Surrogacy Costs after XX

Whittington Hospital NHS Trust v XX [2020] UKSC 14 (01 April 2020)

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On 1 April 2020, the Supreme Court rejected the Appeal by the Whittington Hospital and upheld the December 2018 judgment of the Court of Appeal, allowing full US commercial surrogacy costs including the costs of using donor eggs, in this clinical negligence case.

Background Summary

In December 2008 XX underwent a routine cervical smear test at her GP surgery. In January 2009, this smear test was wrongly reported as normal. In 2011 XX began to experience gynaecological symptoms and she was referred to the hospital for investigation. Her symptoms were dismissed as psychological. In 2012, a repeat smear test was also wrongly reported, as were cervical biopsies taken in 2012 and 2013 during a colposcopy and subsequent LLETZ procedure. In May 2013 XX's LLETZ biopsy was reviewed and it was discovered that she had advanced cervical cancer.

A Serious Incident Report within the Trust, which included external review of all pathology samples, concluded that all of the samples from December 2008 onwards had been inaccurately and incorrectly reported. From 2008 to 2013 there had been progression from a benign wholly treatable pre-cancerous condition to a highly invasive cancer.

By the time of her diagnosis with stage 2B cervical cancer in June 2013, the disease was too far advanced for fertility sparing surgery. She was encouraged by her treating clinicians to undergo egg harvesting, completing 1 cycle in July 2013 which was followed by a course of chemo-radiotherapy. In addition to rendering her infertile, the treatment caused irreversible damage to her bladder, bowels and vagina.

Proceedings

Liability was admitted in February 2016 and thereafter the matter proceeded to the assessment of damages with a Trial on quantum only listed on 13 June 2017.

Throughout, XX maintained that she had always intended to have a family of 4 children. The agreed medical evidence was that the claimant and her partner would have to use the services of surrogate, as they wished to have children with a genetic connection to one or both of them. The fertility experts were also agreed that it was likely that 2 live births would result from the 12 eggs harvested and she would need to rely on donor eggs to complete her family. However, XX had no close female relatives who could act as a surrogate for her and she would have to find a surrogate either in the UK or abroad.

High Court

At trial Sir Robert Nelson found XX to be a very credible witness and accepted her evidence as to her desire to have 4 children with her partner and (crucially) that she would pursue this through a surrogacy arrangement in California, if she had the funds to do so, or in the UK if California was not open to her.

The trial judge held that it is not illegal or contrary to public policy to enter into a surrogacy arrangement in the UK provided the requirements of the Surrogacy

Arrangements Act 1985 ("SAA") are met and, where the prospects of success of a live birth are reasonable if not good, he could find no reason why a claim for the cost of surrogacy in the UK should not succeed. However, he felt bound by the authority in *Briody v St Helen's & Knowsley Area Health Authority* [2002] QB 856 in terms of the claim for the costs of US Surrogacy and the use of donor eggs.

He therefore allowed the costs of surrogacy for two children using XX's own eggs in the UK under the 'altruistic' system and awarded a total of £74,000, i.e. £37,000 for the total costs of each of the surrogacy arrangements.

In respect of XX's claim for pain and suffering, he awarded £160,000. The total award made, to include sums in respect of future treatment costs for her radiation injuries, was £580,618.52.

Permission to appeal to the Court of Appeal in relation to the costs of commercial surrogacy in the US and the use of donor eggs was granted. The Trust cross-appealed against the award of UK surrogacy costs and, in the alternative, in respect of the level of the award of General Damages, and permission was granted by the Court of Appeal on 27 February 2018.

Court of Appeal

The Appeal was heard by McCombe LJ, King LJ and Davies LJ on 7 and 8 November 2018 and the unanimous judgment of the Court was handed down on 18 December 2018.

The judgment restated and reaffirmed established principles in the assessment of damages, within the relevant statutory framework and common law. The principles for the assessment of damages had not changed (ref. *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25) and the Court treated the issue of surrogacy costs claimed as another head of loss to be considered in the same way as any other.

The Court held that the legal framework around surrogacy (including amendments to the SAA) had moved on significantly since the *Briody* judgment was handed down in 2001. Those statutory changes reflected the significant changes in our society which have taken place over the intervening 17 years, from the introduction of civil partnerships and same sex marriage, giving rise to the increasing resort to surrogacy, to changes in social attitudes towards surrogacy and, perhaps central to all of that, the widening definition of what constitutes a family.

