

Legal Spotlight

Damages for the cost of commercial surrogacy abroad

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The majority of the Supreme Court (Lady Hale, Kerr and Wilson LJJ) in a landmark case (see, *Whittington Hospital NHS Trust v XX* [2020] UKSC 14) has held that a claimant was entitled to recover damages, following the hospital's admitted negligence in failing to detect her cervical cancer in time, to fund the cost of commercial surrogacy arrangements using donor eggs in a country where such arrangements are not unlawful. It will be convenient to examine the earlier case law on this important area before turning to the Supreme Court judgment.

The *Briody* ruling

In *Briody v St Helen's and Knowsley Area Health Authority* [2001] EWCA Civ 1010, the claimant sought damages against the defendant health authority, whose negligence had deprived her of her uterus, in order that she could try to have two children through a surrogacy arrangement involving the use of the claimant's own eggs, fertilising them with her partner's sperm and implanting the resulting embryos in the womb of a surrogate mother in California. The expert evidence, however, showed that the chances of success were minimal, being less than 1%.

The Court of Appeal, affirming the decision of Ebsworth J at first instance (see, [2000] PIQR Q165) rejected the claim on a number of grounds. First, since the chance of successful outcome of a surrogacy using the claimant's own eggs was so small, it was unreasonable to expect the defendant to pay

the expense of it. Secondly, although there was a higher chance of success using donor eggs, such a course would not be restorative of the claimant's position before she was injured – it would be seeking to make up for some of what she had lost by giving her something different since neither the pregnancy nor the child would be hers. In the words of Hale LJ, at [26] and [28]:

‘... while everyone has the right to try and have their own children by natural means, no one has the right to be provided with a child... I repeat, neither the child nor the pregnancy would be hers; without either, the situation is no different from adoption.’

Thirdly, a commercial surrogacy arrangement was clearly unlawful in the UK by virtue of s 2(1) of the Surrogacy Arrangements Act 1985 (‘the 1985 Act’) and, therefore, it would be wrong to award damages to acquire a child by a method which did not comply with UK law. On this point, Judge LJ stated, at [39]:

‘... the entire surrogacy agreement was unlawful in the United Kingdom. The judge was being asked to award damages for the express purpose of enabling Ms Briody to be provided with the wherewithal to pay for an unlawful contractual arrangement. That is not a principled basis on which to make a compensatory award.’

Significantly, the fact that the claimant would not herself be committing a criminal offence under s 2(1) of the 1985 Act (see, s 2(2)), did not detract from his Lordship's emphatic conclusion on this point. Hale LJ was of the same view, at [15]:

‘... I have no difficulty in agreeing with the judge that the proposals put to her were contrary to the public policy of this country, clearly established in legislation, and that it would be quite unreasonable to expect a defendant to fund it.’

XX v Whittington Hospital NHS Trust

(a) First instance

The claimant became infertile as a result of the defendant NHS trust's negligent delay in diagnosing her with cancer of the cervix. She brought an action for damages against the defendant claiming the cost of undergoing four pregnancies by surrogacy arrangements which she intended to make either in California on a commercial basis or in the UK on a non-commercial basis, using her own eggs which had been harvested before she became infertile or, alternatively, donor eggs.

At first instance, Sir Robert Nelson (see *XX v Whittington Hospital NHS Trust* [2017] EWHC 2318 (QB)) rejected the claim for the cost of surrogacy arrangements in California holding that, in line with the earlier Court of Appeal ruling in *Briody*, it was contrary to public policy to award damages for the cost of a commercial surrogacy which was illegal in the UK by virtue of s 2(1) of the 1985 Act regardless of the fact that it was lawful in California. He also limited damages for the cost of surrogacy arrangements in the UK using the claimant's own eggs to lead to two children. Here again, he felt bound by *Briody* to reject the claim concerning the use of donor eggs on the basis that the use of such eggs would not be restorative of the loss suffered by the claimant, which was the inability to have her child, not a child. In his words, at [50]–[51]:

'The loss that the injured mother sustains is the inability to have her child, not a child. The use of donor eggs is not, therefore, restorative of her loss . . . If the loss was to be properly regarded as the loss of a child, it would not be reasonable or proportionate to require a defendant to pay for the cost of donor egg surrogacy. I, therefore, limit the claim for surrogacy in the UK, using the claimant's own eggs, to the cost of surrogacy for 2 children, as I am satisfied on the balance of probabilities on the expert evidence that the claimant will achieve two live births.'

