17 December 2018

PRESS SUMMARY

ARB (Appellant) v IVF Hammersmith (Respondent) v R (Third Party)
[2018] EWCA Civ 2803
On appeal from [2017] EWHC 2438 (QB)

JUSTICES: Lady Justice King DBE, Lord Justice David Richards, Lady Justice Nicola Davies DBE

BACKGROUND TO THE APPEAL
In 2008 ARB, the appellant, and R, the third party, attended the respondent's IVF clinic for the purpose of investigating and subsequently undergoing fertility treatment. They entered into a contract for the provision of fertility services. As a result an embryo was placed into R and she subsequently gave birth to a healthy boy. As part of that treatment a number of embryos made with ARB and R's gametes were frozen to await the possibility that they would decide to undergo future treatment.

In 2010 the clinic thawed and implanted an embryo containing ARB's gametes into R from whom ARB had by that date separated. The clinic failed to obtain ARB's written or informed consent to the procedure. It proceeded on the basis of a signature on the relevant form, purportedly that of ARB, which the trial judge found had in fact been forged by R. As a result of the clinic's breach of contract in thawing and implanting the embryo without consent, R gave birth to a daughter, E. ARB seeks damages for the pecuniary losses relating to E's upbringing incurred as a result of the clinic's breach of contract.

Jay J in the High Court held that ARB succeeded on all aspects of his primary case against the clinic for breach of contract. However, the judge held that ARB could not recover damages for the cost of E's upbringing for reasons of legal policy enunciated, in the context of a claim in tort in *McFarlane v Tayside Health Board* [2000] 2 AC 59 and *Rees v Darlington Memorial Hospital NHS Trust* [2004] 1 AC 309.

JUDGMENT
The Court of Appeal unanimously dismisses the appeal. Lady Justice Nicola Davies DBE gives the sole judgment of the Court with which King LJ and David Richards LJ agree.

REASONS FOR THE JUDGMENT
At the core of the legal policy which prevented recoverability of the losses flowing from the birth of a healthy child in tort was the impossibility of calculating the loss given the benefits and burdens of bringing up a healthy child. If it is impossible for a court to calculate the value to be attributed to the benefit of a child, so as to set off such value against the financial cost of the child's upbringing as a matter of legal policy in tort, how is an assessment possible for a court if such loss results from a breach of contract? Added to this is the sense, reflected in the judgments of *McFarlane* and *Rees*, that it is morally unacceptable to regard a child as a financial liability **[33]**.

The appellant sought to distinguish between the position in tort and contract on the basis that ARB had paid for the services which he received pursuant to the contract and thus could sue on the same, unlike the person who obtained the services of the NHS and brought a claim in tort. Taking the appellant's submission through to its conclusion, a person who has the means to pay for private services could sue in contract and receive damages whereas the individual who does not have the means to pay for private treatment would have to bring a claim in tort, which would fail because of the legal policy in *McFarlane* and *Rees*. The fundamental unfairness resulting from such a factual position serves to underpin the reasoning behind the legal policy and the need for the same in contract and tort **[37]**.

For these reasons Jay J was correct to find the legal policy which prevented recoverability of the cost of the upbringing of a healthy child in the tortious claims in *McFarlane* and *Rees* applies to ARB's claim for breach of contract.

Is Clause 1(a) of the agreement between the parties a strict obligation?
Clause 1(a) of the agreement between the parties sets out that both ARB and R must give written consent before any embryos are thawed and replaced. This is a strict obligation. It should not be read as limited to a duty to take reasonable care. Health care professionals do not usually undertake obligations involving strict liability. However, the wording of clause 1(a) imposes an absolute restriction on the thawing or implanting of an embryo without consent **[49]**. Importantly, the duty not to act without the written consent of ARB and R is a straightforward process which requires the physical obtaining of the written document. It is not a process which is dependant on medical or scientific skill. There is no medical or scientific uncertainty involved which is a significant factor in the rationale underpinning the more limited duty to take reasonable care **[50]**.

The purpose of clause 1(a) is to ensure that written consent is given. The purpose of the Agreement is to give effect to the statutory obligations under the Human Fertilisation and Embryology Act 1990. The risk of fraud or forgery in this particular area of medicine is yet another reason underpinning the purpose of clause 1(a) - the strict imperative to obtain proof of written consent **[53]**.

Obtaining consent as a part of the respondent clinic's process
Consent is a cornerstone of the Human Fertilisation and Embryology Act 1990 (as amended). A procedure which permits delegation for the obtaining of consent to a person who is not employed by the clinic and, critically, could have his/her own reasons for providing consent which was not true consent in not only illogical, it makes a mockery of a process, the purpose of which is to obtain valid written consent. The illogicality of this process represented an abrogation by the clinic of its duty to obtain consent. The identified practice of the clinic was neither reasonable nor responsible **[59]**.

References in square brackets are to paragraphs in the judgment.