entitled to Irish citizenship if born in Northern Ireland albeit they are not automatically an Irish citizen and no formula has been prescribed for a declaration taking up this citizenship entitlement. Neither plaintiff has declared that he is a citizen, and they have not presented evidence that due to their birth dates or that of their parents they are automatically entitled to citizenship under s. 6(1) of the Act.

The State (K.M.) v. Minister for Foreign Affairs Unreported Judgment of High Court, 29 May 1978 stated that all citizens are entitled to a passport and, as such, the right to travel outside the State. Thus, the possession of the passport corresponds with citizenship. The first plaintiff, Christopher McGimpsey, holds an Irish passport and since no formula for a declaration under s. 7(1) has been prescribed under the Act, it can be assumed that the first plaintiff, in undertaking a positive act by claiming citizenship in seeking a passport, has taken up his entitlement. As has already been demonstrated in *Kostan v. Ireland* [1978] I.L.R.M. 12, citizenship is not a prerequisite of a successful constitutional claim thus the act of making the claim by Michael McGimpsey does not necessarily mean a form of citizenship has been made in undertaking a constitutional claim. While my learned colleague McCarthy J. in concurrence argues that Mr. Crotty was an 'undoubted citizen' this is largely irrelevant when the circumstances do not require the plaintiffs to be citizens to have standing.

The lack of prescription as to the necessary elements of the declaration under s. 7(1) of the Irish Nationality and Citizenship Act, 1956 places those entitled to citizenship at a unique disadvantage as to how to attain their citizenship without either seeking a passport, or making a declaration of citizenship before a Court within Ireland or before the authorities of a foreign jurisdiction. For the individual that does not embark on foreign travel nor possesses the resource or reason to come to the attention of the authorities in the Republic it would seem difficult to claim citizenship if it remains entirely within the personal and private claim of the individual. As such, the second plaintiff could have taken up his entitlement to citizenship, albeit there is no such claim here, and it be an entirely private act. Further, precluding persons who have not had an opportunity to make a declaration under s. 7 of the Irish Nationality and Citizenship Act, 1956 from making constitutional claims would disadvantage a group that has not previously sought or had the opportunity to make a public claim of citizenship.

Christopher McGimpsey, in claiming a passport, has made a declaration of Irish citizenship though this does not preclude other citizenship entitlements that the first plaintiff may have or seek to claim in the alternative or in combination. The second plaintiff has not sought to make a declaration in this case however nor has the state prescribed how the entitlement to citizenship is transformed into actual citizenship. As such, Michael McGimpsey's legal entitlement to citizenship stands. In combination with the territorial claim made under Articles 2 and 3 of the Constitution and s. 7(1) of the Irish Nationality and Citizenship Act, 1956 the Court can assume that the entitlement to citizenship as an

element of these Constitutional claims, if not actual citizenship, would give the second plaintiff an additional claim to *locus standi*. To find otherwise would be to automatically disadvantage those living in Northern Ireland that have not made active public steps towards declaring citizenship and further, would make the character of citizenship itself of an entirely public character excluding those whose lives are largely lived in what the law regards as the private sphere. Further, decoupling this claim from citizenship enables Michael McGimpsey to maintain his identity, a key element of the Anglo-Irish Agreement's recognition of the communities of Northern Ireland.

The defence suggest that neither plaintiff believes that the national territory includes Northern Ireland as per Article 2 of the Constitution and that this affects their *locus standi*. The Constitutional claim extends an entitlement to citizenship for those born in Northern Ireland irrespective of political belief and allows the possibility to contest treaties as unconstitutional without requiring individuals subject to these claims to openly avow their belief or otherwise in the veracity or correctness of Constitutional content. The defence's claim would prevent challenges to constitutional provisions or interpretations which individuals regard as fundamentally negatively affecting their lives. Indeed such a claim would preclude the potential for debate as part of referenda under Article 46 of the Constitution or to challenge the creation of unenumerated rights as per *Ryan v. Attorney General* [1965] I.R. 29 both of which prevent the calcification of the Constitution in 1937. It is even possible that at some future date Article 2 or other Articles of the Constitution may be amended in line with the plaintiffs', or others', beliefs. Thus to exclude the plaintiffs due to an impugned belief of theirs would be contrary to the spirit of the potential for Constitutional debate and evolution.

