



CORNWALL STREET

BARRISTERS

Briefing Note

CICA v First Tier Tribunal and Y

[2017] EWCA Civ 139

Has a claimant who is born with a genetic disorder caused by the criminal manner in which he was conceived suffered a criminal injury?

Y was born with a serious genetic disorder. From the age of 9 his mother (M) had been sexually abused by her father (F) and Y had been born following incestuous sexual intercourse between them. It was accepted that Y's disorder was likely to have been caused by the incest.

F subsequently pleaded guilty to incest and was imprisoned. M successfully brought a claim under the Criminal Injuries Compensation Scheme 1990.

Subsequently a claim was brought by Y under the Criminal Injuries Compensation Scheme 2008. This was initially refused on the grounds that Y was not a victim of a crime of violence. Y's appeal was refused by the First-Tier Tribunal but permitted by the Upper Tribunal. CICA appealed to the Court of Appeal.

The Court of Appeal considered two questions:

- i. Whether Y was a victim who sustained an injury directly attributable to the act of incestuous rape. This involved consideration of the necessity for a pre-existing state which is altered by the rape; and,
- ii. Whether Y's case fell within the definition of a criminal injury contained within the Scheme, and whether the definition presupposed the existence of Y at the time of the rape.

The appeal was allowed. The Court determined that, if the rape had not been committed, Y would not have existed. He could not be a victim prior to conception. If he had received genetic material that had caused him to not suffer from the condition, he would not have been Y at all, but somebody else. Central to the Court's reasoning was that there was no pre-disability state from which to measure the extent of Y's injury and so assess damages.



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Lord Justice Henderson concluded: *“The injury of which he complains is, in truth, a complaint about the genetic inheritance which made him the unique person who he is. That is not a complaint of an injury sustained by him, because he, the person allegedly injured, has never existed in an uninjured state. On analysis, his real complaint would have to be that he should never have been conceived at all. A complaint of that nature, however, is not a claim for personal injury, but a claim for wrongful existence, which as this court explained in McKay v Essex Area Health Authority is not one which the law can recognise, or for which compensation could be assessed.”*

The decision is unsurprising in light of the Court of Appeal’s earlier judgment in *CP v First-Tier Tribunal* [2014] EWCA Civ 1554, where the claim of a child affected by her mother’s excessive drinking during her pregnancy was dismissed on the grounds that she had no legal personality at the time she suffered the harm. Nevertheless, it leaves some apparent tension between the CICA regime and the law of negligence in which claims for damages caused to unborn children, such as the Corby birth defects litigation, have been upheld. Courts determining these claims have been seemingly less concerned about the lack of a pre-disability state against which to measure the extent of injury.

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If you would like further information on this please contact:

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