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.

Hilary Term
[2020] UKSC 14
On appeal from: [2018] EWCA Civ 2832

JUDGMENT

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

before

Lady Hale
Lord Reed
Lord Kerr
Lord Wilson
Lord Carnwath

JUDGMENT GIVEN ON

1 April 2020

Heard on 16 and 17 December 2019

Appellant
Lord Faulks QC
Charles Feeny
(Instructed by Bevan Brittan LLP (London))

Respondent
Christopher Johnston QC
Claire Watson
(Instructed by Irwin Mitchell LLP (London))

LADY HALE: (with whom Lord Kerr and Wilson agree)

1. The object of damages in tort is to put the claimant, as far as possible, back in the position in which she would have been had the tort not been committed. Money has to compensate, as far as it can, for those injuries that cannot be cured. For some women, the ability to bear and to rear children is a vital part of their identity. What then should be the measure of damages for a woman who has been wrongfully deprived of the ability to bear children herself? Along with general damages for pain, suffering and loss of amenity, should it include the cost of making surrogacy arrangements with another woman to bear a child for her to bring up? In particular, should it include the cost of making commercial surrogacy arrangements abroad?

The history

2. The claimant was born in 1983 and so was aged 29 when the negligence in question was discovered. She had a cervical smear test in 2008 which was wrongly reported as negative when in fact it showed severe dyskariosis. She had another smear test in February 2012 which again was wrongly reported as inadequate when in fact it showed invasive carcinoma. She had a repeat smear test in September 2012 which again was wrongly reported as showing severe dyskariosis when in fact it showed features suggestive of invasive carcinoma. In September and October 2012 she underwent cervical biopsies and these too were wrongly reported as showing pre-malignant changes when in fact they showed evidence of invasive carcinoma. The hospital admitted negligence in respect of the 2008 and February 2012 smear tests and both the biopsies. Had appropriate action been taken in 2008, there was a 95% chance of a complete cure, and she would not have developed cancer at all.

3. The errors were detected in 2013 when her pathology was reviewed as a result of the symptoms she was suffering. In June 2013 she was told that she had cervical cancer and was referred to another hospital. That hospital assessed her condition as too far advanced for her to have the surgery which would have preserved her ability to bear a child. She was advised to have chemo-radiotherapy which would result in her being unable to bear a child. This was confirmed by two further medical opinions.

4. In June 2013, therefore, the claimant underwent a round of ovarian stimulation and egg collection as a result of which she has eight mature eggs frozen in storage. After that, she had surgery and chemo-radiotherapy. As a result of this she suffered significant complications, long-term disability and psychiatric injury,

for which she has been awarded substantial damages. The damage to her womb was such that she could not bear children herself. The focus of this appeal is upon the damages payable for the loss of the ability to bear her own child.

5. The claimant has always wanted a large family. Both her parents come from large families and they had one of their own. Her sister has ten children. Her partner also comes from a large family. They would like to have four children. The expert evidence is that it is probable that they can have two children using her eggs and his sperm. They would then like to have two further children using donor eggs and his sperm. The claimant would prefer to use commercial surrogacy arrangements in California. But if this is not funded, she will use non-commercial arrangements in the United Kingdom.

6. Liability was admitted and judgment entered in May 2016. Damages were assessed, after a hearing in June 2017, by Sir Robert Nelson in September 2017: [2017] EWHC 2318 (QB); [2018] PIQR Q2. Much of his judgment relates to matters other than the surrogacy claim. In relation to surrogacy he held that he was bound by the decision of the Court of Appeal in *Briody v St Helen's and Knowsley Area Health Authority* [2001] EWCA Civ 1010; [2002] QB 856, first, to reject the claim for commercial surrogacy in California as contrary to public policy, and second, to hold that surrogacy using donor eggs was not restorative of the claimant's fertility. Non-commercial surrogacy using the claimant's own eggs, however, could be considered restorative of the claimant's fertility. Hence he awarded her the sum of £37,000 per pregnancy, a total of £74,000.

7. 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 (McCombe, King and Nicola Davies LJJ) dismissed the cross appeal and allowed the claimant's appeal on both points: [2018] EWCA Civ 2832; [2019] 3 WLR 107. Public policy was not fixed in time and had now to be judged by the framework laid down by this court in *Patel v Mirza* [2016] UKSC 42; [2017] AC 467. 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.