Whilst in *Attorney General (at the relation of the Society for the Protection of Unborn Children) v. Open Door Counselling Ltd.* [1988] I.R. 593 the Court was satisfied that the Attorney General had a 'bona fide concern and interest for the protection of the constitutionally guaranteed right' the fact that both plaintiffs are elected representatives of the Unionist Community does not in itself mean that they embody the interests of everyone that either identifies as Unionist or in the alternative does seek to be identified as Nationalist although they have demonstrated that the Anglo-Irish Agreement will, in line with *Crotty v. An Taoiseach* [1987] I.R. 713, affect all individuals on the island and most particularly those in Northern Ireland.

It is also critical that both individuals' chosen political identities as Unionists and, as such, part of the majority community, as it is assumed to be under the Anglo-Irish Agreement, be respected and acknowledged. In *Boland v. An Taoiseach* [1974] I.R. 338, a case taken to challenge the Sunningdale Agreement, a precursor to the Anglo-Irish Agreement, the claim was taken by an individual who identified as both a Nationalist and citizen. The mere fact that in this case the plaintiffs take the opposite view ought not raise any questions as to loyalty to the Constitution nor require them to be citizens if this status is unnecessary for the case to proceed or if the plaintiffs do not seek to be citizens. Under the Constitution individuals are entitled to the freedom and autonomy to express their convictions and opinions and, as such, whether Christopher and Michael McGimpsey agree with the content of the Constitution, or consider it to be fundamentally contradictory to their [aspirations] or the political aspirations of the state, ought not be a bar to making a claim of unconstitutionality.

My colleague McCarthy J. raises the question of Article 9.3 of the Constitution which states that:-

> "[f]idelity to the nation and loyalty to the State are fundamental political duties of all citizens"

and links this to the question of the plaintiffs' citizenship and their *locus standi*. Relying on *Crotty v. An Taoiseach* [1987] I.R. 713 and *The State (Nicolaou) v. An Bord Uchtála* [1966] I.R. 567, my colleague suggests that the matters before the Court are such that they require citizenship and finds that neither the first nor the second plaintiff is, in fact, a citizen. Very few citizens make declarations to uphold the Constitution and indeed some may aver to be unsupportive of some of its content whilst a non-citizen could also surely claim to wish to uphold the Constitution. Even in such an instance where a declaration of loyalty was made this would not preclude challenges as to the substantive implementation or debate of constitutional provisions. In sum, the Anglo-Irish Agreement has the potential to impact upon all those on this island but, in particular, those living in Northern Ireland and the facts are such that no special injury as distinct from other individuals in Northern Ireland needs to be demonstrated. As such, citizenship is not a prerequisite for *locus standi.*

The Merits

The plaintiffs argue that the Anglo-Irish Agreement is contrary to Articles 2 and 3 of the Constitution; that the establishment of an intergovernmental conference and secretariat fetters the powers of the Government under Articles 28 and 29 of the Constitution; and finally that the State may not enter into a treaty whereby it commits itself to have regard to one section of the Irish society to the disregard of another. Each of these will be dealt with in turn.

Regarding Articles 2 and 3 of the Constitution, I have read the majority judgment and I am satisfied with the interpretation put forth therein that both Articles 2 and 3 of the Constitution are legal claims. This is firmly asserted by this Court in *Re Art 26 and the Criminal Law (Jurisdiction) Bill, 1975* [1977] I.R. 129, when this Court stated that Article 3:-

> "expressed not only legal norms but basic doctrines of political and social theory."

However, I would disagree that Article 3 prohibits the enactment of laws applicable in Northern Ireland; rather Article 3 prohibits their enforcement. To this extent I agree with the submissions of both parties and their interpretation of the dictum of O'Keeffe P. in *Boland v. An Taoiseach* [1974] I.R. 338 and O'Byrne J. in *The People v. Rutledge* [1978] I.R. 376. In *Re Art 26 and the Criminal Law (Jurisdiction) Bill, 1975* [1977] I.R. 129 this Court looked at the historical and international legal issues related to the extra-territorial effect of legislation introduced which related to Northern Ireland and found that the particular legislation was not in violation of international law or the Constitution. The Irish Nationality and Citizenship Act, 1956, as discussed previously, is one example of an Act which is applicable in Northern Ireland but is not enforceable without the voluntary consent of other governments to the uptake of the entitlement to citizenship.

