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Surrogacy and public policy

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ABSTRACT

The Supreme Court in the United Kingdom has held that it is not contrary to public policy to award damages in tort to fund a commercial surrogacy in another jurisdiction where this is lawful. This significant decision, in the case of *Whittington Hospital NHS Trust v XX* [2020] UKSC 14, will potentially have an impact on the regulation and reform of surrogacy law in the United Kingdom, Ireland and internationally. The judgment delivered by Lady Hale draws attention to multiple inconsistencies in the law, and it highlights, in particular, the need for effective regulation of domestic surrogacy. Legislators face an important and imminent challenge to reconcile the reality of commercial surrogacy with a deficient legal framework. This article seeks to highlight some of the important issues which this case has raised when considering regulation and reform of surrogacy law.

Keywords: commercial surrogacy; public policy; law reform; domestic surrogacy; international surrogacy.

INTRODUCTION

Proposals for the regulation and reform of surrogacy law have been published in recent years in Ireland and the United Kingdom (UK).[1] In Ireland, where surrogacy is currently unregulated, the General Scheme of the Assisted Human Reproduction Bill 2017 (AHR Bill 2017) provides for domestic, gestational and non-commercial, or altruistic, surrogacy.[2] No provision is made for the regulation of international surrogacy arrangements, while commercial surrogacy is expressly prohibited under Head 40 of the AHR Bill 2017.[3] A surrogate can, however, claim 'reasonable expenses'.[4] This proposed approach prohibiting commercial surrogacy arrangements is in line with how

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1 In Ireland, see the General Scheme of the Assisted Human Reproduction Bill 2017 (Department of Health 2017). In the UK, see the Law Commission of England and Wales and Scottish Law Commission, *Building Families through Surrogacy: A New Law. A Joint Consultation Paper* (Law Com No 244, 2019).

2 Head 36 of the AHR Bill 2017.

3 Head 40(2) outlines that commercial surrogacy involves payment and/or reward in respect of a surrogacy agreement.

4 Head 41 of the AHR Bill 2017.

many jurisdictions have chosen to regulate surrogacy.[5] According to the UN Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and any other child sexual abuse material (hereinafter UN Special Rapporteur), this is 'based on the viewpoint that commercial surrogacy commonly commodifies children and exploits surrogate mothers'.[6]

Commercial surrogacy is also prohibited in the UK, although this position has been queried by many, in part because of difficulties expressed by judges in case law such as *Re X and Y (Foreign Surrogacy)*.[7] As the Law Commission of England and Wales and the Scottish Law Commission (the Law Commissions) have stated, 'the current law, which enables surrogates to be paid "expenses reasonably incurred" has been interpreted widely'.[8] Jackson commented that 'in practice, UK citizens can engage in commercial surrogacy abroad or at home without facing any sanction at all. The prohibition on commercial surrogacy is therefore almost completely ineffective.'[9] Fenton-Glynn and Scherpe also emphasise this point, stating that, '[t]he law is not being enforced, and commercial agreements are being permitted through the back door. This undermines the rule of law by allowing a practice that the legislature has expressly disallowed'.[10] The Law Commissions suggested that using the terms 'altruistic' and 'commercial' in the reform of surrogacy law can be unhelpful, thereby also recognising the many discrepancies that permeate law and practice.[11]

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5 Hague Conference on Private International Law, *A Preliminary Report on the Issues arising from International Surrogacy Arrangements* (March 2012) 13, para 18.

6 Report of the UN Special Rapporteur on the sale and sexual exploitation of children, Thematic Report on Surrogacy, A/HRC/37/60 (15 January 2018) 5, para 15 and at 7, para 20.

7 Section 54(8) Human Fertilisation and Embryology Act 2008. *Re X and Y (Foreign Surrogacy)* [2008] EWHC 3030 (Fam), [2009] 1 FLR 733. For a discussion of this case and wider reform, see C Fenton-Glynn, 'Outsourcing ethical dilemmas: regulating international surrogacy arrangements' (2016) 24(1) Medical Law Review 59.

8 Law Commission of England and Wales and Scottish Law Commission (n 1 above) 26, [2.15].

9 E Jackson, 'UK Law and International Commercial Surrogacy: "the very antithesis of sensible"' (2016) 4(3) Journal of Medical Law and Ethics 197, 203.

10 C Fenton-Glynn and J Scherpe, 'Surrogacy: is the law governing surrogacy keeping pace with social change?' (Cambridge Family Law 2017) 4.