8. The hospital now appeals to this court. There are 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?

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

The UK law relating to surrogacy

9. UK law on surrogacy is fragmented and in some ways obscure. In essence, the arrangement is completely unenforceable. The surrogate mother is always the child's legal parent unless and until a court order is made in favour of the commissioning parents. Making surrogacy arrangements on a commercial basis is banned. The details are more complicated.

10. The starting point is that the woman who bears the child is always the child's legal mother when the child is born (Human Fertilisation and Embryology Act 1990, section 27; Human Fertilisation and Embryology Act 2008, section 33). This means that she has (in English law) parental responsibility or (in Scots law) parental responsibilities and rights. A person who has parental responsibility for a child may not surrender or transfer any part of that responsibility to another (Children Act 1989, section 2(9)). Even without the Surrogacy Arrangements Act 1985, this would mean that any contract between a surrogate mother and the commissioning parent or parents is unenforceable against her. But section 1A of that Act (as inserted by section 36(1) of the Human Fertilisation and Embryology Act 1990) goes further and expressly provides that "no surrogacy arrangement is enforceable by or against any of the persons making it". If she refuses to surrender the child, the commissioning parent or parents will have to go to court seeking an order that the child is to live with them. The welfare of the child is the paramount consideration in deciding whether to make such an order. The agreement would be a relevant factor, but is by no means decisive.

11. If the mother is not married or in a civil partnership, and the commissioning father has provided the sperm, then he will be the child's legal father. However, if the mother is married or in a civil partnership, her husband, wife or civil partner will automatically be the child's other legal parent, unless it is shown that he or she did not consent to the placing in her of sperm and eggs, or the embryo, or the artificial insemination which led to the pregnancy (1990 Act, section 28; 2008 Act sections 34, 35 and 42). This complicates any decision as to where the child should live - with the gestational mother (who may also be the genetic mother) and her partner or with the commissioning parents one or both of whom will have a genetic relationship with the child but not a gestational one. It also makes it even more important that

there be a mechanism for transferring legal parenthood from surrogate to commissioning family.

12. That mechanism is to be found in the scheme for making parental orders, which has existed since 1994 but is now contained in sections 54 and 54A of the Human Fertilisation and Embryology Act 2008. Applications can be made jointly by a married couple, by civil partners or by two people who are living as partners in an enduring family relationship (but are not within the prohibited degrees of relationship, such as siblings) (section 54(2)). Applications can also now be made by a single person (following the insertion of section 54A(1) by the Human Fertilisation and Embryology Act 2008 (Remedial) Order 2018 (SI 2018/1413)), made after a declaration that their exclusion was incompatible with the right to respect for private and family life in article 8 of the European Convention on Human Rights (ECHR): *In re Z (Surrogate Father: Parental Order) (No 2)* [2016] EWHC 1191 (Fam); [2017] Fam 25. All applicants must be aged at least 18 when the order is made. The child must have been carried by another woman as a result of the placing in her of eggs and sperm, or an embryo, or her artificial insemination. The gametes of at least one of the applicants must have been used to create the embryo. This may have been done anywhere in the world, so the procedure is available after a foreign surrogacy and if the commissioning parents are the legal parents according to the law of the place where that took place. Without it, they would not be recognised as legal parents here.

13. Applications cannot be made until after the child is born but must then be made within the period of six months beginning with the day on which the child was born (section 54(3); section 54A(2)). Nevertheless, in *In re X (A Child) (Parental Order: Time Limit)* [2014] EWHC 3135 (Fam); [2015] Fam 186, Sir James Munby, President of the Family Division held that the deadline could be relaxed and the courts now frequently make parental orders in respect of children who are much older (in *A v C* [2016] EWFC 42; [2017] 2 FLR 101, for example, as old as 12 and 13).

14. The child must have his home with the applicants or sole applicant both at the time of making the application and at the time of making the order (section 54(4)(a), section 54A(3)(a)). This too was liberally interpreted in *In re X*, as not requiring the applicants to have a single family home, as long as the child had his home with both of them. This has been applied in many cases where the commissioning parents have separated either before the application or before it is granted. At least one of the applicants must be domiciled in the UK, Channel Islands or Isle of Man, both at the time of the application and at the time of the order (section 54(4)(b), section 54A(3)(b)). Residence here is neither necessary nor sufficient.