Article 5 of the Constitution commits Ireland to democracy and this is reaffirmed in *de Búrca v. Attorney General* [1976] I.R. 294 where the Court also asserted that lack of

representativeness, in that case regarding property qualifications and gender on juries, was a violation of Articles 38 and 40 of the Constitution. In *Russell v. Fanning* [1988] I.R. 505 concerning Article 6 of the Constitution this Court made clear that only through democratic means should decisions as to policy in line with the common good, including with regard to re-integration of Northern Ireland, be made. The democratic character of enacting laws that are applicable to though not enforceable on individuals that have no part in the democratic process is problematic, especially for those, who unlike the plaintiffs do not have either the political voice or resource to object to such laws, the Constitution and its subsequent interpretation. The fact that enforcement of the law cannot take place ameliorates the difficulty in reconciling Article 3 with Article 5, however the disenfranchisement that takes place of whole portions of Northern Irish society who are not part of vocal political processes ought to be taken into consideration when the State enacts laws which impact upon Northern Ireland. Nowhere in the Irish Constitution is there a claim to extra-territorial jurisdiction although certain matters, all or part of which take place outside the State, may still be subject to this jurisdiction.

In *Russell v. Fanning* [1988] I.R. 505 this Court stated that re-integration of Northern Ireland under Articles 2 and 3 is a Constitutional imperative. Ireland's Constitutional commitment to democracy under Article 5, as well as its international legal commitments to substantive democracy within the European Convention on Human Rights and the International Covenant on Civil and Political Rights, as well as the right to self-determination which forms part of customary international law, forms part of the Government's legal considerations on how it fulfils this Constitutional imperative.

With regard to the terms of the Anglo-Irish Agreement and specifically Article 1, I agree with my colleague Finlay C.J. and with Barrington J. in the High Court that this recognises the political situation in Northern Ireland but further is in line with the democratic imperative set out in Article 5 of the Constitution that commits the Government to democratic means of consultation. Articles 1 and 2 of the Anglo-Irish Agreement, particularly the assertion of sovereignty and the recognition of current jurisdictional operations of the UK and Ireland, can be read in line with Articles 2, 3 and 5 of the Constitution. The claim to the territory of the entire island stands but the democratic character of both the UK and Ireland, as well as the right of all those living in Northern Ireland to be engaged with processes that determine their futures, is made clear under the Anglo-Irish Agreement. Finally, the Agreement does not state what the ultimate status of Northern Ireland will be and does not change the current claims of either the UK or Ireland; rather it sets the terms of democratic engagement for those living in Northern Ireland.

The plaintiffs have claimed that the Anglo-Irish Agreement will create an estoppel claim within international law and specifically relying on the cases of the *Temple of Preah Vihear* [1962] I.C.J. Rep 6 and *Eastern Greenland* 1933 P.C.I.J. (ser.A/B) No.53. In both cases, the International Courts found that statements as to territorial claims could be used to estop governments from subsequently altering their position. In the particular circumstances here, the Government has not recognised nor acquiesced to a change to the Constitutional territorial claim. Rather, the Anglo-Irish Agreement recognises the *de facto* situation in Northern Ireland while maintaining both Governments' respective territorial claims. In such circumstances international law will not estop Ireland from continuing with its territorial claim under Articles 2 and 3 of the Constitution. If Ireland's treaty or state practice

were to change this may cause estoppel under international law to come into effect whatever the domestic Constitutional status were to be and this ought to be borne in mind in future negotiations on the status of Northern Ireland.

The plaintiffs argue that, in breach of Article 29 of the Constitution, the Anglo-Irish Agreement fetters the Government's ability to conduct its external relations. Here I would disagree with my colleague for the majority in distinguishing *Crotty v. An Taoiseach* [1987] I.R. 713 on the grounds that the Anglo-Irish Agreement is a bilateral treaty while the Single European Act is multilateral in form. There is no basis in international law for differentiating between a bilateral and multilateral treaty or the manner in which either may or may not fetter a Government's conduct of its external relations. Where I would agree with the majority is to distinguish the character of fettering involved in both instances. Within international relations it is common for international secretariats and permanent fora to be established and this was anticipated by Ireland's membership of the League of Nations as the Constitution came into force. Indeed Article 29 of the Constitution's commitment to the pacific settlement of disputes and to peace and friendly relations based upon international justice and morality makes it incumbent upon the Government to seek such solutions and does not constitute the transfer of any power to conduct foreign relations. Ireland's continued membership of the IMF, World Bank and UN follows that pattern. The degree of integration and the forms of decision-making at the European level introduced by the Single European Act are of an entirely different character both to that proposed in the Anglo-Irish Agreement and Ireland's other current international commitments and thus it is possible to distinguish *Crotty v. An Taoiseach* [1987] I.R. 713.

