IVF Mix-up Raises Vexing Legal Issues

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The recent incident involving the mix-up at Thomson Fertility Centre raises vexing legal issues that the courts will have to deal with if the matter is not settled ('Law here has to develop to deal with such cases'; Nov 4).

This is a case without local precedent, so it is likely that our courts will look to how other Commonwealth countries have dealt with comparable situations. However, differing approaches have been taken.

Britain's House of Lords, the judgments of which are given much weight by our courts, ruled in 1999 that a couple could not sue a health board for a failed vasectomy negligently carried out on the husband, which led to the birth of a healthy child. It was against public policy to hold that the health board was liable for the financial cost to the couple for bringing up the child as, among other reasons, the birth of a healthy child was a benefit and not a detriment to the couple.

On the other hand, a claim for such expenses was allowed by the High Court of Australia in 2003.

Another issue is whether the child could make a claim against a negligent in-vitro fertilisation (IVF) provider. It seems it will be difficult for a healthy child to prove he has suffered any injury that the law should recognise. In a 1982 case, a British court held that a child cannot claim that he should not have been born at all, even if a doctor's negligence has caused a disability.

Last month, the High Court in Northern Ireland decided that although the two children born following an IVF mix-up had been subject to abusive and derogatory remarks because they had a darker complexion than their white parents, in a modern, civilised society it could not be said that being born with a particular skin colour amounted to 'damage' to them. Thus, even though the fertility clinic had admitted negligently inseminating the children's mother with the wrong type of sperm, it was not in the public interest for the children to be allowed to succeed in their claim.

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