Neutral Citation Number: [2018] EWCA Civ 2832

Case No: B3/2017/3220

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE,
QUEEN'S BENCH DIVISION
Sir Robert Nelson
HQ15C04535

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19/12/2018

Before:

LORD JUSTICE McCOMBE
LADY JUSTICE KING
and
LADY JUSTICE NICOLA DAVIES

- -

Between:

XX	**Appellant**
- and -	
WHITTINGTON HOSPITAL NHS TRUST	**Respondent**

- -
- -

Christopher Johnston QC and Claire Watson (instructed by Irwin Mitchell LLP) for the Appellant
Lord Faulks QC and Charles Feeny (instructed by Bevan Brittan LLP) for the Respondent

Hearing dates: 7-8 November 2018

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Approved Judgment

Lord Justice McCombe:

(A) Introduction

1. This is an appeal brought by the appellant claimant in the proceedings ("Ms X") from the order of 18 September 2017 of Sir Robert Nelson (sitting as a Judge of the High Court), made upon the assessment of damages for admitted negligence of the Respondent ("the Hospital") in failing to detect in Ms X signs of cancer both from smear tests carried out in 2008 and 2012 and from biopsies performed in 2012 and 2013. Ms X developed cancer of the cervix for which she required chemo-radiotherapy treatment which in turn led to infertility and severe radiation damage to her bladder, bowel and vagina.

2. The principal issue on the appeal is whether the judge was correct in law to refuse (or limit) Ms X's recovery of damages for expenses of surrogacy arrangements which she intended to make, either in the state of California in the United States of America or, alternatively, in this country. The second issue is whether, in so far as the judge awarded damages for such surrogacy expenses as would be lawful in this country, he was correct to differentiate between "own egg" and "donor egg" surrogacies. The third issue is whether, dependent upon our decision upon the surrogacy issues, there should be any reduction in the damages awarded for pain, suffering and loss of amenity ("PSLA").

3. There is a cross-appeal by the Hospital by which it seeks to reverse the judge's award of damages in respect of the costs of limited, non-commercial surrogacy in this country. Alternatively, the Hospital submits that, in so far as the judge was correct in awarding such damages as he did for such costs, the judge should not have awarded general damages which reflected Ms X's complete infertility and that the damages for PSLA awarded by the judge should be reduced accordingly.

(B) Background Facts

4. The full background facts and the full extent of the injury suffered by Ms X, as relevant to the damages assessment overall, can be found in the judge's careful judgment below ([2017] EWHC 2318 (QB)), paragraphs 2 to 18. For the narrower issues arising on this appeal it is only necessary to repeat part of that material.

5. Ms X was born on 1 November 1983. She is now 35 years old. The defective analyses of the smears and biopsies were carried out when she was aged between 25 and 29 years old. While still 29, she was eventually diagnosed as suffering from stage II B cervical cancer. Because of the delay in diagnosis, she was unable to have fertility saving surgery which otherwise would have been available to her. She suffered a complete loss of fertility whereas she had had a strong ambition to found her own family and to bring up four children. On being told of her inability to bear children, she postponed treatment for her life-threatening cancer in order to take second and third opinions on whether her fertility could, after all, be saved. The opinions confirmed her complete loss of fertility and (on 16 July 2013) she underwent a cycle of ovarian stimulation and egg harvest, producing 12 eggs which were then cryopreserved by vitrification.

6. On 24 July 2013, Ms X underwent surgery for her cancer followed by a course of chemo-radiotherapy in August and September 2013. That treatment caused irreparable damage to her uterus and ovaries. She entered premature menopause, leading to bad sweats at night and decreased levels of energy. The treatments also led to vaginal stenosis and atrophy of the vaginal tissues, making intercourse extremely painful and thus impossible.

7. Ms X also suffers from other problems with her bladder and her bowel, leading to occasional incontinence limiting her confidence, her ability to work normally, to travel and to engage in various other types of otherwise normal activity.

8. The onset of infertility led to Ms X and her long-standing partner deciding to have their own biological children by surrogacy. She came from a large family and intended to have four children. Their wish was to have the relevant surrogacy carried out in California.

(C) Summary of the surrogacy position

9. Surrogacy is lawful in California and commercial surrogacy agreements are binding on the parties to them. In this country, lawful surrogacy is limited. The evidence in this case indicated that the surrogacy system is well established in California and, as well as the arrangements being legally binding, the intending parents can obtain a pre-birth order from the court confirming their legal status as parents of the expected child. There was and is no criticism in this case of the nature of surrogacy arrangements, including the legal framework behind them, that are available in California.

10. In the United Kingdom, by contrast, commercial surrogacy arrangements are unlawful and it is a criminal offence to advertise either for a surrogate or to offer oneself as a surrogate: Surrogacy Arrangements Act 1985 ("SAA") ss.2 and 3. Any such arrangement is unenforceable. However, it is to be noted that no criminal offence is committed by a person in Ms X's position by being a party to a commercial surrogacy arrangement.

11. 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 one of the established and recognised non-profit making agencies. When such lawful surrogacy is undertaken, in English law, the surrogate mother is the legal mother of the child and can refuse to give the child to the intending parents. To obtain the parental status, it is necessary for the intending parents to apply to the court in the UK for a "parental order" post birth. To obtain such a parental order, it is necessary for the applicant to satisfy the court, exercising family jurisdiction, that any payments made should be authorised. I return later to these provisions, which are important in consideration of the arguments raised on this appeal.

12. So far as the intending parents are concerned, there is a further disadvantage that it is the surrogate mother who chooses the parent and not the other way round as would be the case in California. The judge noted Ms X's evidence that the prospect of "being at the mercy of someone else's choosing", including attending parties to meet potential surrogates, was frightening to her. She said, however, that she was sufficiently determined to have children that she would use the lawful UK system if she were to be

unable to secure a damages award to meet the expenses of surrogacy in California. The judge accepted Ms X's evidence, and that of her partner, on all these points.

(D) The Claim for surrogacy expenses and the judge's decision

13. The claim made by Ms X in this respect was for the cost of four pregnancies, using Ms X's own eggs, but if necessary using donor eggs and her partner's sperm. The expert evidence from the consultant gynaecologists for the parties was that, on a balance of probabilities, Ms X would achieve either one or two live births from her cryopreserved eggs. The data for donor eggs gave a slightly lower prospect of success.

14. After a careful review of the arguments and the law, the judge held that the claim for expenses of Californian surrogacy had to fail. Commercial surrogacy arrangements were still illegal in the UK and thus were contrary to public policy. He found that he was bound so to hold by the decision of this court in *Briody v St Helens and Knowsley Area Health Authority* [2002] QB 856 ("*Briody")*. It did not matter that a contract made in California was lawful; in this country such a contract is unlawful and could not found a claim for the expenses of it as damages in an action such as this. The "reasonable" expenses of such a contract could not, he held, be severed as the contract remained illegal as a whole and was contrary to public policy. Further, the position was not changed by the new legislation enacted since *Briody.*

15. The judge said he was "attracted" by the judgment in the Canadian case of *Wilhemson v Dumma* [2017] BCSC 616 (Can L11), relied upon by counsel for Ms X. The claimant in that case was pursuing a claim based on a lawful surrogacy arrangement in the United States, but which remained illegal in Canada, the country where the claim was brought. Thus, Sir Robert Nelson decided that it was unlikely to be followed in our courts, and, as the judge said, he found himself bound by *Briody*. To the extent that attitudes had changed since *Briody,* any change would have to follow through Parliament or perhaps the Supreme Court.

16. On the other hand, the judge held that the claim in respect of UK surrogacy was different. It was not unlawful or contrary to public policy to use an agency to find a surrogate and to pay reasonable expenses, provided that the requirements of UK legislation were observed. There was no reason why, on general principle and based upon a dictum of Hale LJ in *Briody*, such a claim should not be capable of attracting an award and why such a claim should not succeed.

17. The claim in respect of UK surrogacy, however, was confined by the judge to the use of the mother's own eggs, as was stated in *dicta* in *Briody* which he considered that he should follow: the loss suffered by the injured mother was the inability to have *her* child, not *a* child; the use of donor eggs was not, therefore, restorative of the mother's loss.

18. Accordingly, the damages were limited to expenses of surrogacy in the UK, using Ms X's own eggs, to lead to two children. The judge found, on the balance of probability on the expert evidence, that two live births would be achieved. He allowed £37,000 for each surrogacy, a total award under this head of claim of £74,000. The judge had earlier decided to award £160,000 for PSLA, allowing for the fact that there were to be no damages in respect of surrogacy in California.

19. According to a helpful table produced in the skeleton argument for Ms X on this appeal, the additional award sought on the appeal varies between some £155,000 and £558,000, depending upon the nature of expenses that this court might find to be recoverable.