15. The court must be satisfied that the woman who carried the child and anyone else who is a legal parent (not being an applicant) has freely and with full understanding of what is involved agreed unconditionally to the making of the order. The woman's agreement is ineffective if given less than six weeks after the child's birth. The only exceptions to the agreement requirement are if the person cannot be found or is incapable of giving agreement. The surrogate mother may therefore refuse her consent even if she has handed over the child. Not only that, another legal parent may do so, even if the surrogate has agreed. In *In re AB (Surrogacy: Consent)* [2016] EWHC 2643 (Fam); [2017] 2 FLR 217, both the surrogate and her husband refused to agree to the order even though they had handed over the child to the commissioning parents. All the court could do was make a child arrangements order which gave them parental responsibility but left the child a member of the surrogate's family. Theis J commented that an adoption order would be inappropriate as the parents would be asking to adopt their own children: a parental order recognises their genetic link to the child. She did, however, adjourn the parental order application generally in the hope of a change of mind or a change in the law, as the President had done in *In re Z*.

16. The court must also be satisfied that no money or other benefit, other than for expenses reasonably incurred, has been given or received by any applicant for making the arrangements, handing over the child, giving agreement, or making the order, unless authorised by the court (section 54(8), section 54A(7)). This might be thought to discourage the making of parental orders following a foreign (or indeed any) commercial surrogacy. But what is the court to do when confronted with a fait accompli? It was soon held that payments other than reasonable expenses could be authorised retrospectively, after they had been made: *In re Q (Parental Order)* [1996] 1 FLR 369. In *In re X and Y (Foreign Surrogacy)* [2008] EWHC 3030 (Fam); [2009] Fam 71, which was the first case dealing with payments for a foreign commercial surrogacy, Hedley J asked himself whether the sums paid were disproportionate to reasonable expenses, whether the applicants were acting in good faith in their dealings with the surrogate, and whether they were party to any attempt to defraud the authorities. This set the tone. The Law Commissions are not aware of any case in which a parental order has been refused on the basis of payments which exceed reasonable expenses (*Building families through surrogacy: a new law* (2019) (LCCP 244, SLCDP 167), para 5.93). This is not surprising: the deed has been done, the child is here living with the commissioning parents, and his welfare will almost always require that he is not left legally parentless (and possibly also stateless). This has led one academic commentator to remark that: "English law, as developed through the jurisprudence of the High Court in the 30 years since [the Warnock Report] does not view commercial surrogacy as an intrinsic wrong" (Claire Fenton-Glynn, "Outsourcing Ethical Dilemmas: Regulating International Surrogacy Arrangements" (2016) 24 Med LR 59, 67).

17. Certain provisions in the Adoption and Children Act 2002 and its equivalent in Scotland are applied to parental order applications by Regulations (currently the Human Fertilisation and Embryology (Parental Orders) Regulations 2018 (SI 2018/1412), replacing those in 2010). These include the requirement that the court treat the welfare of the child as its paramount consideration: the court is required to have regard to the welfare of the child, not only during childhood, but throughout his life. As the Law Commissions comment, although laudable, this creates a tension: welfare considerations will almost always point towards making a parental order but this makes it difficult for the court to police even the requirements of sections 54 and 54A, let alone to enforce any public policy against commercial surrogacy arrangements which might be deduced from the Surrogacy Arrangements Act 1985.

18. The Surrogacy Arrangements Act 1985 was passed as a result of the Report of the Committee of Inquiry into Human Fertilisation and Embryology chaired by Dame Mary Warnock (1984) (Cmnd 9314). The view of the majority was this (para 8.17):

> "Even in compelling medical circumstances the danger of exploitation of one human being by another appears to the majority of us far to outweigh the potential benefits, in almost every case. That people should treat others as a means to their own ends, however desirable the consequences, must always be liable to moral objection."

Hence they recommended that the criminal law should ban all agencies, whether profit or non-profit-making, recruiting surrogates and making surrogacy arrangements; and also ban all professionals from knowingly assisting in the establishment of a surrogate pregnancy; and that surrogacy agreements should be illegal contracts and unenforceable (paras 8.18, 8.19). The minority (Dr Wendy Greengross and Dr David Davies) took the view that "the question of exploitation of the surrogate mother, or the treating of her as a means to other people's ends, is not as clear-cut a moral issue as our colleagues suggest" (para 3). They agreed that there was no place for commercial surrogacy agencies, as with commercial adoption agencies; but they disagreed with preventing gynaecologists from helping couples to achieve a surrogate pregnancy; they thought that arrangements made by a regulated non-profit-making body should not be illegal; and that payments made to a surrogate mother should not be a barrier to adoption by the commissioning couple: "most surrogate mothers would expect payment for their services" (para 7).

