Whittington Hospitals NHS Trust v XX [2020] UKSC 14

Factual Background

The dispute arose as a result of a delay, by the Trust, in diagnosing the Claimant (Respondent)'s cancer, and the infertility this caused.

The Claimant had had a cervical smear test in 2008, which the Trust had incorrectly reported as negative, when in fact it showed severe dyskariosis. She had subsequent smear tests in February 2012 and September 2012, both of which were also incorrectly reported as negative. The September sample showed severe dyskariosis with features suggestive of invasive carcinoma. The Claimant underwent cervical biopsies in September and October 2012. These were incorrectly reported as showing pre-malignant changes, though they in fact showed evidence of invasive carcinoma. The errors were not detected until 2013, at a review of the Claimant's pathology prompted by the symptoms she was by then experiencing. It was then discovered that she had cervical cancer. Unfortunately, by this stage, the condition was assessed as too far advanced for the Claimant to have the surgery that would have preserved her fertility. Instead, she was advised to have chemo-radiotherapy which would result in her inability to bear a child. Had appropriate action been taken in 2008, there was a 95% prospect of a complete cure, and she would never have developed the cancer at all.

Liability was admitted by the Trust.

Prior to undergoing the chemo-radiotherapy, the Claimant underwent a round of ovarian stimulation and egg collection and had eight mature eggs frozen. The Claimant and her partner both came from large families and wished to have 4 children. According to the expert evidence, it was likely that they could have two children using the Claimant's frozen eggs and her partner's sperm, and 2 further children using donor eggs. The Claimant's preference was to use commercial surrogacy arrangements in California.

Procedural background

At first instance ([2017] EWHC 2318), the judge held that he was bound by *Briody v St Helens & Knowsley AHA* [2001] EWCA Civ 1010 and that, applying that decision:

1. Damages for commercial surrogacy were irrecoverable as contrary to public policy; and
2. Surrogacy using donor eggs was not restorative of what the Claimant had lost; but
3. Non-commercial surrogacy in the UK, using the Claimant's own eggs, was restorative of what the Claimant had lost, and was not contrary to public policy. Accordingly, these costs were recoverable.

The Claimant appealed against the denial of her claim for commercial surrogacy and the use of donor eggs. The Trust cross appealed against the award for the two own-egg surrogacies. The Court of Appeal dismissed the cross appeal and allowed the appeal on both points ([2018] EWCA Civ 2832).

The Trust appealed to the Supreme Court. The leading judgment was given by Lady Hale, with whom Lords Kerr and Wilson agreed.

At the outset of the judgment (para 8), the court set out the 3 issues to be determined:

1. Are damages to fund own-egg surrogacy recoverable?
2. If so, are damages to fund surrogacy arrangements using donor eggs also recoverable?
3. In either event, are damages to fund the cost of commercial surrogacy arrangements in a country where such arrangements are not unlawful recoverable?

The legal background to surrogacy in the UK

It is important to consider the Supreme Court's decision against the legislative background, and the previous Court of Appeal case of *Briody v St Helens & Knowsley AHA* [2001] EWCA Civ 1010. The position was summarised at Paragraph 9 of the Supreme Court judgment:

> *UK law on surrogacy is fragmented and in some ways obscure. In essence, the arrangement is completely unenforceable. The surrogate mother is always the child's legal parent unless and until a court order is made in favour of the commissioning parents. Making surrogacy arrangements on a commercial basis is banned. The details are more complicated.*

Statutory background

The key legislative provision is the Surrogacy Arrangements Act 1985 ('the 1985 Act'), section 2(1):

> *(1) No person shall on a commercial basis do any of the following acts in the United Kingdom, that is—*
>
> *(a) initiate [...][1] any negotiations with a view to the making of a surrogacy arrangement,*
>
> *(aa) take part in any negotiations with a view to the making of a surrogacy arrangement,*
>
> *(b) offer or agree to negotiate the making of a surrogacy arrangement, or*
>
> *(c) compile any information with a view to its use in making, or negotiating the making of, surrogacy arrangement;*
>
> *and no person shall in the United Kingdom knowingly cause another to do any of those acts on a commercial basis.*

Somewhat confusingly, section 2(2) of the 1985 Act creates a criminal offence wherever any of the above acts are done by a third party, but not by the prospective surrogate parents.

In addition to the criminalisation of third-party commercial surrogacy arrangements, the position is further complicated by the Human Fertilisation and Embryo Act 1990, sections 27 and 33. Under these provisions, the woman who carried the child is that child's mother in law, even in the case of own-egg surrogacies. Therefore, contracts for surrogacy in the UK made between the genetic parents and surrogate mother are unenforceable, as the mother cannot

be contractually compelled to surrender the child following birth. As explained by Lady Hale (paras 12-16), in order to obtain custody of the child, the prospective parents must make an application to the court for a parental order. The court determines such applications principally by reference to the child's best interests.

Briody v St Helens & Knowsley AHA [2001] EWCA Civ 1010

On similar facts to the present case, the Claimant in *Briody* (B) had been deprived of the opportunity of naturally conceiving and bearing a child following a sub total hysterectomy. She had also sought the costs of own-egg surrogacy arrangements in California, and surrogacy using donor eggs. The Court of Appeal held that surrogacy using donor eggs was not restorative of B's surrogacy, and the prospects of fertilisation using B's own eggs were so low that the costs claimed were not reasonable. Though the judgment was of course not binding on the Supreme Court, the court took the opportunity to re-examine some of the principles set out in *Briody*.