The commitments in Articles 4 and 5 of the Anglo-Irish Agreement to human rights, co-operation against terrorism and the development of economic, social and cultural co-operation are in line with Article 29 of the Constitution and to Ireland's international legal commitments in both treaty and customary international law. Articles 4(c) and 5(c) of the Anglo-Irish Agreement regarding devolution are in line with the Constitution's Article 5 commitment to democracy. Indeed enshrining consent into the Anglo-Irish Agreement underpins the Constitutional commitment. Devolution, properly undertaken, would lead to decision-making at a more local level and enable a wider array of those living in Northern Ireland to be engaged in the political process without the necessary resource implications of travelling and engaging with either Dublin or London. None of these commitments to human rights, including democracy, or to co-operation with another state to attain peace are new to the Irish Government and are entirely in line with Articles 5 and 29 of the Constitution and in particular the Preamble orientation toward:-

> "the dignity and freedom of the individual [which] may be assured, true social order attained, the unity of our country restored, and concord established with other nations."

Articles 4 and 5 of the Anglo-Irish Agreement do not bind the Irish Government in the manner in which or as to the substantive outcome in which it negotiates with the UK Government. However if, under the auspices of the Anglo-Irish Agreement, the Government were to introduce legislation contrary to its constitutional and international human rights obligations, for example, with regard to equality, then this would be challengeable in the prescribed manner. Indeed, in negotiating with the UK to find a peaceful solution to the territorial claim in Articles 2 and 3 in line with international law the Irish Government is working under the terms of Article 29 of the Constitution.

The third basis on which the plaintiffs challenge the constitutionality of the Agreement is more problematic. The plaintiffs argue that the Anglo-Irish Agreement permits the Irish Government to disregard the interests of the majority community in favour of the minority community in Northern Ireland. As an international treaty the Agreement must be interpreted in line with the Vienna Convention on the Law of Treaties. Ireland has not ratified the Convention; however as it codifies customary international law it is binding within international law. Article 31 of the Vienna Convention requires treaties to be interpreted in good faith in accordance with the ordinary meaning in their context and in light of their object and purpose. To decipher the object and purpose under Article 31 of the Convention parties are to look to the preamble:-

> "2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes …"

The terms of the Anglo-Irish Agreement are not solely couched in the language of community but refer to a plethora of other terms which together are construed to identify two distinct interests in Northern Ireland. With regard to the status of Northern Ireland these interests are designated as the "two traditions" or:-

> "those who wish for no change in the present status of Northern Ireland and on the other hand by those who aspire to a sovereign united Ireland achieved by peaceful means and through agreement;"

The Agreement further references Unionists and Nationalists, while also alluding to the majority of the people of Northern Ireland. At no point in the Agreement is the minority or majority community specifically identified. Binary descriptions are put forward, such as Unionist and Nationalist or the two traditions that when combined with thestatistical break-down of the population of Northern Ireland into two specific groups, Catholic and Protestant, it can be assumed that these are the communities referenced by both Governments.

With regard to community under the Agreement, it is used with specific reference to the notion of identity utilised in the Preamble:-

> "Recognising and respecting the identities of the two communities in Northern Ireland, and the right of each to pursue its aspirations by peaceful and constitutional means;"

The Anglo-Irish Agreement does not differentiate between any particular groups regarding its commitment to peace, stability, reconciliation, human rights and economic, social and cultural co-operation. As such these Articles, including Article 4, may be understood to mean everyone living in Northern Ireland irrespective of their political, religious or other affiliation.

After the reference to community in the Preamble it is the Anglo-Irish Agreement's use of community in Articles 4(c) and Article 5(c) that Christopher and Michael McGimpsey find problematic. They argue that these articles are in breach of Article 40.1 and Article 40.3. 1° of the Constitution and its protection of equality:-

> "The Conference shall be a framework within which the Irish Government may put forward views and proposals on the modalities of bringing about devolution in Northern Ireland, in so far as they relate to the interests of the minority community."

The approach taken by the two Governments assumes that the "interests" of the population of Northern Ireland may be subdivided into two groups. What is evident in the Agreement is that only one interest will have Irish Governmental representation as it appears to be assumed that either the British Government's view will coincide with the other interest or in the alternative that this other interest is already fully represented and will be engaged in devolution negotiations or other processes that follow from the Agreement. The existence of political parties and Noble Peace Prize winning activists such as Betty Williams and Mairéad Maguire that are cross-community indicates that the binary description chosen by the Governments does not necessarily provide a sufficient description of the interests or indeed the identities of all those in Northern Ireland.