Considering the issue of whether allowing the cost of commercial surrogacy abroad would be contrary to 'public policy' the Court followed the principles set out by the Supreme Court in the case of **Patel v Mirza [2017] AC 467,** in which the law of illegality as a bar to a civil claim was carefully examined and comprehensively re-stated. McCombe LJ stated "*this new case, of the highest authority, does put Ms X's claim in a different light from that which shone upon this court in Briody*." [68]

The Court of Appeal's judgment confirmed the statutory position within the SAA that as an Intended Parent, nothing XX proposed to do, either in the UK or the US, was unlawful. S.2 (1) SAA (the ban on commercial surrogacy payments) relates solely to acts undertaken in the UK – but not to any acts undertaken by those within the intimate surrogacy relationship i.e. the Surrogate and Intended Parent(s). Applying the trio of considerations in *Patel*, the Court of Appeal held that XX's proposal to enter into a commercial Californian surrogacy arrangement was not unlawful or contrary to public policy and a bar on recovery of the costs claimed, so as to prevent full recovery of damages, would be overkill.

Having reviewed the developments in the law in the Family Division in parental order applications and the changes in social attitudes towards surrogacy, and having considered the proper application of the restitutionary principle of an award of damages in Livingstone, the Court also held that maintaining the distinction between "own egg" surrogacy and "donor egg" surrogacy - which was the subject of obiter dicta by Hale LJ (as she then was) in the Briody case - would be entirely artificial.

The Appeal was allowed in full and XX received damages of £632,945 for the cost of having 4 children through Californian surrogacy arrangements. It was conceded on behalf of XX that if she succeeded on her appeal there should be a reduction in her general damages award and the cross-appeal was allowed in part, reducing the amount awarded in respect of PSLA by £10,000, from £160,000 to £150,000.

The Order made confirmed the total damages award at £1,129,563.52 plus costs, which included an additional amount of £75,000 pursuant to Part 36.17.

The Court of Appeal refused the Respondent Trust's application for permission to appeal to the Supreme Court, however permission was granted by Lady Hale on 26 June 2019, following direct petition. The appeal to the Supreme Court was heard on 16 and 17 December 2019. Significantly, this was the last case heard by Lady Hale before her retirement.

Supreme Court

By the time permission was granted to the Appellant, the Law Commissions (Law Commission of England and Wales and the Scottish Law Commission) had published a Consultation Paper '*Building families through surrogacy: a new law*' (2019) (LCCP 244, SLCDP 167). This Consultation Paper highlighted the problems with UK surrogacy in practice and concluded that the law on surrogacy was "*overdue for re-examination in light of the societal and medical changes that have occurred*" over the last 30 years.

By a majority of 3 to 2 the Court dismissed the Appeal and upheld the decision of the Court of Appeal, albeit with different reasoning; the dissenting judgment relating to what was considered to be the most contentious issue, namely, the recoverability of commercial surrogacy costs.

The Judgment summarises the 3 issues before the Court, as follows:

i. Are damages to fund surrogacy arrangements using the claimant's own eggs recoverable?

ii. If so, are damages to fund surrogacy arrangements using donor eggs recoverable?

iii. In either event, are damages to fund the cost of commercial surrogacy arrangements in a country where this is not unlawful recoverable?

All of the justices were agreed in respect of the first two questions and held that damages are recoverable to fund surrogacy using the claimant's own eggs and using donor eggs.

On the third issue – described by Lady Hale as 'the 'most difficult' [49] - the majority (Lady Hale, Lord Kerr and Lord Wilson) answered this question in the affirmative and held that it was no longer contrary to public policy to award damages for the costs of foreign commercial surrogacy.

In a short dissenting judgment, Lord Carnwath and Lord Reed maintained that the Court of Appeal in Briody was correct and it would not be consistent with legal coherence to allow damages to be awarded for commercial surrogacy.

Q1: Own egg surrogacy in the UK

XX's primary submission at Trial, in the Court of Appeal and in the Supreme Court was that her case ultimately concerned the assessment of reasonable damages to compensate her for being wrongly deprived of the ability to bear her own children.