20. The judge gave Ms X permission to appeal on the questions of recoverability of damages for commercial surrogacy in California and on the recoverability of damages for the cost of surrogacy using donor eggs. In so doing, he said,

> "I consider that it is arguable that the cost of commercial surrogacy in California and the cost of surrogacy using donor eggs is recoverable given the changes in social attitudes since Briody [see below] was decided and the change in statute law re the care of the child in surrogacy cases."

21. Hamblen LJ gave to the Hospital permission to appeal against the judge's allowance of the claim for non-commercial surrogacy expenses in the UK and against the level of the award of damages for PSLA. He considered that all the various issues should be considered by the court, together with Ms X's appeal

(E) *Briody*

22. Like the judge, subject to the arguments which we have heard as to the true ambit of domestic legislation and the modern "public policy" in this field, we would remain bound by the decision in *Briody* and I will, therefore, set out the principal features of that case in a little detail.

23. In that case, the claimant, Ms Briody claimed damages against the health authority whose negligence had led to her losing her uterus. Like Ms X she claimed damages in respect of the cost of a surrogacy arrangement entered into with a surrogate mother. The agreement was governed by the law of California.

24. The arrangement involved recovering the claimant's own eggs, fertilising them with her partner's sperm and implanting the resultant embryos in the womb of the surrogate mother in California. At the trial two experts gave evidence that the chances of success were minimal, being less than 1%. The trial judge (Ebsworth J) rejected the claim on two bases: a) because the chances of success were so low; and b) because the surrogacy arrangement did not comply with English law.

25. The claimant appealed and sought to adduce new evidence of the recovery of her own eggs and fertilisation with her partner's sperm which had resulted in six embryos which had been put into storage. The chances of success remained low but she proposed a further arrangement involving the use of donor eggs, which would comply with English law and for which, in her case, the chances of success were higher.

26. The court declined to admit the fresh evidence, but Hale LJ considered the donor egg proposal which had been raised for the first time in that case in the proposed fresh evidence.

27. On the appeal against the decision of Ebsworth J, the appeal was dismissed. First, it was held that, while reasonably incurred medical expenses arising because of a need for continuing treatment could be recovered from a tortfeasor who had caused

permanent injury, the chance of a successful outcome through surrogacy, using the claimant's eggs in that case was so small that it was unreasonable to expect the defendant to pay for the attempt. Further, secondly, it was said that the surrogacy agreement was unlawful in this country and it would be wrong to award damages to acquire a child by methods which did not comply with English law. (There is a dispute in the case before us as to whether this second decision was part of the *ratio decidendi* of *Briody* and, therefore, as to whether it is strictly binding upon us. To that dispute, I will return.)

28. The leading judgment on the principal issues with which we are now concerned was given by Hale LJ (as she then was). With that judgment, Henry LJ agreed. Judge LJ (as he then was) agreed that the appeal should be dismissed, without addressing all the points covered in Hale LJ's judgment. He considered the claim had to fail because of the low chances of success and because "the entire surrogacy agreement was unlawful in the United Kingdom".

29. Hale LJ set out in some detail the state of English law on surrogacy. In view of the submissions advanced to us that "public policy" affecting surrogacy should be held to have changed since that time, I should perhaps set out in full Hale LJ's summary of the law as it stood in 2001. It appears in paragraph 10 of the judgment as follows:

> "*English law on surrogacy*
>
> 10. English law on surrogacy is quite clear.
>
> (a) Surrogacy arrangements are not unlawful, nor is the payment of money to a surrogate mother in return for her agreeing to carry and hand over the child.
>
> (b) The activities of commercial surrogacy agencies are unlawful. It is an offence for any person to take part in negotiating surrogacy arrangements on a commercial basis, i e for payment to himself or another (apart from the surrogate mother); for a body of persons negotiating surrogacy arrangements to receive payment from either the proposed surrogate mother or the commissioning parents; or for a person to take part in the management or control of a body of persons which negotiates or facilitates surrogacy arrangements: Surrogacy Arrangements Act 1985, section 2.
>
> (c) It is also a crime to advertise either for surrogate mothers or a willingness to enter into or make surrogacy arrangements: Surrogacy Arrangements Act 1984, section 3.
>
> (d) The surrogate mother is always the child's legal mother, irrespective of whose eggs were used: Human Fertilisation and Embryology Act 1990, section 27 (I).
>
> (e) If the commissioning father supplied the sperm, he will be the child's legal father, unless section 28 of the Human Fertilisation and Embryology Act 1990 applies so as to make

someone else the father. It should be possible, by treating him and the surrogate together, to avoid the exclusion from fatherhood of ordinary sperm donors: see the 1990 Act, section 28(6)(a) and Schedule 3, paragraph 5.

(f) If the child is born by IVF (in vitro fertilisation), GIFT (gamete intrafallopian transfer) or artificial (but not natural) insemination to a married surrogate mother, her husband will be the legal father unless it is shown that he did not consent to the treatment: Human Fertilisation and Embryology Act 1990, section 28(2). If the treatment was given "in the course of treatment services provided for her and a man together" by a licensed clinic, her partner will be the father: 1990 Act, section 28(3). But this can easily be avoided by her partner taking no part in the treatment.

(g) No surrogacy arrangement is enforceable by or against any of the persons making it: Surrogacy Arrangements Act 1985, section 1A, as inserted by section 36 of the 1990 Act (see also the Children Act 1989, section 2(9), reflecting the common law).

(h) The future of any child born, if disputed, will always be governed by the paramount consideration of the welfare of the child: Children Act 1989, section 1(1). It is unlikely, although not impossible, that a court would decide that the child should go to the commissioning parents rather than stay with a mother who had changed her mind: see *A v C* [1985] 1 FLR 445 and *In re P (Minors) (Wardship: Surrogacy)* [1987] 2 FLR 421. If the mother does not want the child and the commissioning parents are able to offer a suitable home, the court is likely to allow them to do so: see *In re C (A Minor) (Wardship: Surrogacy)* [1985] FLR 846.

(i) If the child is handed over in accordance with the arrangement, the court may be prepared retrospectively to authorise, under section 57(3) of the Adoption Act 1976, any payment made to the surrogate mother and grant an adoption order which would otherwise be prohibited by section 24(2) of the 1976 Act: see *In re Adoption Application (Payment for Adoption)* [1987] Fam 81.

(j) There is now a special procedure, similar to adoption, whereby the commissioning parents may become the child's legal parents: they must be married to one another, the child must be born as result of IVF, GIFT or artificial (again not natural) insemination using the gametes of one or both of them, the child must be living with them, the surrogate mother (and any father of the child who is not the commissioning father) must agree, and no payment must have been made unless authorised by the court: Human Fertilisation and Embryology Act 1990, section 30; see *In re Q (Parental Order)* [1996] 1 FLR 369.

> (k) If a surrogacy arrangement involves treatment in a clinic licensed by the Human Fertilisation and Embryology Authority (which will be the case in this country unless natural or private artificial insemination is used), this must not be provided "unless account has been taken of the welfare of any child who may be born as a result of the treatment (including the need of that child for a father), and of any other child who may be affected by the birth": Human Fertilisation and Embryology Act 1990, section 13(5).
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> (l) Clinics must observe the Code of Practice, 4th ed (1998), promulgated by the Human Fertilisation and Embryology Authority. This provides, in para 3.20:
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> > "The application of assisted conception techniques to initiate a surrogate pregnancy should only be considered where it is physically impossible or highly undesirable for medical reasons for the commissioning mother to carry the child"."

30. Hale LJ also described the developing views on the subject across the world. Her assessment of the statutory provisions and opinions overall was this:

> "11. These provisions do not indicate that surrogacy as such is contrary to public policy. They tend to indicate that the issue is a difficult one, upon which opinions are divided, so that it would be wise to tread with caution. This is borne out in the official publications which have considered the matter. If there is a trend, it is towards acceptance and regulation as a last resort rather than towards prohibition."

She set out the English opinions (paragraphs 12-14) and then contrasted the Californian arrangement with the lawful English arrangements put forward in the fresh evidence. She said this (at paragraphs 15 and 16):

> "15. Elsewhere in the world, opinion is even more divided. There are some jurisdictions where surrogacy is banned altogether and others where the surrogate mother is not even regarded as the mother of the child. It would appear (although I do not know whether there was any evidence on this before the judge) that in California commercial agencies are permitted and surrogacy agreements may be binding. If so, I have no difficulty in agreeing with the judge that the proposals put to her were contrary to the public policy of this country, clearly established in legislation, and that it would quite unreasonable to expect a defendant to fund it.
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> 16. On the other hand, I find it impossible to say that the proposals which the claimant now wishes to pursue are contrary to public policy in that sense. She fulfils the criteria for permissible surrogacy laid down both by the Human Fertilisation and Embryology Authority and the BMA: she has no other way

> of having a baby because she has no womb. She has found a surrogate mother through perfectly lawful means with who she proposes to make a lawful, although unenforceable, arrangement. She is being treated through a clinic which is licensed to provide these treatments by the Human Fertilisation and Embryology Authority, which has arranged the counselling required under the HFEA Code of Practice, and has presumably made its assessment of the welfare of the child (and of the surrogate mother's children) in accordance with that code. That is not, however, the end of the matter."

