THE COURT ORDERED that no one shall publish or reveal the name or address of the Respondent who is involved in these proceedings or publish or reveal any information which would be likely to lead to the identification of the Respondent or of any member of her family in connection with these proceedings.

1 April 2020

PRESS SUMMARY

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

[2020] UKSC 14

ON APPEAL FROM: The Court of Appeal (Civil Division), [2018] EWCA Civ 2832

JUSTICES: Lady Hale, Lord Reed, Lord Kerr, Lord Wilson, Lord Carnwath

BACKGROUND TO THE APPEAL

The claimant (respondent to this appeal) was born in 1983. She had cervical smear tests in 2008 and 2012 and cervical biopsies in 2012. Each of these tests was negligently wrongly reported by the defendant hospital (the appellant). In 2013, when the errors were detected, her cervical cancer was too far advanced for her to have surgery which would preserve her ability to bear a child. She was advised to have chemo-radiotherapy, which would result in her being unable to do so. Before having the treatment, she had eight eggs collected and frozen. The focus of this appeal is on the damages payable for the loss of the ability to bear her own child. She and her partner wanted to have four children. It was probable that, through surrogacy arrangements, they could have two children using her eggs and his sperm. They then wished to have two more children using donor eggs and his sperm. Her preference was for surrogacy arrangements in California on a commercial basis. If this was not funded, she intended to use non-commercial arrangements in the UK.

The hospital admitted liability. Assessing damages, the judge held in relation to surrogacy that, following *Briody v St Helen's & Knowsley Area Health Authority* [2000] EWCA Civ 1010; [2002] QB 856 ("*Briody*"), he was bound to reject the claim for commercial surrogacy in California as contrary to public policy, and to hold that surrogacy using donor eggs was not restorative of the claimant's fertility. By contrast, damages could be awarded for two own-egg surrogacies in the UK. The claimant appealed against the denial of her claim for commercial surrogacy and the use of donor eggs. The hospital cross-appealed against the award for the two own-egg surrogacies. The Court of Appeal dismissed the cross-appeal and allowed the appeal on both points. The hospital now appeals to the Supreme Court.

The appeal raises three issues. First, can damages to fund surrogacy arrangements using the claimant's own eggs be recovered? Second, if so, can damages to fund arrangements using

donor eggs be recovered? Third, in either event, can damages to fund the cost of commercial surrogacy arrangements in a country where this is not unlawful be recovered?

JUDGMENT

By a majority, the Supreme Court dismisses the appeal. Lady Hale gives the majority judgment, with which Lord Kerr and Lord Wilson agree. Lord Carnwath gives a judgment dissenting on issue three, with which Lord Reed agrees.

REASONS FOR THE JUDGMENT

Lady Hale's judgment explains that under UK law, in essence, surrogacy arrangements are completely unenforceable; the surrogate mother is always the child's legal parent unless and until a court makes a "parental order" transferring legal parenthood to the commissioning parents; and the making of surrogacy arrangements on a commercial basis is banned. The details are more complicated **[9]**. For example, section 2(1) of the Surrogacy Arrangements Act 1985 ("the 1985 Act") bans third parties from (among other things) initiating or taking part in negotiations with a view to making surrogacy arrangements on a commercial basis. However, offences under the 1985 Act can only be committed in the UK, and so there is nothing to stop agencies based abroad from making surrogacy arrangements on a commercial basis abroad. Nor does this ban extend to acts by commissioning parents or surrogate mothers **[19] – [21]**. As for *Briody*, it is not binding on the court, and its persuasiveness is affected by subsequent developments in the law and social attitudes relating to surrogacy (see below) **[29] – [39]**.

Nothing which the claimant proposes to do involves a criminal offence here or abroad. Damages in tort seek to put the injured party in the position she would have been in had she not been injured; but they cannot be recovered where it would be contrary to legal or public policy, or unreasonable **[40] – [43]**. On the first issue in the appeal, *Briody* did not rule out the award of damages for own-egg surrogacy arrangements made in the UK; rather, it held that whether it was reasonable to seek to remedy the loss of a womb through surrogacy depended on the chances of a successful outcome. Here, those chances are reasonable, and the claimant delayed cancer treatment to ensure that her eggs were harvested. It is therefore difficult to see why the claim should not succeed **[44]**. On the second issue, the view expressed in *Briody,* that damages for donor-egg surrogacy arrangements could not be recovered as they were not restorative of what the claimant had lost, was probably wrong then, and is certainly wrong now. There have been dramatic developments in the law's idea of what constitutes a family **[30]**. And this is the closest one can get to putting the claimant in the position she would have been in had she not been injured. Therefore, as long as the arrangement has reasonable prospects of success, damages for the reasonable costs of it may be awarded **[45] – [48]**.

On the third issue, UK courts will not enforce a foreign contract if it would be contrary to public policy. But most items in the bill for a surrogacy in California could also be claimed if it occurred here. In addition, damages would be awarded to the claimant, the commissioning parent, and it is not against UK law for such a person to do the acts prohibited by section 2(1) of the 1985 Act. Added to that are developments since *Briody*: the courts have striven to recognise the relationships created by surrogacy; government policy now supports it; assisted reproduction has become widespread and socially acceptable; and the Law Commissions have proposed a surrogacy pathway which, if accepted, would enable the child to be recognised as the commissioning parents' child from birth. Awards of damages for foreign commercial

surrogacy are therefore no longer contrary to public policy. However, there are important factors limiting the availability and extent of such awards: both the treatment programme and the costs involved must be reasonable; and it must be reasonable for the claimant to seek the foreign commercial arrangements proposed rather than to make arrangements within the UK; this is unlikely to be reasonable unless the foreign country has a well-established system in which the interests of all involved, including the child, are properly safeguarded **[49] – [54]**.

Lord Carnwath's dissenting judgment differs from the majority on the third issue only. In his view, while this case is not concerned with illegality, there is a broader principle of legal coherence, which aims to preserve consistency between civil and criminal law. It would go against that principle for civil courts to award damages based on conduct which, if undertaken in the UK, would offend its criminal law. Society's approach to surrogacy has developed, but there has been no change in the critical laws on commercial surrogacy which led to the refusal in *Briody* of damages on that basis. It would not be consistent with legal coherence to allow damages to be awarded on a different basis **[55] – [68]**.

References in square brackets are to paragraphs in the judgment