SUPREME COURT UPDATE

WHITTINGTON HOSPITAL NHS TRUST V XX [2020] UKSC 14

A Guidance Note from the 2TG Clinical Negligence Team **Spring 2020**

On 1 April 2020, the Supreme Court handed down judgment in *Whittington Hospital NHS Trust v XX* [2020] UKSC 14 ("XX"). This case addressed the sensitive question of how damages should be assessed where medical negligence has deprived a woman of her ability to bear children.

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Background

In *XX*, the Appellant Hospital had negligently failed to identify the Respondent's developing cervical cancer. As a result, the Respondent underwent surgery and chemo-radiotherapy which caused serious and irreversible damage to her womb, preventing her from carrying children. The Respondent claimed, *inter alia*, for the costs of having four children through commercial surrogates in California – two using her own preserved eggs and two using donor eggs.

At first instance[1], Sir Robert Nelson awarded only the cost of non-commercial surrogacy using the Respondent's own eggs. He held that, in light of the Court of Appeal decision in *Briody v St Helen's and Knowsley Area Health Authority* [2001] EWCA Civ 1010, damages in respect of commercial surrogacy were irrecoverable on the grounds of public policy. Further, he denied the claim for surrogacy using donor eggs on the basis that this procedure could not in any real sense be considered as restoring the Respondent's pre-injury fertility.

1 [2017] EWHC 2318 (QB).

On appeal, the Court of Appeal[2] upheld the decision in respect of the own-egg surrogacy but allowed the Respondent's appeal in respect of donor-egg surrogacy and the costs of a commercial arrangement. Public policy was not fixed in time and had to be considered in light of changing social attitudes to commercial surrogacy and genetic conceptions of the family. The Appellant Hospital appealed in respect of all three heads of loss.

The Majority Decision of the Supreme Court

Lady Hale, in giving the majority judgment of the Supreme Court, had no trouble in upholding the decision of the Court of Appeal in relation to the first two issues. If, on the facts of the case, undertaking surrogacy using the claimant's own eggs was reasonable and had reasonable prospects of success, the costs involved could be recovered in damages.

As to the question of surrogacy using donor eggs, Lady Hale explicitly reversed the position set out in *Briody*. Although such a procedure cannot directly replace a claimant's fertility, it is the best that medical science can do to make good what she has lost. Therefore, the costs of donor-egg surrogacy could also be recovered.

Finally, and most interestingly, the majority found that claims for the cost of entering a commercial surrogacy arrangement abroad should no longer be refused on the grounds of public policy. In coming to this conclusion, Lady Hale put great weight on the social and legal changes which had taken place since *Briody* was decided, reflecting an ever wider conception of what constituted a family.

Alongside this dramatic shift in approach, Lady Hale nevertheless sounded a note of caution for litigants going forward. In addition to proving that the use of a surrogate is reasonable in itself and that the costs being claimed are reasonable in extent, a prospective claimant must also show that it is reasonable for the procedure to be arranged on a commercial basis in a foreign jurisdiction, rather than on an altruistic basis in the UK. However, given the precarious position of intended parents under English law, it is at least arguable that this requirement will be reasonably easy to satisfy in practice.

The Dissenting Judgment

Lords Carnworth and Reed concurred with the majority decision in respect of the first two issues before the Court but dissented on the question of recoverability for commercial surrogacy. Although they agreed with Lady Hale that the doctrine of illegality was not itself in issue, they nevertheless considered that legal policy requires the law to maintain coherence and consistency across the system. As Parliament had seen fit to impose criminal penalties for engaging in commercial surrogacy within the jurisdiction, it would be undesirable for the civil courts to implicitly condone the principle of paying for such services through the award of damages.

From a purely legal perspective, there is significant force in the minority's approach. It remains to be seen whether, in a time of increasing concern over the cost of clinical negligence claims to the NHS, Parliament will intervene to reverse the potential expansion of surrogacy claims heralded by *XX*.

[2] [2018] EWCA Civ 2832.

Conclusion

No doubt the decision in *XX* will be met with some disquiet among Defendants, who now face the possibility of significantly expanded claims for general damages in cases where negligence has damaged a woman's ability to carry and bear children. Nevertheless, some comfort can be gleaned from the majority decision. First, while claims in respect of donor-egg surrogacy and commercial surrogacy are now recoverable in principle, it remains necessary for the Claimant to prove that their claims for such treatments are reasonable. Second, in respect of the cost of those treatments, Lady Hale emphasised that the appeal in *XX* had been advanced on principle only and that the reasonableness of the sums claimed by the Respondent was not in issue. It remains to be seen, therefore, whether future courts will be as generous when it comes to assessing the quantum of these new heads of loss as this decision on principle suggests.

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Paige is developing a practice across a broad range of Chambers' core specialisms, with a particular emphasis on personal injury, clinical negligence, property damage and product liability.

Prior to joining Chambers, Paige read for undergraduate and Masters' degrees in Law at Emmanuel College, Cambridge where she received a number of scholarships and prizes. She also taught on the Property II course (comprising Land Law and Equity and Trusts) at the London School of Economics.

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