31. Hale LJ then turned to the principles of the law of damages. She began by citing a passage from the speech of Lord Blackburn in *Livingstone v Rawyards Coal Co.* (1880) App. Cas. 25, 39 as follows:

> "*The principles of the law of damages*
>
> 17. In novel cases it is often helpful to return to first principles. It is trite law that the purpose of the award of damages in tort is, so far as possible, to put the claimant in the position in which she would have been had the tort not taken place. This was clearly stated by Lord Blackburn in *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25, 39:
>
> > "I do not think there is any difference of opinion as to its being a general rule that, where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation."
>
> Part of that principle is that the claimant is not entitled to ask the defendant to pay to make him better off than he would have been without the tort. He also has to give credit for any benefits received: hence the House of Lords' decision in *McFarlane v Tayside Health Board* [2000] 2 AC 59 that the benefits of having a healthy, if initially unwanted, child must be taken to cancel out the costs of his upbringing."

Hale LJ then said:

> "Part of that principle is that the claimant is not entitled to ask the defendant to make him better off than he would have been without the tort."

(In the present case, both parties rely upon the passage from Lord Blackburn's judgment in different ways.) At paragraph 18 of her judgment, Hale LJ then said:

> "18. Where someone has suffered personal injuries of a lasting nature, they cannot be put back in the position in which they would have been had the injury not happened. They are compensated by an award for the pain and suffering they have endured and for the continuing loss of amenity in their lives. In the case of a woman who has always wanted children, to be deprived forever of the chance of having and bringing up those children is a very serious loss of amenity quite separate from the pain and suffering caused by the injury. The level of awards for young childless women should reflect an understanding of how grave a detriment this is."

32. The judgment then proceeded to deal with the recoverability of expenses of continuing medical treatment. In all events, Hale LJ found herself in agreement with Ebsworth J that since the chances of success of the proposed surrogacy using Ms Briody's own eggs was so "vanishingly small" it would not have been reasonable to expect the defendant to pay the expenses of it. She turned to the proposal that donor eggs and a surrogate mother should be engaged, which (in that case on the new evidence) afforded a greater chance of success. However, she rejected the recoverability of those on the basis that such treatment would not be restorative of the claimant's position before injury. She said this (at paragraph 25):

> "25. …This proposal is not in any sense restorative of Ms Briody's position before she was so grievously injured. It is seeking to make up for some of what she has lost by giving her something different. Neither the child nor the pregnancy would be hers. It is significant that Ms Briody and her first husband tried to make good their loss by adoption, but by then the supply of babies for adoption was beginning to dry up and they turned to fostering instead. These days, some childless couples with the resources to do so become parents by inter-country adoption. The expenses of travelling to the foreign country, staying there, dealing with the various intermediaries and formalities, can be very heavy. But, so far as I am aware, no one who has been wrongfully deprived of the possibility of having a child of their own has sought to claim these. I cannot think that any court would consider it reasonable to expect a defendant to pay them."

33. Hale LJ addressed argument by Mr Irwin QC (as he then was) appearing for the claimant based upon article 12 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (right to marry and found a family). At paragraphs 27 and 28, she said:

> "27. So far, the European jurisprudence has linked these two rights: the right to found a family is a family founded by marriage; the right to marry is limited to traditional marriage between persons of opposite biological sex: see *Rees v United Kingdom* (1986) 9 EHRR 56. More importantly, these are freedoms which should not be arbitrarily restricted, for example by preventing prisoners from marrying; this may well preclude placing arbitrary or disproportionate restrictions upon access to

> the reproductive services which are generally available. But that is quite different from having a right to be supplied with a child (or a spouse): see the recent decision of this court in *R (Mellor) v Secretary of State for the Home Department* [2002] QB 13.
>
> 28. I conclude that expenditure on surrogacy in this case is not "reasonable" and the defendant should not be required to fund it. I am fortified in that view by the opinion of Professor Craft. Although he thought that the claimant should be given the chance of achieving her desires he did not think that she was "sensible" to do so. "Sensible" is very close to "reasonable". I repeat, neither the child nor the pregnancy would be hers; without either, the situation is no different from adoption."

34. The final part of Hale LJ's judgment, relevant for our purposes, dealt with recoverability of damages in what she described as two "Intermediate Cases". The first case was where the claimant wished to make a surrogacy arrangement using her own eggs. The second was where she wished to undergo IVF using donor eggs, because of negligent removal or damage to her ovaries. As Hale LJ said, in the first case, the child would be hers, but the pregnancy would not; in the second, the pregnancy would be hers, but the child would not. Of the first intermediate case Hale LJ said:

> "30. To be reasonable, there would have to be a reasonable chance of a child being achieved as a result. This would be a matter of evidence. But I would not exclude surrogacy just because it was surrogacy: I have already explained why I do not consider that an arrangement which conforms to English law is contrary to public policy. The difference between supplying eggs and supplying a womb is that the surrogate who supplies the womb may change her mind; but the evidence given to the Brazier team was that this is very rare. It would depend upon the evidence in the individual case, and that chance would have to be added to the other uncertainties involved in all such treatment. But, if those chances were good enough, I would not think this a good reason to refuse an award. The question is whether, to be reasonable, reparation has to produce, not only a child to rear, but also a child who is the product both of one's own genes *and* of one's own womb."

Neither "intermediate" solution is open to Ms X here.

35. Her final conclusion on the intermediate cases, however, was this:

> "32. My tentative view is that each of these cases is a step too far. To choose between them would be to elevate either genetic parentage or the process of carrying and giving birth above the other in the scale of loss which it is reasonable to try to make good with alternatives. But I recognise the force of the contrary argument that both are equally serious and that, given the right evidence of the reasonableness of the procedure and the

> prospects of success, each should be capable of attracting an award."

36. While I have summarised already Sir Robert Nelson's decision, I think it is useful (in contrast to the passages of Hale LJ's judgment just quoted above) to cite here his conclusions in respect of lawful surrogacy, using the claimant's eggs and donor eggs respectively, in the present case. He said this at paragraphs 49-50 of his judgment, dealing first with the "own eggs" example:

> "49. It is not illegal nor contrary to public policy to use an agency to find and use a surrogate mother provided the requirements of the Act are fulfilled. As Lady Justice Hale said in Briody when dealing with this situation obiter, given the right evidence of the reasonableness of the procedure and the prospects of success such a case should be capable of attracting an award. (para 32) It is also correct that she said that her tentative view was that such a claim was a step too far. If however, as here, the prospects of success of a live child being born are reasonable if not good, and the Claimant has delayed her cancer treatment to ensure her eggs were harvested, I find it difficult to see why, both on general principle, and based upon Lady Justice Hale's own view, such a case should not be "capable of attracting an award", and why the claim relating to the UK should not succeed.
>
> 50. The use of a mother's own eggs is however to be contrasted with a claim based on the use of donor eggs. I am bound by the decision in Briody to reject such a claim. (para 25) The loss that the injured mother sustains is the inability to have her child, not a child. The use of donor eggs is not therefore restorative of her loss. Even if that part of the decision were technically obiter I would adopt the reasoning of the Court of Appeal and reject any claim in respect of donor eggs. If the loss was to be properly regarded as the loss of a child it would not be reasonable or proportionate to require a defendant to pay for the cost of donor egg surrogacy."

(F) The Appeal and my Conclusions

37. As I have recorded, Sir Robert Nelson decided that he was compelled by the decision in *Briody* to reject Ms X's claim for expenses of Californian surrogacy. He held he was similarly bound to reject the claim to the expenses of the "donor egg" version of UK surrogacy. He allowed the claim in respect of UK "own egg" surrogacy.

38. I will deal first with the points arising upon Ms X's primary claim to recover the expenses of Californian commercial surrogacy arrangements. I return afterwards to the points concerning the potential alternative of surrogacy in the UK with the use of "donor eggs" (Ms X's appeal) and "own eggs" (the cross-appeal). On all the points, we were fortunate to be assisted by most helpful arguments by all four counsel who appeared before us.

39. The core submission by Lord Faulks QC and Mr Feeny for the Hospital on the primary point on the appeal is short and simple. That submission is that the judge was right in his approach to Ms X's claim, except in the area covered by the cross-appeal. The judge had considered that he was bound by *Briody* to reject the principal head of the claim and, it is submitted that he was right about that and that we should take the same view and dismiss the appeal. Lord Faulks says that this is a complex area of law and policy which is under consideration by the Law Commission. We should not, therefore, anticipate what the Commission may advise and what Parliament may do as a result. So far as the courts are concerned, it is submitted that only the Supreme Court can go behind the decision in *Briody*.