The assumption of two interests is problematic in that it assumes that the two traditions and communities can and do represent the views of all those living in Northern Ireland, even those that choose not to self-identify with these groups, individuals when the two traditions or communities would not wish to represent or those whose voices, which often is the result of community dynamics, are drowned out or not given volume. This binary division may leave portions of the community from participating in any new political and legal structures that emerge under the Anglo-Irish Agreement. This is particularly problematic for those individuals in the population that due to reasons of gender or socio-economic structures have been unable to participate in the political structures dominated by two distinct viewpoints to the exclusion of others

Barrington J. in the High Court is correct that *East Donegal Co-op Livestock Mart Ltd. v. Attorney General* [1970] 1 I.R. 317 cannot be used in the interpretation of treaties and thus the text of the Agreement. Rather in line with the Vienna Convention the subsequent articles of the Treaty ought to be interpreted with the object and purpose as set out in the Preamble of ensuring, amongst other claims, that all will live without discrimination. Article 40.1 has been interpreted by this Court in *East Donegal Co-op Livestock Mart Ltd. v. Attorney General* [1970] 1 I.R. 317 as meaning that unless discriminatory action could be shown it should not be readily assumed, instead it ought to be assumed that the Government will act within the purview of constitutional, administrative and in this instance, human rights law. While that case is not directly applicable here it will dictate how any implementing legislation will be examined. The extent to which legal structures and protection emerge from the Agreement ought to be set against its object and purpose as well as Article 4 which states that both respect for human rights and the identities of the two traditions are co-equal under Articles 4 a (i), (ii) and 5. In addition Article 53 of the Vienna Convention specifically voids any treaty concluded in violation of peremptory norms. The Vienna Convention does not specify the content of these norms, however it can be assumed that the basic human rights protection which they offer will be maintained under the Anglo-Irish Agreement.

Further should the Government introduce domestic legislation following the Anglo-Irish Agreement it can be assumed that the actions the Government may take in the implementation of law will be in line with the Constitution as per *East Donegal Co-op Livestock Mart Ltd. v. Attorney General* [1970] 1 I.R. 317 and *Boland v. An Taoiseach* [1974] I.R. 338 though as with all of these situations the presumption of constitutional compliance in Government action ought to, as the plaintiffs have done here, be vigorously contested. The question is whether the references to the dignity of the individual are enough to assume that if the Government were to go beyond advice or the suggestion of proposals that would become enforced law on behalf of one group it would be in compliance with

Ireland's Constitutional and international equality obligations. Under Article 40 of the Constitution:-

> "1 All citizens shall, as human persons, be held equal before the law.
>
> This shall not be held to mean that the State shall not in its enactments have due regard to differences of capacity, physical and moral, and of social function.
>
> …
>
> 3 1° The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen."

This Court stated in *Quinn's Supermarket v. Attorney General* [1972] I.R. 1:-

> "this provision is not a guarantee of absolute equality for all citizens in all circumstances but it is a guarantee of equality as human persons and (as the Irish text of the Constitution makes quite clear) is a guarantee related to their dignity as human beings and a guarantee against any inequalities grounded upon an assumption, or indeed a belief, that some individual or individuals or classes of individuals, by reason of their human attributes or their ethnic or racial, social or religious background, are to be treated as the inferior or superior of other individuals in the community. This list does not pretend to be complete; but it is merely intended to illustrate the view that this guarantee refers to human persons for what they are in themselves rather than to any lawful activities, trades or pursuits which they may engage in or follow."

Ireland's international obligations provide a firm grounding of equality protection all of which are also aspects of UK law within Northern Ireland and as this Court demonstrated in *Bourke v. Attorney General* [1971] I.R. 316 international human rights obligations are considerations when examining the application of law in Ireland. They also impact in examining Ireland's international legal obligations under the Anglo-Irish Agreement. As this case does not relate to the domestic legislative action of the Irish Government and its constitutionality the case of *Re Ó Laighléis* [1960] I.R. 93 and the issue of Ireland's implementation of its human rights obligations are not relevant. Nonetheless, in *Ireland v. United Kingdom* (1978) 2 E.H.R.R. 25, the state relied on the European Convention on Human Rights with regard to Northern Ireland and therefore recognises its applicability in holding the UK and itself to account for actions in Northern Ireland.