19. The resulting Act was a compromise. Professionals were not banned from taking part in surrogate pregnancies, but the activities of agencies, whether or not for profit, if on a commercial basis, and advertisements, were banned. Section 2 of

the 1985 Act bans third parties (but not the surrogate or the commissioning parents) from initiating or taking part in negotiations, offering or agreeing to do so, and compiling information for use in making surrogacy arrangements on a commercial basis: this means for payment to the third party or anyone else except the surrogate mother (section 2(1), (2), (3)). However, amendments made by the 2008 Act permit non-profit-making bodies to initiate (but not actually take part in) negotiations with a view to making a surrogacy arrangement and to compile information for use in negotiating or making surrogacy arrangements in respect of which "any reasonable payment" is received by that body or another (section 2(2A), (2B)); payment to the body must not exceed the body's reasonable costs in doing those things (section 2(2C)). Commercial surrogacy agencies are banned from receiving money from the surrogate or commissioning parents (section 2(5)) Taking part in the management and control of commercial surrogacy agencies is also banned (section 2(7), (8)). Once again, however, the 2008 Act introduced exceptions for non-profit-making bodies taking part in surrogacy arrangements in the UK (sections 2(5A), (8A), (8B)).

20. Section 3 of the 1985 Act bans advertisements indicating that anyone might be willing to enter into or negotiate a surrogacy arrangement or that anyone is looking for a surrogate mother or asking for such persons (section 3(1)). Once again, however, the 2008 Act introduced an exception for advertisements placed by a non-profit-making body relating to acts done by that body which would not fall within the ban in section 2 even if done on a commercial basis (section 3(1A)).

21. The surrogacy arrangements referred to might be anywhere in the world. The offences, however, can only be committed in the United Kingdom. There is nothing to stop agencies based abroad from helping to make surrogacy arrangements on a commercial basis abroad. Nor is there anything to stop commissioning parents and surrogate mothers from making their arrangements directly, either here or abroad, even on a commercial basis. The *Review for Health Ministers of Current Arrangements for Payments and Regulation*, chaired by Professor Margaret Brazier (1998) (Cm 4068), recommended that payments to the surrogate mother be expressly limited to expenses occasioned by the pregnancy; but this has not been implemented. Agreements for such payments are, of course, unenforceable and could result in the refusal of a parental order. As seen above, however, that is highly unlikely.

22. In the circumstances, it is scarcely surprising that the claimant's clear preference is for a commercial surrogacy arrangement in California. As Sir Robert Nelson said, "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" (para 31). A further disadvantage of the UK system in the claimant's eyes is that "it is the surrogate mother who chooses the intended parent rather than the other way around … the idea of being at the mercy of someone else's choosing, and attending informal parties to meet

surrogate mothers frightens her" (para 32). In other words, the friendship model of altruistic surrogacy arrangements promoted by surrogacy organisations here does not appeal.

Briody v St Helen's and Knowsley Area Health Authority

23. Owing to medical negligence, the claimant underwent a sub-total hysterectomy when aged around 19, having lost two babies in quick succession. Her ovaries were left intact. Many years later, she brought proceedings claiming damages for, among other things, the cost of a Californian surrogacy. The claim was on the basis that there should be two cycles of treatment using her own eggs, which it was accepted would probably fail, and four cycles using donor eggs, all using her partner's sperm. Ebsworth J rejected both proposals, partly because the chances of success using her own eggs were so low and partly because a commercial surrogacy was not lawful here.

24. By the time the case reached the Court of Appeal, however, eggs had been successfully recovered from the claimant and fertilised with her partner's sperm. There were now six embryos in storage. Nevertheless, the chances of success were still no more than 1%. The claimant was now proposing two cycles using her own embryos and if that failed up to four more cycles using the surrogate's eggs and if successful three more to have a second child. All of this would be arranged, not commercially abroad, but here through the well-known self-help group, Childlessness Overcome Through Surrogacy (COTS).