40. It is further submitted that views on many aspects of surrogacy differ across the world and we should exercise caution in any expression of public policy in the law: Lord Faulks supported this submission by reference to an anonymous article from "The Economist" magazine of 13 May 2017. (I would observe that the magazine has a high reputation, but (with respect) an article of this character cannot carry significant authority as a source of the common law or even as a guide to it.)

41. Lord Faulks argued that much of the thinking on surrogacy has tended to focus on the commissioning parents, but the interests of the surrogate mother and of the child must be considered. While such arrangements may be well regulated in California, that is not replicated in other parts of the world where some countries seek to ban surrogacy altogether. It would be unsatisfactory to permit a claim of this character which would open up factual arguments in other cases about the suitability of other surrogacy regimes in other countries and the specific arrangements proposed in each individual case. If surrogacy agreements are enforceable in California, they are plainly not enforceable here and are unlawful.

42. Mr Johnston QC and Ms Watson for Ms X argue that the ratio of *Briody* was simply that the prospects of successful surrogacy in that case were so "vanishingly small" that the expenditure was not "reasonable" and, therefore, not recoverable as special damages. In the present case, they submit, the chances of success have been held to be materially different and that, therefore, in principle (all other things being equal), suitable damages should be awarded to cover the reasonable expenses of Californian commercial surrogacy.

43. It is argued that "public policy" points made by this court in *Briody* were *obiter dicta* and are not binding on us. In any event, it is submitted that the amendments to UK legislation and the shifts in public policy surrounding surrogacy have so changed that what they characterise as "the anomalous *Briody*…restriction on a woman's ability to recover damages for reasonable medical expenses should in 2018 be removed" (skeleton argument paragraphs 6.3). For my part, I think that the two limbs of this court's decision in *Briody* should be seen as co-existent parts of one *ratio decidendi*; the same is, I think, true of the two part decision of Ebsworth J in that case which was affirmed on the appeal.

44. Mr Johnston, however, pointed out that at the time of *Briody* no surrogacy arrangements involving third party agencies or the payment of money, even expenses, were permitted. Third party surrogacy arrangements of any type were criminalised. Under the Human Fertilisation and Embryology Acts ("HFEA") 1990 and 2008, third party surrogacy relationships in this country are now permitted in limited circumstances. While

payments which are "commercial" remain unlawful, reasonable payments to surrogates and non-profit making agencies facilitating surrogacies are now allowed; such payments can be significant: see SAA (as amended) ss. 2(2A), 2(5A) and 2(8A). Advertising for surrogates may now be placed by non-profit making bodies: Ibid. s. 3(1A).

45. Parliament has also permitted the family courts to sanction overseas surrogacy arrangements by way of "parental orders", including the sanction of payments made in the context of such arrangements: see HFEA 1990 s.30 and HFEA 2008 s.54, especially subsections (7) and (8) respectively of those Acts. Under s.54 of the 2008 Act, the court can make an order in favour of persons, in defined relationships, for a child born by surrogacy to be treated in law as the child of the applicants, provided that the conditions set out in the section are satisfied. The threshold requirements are set out in section 54(1) as follows:

> "(1) On an application made by two people ("the applicants"), the court may make an order providing for a child to be treated in law as the child of the applicants if—
>
> (a) the child has been carried by a woman who is not one of the applicants, as a result of the placing in her of an embryo or sperm and eggs or her artificial insemination,
>
> (b) the gametes of at least one of the applicants were used to bring about the creation of the embryo, and
>
> (c) the conditions in subsections (2) to (8) are satisfied."

46. By s.54(2), before the 2018 statutory instrument, the applicants must be married or in civil partnership or "in an enduring family relationship" not within the prohibited degrees. (However, see below as to the extension of the categories of permitted applicants to single persons under a 2018 statutory instrument.) Section 54(8) makes it a condition of the making of the parental order that money has not changed hands in the process of the exercise "unless authorised by the court". Subsection (8) reads as follows:

> "(8) The court must be satisfied that no money or other benefit (other than for expenses reasonably incurred) has been given or received by either of the applicants for or in consideration of—
>
> (a) the making of the order,
>
> (b) any agreement required by subsection (6),
>
> (c) the handing over of the child to the applicants, or

> (d) the making of arrangements with a view to the making of the order, unless authorised by the court."

47. It is to be noted, however, that approval of payments made as a condition of the making of a parental order was already possible at the time of *Briody*, as Hale LJ noted in paragraph 10 j of her judgment (supra). In the case cited in that paragraph (*Re Q (Parental Order)*), Johnson J had authorised retrospectively (with some hesitation) a payment of £8280 paid to the surrogate mother. In doing so, he had followed *Re Adoption Application (Payment for Adoption)* [1987] Fam. 81 (Latey J), a decision under the Adoption Act 1958 s.50.

48. However, things have certainly moved on in the exercise of that jurisdiction. In *Re C (Parental Order)* [2014] 1 FLR 757, Theis J made a parental order in favour of married applicants in respect of a surrogate birth, arranged in California, where nearly US$95,000 had been paid by the applicants to achieve the result. In doing so, Theis J said this at paragraphs 17-20:

> "17. As has been established in the cases to date, when the court is considering whether to authorise payments such as these, the court needs to look at a number of factors: was the sum paid disproportionate to reasonable expenses? Were the applicants acting in good faith and without moral taint? Were the applicants' party to any attempt to defraud the authorities?
>
> 18. I am entirely satisfied in this case that the sums which were paid were not disproportionate to the reasonable expenses. They did not overbear the will of the surrogate and were not of such a level to be an affront to public policy. They were payments permitted in the jurisdiction in which they were made, and are not too dissimilar to payments made in similar cases. The profile information about the first respondent demonstrated she was altruistically motivated to become a surrogate mother and to assist the applicants [to] have a much wanted child. She had been a surrogate before and had the benefit of detailed prior discussions and legal advice before entering into the agreement with the applicants and had a clear understanding of the process and issues involved. She formed a positive relationship with the applicants and she wholeheartedly supports the applicants' wish to be treated as C's parents.
>
> 19. In relation to the applicants acting in good faith and their involvement with the authorities, they have co-operated entirely with any requirements which have been made of them in either the United States or in this jurisdiction, both in relation to the steps which they have taken in the United States, for example, seeking the pre-birth order, the advice which they have taken in the United States and, also, promptly issuing their application here and furnishing this court with all the information which it requires to enable it to consider the application. There has been no 'moral taint' in the applicants' dealings with the respondents

> or with the authorities. The applicants have at all times sought to comply fully with the requirements of Californian and English Law. It is also clear from the applicants' statements that the surrogacy arrangement was entered into with care and thought and in respect of a much-wanted child, and does not represent the simple buying of a child overseas.
>
> 20. I am satisfied, in the circumstances of this case, that the payments should be authorised by the court in accordance with s54(8)."

49. It is submitted that *Re C* shows that the law has advanced considerably in approving retrospectively payments made in connection with surrogacy when the court exercises the jurisdiction under HFEA s.54 since the time of the decisions of Latey J in 1987 and of Johnson J in 1996, and indeed since Hale LJ referred to this "special procedure", as she called it, in paragraph 10 j of the judgment in *Briody*. Counsel for Ms X accept, however, that the welfare of the child is the paramount consideration in s.54 cases – a rather different issue from the one that confronts the court here. Nonetheless, he argues that "welfare" may be the paramount consideration, but it is not the only one, and the cases decided under s.54 do not support any proposition that SAA ss. 1A and 2 and that public policy requires the law to set its face against the lawful resort to commercial surrogacy abroad – rather the contrary.

50. It is argued for Ms X that public policy is notoriously not immutable. It has been recognised in other fields that the common law has to reflect changes in attitude over time. The change in the law as to marital rape is cited as an example: *R v R* [1992] AC 599.

51. In the present field, it is submitted further that social conditions have moved. Within the immediate confines of surrogacy legislation, whereas the "parental order" jurisdiction was only available to married couples at the time of *Briody*: see HFEA s.30(1) and (2), it is now open to civil partners and those living in an "enduring family relationship". In 2016, the High Court declared that the exclusion of single persons from the jurisdiction under s.54 was incompatible with anti-discrimination provisions of Article 14 of the European Convention on Human Rights, taken in conjunction with Article 8: see *Re Z (A Child) (Surrogate Father: Parental Order) (No.2)* [2016] EWHC 1191 (Fam) (Munby P). As a result, the incompatibility was removed by the introduction of a new s.54A into the HFEA 2008, to permit parental orders to be made in favour of a single applicant, by the Human Fertilisation and Embryology Act 2008 (Remedial) Order 2018.