It was argued on behalf of the claimant that public policy had changed since the *Briody*

ruling. In particular, the Human Fertilisation and Embryology Act 2008 ('the 2008 Act') had amended the 1985 Act by permitting reasonable payment for arranging surrogacy through non-profit agencies and the family courts now granted parental orders to intended parents who have entered into commercial surrogacy arrangements abroad, and have retrospectively authorised commercial payments to surrogates and surrogate agencies pursuant to s 54 of the 2008 Act. This argument, however, was strongly rejected by Sir Robert Nelson, at [45]–[46]:

'The HFEA does not make commercial surrogacy contracts legal, only non-profit arrangements. Commercial surrogacy arrangements remain illegal. The parental orders made by the family courts do not affect this issue; they relate to the welfare of the child in respect of children already born and are not concerned with either the welfare of an intended mother or any claim she may have, either directly or by analogy. As Mrs Justice Ebsworth said in *Briody* at first instance, whether one should award damages in order to bring a new child into the world is a quite different question from how one should look after and pay for a child who is already here. This comment was made in relation to IVF claims and before the HFEA and SAA but remains apposite.'

According to his Lordship, therefore, there was no inconsistency between the recovery of payments under the parental order jurisdiction and the refusal of an award of damages based upon a claim which requires the claimant to rely upon a commercial arrangement which is clearly unlawful in this country.

(b) Court of Appeal

The Court of Appeal (see *XX v Whittington Hospital NHS Trust* [2018] EWCA Civ 2832) reversed the first instance decision on a number of grounds. First, the interpretation of s 2(1) of the 1985 Act was limited to render acts of commercial surrogacy unlawful in the UK only, not to prohibit individuals from entering into such

arrangements in any other country. Secondly, barring recovery of the Californian surrogacy costs would prevent the full recovery of damages by the claimant so as to restore her to the position she had been in prior to the defendant's negligence and would be a disproportionate response to the illegality of commercial surrogacy arrangements in the UK. In reaching this conclusion, the Court of Appeal considered that there was no longer a public policy bar to recovery of the costs of commercial surrogacy that was lawfully entered into abroad. Thirdly, the Court concluded that an award of damages for the costs of surrogacy using donor eggs constituted legitimate, restorative compensation to the claimant. The distinction between 'own egg' surrogacy and 'donor egg' surrogacy was now artificial given modern social attitudes towards family and children: see, McCombe LJ, at [92]–[94] and King LJ at [101]–[105]. Fourthly, since the prospects of a live child being born from the surrogacy arrangements were good, damages were recoverable for the cost of such arrangements regardless whether the treatment was to be undertaken in the UK or California using the claimant's own eggs or donor eggs.

Supreme Court ruling

(a) *The arguments*

In the Supreme Court in *Whittington*, much emphasis was placed by the claimant on the new formulation of the law of illegality adopted by the majority of the Supreme Court in *Patel v Mirza* [2016] UKSC 42, which was also referred to at some length by McCombe LJ in the Court of Appeal, at [69]–[72], in the following terms:

'First, the underlying purpose of the prohibition in section 2(1) of the [1985 Act], as amended, is to render acts of commercial surrogacy unlawful in the UK. It does not purport to legislate for any country other than the UK and does not prohibit Ms X from doing what she proposes. Her intended action is not the target of the current legislation (as amended) at all . . . It cannot conceivably be said now that surrogacy as such is contrary to the public policy of our law. Secondly, subject to the

question of the extent of recoverability of damages to achieve restoration of a claimant into his/her position prior to the tort, I see that a bar to recovery here would prevent full recovery of damages such as to restore Ms Xs personal autonomy in being able to found a family. Thirdly, it seems to me clear that it would constitute overkill if recovery were to be barred in this case. A notional aversion to a lawful act abroad by reference to a prohibition here seems to be just that, overkill.'