25. I gave the leading judgment on the issue of principle. Having set out the law relating to surrogacy, I commented that "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. … If there is a trend, it is towards acceptance and regulation as a last resort rather than towards prohibition" (para 11).

26. On the Californian proposals put before the judge, I had no difficulty in agreeing with her that they 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" (para 15). As to the new proposals, I also agreed with the judge that it would not be reasonable to expect the defendant to pay for the implantation of the claimant's embryos when this had such a slim chance of success (para 22). As to a surrogacy using donor eggs, I took the view that this was "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" (para 25).

27. Having reached the conclusion that, even with the evidence of the new proposals, the claim should not succeed, it was not strictly necessary to decide whether that evidence should be admitted (para 33). I agreed, however, with Judge LJ, who explained that it should not be admitted because it would inevitably require a new trial and the claimant should not have two bites of the cherry (para 53). Judge LJ agreed with me that in any event there was no sufficient basis for an award of damages to reflect these new proposals (para 54). Henry LJ agreed with us both (para 56).

Developments since Briody

28. This Court is not, in any event, bound by the ratio of *Briody*. But the persuasiveness of that ratio is inevitably affected by the developments in law and social attitudes which have taken place since then. We have also had the benefit of the joint Consultation Paper issued in June 2019 by the Law Commission and the Scottish Law Commission, *Building families through surrogacy: a new law* (LCCP 244, SLCDP 167), which contains much useful information.

29. The developments in the law have been quite dramatic. Under the 1985 Act, originally all third parties were banned from taking part in surrogacy arrangements for payment, whereas under the 2008 Act amendments, non-profit-making bodies may initiate negotiations and compile information for reasonable payment. Non-profit-making bodies can also advertise. There are now three not-for-profit organisations facilitating surrogacy arrangements in the UK, COTS, Brilliant Beginnings and Surrogacy UK (*Building families through surrogacy: a new law*, para 3.17).

30. More dramatic still have been the developments in the law's ideas of what constitutes a family. Traditionally, families were limited to those related by consanguinity (blood) or affinity (marriage). Hence at first only opposite sex married couples could apply for parental orders. Now they have been joined by same sex married couples, by same sex and opposite sex civil partners, and by couples, whether of the same or opposite sexes, who are neither married nor civil partners, but are living together in an enduring family relationship. They have also been joined by single applicants. All of these would be regarded as family relationships within the meaning of article 8 of the ECHR.

31. The law now recognises and supports same sex relationships and parenthood in almost exactly the same way as it recognises and supports opposite sex relationships. Civil partnerships between same sex couples were introduced throughout the UK by the Civil Partnerships Act 2004. Gay marriage was introduced in England and Wales by the Marriage (Same-sex Couples) Act 2013, in Scotland

by the Marriage and Civil Partnership (Scotland) Act 2014, and in Northern Ireland by the Marriage (Same-sex Couples) and Civil Partnership (Opposite-sex Couples) (Northern Ireland) Regulations 2019 (SI 2019/1514). Same sex couples have been able to adopt jointly in England and Wales since the Adoption and Children Act 2002 and in Scotland since the Adoption and Children (Scotland) Act 2007. In *In re G (Adoption: Unmarried Couple)* [2008] UKHL 38; [2009] 1 AC 173, this Court declared the exclusion of unmarried couples from the Northern Ireland Adoption Order incompatible with the equal enjoyment of the right to respect for family life protected by articles 8 and 14 of the ECHR. Obviously, male same sex couples can achieve parenthood only through adoption or surrogacy and there is evidence of a growing demand from them for surrogacy arrangements. The UK surrogacy organisations report a growing proportion of male same sex couples using their services, as many as 50% of those using COTS and Brilliant Beginnings (*Building families through surrogacy: a new law*, paras 3.18 to 3.21).

32. All of this supports the observations of King LJ in this case (para 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."

33. Not only does family law recognise a much wider set of relationships as "family life" these days. Government policy has moved strongly in the direction of supporting surrogacy arrangements in appropriate cases. The Children and Families Act 2014, section 122, provides for the extension of the right to shared parental leave under the Employment Rights Act 1996 and statutory paternity and adoption pay under the Social Security and Contributions Act 1992 to people who have applied for or intend to apply for a parental order under the 2008 Act. The Human Fertilisation and Embryology (Parental Orders) Regulations 2018 adapt the Children Act 1989 and the Foster Children (Scotland) Act 1984 so that commissioning parents who propose to apply for a parental order no longer fall within the definition of private foster parents who are required to inform the local authority that the child is living with them.

