

PRESS SUMMARY

XX (Appellant) v Whittington Hospital NHS Trust (Respondent)

Lord Justice McCombe, Lady Justice King, Lady Justice Nicola Davies

19 December 2018

BACKGROUND TO THE APPEAL

The Respondent, the Whittington Hospital NHS Trust, had admitted negligence in failing to detect signs of cancer in smear tests carried out on the Appellant, Ms X, in 2008 and 2012, as well as in biopsies performed in 2012 and 2013. Having developed cervical cancer, Ms X underwent chemo-radiotherapy treatment, which in turn led to a complete loss of fertility and severe radiation damage to her bladder, bowel and vagina. In 2013, Ms X underwent a cycle of ovarian stimulation and egg harvest. This procedure produced twelve eggs, which were then cryopreserved. Ms X had very much desired to have children. She and her partner decided to have their own biological children either by way of commercial surrogacy carried out in California or non-commercial surrogacy in the United Kingdom.

Though lawful in the State of California, commercial surrogacy is unlawful in the United Kingdom. Non-commercial surrogacy is permitted in this country, but only reasonable expenses may be paid to the surrogate mother. Such surrogacies may be arranged privately or through a recognised non-profit-making agency. Under English law, the surrogate mother is the legal mother of the child; she can refuse to give the child to the intending parents. In order to obtain parental status, the intending parents must apply to an English court for a “parental order” *after* the birth. Under sections 2 and 3 of the Surrogacy Arrangements Act 1985, it is a criminal offence to advertise in search of a surrogate or in order to offer oneself as a surrogate. In California, however, commercial surrogacy agreements are binding on the parties (the surrogate mother, on one hand, and the intending parents, on the other). The intending parents can obtain a *pre-birth* order from a Californian court to confirm their legal status as parents of the expected child.

Ms X made a claim against the Hospital Trust, including a claim for special damages specifically to cover the expenses of commercial surrogacy arrangements in California or, alternatively, non-commercial surrogacy in this country. Ms X claimed the cost of four pregnancies using her own eggs or, if necessary, donor eggs and her partner’s sperm. The matter came before a judge of the High Court in June 2017. Expert consultant gynaecologists gave evidence that, on the balance of probabilities, Ms X would achieve either one or two live births from her own cryopreserved eggs. Their evidence was that donor eggs would present a slightly lower prospect of success.

The judge refused Ms X’s recovery of damages for the costs of Californian surrogacy. He concluded that he was bound by the earlier Court of Appeal decision of *Briody v St Helens and Knowsley Area Health Authority* [2002] QB 856: since commercial surrogacy arrangements are illegal in the United Kingdom, they are contrary to public policy and Ms X’s claim for expenses to fund surrogacy in California had to fail. It did not matter that such surrogacy would be lawful in California. Societal attitudes to commercial surrogacy may have changed since the case of *Briody*, but the judge held that such changes would have to follow through Parliament or the Supreme Court. However, he *did* hold that Ms X could recover

limited expenses for surrogacy in the United Kingdom, using her own eggs. It would not be unlawful or contrary to public policy to use an agency and pay reasonable expenses to a surrogate mother, provided that relevant UK legislation was observed. The damages were limited to expenses for UK surrogacy using Ms X's own eggs and not those of a donor. Relying on the expert evidence, the judge found that two live births would be achieved, and allowed £37,000 for each surrogacy (a total award of £74,000). He also awarded damages to the value of £160,000 for Ms X's pain, suffering and loss of amenity ("PSLA"), allowing for the fact that there were to be no damages in respect of surrogacy in California.

Ms X appealed to the Court of Appeal on two issues: the recoverability of damages for commercial surrogacy in California; and the recoverability of damages for the cost of surrogacy using donor eggs. The Hospital Trust appealed against the judge's allowance of the claim for non-commercial surrogacy expenses in the UK, and also against his finding as to the level of damages for PSLA.

JUDGMENT

The Court of Appeal unanimously allows Ms X's appeal and dismisses the Hospital Trust's cross-appeal. As a result of the appeal being allowed, the Court thinks it necessary to revise the total award of damages. Such a revision can be agreed by the parties. The Court considers that the sum of £150,000 would be appropriate for PSLA damages, bearing in mind that part of the £160,000 sum ordered by the judge had been in respect of the loss of Ms X's claim for surrogacy in California and provisional damages for psychological sequelae.

REASONS FOR THE JUDGMENT

Under English law, Ms X is not proposing to do anything illegal. Section 2(1) of the Surrogacy Arrangements Act 1985 bans acts of commercial surrogacy undertaken in the United Kingdom, but it does not ban such acts from taking place abroad [55, 76]. Further, this prohibition seems only to apply to commercial surrogacy *businesses* in the UK and subjects those running such businesses to criminal liability [56]. If Ms X entered into a commercial surrogacy agreement in the United Kingdom, the agreement would be unlawful but she herself would not be subject to criminal liability.

It is well recognised that the English doctrine of public policy is variable – once identified in a given context, it does not necessarily remain fixed [64]. The law relating to surrogacy in this country has clearly changed since the case of *Briody* [30, 60]. Also, a decision in the Supreme Court in 2016, reviewing the law on "illegality" as a bar to civil claims, required the Court of Appeal to reconsider its previous decision in *Briody*. Nothing in the legislation suggests that Ms X's act of entering into a commercial surrogacy agreement in California would be counter to the law or morals of UK statutes. It would be incoherent to deprive Ms X of her claim for damages at the outset when she personally proposes no wrongdoing either under Californian law or under the laws of the United Kingdom [68]. Therefore, it cannot be said that an intending mother's recourse to commercial surrogacy remains counter to the public policy of English law. The law cannot bar the recovery of damages for the cost of such surrogacy [81].

It is important to recall that the aim of damages is to allow the injured party as nearly as possible to receive a sum of money which will put her in the position in which she would have found herself had she not sustained the wrong [86]. In this case, Ms X's recourse to surrogacy using her own eggs would probably result in at least one or two live births [18].

Expenses for such surrogacy should therefore be recoverable from the Hospital Trust, irrespective of whether the treatment would occur in California or the United Kingdom [84]. The Court of Appeal therefore dismisses the Hospital Trust's cross-appeal of the judge's decision to award damages for the expenses of surrogacy using Ms X's own eggs.

An award of damages for the cost of *donor* egg surrogacy also constitutes legitimate, restorative compensation [94]. Following *Briody*, the judge had found that donor eggs would not restore Ms X's loss because the loss she had sustained was the inability to have "her" child, not "a" child [99]. However, the distinction between "own egg" surrogacy and "donor egg" surrogacy (using the sperm of Ms X's partner) is artificial and cannot be maintained [105]. The following points are borne in mind when considering whether compensation for donor egg surrogacy could 'restore' Ms X's position [92-93]: society does not now place 'lesser value' on children born with only one of their parent's genes [92]; attitudes towards 'blended families' have changed since the case of *Briody*; and the creation of such families is often facilitated and consequent upon advances in fertility treatment, including acceptance of the increased use of donor eggs [101-102]. Ms X and her partner have an earnest desire to found the family they had intended to have before the Hospital Trust's negligence brought about Ms X's infertility [91]. Therefore, damages in respect of the cost of donor egg surrogacy can have the effect of putting Ms X as nearly as possible in the position she would have been in had she not sustained the wrong.

References in square brackets are to paragraphs in the judgment.

NOTE

This summary is provided to assist in understanding the Court's decision. It does not form part of the reasons for the decision. The full judgment of the Court is the only authoritative document. Judgments are public documents and are available at: <https://www.judiciary.uk/court/court-of-appeal/>