11 The Law Commission defined commercial surrogacy as: '[a] surrogacy arrangement in which the woman who becomes the surrogate and any agency involved charge the intended parents a fee which includes an element of profit. A commercial surrogacy arrangement may also be characterised by the existence of an enforceable surrogacy contract between the intended parents and the surrogate'. Law Commission of England and Wales and Scottish Law Commission (n 1 above) xiv.

In this context, the judgment of the Supreme Court in the UK in the case of *Whittington Hospital NHS Trust v XX* presents an important, and likely an influential, view of the stance of international commercial surrogacy arrangements.[12] Lady Hale held that it is possible to get damages in tort for a commercial surrogacy arrangement carried out abroad. The next section of this article presents an outline of this case, detailing the issues which arose before the court and how Lady Hale navigated them, especially in overturning the decision of the Court of Appeal in *Briody v St Helen's and Knowsley Area Health Authority* (*Briody*).[13] The dissenting views of Lord Carnwath and Lord Reed are also presented. The third section presents a discussion of several important issues which arose in the judgments. It is argued here that these issues must be considered by legislators for the regulation and reform of surrogacy law. The final section sets out the conclusions.

WHITTINGTON HOSPITAL NHS TRUST V XX

In this case, Lady Hale delivered the judgment of the Supreme Court, with Lord Kerr and Lord Wilson concurring. As to the facts, the claimant's cervical smear tests and biopsies were wrongly reported on multiple occasions. The errors came to light in 2013, some five years after the claimant's initial wrongly reported smear test and, at that stage, her condition meant that she could no longer bear a child. In advance of the claimant's surgery and chemo-radiotherapy, she underwent treatment to collect and freeze eight eggs. The case before the Supreme Court considered what damages can be recovered for losing the ability to bear a child and focused on three issues:

(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?

12 *Whittington Hospital NHS Trust v XX* [2020] UKSC 14.

13 [2001] EWCA Civ 1010, [2002] 2 WLR 394. A number of case comments have already been published regarding this judgment. See, for example, K Horsey and A Powell, 'A step too far? *Whittington Hospital NHS Trust v XX* [2020] UKSC 14' (2021) 29(1) Medical Law Review 172; N Bhatia, 'Whittington Hospital NHS Trust v XX [2020] UKSC 14' (2020) 17 Bioethical Inquiry 455–460. For analysis of this case at the Court of Appeal, see: J L M Taylor, 'International commercial surrogacy as a new head of tortious damage: XX v Whittington Hospital NHS Trust [2018] EWCA Civ 2832' (2020) 28(1) Medical Law Review 197. See also, B M Dickens, 'Paid surrogacy abroad does not violate public policy: UK Supreme Court' (2020) 150(1) International Journal of Gynaecology and Obstetrics 129.

> (3) In either event, are damages to fund the cost of commercial surrogacy arrangements in a country where this is not unlawful recoverable?[14]

The claimant stated that she wanted to have four children. While she had frozen eight eggs, evidence before the court suggested that it was likely that she could have two children using her eggs and donor eggs would be required to have more children. The claimant expressed preference to use commercial surrogacy in California. The High Court, in following the decision of the Court of Appeal in *Briody*,[15] held that commercial surrogacy in California was 'contrary to public policy' and that 'surrogacy using donor eggs was not restorative of the claimant's fertility'.[16] Non-commercial surrogacy using the claimant's own eggs was restorative of her fertility.[17] The claimant appealed the decision and the Court of Appeal held that '(p)ublic policy was not fixed in time ... Attitudes to commercial surrogacy had changed since Briody; perceptions of the family had also changed and using donor eggs could now be regarded as restorative.'[18] The hospital appealed this decision, bringing it before the Supreme Court.

Lady Hale held that the Supreme Court was not bound by the *ratio* of *Briody*. She held that 'developments in law and social attitudes' as well as 'useful information' documented in the Law Commissions' Consultation Paper demonstrate that a different conclusion must be reached in this case.[19] Lady Hale described the changes that have occurred since *Briody*, including that there are now a number of organisations in the UK providing not-for-profit surrogacy arrangements, a wider recognition of 'the family', government recognition that surrogacy is a pathway to parenthood and medical developments. Lady Hale also cited the Law Commissions' summary of social attitudes in this area, namely that:

> ... the research that exists suggests that public attitudes to surrogacy also now stand in stark contrast to the prevailing hostile attitudes at the time of the [Surrogacy Arrangements Act] 1985. The available research reflects the fact that the legislation is now out of step with attitudes towards surrogacy.[20]

In making a decision, Lady Hale stated that:

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14 *Whittington Hospital* (n 12 above) [8].
15 [2001] EWCA Civ 1010, [2002] 2 WLR 394.
16 *Whittington Hospital* (n 12 above) [6].
17 Ibid [6].
18 Ibid [7].
19 Ibid [28].
20 Ibid [37].