Ireland is bound to equality before the law under Article 14 of the European Convention on Human Rights and Article 26 of the International Convention on Civil and Political Rights both of which the Government have signed albeit the latter currently remains unratified though the international legal commitment remains. Article 14 of the European Convention ensures that rights under the Convention are not to be subject to discrimination on grounds of 'sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status' albeit this is in reference to rights under the Treaty. The multiple references to rights in the Anglo-Irish Agreement and particularly the potential introduction of a Bill of Rights within Northern Ireland, and the fact both the UK and Ireland are signatories of the Convention would probably mean that any such Bill of Rights would be under the Convention's rubric and thus the intention of both Governments that these rights form the basis of rights under the agreement.

Under the International Convention on Civil and Political Right, equality is extended thus to:

> "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

The EEC also has significant equality legislation, Article 119 EEC stating that:-

> "[e]ach Member State shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work."

This has since been interpreted by the European Court of Justice in Case 149/77 *Defrenne v. Sabena* [1978] E.C.R. 1365 as directly applicable within states and being further refined in Case 69/80 *Worringham and Humphreys v. Lloyds Bank* [1981] E.C.R. 767.

The majority decision has found that the Anglo-Irish Agreement is not "law" as intended by Article 40.1. The capacity of the Government to put forward views and proposals as to the bringing about of devolution or re-integration is not holding any person equal or unequal before the law. In *The State (Nicolaou) v. An Bord Uchtála* [1966] I.R. 567 the Court makes direct reference to the laws of the State which places the Agreement, as an international treaty, outside Constitutional parameters in this respect. Nonetheless as has already been discussed, such a treaty cannot be in violation of the Vienna Convention of the Law of Treaties and in line with Article 29 of the Constitution there is nothing to suggest that it would be in violation if the rights of all individuals within Northern Ireland are protected and vindicated in line with Ireland and the UK's international and domestic human rights commitments.

The plaintiffs also argued that the provisions of Article 40.3. 1° were violated; the majority found that the mere fact of expressing views and proposals as they relate to the interests of the minority community did not constitute an abandonment of the majority. This follows the reasoning of this Court in *Crowley v. Ireland* Unreported; Judgment of Supreme Court, 1 November 1979 where the Court emphasised that this provision related only to the State's legislative activity. As with Article 40.1 the Anglo-Irish Agreement as a whole commits itself to the human rights of all individuals in Northern Ireland separate to its binary use of community or tradition. As such the rights of all individuals within Northern Ireland ought to be protected and vindicated under the Agreement. Should, as is envisaged by Article 40.1 or Article 40.3.1, the Agreement lead to law clearly intended to differentiate between the parties, the test as set out in *de Búrca v. Attorney General* [1976] I.R. 294 would be applicable. The invidious or arbitrary character of the discrimination and following *O'B. v. S.* [1984] I.R. 316 the object and purpose of the legislation is critical in interpreting discrimination. If legislation following the Agreement maintained its commitments to human rights provisions and to democracy for all individuals the recognition of the two interests and the Irish Government's advocacy for the minority community would be balanced by the recognition of rights protection no matter the political interests which the individual may lay claim to or the multiple communities the individual may identify with in Northern Ireland.

In finding that the Anglo-Irish Agreement is constitutional this Court is clearly stating that while Articles 2 and 3 of the Constitution are both legal and political claims, any change to the status of Northern Ireland must be through democratic means in line with the other Articles of the Constitution and this may be the ultimate protection of all interests in Northern Ireland including those who are either not citizens or do wish to claim to be so. This judgment also finds that the guarantee of good governance in the absence of discrimination and the introduction of human rights protection in a peaceful and secure environment under the terms of the Anglo-Irish Agreement aims to aid in enabling all individuals with their multitude of interests to take part in deciding the future of Northern Ireland.

30

Commentary on *A and B (by C) v A (Health and Social Services Trust)*

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 white, black and Malay heritage.[1] 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.[2]

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 on which feminist analyses of tort law have traditionally focused.[3] 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,[4] raising important questions pertaining to power and privilege associated with the intersection of perceived racial characteristics and family structure.

[1] For a history of the term 'Caucasian' and its problematic associations with Whiteness, see Nell Irvin Painter, *The History of White People* (New York, WW Norton and Company Inc, 2010, reprint edition), 72–90.

[2] 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.

[3] Janice Richardson and Erika Rackley (eds), *Feminist Perspectives on Tort Law* (Abingdon, Routledge, 2012).