52. In addition, counsel referred us to the Children and Families Act 2014 which has made provision for the extension of rights to shared parental pay and adoption leave (under the Social Security Contributions and Benefits Act 1982 and the Employment Rights Act 1996) to applicants for orders under HFEA s.54. These particular changes to bring parents of children born under surrogacy arrangements under the statutory protections available to parents of other children show, it is submitted, that the law has moved to "normalise" families that have come into being through surrogacy.

53. All this, Mr Johnston argued, has also to be seen in the changed social order brought about by the progressive introduction of civil partnerships and same sex marriage, giving rise to increasing resort to surrogate births.

54. As it seems to me, there is plenty of judicial authority, arising from the diversity of the family in modern society, which requires the court to ask itself, when such questions arise in contexts such as the present, whether the law is achieving a necessary coherence and consistency in sticking rigidly to a perception of public policy formulated even a few years ago: *vide infra* (paragraph 61), a quotation from Sir Percy Winfield. Thorpe LJ recognised this in *Re G (Children)* EWCA Civ 462 at [24], when considering an application for what was then called a "shared residence order" in respect of children of a same sex couple. In a case concerning an application by a father of a same sex couple to be granted parental responsibility (*B v A, C, D* [2006] EWHC 2 (Fam)), Black J (as she then was) after referring to the judgment of Thorpe LJ in *Re G* (supra) said:

> "31. …Thorpe LJ commented that the authorities demonstrate the evolution of judicial acceptance of the diversity of the family in modern society and made reference to authorities both in the family law field and outside it. We have come a long way from the days when a mother who began a lesbian relationship might well have found that it meant she was not permitted to have care of her children.
>
> 32. The speed with which the law responds to social change is not uniform. Sometimes change is well advanced and accepted in society before there is legal recognition of it. At other times, Parliament or the courts react to the prompt of a minority and are in the vanguard of change. Sometimes legislation is actually passed to provoke change – anti-discrimination provisions are perhaps an obvious example of this. It cannot be assumed, therefore, that the majority of the population necessarily supports the provisions of the Civil Partnership Act or the provisions of the Adoption and Children Act which will permit adoption by a same sex couple."

55. Further, the argument runs, Ms X proposes to do nothing illegal. She intends to enter into an arrangement lawful by the law of the place where that arrangement is made. In making such an arrangement, she would not be not guilty of any criminal offence, either here or abroad. It is submitted that SAA s.2(1), banning commercial surrogacy, relates solely to acts undertaken in the UK, and even then only to a limited extent: there is no indication of an intention on the part of Parliament to give the section extraterritorial effect. To the contrary, SAA s.2(1) is *expressly* limited to a prohibition of actions "in the United Kingdom".

56. I agree with this closer analysis of the purpose of the prohibition of commercial surrogacy in this country, as it stands in the legislation, as amended since *Briody*. The sole surviving object of the prohibition, taking the statutes overall, seems to be to render unlawful commercial surrogacy businesses in the UK and to subject those running such businesses, and some of those who might use them, to criminal liability. This is well understandable. The law thus prevents the operation of such businesses in circumstances in which we have no standards set for their operation, no licensing

arrangements and no regulatory policing of day to day operation. This, therefore, renders such illegality as remains under the statute of more narrow focus than might otherwise be imagined. It is necessary, in my view, to identify the true ambit of modern public policy imported by SAA s.2. Focus on what the prohibition is about is the core of the modern law of illegality.

57. This is a result of the new formulation of the law of illegality, as a bar to a civil claim, adopted by the majority of the Supreme Court in *Patel v Mirza* [2016] UKSC 42, a case decided well after *Briody* and to which Sir Robert Nelson was not referred. In my judgment, *Patel* gives this court a fresh opportunity to examine the "public policy" behind the bar to this particular civil claim which was held to exist 17 years ago in *Briody*.

58. I would add that with all these changes since *Briody* in mind, in the course of preparation for the hearing of this appeal, the court also asked for submissions from the parties upon conflict of law issues which seemed to us to arise in this case and which do not appear to have been ventilated in *Briody*. I return to this aspect of the case below.

59. The core of the *Briody* case on this point of public policy/illegality is in the last sentence of paragraph 15 of Hale LJ's judgment (to recap) as follows:

> "…I have no difficulty in agreeing with the judge that the proposals put to her were contrary to the public policy of this country, clearly established in legislation, and that it would be quite unreasonable to expect a defendant to fund it".

60. The claim failed because of "public policy" seen to be enshrined in the legislation. The question for us, as it seems to me (in the light of *Patel v Mirza*) is whether that perception of public policy barring the remedy should be the same today as it was in 2001.

61. In 1928 Sir Percy Winfield wrote (42 Harvard Law Review 76 at 93-95):

> "Public policy is necessarily variable. It may be variable not only from one century to another, not only from one generation to another, but even in the same generation … This variability of public policy is a stone in the edifice of the doctrine, and not a missile to be flung at it. Public policy would be almost useless without it."

62. More recently in 2017, in the current edition of Cheshire, Fifoot & Furmston on Contract (17th Edn.), p.459 there is the following observation:

> "Since public policy reflects the mores and fundamental assumptions of the community, the content of the rules should vary from country to country and from era to era. There is high authority for the view that in matters of public policy the courts should adopt a broader approach than they usually do to the use of precedents.

> Such flexibility may manifest itself in two ways: by the closing down of existing heads of public policy and by the opening of new heads. There is no doubt that an existing head of public policy may be declared redundant. So in the nineteenth century it was stated that Christianity was part of the law of England and that accordingly a contract to hire a hall for a meeting to promote atheism was contrary to public policy[1] but 50 years later this view was decisively rejected.[2]"

(Footnotes from the original below)

63. In 2018, we have the present edition of Chitty on Contract (33rd Edn.) Vol.1 p.1247, para. 16-005 where there is this:

> "Obviously a doctrine of public policy is somewhat open-textured and flexible, and this flexibility has been the cause of judicial censure of the doctrine. On occasions it has been seen by the courts as being vague and unsatisfactory, "a treacherous ground for legal decision", "a very unstable and dangerous foundation on which to build until made safe by decision".[3] It is in the context of this doctrine that the unruly horse metaphor rode into the litany of the English lawyer.[4] However, the doctrine has had its defenders. For Winfield, the "variability of public policy is a stone in the edifice of the doctrine, and not a missile to be flung at it".[5] Lord Denning M.R. also viewed the doctrine with favour: "[w]ith a good man in the saddle, the unruly horse can be kept in control. It can jump over obstacles.[6]"

(The footnotes in the textbook again are repeated here.)

64. Thus, "public policy" in our law is well-recognised to be variable and is not ossified for all time, once identified in any particular context.

65. Turning then to *Patel v Mirza*, for my part, I accept Mr Johnston's submission that, in the light of that case, one now needs to see the concept of illegality, as a defence to a civil claim of whatever nature, through rather differently shaded spectacles from before. While that case concerned the recovery of money paid under a failed illegal contract, the principle in question was the "public policy" said to bar recovery in a civil claim. Similarly, here we are concerned with identifying the bounds of a perceived "public policy" barring a civil claim, but this time in tort. I cannot see that there should be any

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[1] *Cowan v Milbourn* (1867) LR 2 Exch 230.

[2] *Bowman v Secular Society Ltd* [1917] AC 406.

[3] *Janson v Driefontein Consolidated Mines Ltd* [1902] A.C. 484, 500, per Lord Davey.

[4] "It is a very unruly horse, and when once you get astride it you never know where it will carry you": *Richardson v Mellish* (1824) 2 Bing. 229, 252, per Burrough J. See also *MoneyMarkets International Stockbrokers Ltd v London Stock Exchange* [2002] 1W.L.R. 1150 at [80].

[5] (1928–29) 42 Harv. L. Rev. 76, 94.

[6] *Enderby Town Football Club Ltd v The Football Association Ltd* [1971] Ch. 591, 606.

difference in principle. The case itself emphasises the importance of cohesion and consistency in the law.

66. In his "Summary and disposal" in paragraph 120 of the majority judgment in *Patel*, Lord Toulson said:

> "120. The essential rationale of the illegality doctrine is that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system (or, possibly, certain aspects of public morality, the boundaries of which have never been made entirely clear and which do not arise for consideration in this case). In assessing whether the public interest would be harmed in that way, it is necessary (a) to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim, (b) to consider any other relevant public policy on which the denial of the claim may have an impact and (c) to consider whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts. Within that framework, various factors may be relevant, but it would be a mistake to suggest that the court is free to decide a case in an undisciplined way. The public interest is best served by a principled and transparent assessment of the considerations identified, rather by than the application of a formal approach capable of producing results which may appear arbitrary, unjust or disproportionate."