> ... (n)othing which the claimant proposes to do involves a criminal offence either here or abroad. Her preferred solution is a Californian surrogacy which is lawful there and UK law does not prohibit her from arranging or taking part in it.[21]

On the first issue before the Supreme Court, Lady Hale held that it is possible to claim damages for the cost of surrogacy using the claimant's own eggs. On this matter, she cited the 'acceptance and widespread use of assisted reproduction techniques, for which damages are payable' and reiterated Sir Nelson's decision in the High Court wherein he cited the *Briody* case: 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.[22]

The second issue to be determined was whether damages are recoverable to fund surrogacy using donor eggs. Counsel for the claimant stated 'that this is no different from other artificial means of replacing what has been lost, for example, by having an artificial limb fitted to replace the one which has been amputated'.[23] This argument, coupled with the changing definition of the family in the years since *Briody*, was persuasive for Lady Hale and she held that 'subject to reasonable prospects of success, damages can be claimed for the reasonable costs of UK surrogacy using donor eggs'.[24]

The final issue to be addressed by the court was whether damages are recoverable for a commercial surrogacy in a country where it is lawful. While the judge acknowledged that surrogacy contracts are not enforceable in the UK, she explained that many of the expenses involved in a commercial surrogacy in California would also be payable in the UK. Further, she stated that the deterrent in UK legislation that a court may refuse to retrospectively authorise payments does not appear to have been done in practice, given the court's consistent focus on the child's welfare in these decisions. The judge also emphasised, once again, all of the developments in law and society since the *Briody* decision, stating that 'courts have bent over backwards to recognise the relationships created by surrogacy, including foreign commercial surrogacy'.[25] Significantly, Lady Hale held that 'it is no longer contrary to public policy to award damages for the costs of a foreign commercial surrogacy', subject to a number of conditions:

> First, the proposed programme of treatments must be reasonable ... Second, it must be reasonable for the claimant to seek the foreign

21 Ibid [40].
22 Ibid [44]; see also *XX v Whittington Hospital NHS Trust* [2017] EWHC 2318 (QB).
23 *Whittington Hospital* (n 12 above) [46].
24 Ibid [48].
25 Ibid [52].

> 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, the surrogate, the commissioning parents and any resulting child, are properly safeguarded. Third, the costs involved must be reasonable.[26]

Lord Carnwath and Lord Reed dissented on the issue of recovering damages for a commercial surrogacy arrangement in a country where this is lawful. According to Lord Carnwath, while 'this case is not concerned with illegality as such, the underlying principle of coherence or consistency in the law is of broader application'.[27] Acknowledging the legal and social changes which Lady Hale discussed, Lord Carnwath concluded that '(t)here has however been no change to the critical laws affecting commercial surrogacy, which led to the refusal in 2001 of damages on that basis. Nor does the Law Commission propose any material change in that respect.'[28] Further, he concluded that:

> It is also apparent from recent studies that public attitudes remain deeply divided ... So long as that remains the state of the law on commercial surrogacy in this court, it would not in my view be consistent with legal coherence for the courts to allow damages to be awarded on a different basis.[29]

DISCUSSION

As part of the decision, Lady Hale described the current law on surrogacy as well as the plans for reform, as detailed in the Law Commissions' Consultation Paper. In a striking statement regarding domestic UK law governing surrogacy, Lady Hale noted that 'it is scarcely surprising that the claimant's clear preference is for a commercial surrogacy arrangement in California'.[30] Indeed, Lady Hale cited Sir Nelson in his judgment in this case before the High Court, where he described the appeal of a surrogacy abroad as opposed to a domestic surrogacy: 'the system is well-established, the arrangement binding and the intended parents can obtain a pre-birth order from the Californian court confirming their legal status in relation to the surrogate child'.[31] These observations by Lady Hale and by Sir Nelson summarise why intending parents may choose to engage in a commercial surrogacy abroad as opposed to a domestic, altruistic arrangement. This must