[4] Ruth Frankenberg, *The Social Construction of Whiteness: White Women, Race Matters* (Minneapolis, MN, University of Minnesota Press, 1993).

Such assumptions tend to be ripe for feminist and critical race theory critique,[5] 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 that tackles, rather than overlooks, the culturally specific factors of racism and identity in Northern Ireland. In doing so, she challenges the 'colour blind'[6] approach in the original judgments, as well as the judicial individualisation of racism in Northern Ireland to a 'misguided'[7] and 'boorish'[8] minority. While perhaps not asking the 'woman question',[9] 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 that has underpinned—and continues to underpin—significant levels of material persecution based on (mis)interpretations of lesser worth, citizenship and ability.[10] This case poses uncomfortable questions that 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: while distressing, this does not ordinarily constitute 'harm' in a legally actionable sense, regardless

[5] Patricia Hill Collins, 'It's All in the Family: Intersections of Gender, Race and Nation' (1998) 13(3) *Hypatia* 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 www.thenation.com/article/value-whiteness/ (last accessed 25August 2015).

[6] The literature on 'colour blindness' relates predominantly to the US (see, eg, Michael Brown, Martin Camoy, Elliott Currie, Troy Duster, David Oppenheimer, Marjorie Schultz and David Wellman, *Whitewashing Race: The Myth of a Color-Blind Society* (Berkeley, CA, 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*, at 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.

[7] Gillen J in *A and B (by C, their mother and next friend) v A (Health and Social Services Trust)* [2010] NIQB 108, para 24.

[8] 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* (Hoboken, NJ, Wiley-Blackwell, 2009).

[9] Defined by Rosemary Hunter as one of the techniques of feminist judging: Rosemary Hunter, 'Can *Feminist* Judges Make a Difference?' (2008) 15 *International Journal of the Legal Profession* 7–36.

[10] 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, *Racist Culture: Philosophy and the Politics of Meaning* (Oxford, Blackwell, 1993); and Goldberg, above n 8.

of 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'.[11]

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's being exposed to repeated racist victimisation from individuals that caused concern for 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 that 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 per cent) of children from ethnic minority groups had experienced derogatory racist name calling.[12] A significant number (42 per cent) of minority ethnic 16-year-old students reported having been victims 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 badly 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.[13] Therefore, McCandless LJ is right to question the judicial failure in the original judgments to expand 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 reveals the feminist judgment to be 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 an expert in his or her own experience, particularly when faced with a counter-narrative that represents the dominant race, class and status.[14] 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.

[11] *A and B (by C)*, above n 7, para 24.

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

[13] ibid.

[14] 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* 341–65; and Sandra Harding, 'Standpoint Theories: Productively Controversial' (2009) 24(4) *Hypatia* 192–200.

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.[15]

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 decades of cross-community sectarian conflict.[16] 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[17] is somewhat ambitious, given that just 1.8 per cent of the population (32,400 people) belonged to an ethnic minority group in 2011, double the number recorded in 2001 (0.8 per cent).[18]

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,[19] led to Northern Ireland's being branded the 'hate crime capital of Europe' and 'race hate capital of UK' in the media,[20] 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.[21] These perceptions correlate with official data showing that reports of racially motivated incidents have increased annually.[22] However, just 12 out of 13,655 hate-motivated offences reported to the police between 2008 and 2012 resulted in a successful prosecution.[23] 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.

[15] 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.

[16] 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 in connection with 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.

[17] *A and B (by C)*, above n 7, 23.

[18] Northern Ireland Census, *Key Statistics Summary Report* (2011), at www.nisra.gov.uk/archive/census/2011/results/key-statistics/summary-report.pdf (last accessed 24 June 2015).

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

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

[21] *Northern Ireland Life and Times Survey* dataset, at www.ark.ac.uk/nilt/results/mineth.html (last accessed 24 June 2015).

[22] 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, at www.psni.police.uk/index/updates/updates_statistics/updates_hate_motivation_statistics.htm (last accessed 24 June 2015).

[23] ibid.

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"'.[24] Identity hostility has evidently extended beyond the sectarian divide; the past experiences 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.[25] As traditional sectarian tensions abate, it appears that space has opened up in which other forms of targeted prejudice are recognised.[26] 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[27]—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,[28] to include a keen deference to Parliament and a straightforward application of 'wrongful birth' precedents to a case that quite simply was not about a wrongful birth.

Situating the Feminist Perspective

Feminism has long been critical of the power of law to effect progressive social change,[29] 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 in '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?