It was argued, however, on behalf of the defendant NHS trust that *Patel* was not in point as it concerned the quite different question as to whether, as a matter of public policy, a party should be absolved from having committed an illegal act, whereas in the present appeal there was no suggestion of any illegality committed by the claimant herself under the 1985 Act. In short, the so-called illegality defence in *Patel* did not touch upon the issue of whether public policy should deny a particular head of damages: see also, A Alghari and C Purshouse, 'Damages for Reproductive Negligence: Commercial Surrogacy on the NHS?' (2019) 135 LQR 405.

Reliance was also placed by the claimant on the Canadian case of *Wilhelmson v Dumma* (2017) BCSC 616, involving a claim based on a lawful surrogacy in the United States, but which remained illegal in Canada, the country where the claim was being brought. The point, however, was addressed only briefly by the Supreme Court of British Columbia and *Briody* was not cited to the court. By contrast, the case of *Rousillon v Rousillon* (1880) 14 Ch D 351, relied on by the defendant, established that, if an agreement contrary to the policy of English law, was entered into in a country by the law of which it was valid, an English court would not enforce it. Fry J stated the principle, at 369, as follows:

'It appears to me, however, plain on general principles that this court will not enforce a contract against the public policy of this country, wherever it may be made. It seems to me almost absurd to suppose that the courts of this

country should enforce a contract which they consider to be against public policy simply because it happens to have been made somewhere else.’

The same principle, it was argued, applied in the present appeal where the agreement in question was not simply one in restraint of trade (as in *Rousillon*), but one which was illegal under the criminal law. Had the claimant entered into a commercial surrogacy arrangement in the UK, no damages would be awarded for the costs of so doing. It would then seem rather odd for an English court to sanction something which is illegal in its own jurisdiction simply because it is valid in another country. By way of analogy, it was submitted that the position was not too dissimilar from a potential claim for the costs of an assisted suicide. The example given was that of a tortfeasor who injures a claimant to the extent that he is mentally harmed to the point where he is profoundly depressed and suicidal. The claimant is unable to take his own life and, therefore, contemplates committing suicide by travelling to a country (eg, Switzerland) where assisted dying is lawful. It would be inconceivable, according to the defendant, for the English court to award the claimant special damages for all the costs involved in his intended suicide in that country. The court would not make an award in those circumstances given that assisted suicide was a criminal offence in this country.

Much emphasis was also placed by the defendant on the fact that the policy considerations underlying s 2(1) of the 1985 Act were not limited to surrogacy arrangements conducted in this country, but had wider import in relation to any commercial arrangements wherever they may be operated. In short, considerations relating to human dignity, protection of children, avoiding exploitation of surrogate mothers, etc., applied across the board and were not confined to this jurisdiction. Moreover, the English court was unlikely to know the exact circumstances surrounding a commercial surrogacy arrangement in a foreign country – these may be entirely unsatisfactory and exploitative of a claimant

seeking such an arrangement. It would also be inherently difficult for an English court to ‘police’ prospectively arrangements offered in a foreign country. It was argued, therefore, that any change in the law should only be brought about by the Law Commission and Parliament and not by the courts. Indeed, the Law Commission has already expressed concerns regarding international surrogacy arrangements which do not conform to UK law, in particular those which operate on a commercial basis. Significantly, there is no indication in its recent Consultation Paper of a willingness to change the current law on the illegality of commercial surrogacy arrangements as embodied in s 2(1) of the 1985 Act. On the contrary, the provisional view taken is that surrogacy agencies should not be able to operate on a profit-making basis: see, Law Commission’s Joint Consultation Paper, *Building Family Through Surrogacy: A New Law*, (CP 244, 6 June 2019), at 16.3.