The "lead-in" to that paragraph can be seen earlier in paragraphs 99-101 as follows:

> "99. Looking behind the maxims, there are two broad discernible policy reasons for the common law doctrine of illegality as a defence to a civil claim. One is that a person should not be allowed to profit from his own wrongdoing. The other, linked, consideration is that the law should be coherent and not self-defeating, condoning illegality by giving with the left hand what it takes with the right hand.
>
> 100. Lord Goff observed in the *Spycatcher* case, *Attorney General v Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, 286, that the "statement that a man shall not be allowed to profit from his own wrong is in very general terms, and does not of itself provide any sure guidance to the solution of a problem in any particular case". In *Hall v Hebert* [1993] 2 SCR 159 McLachlin J favoured giving a narrow meaning to profit but, more fundamentally, she expressed the view, at pp 175–176, that, as a rationale, the statement that a plaintiff will not be allowed to profit from his or her own wrongdoing does not fully explain why particular claims have been rejected, and that it may have the undesirable effect of tempting judges to focus on whether the plaintiff is "getting something" out of the

> wrongdoing, rather than on the question whether allowing recovery for something which was illegal would produce inconsistency and disharmony in the law, and so cause damage to the integrity of the legal system.
>
> 101. That is a valuable insight, with which I agree. I agree also with Professor Burrows' observation that this expression leaves open what is meant by inconsistency (or disharmony) in a particular case, but I do not see this as a weakness. It is not a matter which can be determined mechanistically. So how is the court to determine the matter if not by some mechanistic process? In answer to that question I would say that one cannot judge whether allowing a claim which is in some way tainted by illegality would be contrary to the public interest, because it would be harmful to the integrity of the legal system, without (a) considering the underlying purpose of the prohibition which has been transgressed, (b) considering conversely any other relevant public policies which may be rendered ineffective or less effective by denial of the claim, and (c) keeping in mind the possibility of overkill unless the law is applied with a due sense of proportionality. We are, after all, in the area of public policy. That trio of necessary considerations can be found in the case law."

67. Mr Johnston submits that in paragraph 99 of that last passage one can discern a "threshold" of policy behind illegality as a defence to a claim. The threshold is that a person should not be allowed to profit from his own wrong and the law should be coherent and not self-defeating. Only if one crosses that line, does one have to embark upon the "trio" of considerations set out in paragraph 101 of the judgment. He argues that here Ms X proposes to act entirely lawfully. She wishes to embark upon a course of action which is not unlawful in the place where the acts occur and is not criminal under our law either. She does not intend to profit from her own wrongdoing. It is only by a "counter-factual" hypothesis of the action occurring in this country that any question of unlawfulness arises at all, and even then no crime would be committed by Ms X. Secondly, the Hospital's position has to assume that if a lawful surrogacy is undertaken abroad for which approval is likely to be sanctioned in the Family Division in respect of payments made, it is "incoherent" in the Queen's Bench Division to deny the right to recover in an action for negligence the sums of money which are proposed to be spent. Mr Johnson asked in the course of his submissions, "Why should Ms X be made a martyr to a notional public policy?" based upon facts which will never occur. In the circumstances, he submits that it is not necessary to consider Lord Toulson's three "considerations"; the defence of illegality never crosses over the threshold.

68. For my part, I would not be inclined to divide up these paragraphs of Lord Toulson's judgment in this way. When one looks at later paragraphs, e.g. paragraphs 107 and 109, in part quoted below, Lord Toulson returns to the issue of coherence or integrity in the law which is one element of Mr Johnston's perceived "threshold". However, read as a composite whole, it seems to me that 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*. Clearly, Ms X proposes to do nothing which is unlawful on her part. There is nothing

in our statute which tells us that what she wants to do is in any way counter to the law or the morals of UK statutes. When one focuses upon the real extent of the modern surviving prohibition in SAA s. 2, there seems to me to be an incoherence in depriving her of her claim at the outset when she personally proposes no wrongdoing, either under Californian law or under our own law. Indeed, I think (with respect) that it must have been a slip of the pen for Judge LJ to say, as he did at paragraph 38 of the judgments in *Briody*, that,

> "…the purpose of the award, if made would be to enable the claimant to acquire a child by methods which are outlawed in domestic law".

Even then, Mrs Briody personally was not proposing to do anything that would have put her in breach of our criminal law.

69. Returning to Lord Toulson's trio of considerations, I can see nothing there either that would indicate a public policy bar to recovery under the present head of claim.

70. First, the underlying purpose of the prohibition in SAA s.2(1) is to render acts of commercial surrogacy unlawful in the UK. It does not purport to legislate for any country other than the UK and does not prohibit Ms X from doing what she proposes. Her intended action is not the target of the current legislation (as amended) at all. As it seems to me, when one strips away the unlawfulness of the act of the commissioning parent, as I have said already, the only targets left are profit-making commercial surrogacy businesses operating in the UK. It cannot conceivably be said now that surrogacy as such is contrary to the public policy of our law[7].

71. Secondly, subject to the question of the extent of recoverability of damages to achieve restoration of a claimant into his/her position prior to the tort, I see that a bar to recovery here would prevent full recovery of damages such as to restore Ms X's personal autonomy in being able to found a family.

72. Thirdly, it seems to me clear that it would constitute "overkill" if recovery were to be barred in this case. A notional aversion to a lawful act abroad by reference to a prohibition here seems to be just that, overkill.

73. At paragraph 107 of his judgment, Lord Toulson said:

> "107. In considering whether it would be disproportionate to refuse relief to which the claimant would otherwise be entitled, as a matter of public policy, various factors may be relevant. Professor Burrows' list is helpful but I would not attempt to lay down a prescriptive or definitive list because of the infinite possible variety of cases. Potentially relevant factors include the seriousness of the conduct, its centrality to the contract, whether

[7] The statement accompanying the 2018 Remedial Order, mentioned above, said: "Surrogacy has an increasingly important role to play in our society, helping to create much-wanted new families for a range of people. The UK Government recognises the value of this in the 21st century where family structures and life-styles are much more diverse."

> it was intentional and whether there was marked disparity in the parties' respective culpability."

It is for the last sentence of the paragraph that I quote it – the reference to "Professor Burrows' list" is, it will be recalled, to the relevant section of his Restatement of the English Law of Contract (2016). Looking at that last sentence, what (one may ask) is the "seriousness" of Ms X's proposed conduct? There is no wrong at all, let alone "serious" wrong. Of course, it would be intentional, but there is nothing wrong in doing a lawful act intentionally. If one moves to disparity in the parties' respective culpability, there is no contest. I accept, of course, that Lord Toulson was dealing with a contract with two wrongdoers as opposed to a tort and one wrongdoer.

74. Lord Toulson continued in paragraph 108 of the judgment by saying:

> "108. The integrity and harmony of the law permit—and I would say require—such flexibility. Part of the harmony of the law is its division of responsibility between the criminal and civil courts and tribunals. Punishment for wrongdoing is the responsibility of the criminal courts and, in some instances, statutory regulators. It should also be noted that under the Proceeds of Crime Act 2002 the state has wide powers to confiscate proceeds of crime, whether on a conviction or without a conviction. Punishment is not generally the function of the civil courts, which are concerned with determining private rights and obligations. The broad principle is not in doubt that the public interest requires that the civil courts should not undermine the effectiveness of the criminal law; but nor should they impose what would amount in substance to an additional penalty disproportionate to the nature and seriousness of any wrongdoing."

Again, there is no integrity of criminal law and civil law that is endangered if Ms X's claim is allowed. To the contrary she proposes nothing wrong and is deserving of no penalty at all, let alone an additional one. To the same effect is paragraph 109 where this was said:

> "109. The courts must obviously abide by the terms of any statute, but I conclude that it is right for a court which is considering the application of the common law doctrine of illegality to have regard to the policy factors involved and to the nature and circumstances of the illegal conduct in determining whether the public interest in preserving the integrity of the justice system should result in denial of the relief claimed. I put it in that way rather than whether the contract should be regarded as tainted by illegality, because the question is whether the relief claimed should be granted."

It is unnecessary to repeat my comment on Lord Toulson's paragraph 108 above.

75. I mention above the request we made to counsel for submissions upon any "conflict of laws" issues that arise in this case. I was grateful to counsel for their researches. They

seemed to me to reveal pointers in English conflict of laws rules which militate against the barring of claims arising out of acts lawful abroad, but unlawful here.

76. I have already noted that the prohibition of commercial surrogacy in SAA s.2 is expressly limited to acts done in the United Kingdom. There is no case for saying that the statute is intended to operate extraterritorially. I note that s.1A of the same Act says that "No surrogacy arrangement is enforceable by or against any of the persons making it". However, that must include surrogacy arrangements lawfully made in this country. I do not consider that that assists in determining whether the proposed lawful acts of Ms X should give rise to a bar to her recovering the reasonable sums incurred in the exercise. The question whether a surrogacy agreement is enforceable between the parties to it seems to me to be not relevant to that question.

