

In the courts: a landmark decision on 'wrongful birth'

18 October 2017 12:01 am

A Claimant is 'completely vindicated' – yet he lost. A Defendant is in breach of contract, with 'illogical' and 'troubling' operating procedures – but not liable to pay any damages. And in the civilised world of the civil courts, a Judge directly finds that a woman has lied, lied, and lied some more.

While the sensational deceit at its heart has attracted the interest of the media, all practitioners and law students will be interested by the remarkable confluence of legal issues that run through this landmark decision of the High Court on so-called 'wrongful birth'.

The Claimant, whose identity is anonymised as 'ARB', brought proceedings against IVF Hammersmith after a frozen embryo from an earlier round of fertility treatment was implanted into his ex-partner, without his knowledge, after their relationship had ended. She let him know she was pregnant, by text message, on Valentine's Day. She subsequently gave birth to a baby girl, who is now six years old.

After hearing expert handwriting evidence, Mr Justice Jay found ARB's signature on the consent form had been forged, as alleged by him and consistently denied by his ex-partner. ARB sought extensive damages from the clinic for the cost of bringing up his daughter, including private education, university and paying for her wedding.

In a 344 paragraph long judgment, considering historic case law on everything from negligent vasectomies to poisoned livestock, Mr Justice Jay found that the clinic was in breach of a strict obligation to ensure ARB's consent had been obtained. They had authored and signed a contract in which they had expressly undertaken not to thaw an embryo without ARB's written consent. He had not given consent of any kind, and so the Defendant was in breach of contract.

He rejected submissions that the claim for the costs of raising a child was too remote, and indeed found that ARB had succeeded on *'all issues germane to his primary case'*. He decided however that 'policy' objections applied to the claim and precluded the Claimant from recovering any damages.

This was primarily based on the 2003 House of Lords case of *Rees v Darlington*, which barred a claim in tort on grounds including the difficulty of quantifying the loss and the feeling that trying to do so, where a healthy child had been born, was morally unacceptable. Jay J observed that the ratio of *Rees* was limited to tort, but held it would apply to contract claims for not taking reasonable care.

He also reached the view that where tort and contract claims might co-exist and have the same outcome, that outcome should not depend on whether the contractual obligation was strict or an obligation to take reasonable care.

The Judge concluded that *'although he has lost this case, my judgment must be seen as a complete personal and moral vindication for ARB.'* He had been *'deceived'* by his ex-partner and *'let down'* by the clinic but was not entitled to compensation.

Recognising the importance of the point, Jay J has given permission for an appeal.

Jamie Mathieson is a barrister at Serjeants' Inn Chambers who was instructed on behalf of the Claimant.