(b) The ruling

Lady Hale (who gave the majority judgment) considered three separate issues raised in the appeal. The first was whether the claimant could recover damages to fund surrogacy arrangements using her own eggs. On this point, her Ladyship concluded that the *Briody* decision had not ruled out damages for own-egg surrogacy arrangements made in the UK; rather, it held that whether it was reasonable to seek to remedy the loss of a womb through surrogacy depended on the chances of a successful outcome. In the present appeal, those chances were reasonable (above at [44]).

The second issue was whether the claimant could claim damages to fund a surrogacy using donor eggs. Here again, her Ladyship disagreed with *Briody* that damages for donor-egg surrogacy arrangements could not be recovered as they were not restorative of what the claimant had lost. There had been dramatic developments in the law’s idea of what constituted a family and damages to fund arrangements using donor eggs was the closest the court could get to putting the claimant in the position she would have been in had she not been injured. Thus, as

long as the arrangement has reasonable prospects of success, damages for the reasonable costs of it could be awarded. In her Ladyship's words, at [47]:

‘... a woman can hope for four things from having a child: the experience of carrying and giving birth to a child; the perpetuation of one's own genes; the perpetuation of one's partner's genes; and the pleasure of bringing up a child as one's own. Donor egg surrogacy using a partner's sperm gives her two of those. And for many women, the pleasure of bringing up children as one's own is far and away the most important benefit of having children. If this is the best that can be achieved to make good what she has lost, why should she be denied it?’

On the third issue, which was recognised as being the most difficult, the majority acknowledged that the UK courts would not enforce a foreign contract if it would be contrary to public policy. However, most items in the costs bill for a surrogacy in California could also be claimed if it occurred in this country. In addition, it was not against UK law for the claimant to do the acts prohibited by s 2(1) of the 1985 Act. Significantly, there were also important developments since *Briody*: (1) the courts had striven to recognise the relationships created by surrogacy; (2) government policy now supported it; (3) assisted reproduction had become widespread and socially acceptable; and (4) the Law Commission had proposed a surrogacy pathway which, if accepted, would enable the child to be recognised as the commissioning parents' child from birth. Awards of damages for foreign commercial surrogacy were, therefore, no longer contrary to public policy: *ibid*, at [45]–[49].

Conclusion

Although the majority of the Supreme Court has upheld the award of damages for the costs of foreign commercial arrangements, it has also imposed important factors limiting the availability and extent of such awards. First, both the treatment programme and the costs involved must be reasonable. Secondly, it must be reasonable for the claimant to seek the foreign commercial arrangements proposed rather than to make arrangements within the UK. Thirdly, a foreign surrogacy was unlikely to be reasonable unless the foreign country has a well-established system in which the interests of all involved, including the child, are properly safeguarded (above at [53]).

It is noteworthy also that a strong dissenting judgment was given by Lord Carnwath (with whom Lord Reed agreed) on the third issue. In his Lordship's view, while the present appeal was not concerned with illegality, there was a broader principle of legal coherence, which aimed to preserve consistency between civil and criminal law. It would go against that principle for civil courts to award damages based on conduct which, if undertaken in the UK, would offend its criminal law. Whilst society's approach to surrogacy had developed, there had been no change in the critical laws on commercial surrogacy which led to the refusal in *Briody* of damages on that basis. In his view, therefore, it would not be consistent with legal coherence to allow damages to be awarded on a different basis (above at [66]–[67]). In his Lordship's view, therefore, the decision of the Court of Appeal in *Briody* was (and remained) correct on this issue.

For further articles on this case in earlier courts, see [2020] Fam Law 429, 573 and 1186.