Infertility in Medical Negligence Claims: A New Head of Special Damages

When medical negligence leads to infertility, the options available to the injured party can appear limited. In the UK, the rules on surrogacy remain strict and commercial arrangements are prohibited.

Whilst surrogacy is legal, it cannot be advertised or paid for, except for the surrogate's reasonable expenses. Surrogacy agreements are not enforceable by UK law, so once the child is born you must apply for a parental order or adoption to become the legal parent of the child.

By contrast, in certain States in the US, commercial arrangements are enforceable and intended parents can pay a surrogate an "inconvenience fee" in addition to expenses. When the child is born, there is no requirement to seek a parental order. It is therefore not surprising that US surrogacy arrangements are favoured. The question is however, whether those costs can be recovered in a damages claim.

Happily the Supreme Court, has now clarified the issue and handed down a majority decision in the case of XX v Whittington Hospital NHS Trust [2018] EWCA Civ 2832, overruling the case of Briody v St Helens and Knowsley Area Health Authority [2001] EWCA Civ 1010, [2002] QB 856 ("Briody"). The Court has ruled that it is no longer harmful to public policy to award damages for foreign commercial surrogacy costs.

Facts of the Case

The Claimant, Ms X developed cervical cancer, requiring Chemoradiotherapy treatment which led to her infertility. The development of the Claimant's cancer was a consequence of Whittington Hospital failing to detect early signs of cancer development in numerous wrongly reported tests in 2008 and 2012. It was found that if the correct action had been taken in 2008, there was a 95% chance of a complete cure, and Ms X would not have developed cancer at all or become infertile as a result.

Ms X and her partner were from large families themselves and had always dreamed of having a large family of their own. They had wanted to have four children, however, when Ms X was referred to another hospital for treatment, it was confirmed that her cancer was too far advanced for her to receive the treatment that would have preserved her ability to bear children. Ms X therefore decided that she wanted to have her own biological

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children through surrogacy.

The expert evidence suggested that it was probable that the Claimant and her partner would be able to have two children from her own eggs (of which she had 12 cryopreserved eggs in total) and his sperm. If she was not able to achieve 3-4 children using her own eggs she then intended to use donor eggs. The evidence supported that it was then likely that they would have been able to have two further children using donor eggs and her partner's sperm.

The Claimant's preferred choice was to use commercial surrogacy arrangements in California, for the reasons outlined above. The Claimant claimed damages in respect of the expenses that would be incurred for four pregnancies in California. The Claimant accepted that if this was not funded then she would be forced to use non-commercial arrangements available within the United Kingdom and would claim the expenses that this would involve.

High Court Judgment

Whilst Sir Robert Nelson's Judgment did not focus on the issues of surrogacy costs, he did consider that he was bound to follow the decision of Briody on this point and concluded that he must limit the award for damages to the cost of two surrogacies in the UK, using Ms X's own eggs. He rejected the claim for damages in respect of US surrogacy costs, because in his view they were contrary to public policy. He also distinguished between the use of the mother's own eggs which were capable of attracting an award and the use of the donor eggs which he concluded were not, because they were not restorative of Ms X' ability to bear children. She was awarded a total of £74,000, equal to £37,000 for each pregnancy.

The Claimant's appeal against the rejection of her claim for commercial surrogacy costs and the use of donor eggs, was allowed.

Supreme Court Ruling

The Hospital appealed to the Supreme Court, which considered the following questions, in Lady Hale's leading Judgment:

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

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

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

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On the first question, Lady Hale concluded that they were recoverable, especially given that the chances of success were so reasonable.

In answer to question two, Lady Hale noted that public perception had changed since the conclusion drawn in Briody, that donor eggs could not be truly restorative of the Claimant's loss. Lady Hale went further than this to state that she had been wrong to reach that conclusion then and confirmed that it was *"certainly wrong now"*.

Lady Hale decisively concluded after careful consideration of UK legislation on Surrogacy arrangements and public policy arguments that in answer to question three, it was *"no longer contrary to public policy to award damages for the costs of a foreign commercial surrogacy"*.

Lady Hale was however careful to qualify this judgment by adding that, it did not mean that every case claiming costs for commercial surrogacy abroad would always be awarded, placing the following limits on awarding such damages:

1. the proposed programme of treatments must be reasonable;

2. it must be reasonable for the claimant to seek the foreign commercial arrangements proposed rather than to make arrangements within the UK; and

3. the costs involved must be reasonable.

The Supreme Court has provided a long awaited judgment and clarity on this issue, which has attracted a huge amount of media coverage. However, Lady Hale has been careful not to open the floodgates for other cases on similar facts.

If you have any questions about this article, or need any medical negligence legal advice, please contact our clinical negligence solicitors today. Get in touch by emailing online.enquiries@la-law.com or calling 023 8082 7484.

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