77. The cases (thrown up by counsel's researches) on enforceability, in this country, of contracts lawful abroad but unlawful had they been made here indicate that such contracts would be enforceable "unless inconsistent with the fundamental public policy of English law" (Dicey, Morris & Collins 15th Edn. Vol. 2 p. 99, Rule 2). Looking at the examples of inconsistency with fundamental public policy of English law, given in Dicey, Morris & Collins, they appear to be on a far higher plane of unacceptability than public policy against surrogacy (if any) in this country.

78. The case of closest interest to which we were referred was *Saxby v Fulton* [1909] 2 KB 208. The short headnote reads:

> "Money lent in a foreign country for the purpose of being used by the borrower for gaming, the game not being illegal by the law of that country, may be recovered in the English courts.
>
> *Quarrier v Colston* (1842) 1 Ph. 147 followed…"

The case examined a number of differences in the earlier cases between the enforceability of loans made for the purpose of gambling and securities given to cover gambling debts.

79. It is not necessary to examine in detail the nuances of early 20th century law on that issue, the headnote sufficiently summarises the principle decided. A few short quotations from this court's judgments will suffice. Vaughan Williams LJ said at p.225),

> "Mr Atkin [for the defendant] has not succeeded in persuading me that according to the law of England as administered in the English Courts, it is impossible for those who have lent money for gaming purposes in countries where gaming is lawful to recover the amount of the loan. It is sufficient for me to say that I am bound by *Quarrier v Colston* to hold that that point has not been made out."

Buckley LJ said (at p. 227-8):

> "I cannot see that it is contrary to public policy for the English courts to recognise a debt contracted for the purpose of wagering

> abroad in a place where such wagering was legal… [A] betting or gaming contract in a country where betting or gaming is recognized by the law cannot be said to be contrary to essential principles of morality or justice."

Kennedy LJ said (at p.231):

> "There is no doubt generally by the law of England, when a contract is made abroad in a civilised country where it would be held to be a lawful contract, that contract is held to be governed by the lex loci contractus and is enforceable in personam in the Courts of this country."

80. Here, there is a section (SAA s. 1A) that would probably rule out the enforcement in our courts of *any* lawful surrogacy agreement (commercial or otherwise) made abroad or here (Hale LJ was of that view and I agree), but the general rule indicates that the English rules of conflict of laws do not frown unnecessarily adversely upon contracts lawfully made abroad. Here Ms X does not seek the enforcement against the other party to a surrogacy agreement, which seems to be prevented by s.1A. She wishes to recover, as reasonable compensation for her loss, the cost likely to be incurred in making a contract or contracts in implementation of her intended arrangements; that is not caught by s.1A.

81. In my judgment, therefore, the law no longer requires a bar to recovery of the damages claimed by Ms X on public policy grounds.

82. In the context of Ms X's alternative claim for costs of lawful surrogacy in this country and upon the cross appeal by the Hospital in respect of the judge's decision in Ms X's favour to permit recovery of expenses of such surrogacy using Ms X's own preserved eggs, the parties addressed the question of whether the award of such damages was properly "restorative" of Ms X's position before the torts committed against her. In view of the judge's decision to refuse the claim for Californian surrogacy expenses on policy grounds, it was not necessary for him to consider that point at that stage of the argument. However, given my own view on the public policy issue, it seems to me that the arguments are material at this earlier stage also.

83. I have quoted above paragraphs 49 and 50 of Sir Robert Nelson's judgment where he deals with this issue. Sir Robert saw a distinction between "own egg" and "donor egg" surrogacy here, based upon Hale LJ's judgment in *Briody*.

84. In *Briody* the claim in respect of surrogacy using "own eggs" failed because the chances of a successful outcome was, on the facts, vanishingly small. That does not tie this court's hands in respect of "own egg" procedures in this case (in California or here) where the chances of success are so much greater. For my part, on this point, I am content to say that I agree with Sir Robert's succinct reasons for allowing this claim, as set out in paragraph 49 of his judgment. I need add no more. Such expenses should, in my view, be recoverable in this action, irrespective of whether the treatment is to occur here or in California.

85. So far as "donor egg" procedures are concerned, it was said that Mrs Briody's claim, based on the fresh evidence would have failed for the reasons set out in paragraph 25

of Hale LJ's judgment which I have quoted above. She found that the proposed treatment was not truly restorative of Mrs Briody's pre-tort condition. She said that she would reach that conclusion even without the fresh evidence and she agreed with Judge LJ that that evidence should not be admitted. Judge LJ did not deal expressly with this aspect of the case. He agreed with Hale LJ on the public policy issue with regard to commercial surrogacy in California and gave the court's detailed reasons for refusing to admit the fresh evidence. Henry LJ agreed with both judgments, thus agreeing with Hale LJ's paragraph 25 that the hypothetical "donor egg" procedures would not be truly restorative of Mrs Briody's pre-injury condition.

86. The crux of both parties' argument is the "restitutionary" principle of an award of damages in tort, derived from Lord Blackburn's speech in the House of Lords in the *Livingstone* case (supra):

> "…where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation."

87. Mr. Johnston and Ms Watson in their written argument place emphasis upon the words "…as nearly as possible…". Lord Faulks and Mr Feeny focus on the words "…the same position…". In the context of this case, the reason for the differing emphasis is obvious.

88. For the Hospital, it is argued that the judge was right to adopt Hale LJ's reasoning in paragraph 25 of her judgment in *Briody* and to regard himself as bound by it "…even if the decision on this point might be regarded as "technically obiter"." (Skeleton argument paragraph 24)

89. For Ms X, it is submitted that,

> "Ms X seeks compensation for the two donor egg surrogacies she will probably require to complete her family. She (reasonably) wishes to become the mother to those two children and complete her intended family with her partner. Any observations in *Briody* on donor egg surrogacies, were *obiter*…"
>
> (Skeleton argument paragraph 11.1).

90. It is further argued that the Hospital's case that the compensation for "donor eggs" surrogacy is not truly restorative, because of the short proposition that, "Neither the child nor the pregnancy would be hers" does not properly apply the approach set out by Lord Blackburn in *Livingstone*. Mr Johnston submits that an award of damages for the "donor egg" alternative is just as restorative of the antecedent position as the award of damages to achieve a prosthetic limb for an amputee: such a limb is not the claimant's genetic material nor is it as good as a real leg, but it represents the best compensation possible to restore the antecedent function. Lord Faulks argued that the analogy was false because in the prosthetic limb cases, "Both pre and post there would be a functioning limb; there will be no functioning womb". Mr Johnston's riposte was that

this concentrates unduly on mere physical functionality rather than the wider aim of such an award in giving Ms X the chance of having the family that she intended to have if the Hospital had not been negligent; it is not a simple case of seeking to restore a womb to the body.[8]

91. Both parties and the judge have regarded this court's assessment of the "donor egg" issue as having been *obiter*. I see no reason to question their view on this technical point of precedent. Mr Johnston recognised, however, that this court would not lightly depart from the relevant *dicta*. He submitted, nonetheless, that the strictly functional analysis that the court adopted in its *dicta* in *Briody* is outmoded and, as we are free not to follow them, we should not do so. He asked us to note that the evidence about "donor egg" surrogacy was not admitted in *Briody* and had not been tested before the trial judge. The position in this case, it is argued, is quite different. The viability of such surrogacy in Ms X's case has been fully assessed and the judge accepted in full the evidence of Ms X and her partner as to the background and personal circumstances that gave them the earnest desire to found the family that they had intended prior to these torts. The truly restorative nature of a damages award to achieve this, putting Ms X "as nearly as possible…in the same position" as she would have been in had she not sustained the wrongs, therefore, should not be doubted.

92. While this question of restorative compensation is a matter of the correct application of a rule of law rather than an assessment of public policy, the skeleton argument for Ms X advanced the following submission:

> "11.5 Public policy has changed since *Briody* in 2001. It is no longer appropriate to discriminate in an award of damages between a child born from own egg surrogacy and one born from donor egg surrogacy. The characterisation of the donor egg claim as being impermissibly different from an own egg surrogacy claim does not stand up to analysis in our modern society. Throughout the country there are thousands of children born into families who would be appalled at the thought that simply because they have only a genetic connection to one of their parents, they were somehow of lesser value within the family. Legislation points only one way: that donor egg surrogacies should be seen now to have equal status. The familial orthodoxy, which appears to have underpinned the observations on donor egg surrogacy in *Briody*, has been consigned to history. Society does not now place a lesser value on children born with only one of their parents' genes. Same sex relationships can achieve no other result and yet no current public policy would seek to characterise the child as not the child of both of the parents – even though one does not have any biological connection. This is shown by the passage of the Civil Partnerships Act 2004 and the Marriage (Same Sex Couples) Act 2013."

93. Expressed as public policy or not, it seems to me that we are entitled to bear in mind such points in considering whether the claimed compensation would be truly restorative

[8] As this judgment was being prepared news emerged from Brazil of pioneering medical work of successful birth from the transplant of a womb from a dead woman to an aspiring mother.

of a claimant's pre-tort position in a case such as this. Such considerations do, I think, have a proper bearing upon the approach to the "*Livingstone*" test in a 21st century case of this character.