The Supreme Court accepted that submission. However, in contrast to the Court of Appeal, all members of the Court (including Lords Carnwath and Reed) were of the view that the defence of illegality and the principles set out in *Patel v Mirza* [2016] UKSC 42, [2017] AC 467 did not assist in such an assessment, as nothing which Ms X proposed to do involved a criminal offence either in the UK or abroad [40].

The Court therefore restated the 'restitutionary' principle, as established by the case of *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25, in that a claimant should '*as nearly as possible*' be put back into the position she would have been in but for the tort - subject only to considerations of public policy and reasonableness.

Having reviewed the developments in the law, society and fertility treatments Lady Hale then went on to agree with McCombe LJ and Sir Robert Nelson, that it was difficult to see why in principle damages could not be recovered for surrogacy arrangements lawfully entered into in the UK. She referred to the tentative view she had expressed in *Briody* in 2001 that this would be a "step too far" but noted that , even then, she did not consider there to be a point of general principle or public policy to preclude the recovery of the costs of an own-egg surrogacy arrangement made on a lawful basis in the UK [44]. Even 20 years ago, Lady Hale recognised the force in the contrary argument that "it should be capable of attracting an award" with the right evidence of the reasonableness of the procedure and prospects of success. In this case, the chances of a successful live birth using Ms X's own eggs were far greater than the '*vanishingly small*' chances in *Briody* and the Supreme Court therefore concluded that it was difficult to identify any principled basis on which to deny the claim.

Q2 – Donor egg surrogacy

Lady Hale's view in *Briody* was that an award of damages for donor-egg UK surrogacy was not truly restorative of the claimant's loss, in that it would be replacing something she had lost by giving her something different. Lady Hale, reflecting that whether or not this view was technically obiter, candidly accepted that that view '*was probably wrong then and is certainly wrong now*' [45].

The Court accepted the imperfect but apposite analogy put forward on XX's behalf of an amputee receiving a prosthetic limb which was not her own genetic material but replaced what was lost "as nearly as possible." In recalling the argument in *Briody*, that there were said to be four things a woman could hope for from having a child,

Lady Hale noted that using a donor egg and her partner's sperm, whilst not perpetuating Ms X's own genes, would still allow her to bring up a child as her own, which for many women is '*far and away the most important benefit of having children*' [46-47].

In relation to the expanding definition of a 'family' in the intervening 19 years since the *Briody* decision, Lady Hale quoted approvingly from the judgment of King LJ in the Court of Appeal, who stated that in those 'blended' families, '*psychologically and emotionally the baby who is born is just as much "their" child as if one of them had carried and given birth to him or her*.'

As with surrogacy using a claimant's own eggs, subject only to considerations of reasonableness, the Court held that damages can be claimed for the reasonable costs of UK surrogacy using donor eggs [48].

Q3: Commercial surrogacy abroad

Lady Hale acknowledged that in the UK surrogacy agreements are not enforceable and noted that it is well-established that the UK courts will not enforce a foreign contract that would be contrary to the public policy of this jurisdiction. However, the question on this appeal was not whether a commercial surrogacy agreement entered into abroad should be enforceable but whether the UK court should 'facilitate the payment of fees under such contracts by making an award of damages to reflect them.' [49]

In this case Counsel for XX had put before the Court a table which set out the comparative costs of UK and California surrogacy arrangements. Lady Hale took the opportunity to carefully look at these itemised costs and in so doing she noted that many of the items in the Californian arrangement would also be claimable if the surrogacy took place in the UK, including the costs of the fertility treatment, egg donation and, significantly, a payment to the surrogate mother [50]. The only items which would be unlawful in the UK but not in California (and even then not unlawful for XX or the surrogate personally) would be the fees paid to the US lawyers and surrogacy agency. The question Lady Hale posed was whether this was enough to taint all of the items in the bill. She concluded that it was not.

In a succinct analysis of the true ambit of the prohibitions in the SAA, Lady Hale noted that, '*It has never been the object of the legislation to criminalise the surrogate or commissioning parents*.' The only deterrent for those looking to surrogacy abroad is the risk of the courts refusing to retrospectively authorise such payments in a parental order application; however, it was acknowledged that this is really no deterrent at all as '*there is no evidence that that has ever been done*' and the courts' paramount consideration will always be the child's welfare [51].