[24] Richard Montague and Peter Shirlow, *Challenging Racism: Ending Hate* (2010), at www.qub.ac.uk/research-centres/isctsj/filestore/Filetoupload, 472425, en.pdf (last accessed 24 June 2015).

[25] 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) 117–28.

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

[27] *A and B (by C)*, above n 8, 1.

[28] 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) 131–61.

[29] Carol Smart, *The Power of Law* (London, Routledge, 1989).

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 support to the feminist-inspired concept of relational autonomy.[30] This seems to be particularly important given the reproductive and familial context of the case.[31] Secondly, she subverts judicial reliance on policy-based reasoning that is underpinned by abstract 'reasonable man'[32] assumptions by rejecting the 'healthy child' exemption to the normal principles of recovery,[33]and instead developing policy-based reasoning around societal accountability for inequality and class-based injury. Here, she takes inspiration from feminist scholarship that problematises the conventional tort idea of individualised and privatised injury, as well as the dichotomised demarcation between private and public law spheres.[34] While the feminist judgment does insist on holding the clinic accountable for its 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, that is, not as a pale substitute for an award of full damages that would otherwise have been recoverable 'but for' a policy-based exception to the usual rules of recovery.[35] Rather, the award is ordered here in acknowledgement of the substandard treatment and as a way of helping to make the children's lives better.

An alternative feminist approach could reasonably have 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,[36] or that to award monetary compensation in the circumstances would be to shore up patriarchal ideas about inheritance, race and family

[30] 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 in this collection by Claire Murray (commentary) and Mary Donnelly (feminist judgment).

[31] For an application of relational autonomy to family law, see Jonathan Herring, *Relational Autonomy and Family Law* (London, SpringerBriefs in Law, 2014).

[32] Leslie Bender, 'A Lawyer's Primer on Feminist Theory and Tort' (1988) 38 *Journal of Legal Education* 3.

[33] *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).

[34] 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) 148–68; Leslie Bender, 'Feminist (Re)Torts: Thoughts on the Liability Crisis, Mass Torts, Power, and Responsibilities' (1990) 39(4) *Duke Law Journal* 848, 864–72.

[35] Nicolette Priaulx, 'Damages for the "unwanted" child: time for a rethink?' (2005) 73(4) *Medico-Legal Journal* 152–63.

[36] See further Regina Graycar, 'A Feminist Adjudication Process: Is There Such a Thing?' in Ulrike Schultz and Gisela Shaw (eds), *Gender and Judging* (Oxford, Hart Publishing, 2013) 436–57.

structures.[37] 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 the context of reproduction and fertility treatment.[38] 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.[39] 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,[40] 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.[41] However, McCandless LJ's concern with family secrets and 'passing' does not seem motivated by shame or containment discourses; rather she acknowledges the family's interests in having the parents' legitimate expectations upheld in a reproductive context where people must necessarily articulate choices and preferences that often go unspoken. In doing so, she hints at an alternative way in which this case could have been argued by counsel; that of the clinic's interfering with the privacy interests of both the children and the parents.[42]

[37] See Hill Collins, above n 5.

[38] 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).

[39] James Smith, *Ireland's Magdalen Laundries and the Nation's Architecture of Containment* (Notre Dame, IN, University of Notre Dame Press, 2007). 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 experiences similar to those of women in Ireland: see www.amnesty.org.uk/sites/default/files/doc_23218.pdf (last 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 Magdalene Laundries or similar institutions: www.hiainquiry.org/ (last accessed 25 August 2015).

[40] 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.

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

[42] 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' (2011) 19(4) *Medical Law Review* 657–68.

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.*

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.

[**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.

* 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.

[**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* 106 Cal App 3d 811 (1980)) 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 have 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 the respondent's 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?' [14] 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].

[**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 foetuses. 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 signaling 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 foetuses 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 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, 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 hood 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 practised 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 from 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 the respondent 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 its 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 is not 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. Indeed, the existence of such structural inequality is why section 75 of the Northern Ireland Act 1998 puts in place statutory duties which aim to encourage public authorities to address inequalities in the work and functions that they carry out, at least with respect to 'equality of opportunity'—which of course is a more limited aim than fully ameliorating the harms of structural inequality.

[**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 lies 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 effect. 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 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 from the usual principles of recovery (Nicolette Priaulx (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 with personal rights and autonomy that is not otherwise contemplated by conventional doctrine. Due to the carelessness of the respondent, the appellant children have faced, 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.