26 Ibid [53].
27 Ibid [64].
28 Ibid [67].
29 Ibid [67].
30 Ibid [22].
31 *XX v Whittington Hospital NHS Trust* (n 22 above) [31].

be considered by legislators in any reform of the law. Indeed, a recent report by the All-Party Parliamentary Group (APPG) on surrogacy recommended that '[a]n important imperative for law reform should be to create a more stable system in the UK which removes the push factors for seeking surrogacy overseas'.[32] This was also accentuated by the Special Rapporteur on Child Protection in Ireland, who recommended that regulation of surrogacy 'should incentivise reliance on domestic arrangements by adopting a more streamlined and less burdensome framework than for international arrangements'.[33]

What is also evident from this case, as well as from the reports of the UN Special Rapporteur, the Hague Conference on Private International Law and the Law Commissions' Consultation Paper, is that categorising a surrogacy arrangement as altruistic or commercial is not necessarily helpful. The UN Special Rapporteur has emphasised the importance of regulating surrogacy on both a national and international level but is critical of 'the development of organized surrogacy systems labelled "altruistic", which often involve substantial reimbursements to surrogate mothers and substantial payments to intermediaries' which 'may blur the line between commercial and altruistic surrogacy'.[34]

Jackson previously commented, for example, that 'a non-commercial surrogacy arrangement in the UK can cost as much as £35,000. If substantial sums of money are able to change hands in non-commercial surrogacy, the ban on commercial surrogacy looks rather weak and ineffective'.[35] Fenton-Glynn and Scherpe observed that 'payment for services is being hidden'.[36] Indeed, this seems to be at the crux of the issue, and it is now necessary to provide a 'better definition of what constitutes a "reasonable expense"'.[37] The APPG found that '[t]here was no real support for US-style payments to surrogates. If anything, a modest sum at most was supported.'[38]

Also, from a 'coherence' point of view, it is difficult to reconcile a prohibition in law on domestic commercial surrogacy, while in practice such commercial arrangements appear to be taking place and

32 Andrew Percy MP, *Report on Understandings of the Law and Practice of Surrogacy* (All-Party Parliamentary Group on Surrogacy2020) 'Recommendation no 8', 25.

33 C O'Mahony, *A Review of Children's Rights and Best Interests in the Context of Donor-assisted Human Reproduction and Surrogacy in Irish Law* (Government of Ireland 2020), 48.

34 A/HRC/37/60, 16, para 8.

35 Jackson (n 9 above) 206.

36 Fenton-Glynn and Scherpe (n 10 above) 4.

37 Surrogacy UK, *Surrogacy in the UK: Further Evidence for Reform* Second Report (Surrogacy UK Working Group on Surrogacy Law Reform 2018) 7.

38 Percy (n 32 above) 'Recommendation no 9', 25.

international commercial surrogacy arrangements are also consistently approved.

Finally, Lord Carnwath's description of public attitudes as remaining 'deeply divided' is noteworthy given the split within the Supreme Court itself regarding the recovery of damages to fund an international commercial surrogacy arrangement.[39] This split is indicative of the challenges faced by individual states, as well as by the Hague Conference on Private International Law, in trying to achieve consensus on a national and an international level. From the claimant's point of view, however, the majority judgment of the Supreme Court ensures that she can seek to build her family through surrogacy, despite repeated failures in the health system which deprived her of the ability to bear a child.[40]

CONCLUSIONS

The judgments delivered in this case provide an important viewpoint on international commercial surrogacy. How these judgments will shape the proposed new surrogacy law in not only the UK, but also in Ireland and internationally, remains to be seen. This article sought to highlight some important issues which arose in the judgments that must be considered by legislators for the regulation and reform of surrogacy law. Consultations with key stakeholders carried out by the APPG and the Law Commissions are hugely important to ensure that any reform in this area is informed and fit-for-purpose. As Michael Freeman commented more than two decades ago, '(w)e need to make up our minds about surrogacy'.[41]

39 For further commentary on this point, see Horsey and Powell (n 13 above).

40 It was recently reported that a man sought costs in the High Court in Ireland for surrogacy in the United States following the death of his wife from cervical cancer. This case was settled, and the terms of settlement were not disclosed. It is likely, however, that similar cases will arise again before Irish and UK courts. See Vivienne Traynor, 'Husband to use money from High Court settlement for surrogacy' (RTE, 4 March 2021).

41 M Freeman, 'Does surrogacy have a future after Brazier?' [1999] 7(1) Medical Law Review 1, 20.