94. I consider that Mr Johnston's submission correctly reflects the modern law as to restorative compensation in this case. The distinction between "own egg" surrogacy and "donor egg" surrogacy, employing the partner's sperm, would be entirely artificial. Having regard to the development of social attitudes, I feel able (with the very greatest respect to Hale LJ's view of 17 years ago) not to follow the *dicta* in *Briody* on this point.

(G) Proposed Result

95. For these reasons, I would allow Ms X's appeal and I would dismiss the cross-appeal, save to the extent reflected by the judgment of my Lady, Nicola Davies LJ, on ground 2 of the cross-appeal, which I have read in draft and with which I agree. I have also seen in draft the judgment of my Lady, King LJ, with which I also agree.

96. In proposing this result, I would emphasise that a decision in favour of Ms X in this case should not be taken to imply that a court would be right in every case to permit awards of damages to cover surrogacies as extensive as those envisaged in this case. Apart from the points of principle considered both by the learned judge and by us, we have not been called upon to consider whether the attempt to achieve a "four child" family in this case was reasonable in all the circumstances or whether the various surrogacy and medical steps were the reasonable way of achieving the result, such that damages should be awarded on that basis. Those matters were not in issue in this case, as they might well be in future cases. However, I do not think that the court should be unduly alarmed by the issues that this might throw up in future cases to such an extent as to deny what I see to be a proper award of damages. The reasonableness of proposed surrogacy steps will have to be proved. However, the assessment of evidence on such issues is well within the capacities of the judges of the Queen's Bench Division.

Lady Justice King:

97. I agree for the reasons given by McCombe LJ and Nicola Davies LJ that the appeal should be allowed.

98. I would only add a little in relation to the issue of donor eggs. In *Briody* Hale LJ posed the question as to whether "to be reasonable, reparation has to produce, not only a child to rear, but also a child who is the product both of one's own genes *and* of one's own womb."[30] Her tentative view was that to allow reparation by way of surrogacy by donor eggs would be a "step too far".

99. Sir Robert Nelson adopted Hale LJ's reasoning, concluding that the use of donor eggs would not be restorative of Ms X's loss on the basis that the loss she had sustained was the inability to have "her" child not *"*a" child.

100. As set out by McCombe LJ [86], the aim of damages is to allow the injured party "as nearly as possible" to get a sum of money which will put him or her "in the same position as he would have been in had he not sustained the wrong".

101. It is unnecessary to resort to statistics or research in order to appreciate the social changes in the years since *Briody.* These changes have led to the current acceptance of an infinite variety of forms of family life of which single sex, single person and so called 'blended families' are but examples. The creation of these families is often facilitated consequent upon the advances in fertility treatment including the acceptance of and increased use of donor eggs. The law has struggled to keep up, but has done so as identified by McCombe LJ for example through legislation permitting same sex marriage and recently the introduction of parental leave for the commissioning parents following surrogacy.

102. Parental orders can now be made in respect of same sex couples and single individuals. In each case the child born, consequent upon a surrogacy arrangement, will have been conceived as a result of donor gametes (either eggs or sperm, or both depending on the sex and medical circumstances of the applicants). In addition, more and more couples are choosing to start their families in their late 30s and 40s and the use of donor eggs in order to enable such couples to start a family is far from unusual.

103. Children born through surrogacy are legally the child of the commissioning parents upon the making of the parental order. To my mind however of equal significance to those who become parents as a result of surrogacy, is that 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. The same applies to children born as a result of 'donor' IVF. In the skeleton argument filed on behalf of Ms X, Mr Johnston said that such parents would be "appalled" to think that because they have a genetic connection to only one of their parents, the children concerned were somehow of lesser value within their family. Whilst on first reading this passage of the skeleton argument, I rather recoiled at the use of the word "appalled," I am inclined to agree that that is indeed the case.

104. No doubt Ms X, in common with almost every woman who enters into a surrogacy arrangement, would infinitely prefer to be able to carry and give birth to her own child. But in my view, the devastating emotional loss to a woman of child bearing years who suffers this type of injury is not so much the inability physically to bear a child, but the deprivation of the ability to found her own family and lead a family life centred around children with all the ups and downs and highs and lows that such a life entails.

105. It follows that I too would agree with McCombe LJ that Mr Johnston's submission correctly reflects the modern law as to restorative compensation and that the distinction between "own egg" surrogacy and "donor egg" surrogacy, is artificial and cannot be maintained. I therefore, with equal respect to Hale LJ's view in *Briody,* feel able not to follow the dicta on this point.

Lady Justice Nicola Davies:

106. I am in agreement with the judgments of McCombe LJ and King LJ.

107. As the appeal has succeeded this judgment is directed to the second point raised by the Respondent namely that there should be a reduction in the award of general damages to reflect the fact that it included provision for the loss to the appellant of her claim for surrogacy in California and her claim for provisional damages.

108. The appellant sought damages for the expense of four pregnancies, in California or the UK, using her own eggs or if necessary donor eggs. Sir Robert Nelson allowed the claim for surrogacy in the UK using the claimant's own eggs, but limited the same to the cost of surrogacy for two children. He allowed the sum of £74,000 for this item of special damages. The itemised sums awarded in respect of special damages will require revision by reason of the conclusion of McCombe LJ. The revision can be agreed by the parties.

109. In awarding general damages for pain, suffering and loss of amenity ("PSLA") Sir Robert Nelson took account of the relevant Judicial College Guidelines which included the following:

> "(F) Reproductive System: Female
>
> The level of awards in this area will typically depend on:
>
> (i) whether or not the affected woman already has children and/ or whether the intended family was complete;
>
> (ii) scarring;
>
> (iii) depression or psychological scarring;
>
> (iv) whether a foetus was aborted."
>
> … Chapter 6(F) Infertility, whether by reason of injury or disease, with severe depression and anxiety, pain and scarring. The bracket, with 10% uplift, is £96,030 - £141,630
>
> …
>
> Chapter 6(I)(c) Bowels – severe abdominal injury causing impairment of bowel function often necessitating temporary colostomy (leaving disfiguring scars) and/or restriction on employment or diet. The bracket is £37,000 - £58,300
>
> Chapter 6(J)(c) Bladder – serious impairment of bladder control with some pain and incontinence. The bracket is £53,520 – £66,830."

The Guidance was updated in October 2017. The relevant brackets are now: Infertility £100,760 to £148,540; Bowels £39,090 to £61,140; Bladder £56,100 to £70,090.

110. Sir Robert Nelson stated that no case cited by the parties was a good comparator with the claimant's case. He was satisfied that the claimant's injuries were from the upper-middle towards the upper-end of the Guidelines. The respondent submitted to the judge that the global award should not be less than £125,000 but less than £190,000. In awarding damages Sir Robert Nelson stated:

> "22. Having taken into account the parties authorities and submissions I award the global sum of £160,000 for PSLA. This figure takes into account the fact that, for the reasons expressed

> below, there will be no award for provisional damages for the risk of deterioration in the Claimant's psychological condition, and no damages in respect of surrogacy in California. I have allowed for an additional £15,000 to cover these two matters. (£145,000 + £15,000)."

111. In written submissions for the purpose of this appeal the respondent did not challenge the level of the award for PSLA describing it as "generous" and made on the basis that the appellant was wholly infertile. In his submissions to the court Mr Feeny contended that the appropriate award should be £125,000. He relied on the authority of *Butters v Grimsby & Scunthorpe Health Authority* [1998] Lloyds Rep Med 111. Unlike the appellant, the claimant in that case had given birth to a child, prior to the events which gave rise to the loss claimed. I agree with the judge, there is no comparable authority as to the nature and extent of the injuries sustained by this claimant.

112. In assessing the level of damages the judge properly took account of the totality of the respondent's negligence and the injuries caused. In addition to the infertility they included the development of advanced cervical cancer, depression and anxiety, premature menopause, extensive radiation induced damage to the appellant's bowel, bladder and vagina. The judge noted that even with medication and a "controlled and careful lifestyle" the appellant's continuing bowel and bladder problems would cause considerable difficulties in her life. Given the nature and extent of the appellant's life-changing injuries I regard an award of £145,000 as unassailable.

113. It is conceded by the appellant that there should be a reduction in the total award of £160,000 to reflect the fact that the additional award of £15,000 was in respect of the loss of the appellant's claim for surrogacy in California and provisional damages for psychological sequelae. That said, it is contended that the surrogacy procedures in California will carry their own risk of failure which should be reflected in any award of damages. There is force in that argument. Accordingly, there should be a reduction in the total award of £160,000 but account should also be taken of the risk of failure in the surrogacy procedures. In my judgment the appropriate award for general damages is £150,000.