34. As well as these statutory changes, the Department of Health and Social Care published guidelines on the practice of surrogacy in February 2018 (updated November 2019): *The Surrogacy Pathway: Surrogacy and the legal process for intended parents and surrogates in England and Wales* and *Care in Surrogacy:*

guidance for the care of surrogates and intended parents in surrogate births in England and Wales. The former states as follows:

> "The government supports surrogacy as part of the range of assisted conception options. Our view is that surrogacy is a pathway, starting with deciding which surrogacy organisation to work with, deciding which surrogate or intended parent(s) … to work with, reaching an agreement about how things will work, trying to get pregnant, supporting each other through pregnancy and then birth, applying for a parental order to transfer legal parenthood and then helping your child understand the circumstances of their birth. This guidance gives more information about each stage."

Not only that, it was the Department of Health and Social Care which asked the Law Commissions to consider reforms to the law of surrogacy in the United Kingdom.

35. Another change which has taken place over the decades since the Surrogacy Arrangements Act was passed in 1985 is the progress of the medicine and science of assisted reproduction, coupled with their regulation by the Human Fertilisation and Embryology Authority ("HFEA"), and increasing public familiarity with and acceptance of such methods of founding a family. When the Act was passed, donor insemination had become safer because sperm could be successfully frozen, but IVF and embryo transfer were in their infancy and success rates were very low, and eggs could not be frozen. Public concern about the ethics of these techniques had led to the Warnock committee's report, which in turn led to the pioneering work of the HFEA as the first body in the world to regulate such treatments. Since then, new techniques have been developed, success rates have improved, and people who are experiencing problems in conceiving or bearing children, or who are in same sex relationships, increasingly turn to assisted reproduction rather than to adoption in order to fulfil their desire to have a family. While treatment is sometimes available on the NHS, much of it is also provided commercially.

36. It is probable that most gestational surrogacy arrangements in this country involve treatments provided by a clinic licensed by the HFEA. This is required where IVF or embryo transfer are involved. The HFEA's first Code of Practice had one paragraph about surrogacy: this advised that, because either the carrying mother, and in certain circumstances her husband or partner, or the commissioning parents might become the child's legal parents, the welfare of any resulting child should be assessed in relation to both sets of parents, and any risk of disruption to the child's early care and upbringing in the event of a dispute between them considered (para 3.16.a). The most recent, ninth, edition of the Code of Practice, version 2 (2019), has a section on "The welfare of the child assessment process for surrogacy

arrangements" which emphasises the need for a standard operating procedure for centres offering surrogacy treatment (paras 8.9 to 8.13); and a whole chapter (paras 14.1 to 14.14) on surrogacy generally which emphasises the need for full information and discussion about the legal and other implications, as well as counselling, for both the surrogate and the commissioning parents. While this may be off-putting for some, and centres are advised to be alive to the vulnerability of all parties, there is no suggestion that such arrangements should be viewed with particular suspicion or discouraged.

37. As to changes in the attitudes of society in general to surrogacy arrangements, the Law Commissions say this (para 1.9):

> "Whilst we acknowledge that there is a lack of public attitudinal research in this area, 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."

They cite a YouGov poll in 2014 showing that 59% of adults in Great Britain supported using gestational surrogacy to have children.

38. The Law Commissions' paper, *Building families through surrogacy: a new law*, also includes a full discussion of the empirical evidence about the possible harmful effects of surrogacy on the participants involved and the children and of the ethical arguments about surrogacy (Chapter 2). The latter debate "reflects a tension between autonomy and paternalism" (para 2.69). The concerns about exploitation and commodification feature most prominently in relation to commercial arrangements. Domestically, those concerns could be alleviated by more effective regulation (para 2.71). Internationally, where the arrangements are almost invariably commercial in nature, it is impossible for UK law to effect change, except in situations involving intended parents who will bring the child back to the UK (para 2.72):

> "In that respect, we make a provisional proposal for reform that would enable legal parenthood granted overseas to be recognised in the UK, only after an appraisal of the law and practice of surrogacy in each country. We hope that such a development would encourage UK intended parents who do look for an international surrogacy arrangement to use

> countries where there is a level of confidence in the protection provided to women who become surrogates."