In considering the true ambit of the law on surrogacy in the UK, the approach of the Government and the courts to familial relationships created by surrogacy was also highly relevant. Although the Law Commissions' Consultation Paper does not herald a change to the law which would allow commercial surrogacy agencies to operate in this jurisdiction, Lady Hale noted that the courts '*have bent over backwards to recognise the relationships created by surrogacy, including foreign commercial surrogacy*'; the government openly supports surrogacy as a means of building families; the use of assisted reproduction is now widespread and socially acceptable; and the Law Commissions have provisionally proposed a new pathway for surrogacy which would enable the child to be recognised as the child of the commissioning parents from birth "*thus bringing the law closer to the Californian model...*" [52].

For all of these reasons, Lady Hale considered that it was '*no longer contrary to public policy to award damages for the costs of a foreign commercial surrogacy*' [53]. The Trust's appeal was accordingly dismissed.

The dissenting judgment

Lord Carnwath gave the dissenting judgment in answer to Q3 above, with which Lord Reed agreed. The minority placed reliance on the case of *McFarlane v Tayside Health Board* [2000] 2 AC 59, a so-called 'wrongful birth' case, and were clearly concerned by the principle of consistency and coherence in the law.

Lord Carnwath and Lord Reed took the view that public policy is reflected in the criminal law of this jurisdiction. Although it was agreed that there had indeed been 'striking' developments in society's approach to surrogacy and the arrangement proposed would not be unlawful in California, as there had been no change to the criminal law affecting commercial surrogacy here, it would be contrary to the principle of coherence or consistency in the law '*for the civil courts to award damages on the basis of conduct which, if undertaken in this country, would offend its criminal law*' [66].

Commercial Surrogacy as a head of loss

The majority decision comes with important limiting factors [53]:

i. The claimant's **proposed programme of treatments** must be reasonable. This involves a consideration of whether the proposed number of children is reasonable;

ii. It must be reasonable for the claimant **to seek foreign commercial surrogacy** rather than UK surrogacy. If the proposed foreign system is not well-established, not regulated and/or does not have appropriate safeguards, it is unlikely to be reasonable;

iii. The **costs involved** in the proposed arrangement must be reasonable.

Throughout the case the Trust had not disputed XX's desired number of children nor had they challenged the costs associated with surrogacy, whether in the UK or abroad. Lady Hale was keen to stress however that '*it should certainly not be taken for granted that a court would always sanction the sorts of sums of money which have been claimed here.*' [53]

Practice Points in future claims

In light of Lady Hale's comments, in any future claims defendants will no doubt wish to challenge the claimant's factual evidence, seek their own expert evidence, and make robust submissions in opposition to such claims. Claimant lawyers will therefore need to make sure that each and every step in the proposed arrangement is reasonable and fully supported by robust factual and expert evidence, whether the proposed arrangement is in the UK or abroad.

There will need to be clear evidence to support the number of children in respect of whom surrogacy costs are claimed and thought will need to be given to whether there are any limiting factors on the size of a claimant's family arising from the negligently caused injuries. For example, if the claimant has sustained a significant psychiatric injury, will the defendant argue that this will affect her ability to care for a child and, if so, has this been appropriately addressed in the claimant's factual and expert evidence.

In addition, expert evidence will be required to establish reasonable prospects of successfully achieving live births as a result of the particular arrangement, whether from the claimant's own eggs or donor eggs. What constitutes reasonable prospects of success has yet to be determined but if less than 50%, the expert evidence will need to provide some statistical context for the argument that the claimant's chances of success are reasonable.

As in any clinical negligence case, both sides will no doubt be able to put forward reasonable arguments for and against recovery of the sums claimed. Each case will turn on its own facts and the parties will often need to be prepared to compromise. In any claim that goes to trial, it should be remembered that the courts will be scrutinising the claim for surrogacy costs just as carefully as any other head of loss – potentially even more so given the significant sums that may be involved and Lady Hale's warning that '*it should certainly not be taken for granted that a court would always sanction the sorts of sums of money which have been claimed here.*' [53].

NHS Resolution and Insurers will no doubt herald this judgment as 'opening the floodgates' to claims in respect of infertility due to negligence. However, given that reasonableness of all steps will have to be proven in every case, as per the limiting factors above, this is unlikely.

Nevertheless the judgment is welcome clarification for those cases involving infertility arising as a result of negligence and not just confined to clinical negligence.