Judgment

It was observed that there had been significant developments in the law and societal attitudes since 2001. Under the original 1985 Act, all third parties were banned from taking part in surrogacy arrangements for payment, whereas, under amendments introduced in 2008, non-profit making bodies were permitted to initiate negotiations and compile information for reasonable payments to be made to the surrogate mother (para 32). Furthermore, government policy had moved strongly in the direction of supporting surrogacy arrangements (para 33).

The court had heard submissions in respect of the illegality and the framework adopted in *Patel v Mirza* [2017] AC 467. However, it was held that this case did not engage the illegality defence; nor was it to be likened to *Gray v Thames Trains Ltd* [2009] UKHL 33. The crimes under the 1985 Act could only be committed within the UK. UK law did not prevent foreign agencies making commercial surrogacy arrangements outside the jurisdiction. Furthermore, as the 1985 Act did not criminalise prospective parents or surrogate mothers from taking part in commercial surrogacy arrangements, the surrogacy arrangements in California which the Claimant intended to pursue did not involve the commission of any criminal offence; in the UK or any other jurisdiction (para 40).

The starting point, of course, was the general principle that damages in tort should put the party who has been injured in the same position as s/he would have been in had s/he not sustained the wrong which is being compensated. This was subject to qualifications, namely:

1. Damages will not be recoverable where to allow such recovery would be contrary to legal principle or public policy; and
2. In seeking to restore what has been lost, the steps proposed must be reasonable, as must the costs incurred in taking those steps.

Applying those principles to the three issues before the court:

1) Is it ever possible to claim damages for the cost of surrogacy arrangements, even where these are made on a lawful basis within the jurisdiction and using the Claimant's own eggs?

It may once have been possible to argue that the law should not facilitate the bringing into the world of children who would never otherwise have been born. However, given the widespread acceptance of reproductive technologies, such an argument was no longer possible. Provided that the prospects of success are reasonable, the costs of own-egg surrogacy will be recoverable (para 44).

2) Is it possible to claim damages for UK surrogacy arrangements using donor eggs?

Lady Hale acknowledged that, sitting on the Court of Appeal in *Briody*, she had expressed the view that surrogacy using donor eggs was not truly restorative of what the Claimant had lost. However, she stated:

> *We need not concern ourselves with whether or not this view was technically obiter. In my view it was probably wrong then and is certainly wrong now. (para 45)*

It was accepted that donor-egg surrogacy was reasonably analogous to a prosthetic limb; the cost of which was would be recoverable in damages (para 46). Therefore, subject to a reasonable prospect of success, damages could be recovered for the reasonable costs of UK surrogacy using donor eggs (para 48).

3) Are the costs of foreign commercial surrogacy recoverable?

It was acknowledged that this third issue raised 'the most difficult question' (para 47). Surrogacy contracts were unenforceable in the UK, and it was well-established that UK courts will not enforce a foreign contract which would be contrary to public policy in the UK.

However, the damages would be awarded to the commissioning surrogate parent. As stated, it was not against UK law for a commissioning parent or surrogate to do any of the acts prohibited by the 1985 Act; in the UK, let alone another jurisdiction (para 51). Furthermore, the court considered that, against the developments which had taken place since *Briody*, and the fact that the courts would strive to recognise relationships created by surrogacy, it was no longer contrary to public policy to award damages for the costs of foreign commercial surrogacy (paras 52-53).

Nonetheless, the court did set out 3 limiting factors (para 54):

1. The proposed programme of treatments must be reasonable;
2. It must be reasonable for the Claimant to seek the foreign commercial arrangements proposed rather than to make arrangements within the UK. The court suggested that this was unlikely to be reasonable unless the foreign country has a well-established system in which the interests of all involved are properly safeguarded.
3. The costs involved must be reasonable.

Lord Carnwarth, though agreeing with the majority on the first and second issues, dissented on this third point. As he stated (para 66):

> *It would in my view be contrary to principle for the civil courts to award damages on the basis of conduct which, if undertaken in this country, would offend its criminal law.*

Comment

Clearly, this is a significant ruling which will be of great interest to both Defendants and Claimants. However, there are a number of questions raised by the judgment.

For example, what test will future courts adopt in deciding whether or not the proposed programme of treatments is 'reasonable'? The Supreme Court has explicitly stated that the proposed programme is unlikely to be reasonable unless the country in which the proposed treatment is to take place has a system that ensures that the interests of those involved are protected. By implication, this would suggest that courts will be required to scrutinise the regulatory regimes of other jurisdictions and determine whether or not these can be characterised as 'reasonable'.

Equally, what criteria will be adopted for judging the reasonableness of the cost of foreign treatments? Will these be judged against the market rate of such services within the UK, or the country in which the treatment is proposed to take place? Furthermore, what evidence will parties be required to adduce in order to establish the reasonableness or otherwise of the proposed treatments? Presumably, this will require expert evidence on surrogacy services in whichever jurisdiction those services are proposed to take place. Such evidence is likely to increase the costs of litigation in this area.

Furthermore, how will the courts balance the two criteria: the reasonableness of the proposed programme of treatments, and the reasonableness of the costs involved? One might expect that there would be an inverse correlation between the two, as the jurisdictions with fewer safeguards may be correspondingly cheaper.

Finally, the case leaves the law in a somewhat paradoxical state. It is entirely correct that prospective surrogate parents commit no crime by engaging in commercial surrogacy arrangements abroad. However, the UK courts, following the decision, will now compel parties to pay damages for services which, if arranged and executed within the jurisdiction, would amount to a crime under domestic law. This may sit uneasily with some, and was the basis for Lord Carnwarth's dissenting judgment. It may well be that the judgment marks a step towards the legalisation of commercial surrogacy within the jurisdiction.

Prepared by Tom Stafford, Hailsham Chambers
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