39. The reality is that there is a spectrum of surrogacy arrangements. At one end of the scale there are desperately poor women who are induced to sell one of the few things they have for sale, their wombs, and are often grossly exploited by the agents and middlemen who make serious profits from the large sums which desperate commissioning parents are prepared to pay. At the other end of the scale are altruistic women who enjoy being pregnant and are happy to make a gift of their child-bearing capacity to people who need it. It is no longer thought that women should not have the right to choose to use their bodies in this way. But it is thought that both they and the commissioning parents should be protected from exploitation and abuse. It is also thought that surrogacy arrangements, whether altruistic or commercial, should guard against any possibility that children are being bought and sold: see the Report of the United Nations Special Rapporteur on the sale and sexual exploitation of children, including child prostitution, child pornography and other child sexual abuse material (A/HRC/37/60, 15 January 2018).

Application to this case

40. This case is about the assessment of reasonable damages to compensate a woman who has been wrongly deprived of the ability to bear her own children. With the greatest of respect to the argument on behalf of the claimant, accepted by the Court of Appeal, it is not about the illegality defence and the new framework adopted in *Patel v Mirza* [2017] AC 467. Nor is it to be likened to a case like *Gray v Thames Trains Ltd* [2009] UKHL 33; [2009] 1 AC 1339, where the injury suffered by the claimant led to his committing a serious criminal offence and suffering the consequences of doing so, for which he claimed but was denied compensation. Nothing 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. Her second-best solution would be lawful surrogacy arrangements here.

41. The general principle upon which damages in tort are assessed was 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."

There are qualifications to that principle, of course.

42. The first is that some heads of damages which would readily fall within that principle are nevertheless irrecoverable because to allow this would be contrary to legal or public policy. A well-known example is *McFarlane v Tayside Health Board* [2000] 2 AC 59. The Inner House of the Court of Session held that a couple who had a child after the husband had had a vasectomy, allegedly because of negligent advice, could claim damages, not only for the pregnancy and birth, but also for the cost of bringing up the child they never meant to have. The House of Lords held that they could not claim the costs of bringing up a healthy child. They gave a variety of reasons for this, but they all amount to a policy against awarding what would be the normal measure of the claimants' loss.

43. A second qualification is that, in seeking to restore what has been lost, the steps taken must be reasonable ones and the costs thereby incurred must be reasonable.

44. The first question, therefore, is whether it is ever possible to claim damages for the cost of surrogacy arrangements, even where these are made on a lawful basis in this country and using the claimant's own eggs. It might once have been possible to argue that the law should not facilitate the bringing into the world of children who would otherwise never have been born. But the acceptance and widespread use of assisted reproduction techniques, for which damages are payable, means that this is no longer possible. In *Briody*, I did not consider that an arrangement which conformed to English law would be contrary to public policy. The question was whether it was reasonable to seek to remedy the loss of a womb through surrogacy (para 30). This would depend upon the chances of a successful outcome. In that case they were vanishingly small. Nevertheless, had they been better, I expressed the tentative view that it would be a "step too far". But I recognised the force of the contrary argument that, given the right evidence of the reasonableness of the procedure and the prospects of success, it should be capable of attracting an award (para 32). Sir Robert Nelson found it difficult to see why, on general principle, where the prospects of success are reasonable, if not good, and the claimant had delayed her cancer treatment to ensure that her eggs were harvested, the claim should not succeed (para 49). McCombe LJ agreed (para 84). So do I.

45. The next question is whether it is possible to claim damages for UK surrogacy arrangements using donor eggs. In *Briody*, I expressed the view that this was not truly restorative of what the claimant had lost. It was seeking to make up for what

she had lost by giving her something different (para 25). We need not concern ourselves with whether or not this view was technically *obiter*. In my view it was probably wrong then and is certainly wrong now.

46. It was argued for the claimant 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. It is not one's own genetic material and it is not as good as a real limb, but it is the closest one can get to putting the claimant in the position she would have been in had she not been injured. Of course, the analogy is not exact, because the claimant is not being supplied with a replacement womb. But in many ways that is indeed what she is being supplied with, albeit temporarily, through the generosity of a surrogate mother who offers the use of her own womb.

47. Not only that, as counsel had argued for Mrs Briody, a woman can hope for four things from having a child: the experience of carrying and giving birth to a child; the perpetuation of one's own genes; the perpetuation of one's partner's genes; and the pleasure of bringing up a child as one's own (para 24). Donor egg surrogacy using a partner's sperm gives her two of those. And for many women, the pleasure of bringing up children as one's own is far and away the most important benefit of having children. If this is the best that can be achieved to make good what she has lost, why should she be denied it?

48. This view is reinforced by the dramatic changes in the idea of what constitutes a family which have taken place in recent decades, referred to earlier. There are many different kinds of family these days. As King LJ pointed out in the Court of Appeal, "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" (para 103). This is the experience of those judges who have the happy experience of granting parental orders. I would therefore hold that, subject to reasonable prospects of success, damages can be claimed for the reasonable costs of UK surrogacy using donor eggs.

49. That leaves only the most difficult question: what about the costs of foreign commercial surrogacy? Surrogacy contracts are unenforceable here. It is well-established that the UK courts will not enforce a foreign contract which would be contrary to public policy in the UK: see *Rousillon v Rousillon* (1880) 14 Ch D 351; *Israel Discount Bank of New York v Hadjipateras* [1984] 1 WLR 137. Why then should the UK courts facilitate the payment of fees under such contracts by making an award of damages to reflect them?

50. In this case, we have the advantage of evidence about the comparative costs of UK and Californian surrogacy. One thing becomes clear. Many of the items in the Californian bill would also be claimable if the surrogacy took place here. The costs of the fertility treatment and egg donation itself, although they are higher in the US than here, would be recoverable for a UK surrogacy. Then there is the cost of the payment to the surrogate mother herself, which is higher than the "reasonable expenses" thought acceptable here. But, as we have seen, it is not unlawful for commissioning parents to make such payments here. And whether made here or abroad they are likely to be retrospectively authorised by the court. Then there are the fees paid to the UK lawyers, which would also be recoverable here, if reasonable. They are very much higher for a US than for a UK surrogacy, presumably because there is so much more work to be done, but we must also presume that such work does not fall foul of the Surrogacy Arrangements Act 1985. That leaves the fees paid to the US lawyers and surrogacy agency, which would be unlawful here but are not in the US. To what extent should that taint all of the items in the bill?

51. The damages would be awarded to the claimant, the commissioning parent. It is not against the law in this country for a commissioning parent to do any of the acts which are prohibited by section 2(1) of the Surrogacy Arrangements Act 1985 (see section 2(2)(b)). Nor is it against the law in this country for an intending surrogate to do so (see section 2(2)(a)). That is true even of activities in this country, let alone in another country. It has never been the object of the legislation to criminalise the surrogate or commissioning parents. The only deterrent is the risk that the court hearing an application for a parental order might refuse retrospectively to authorise the payments. As we have seen, there is no evidence that that has ever been done. The court's paramount consideration is the welfare of the child involved, which will almost certainly be best served by cementing his home and his family links with the commissioning parents.

52. Added to that are all the other developments which have taken place since the decision in *Briody*. The courts have bent over backwards to recognise the relationships created by surrogacy, including foreign commercial surrogacy. The government now supports surrogacy as a valid way of creating family relationships, although there are no plans to allow commercial surrogacy agencies to operate here. The use of assisted reproduction techniques is now widespread and socially acceptable. The Law Commissions have provisionally proposed a new pathway for surrogacy which, if accepted, would enable the child to be recognised as the child of the commissioning parents from birth, thus bringing the law closer to the Californian model, but with greater safeguards. While the risks of exploitation and commodification are heightened in commercial surrogacy, they are not thought an insuperable ethical barrier to properly regulated arrangements.

53. For all those reasons, I conclude that it is no longer contrary to public policy to award damages for the costs of a foreign commercial surrogacy. However, that

does not mean that such damages, still less damages such as are claimed in this case, will always be awarded. There are some important limiting factors. First, the proposed programme of treatments must be reasonable. There may be good reasons to think that, but for the negligence, the claimant would have had the number of children now proposed, but there may not. Second, 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, the surrogate, the commissioning parents and any resulting child, are properly safeguarded. Unregulated systems where both surrogate and commissioning parents are at the mercy of unscrupulous agents and providers and children may be bought and sold should not be funded by awards of damages in the UK. This has not been explored in this case, but it should not be concluded that, even in California, all is always well (as the Report of the United Nations Special Rapporteur shows). Third, the costs involved must be reasonable. This too has not been put in issue in this case, which has been argued as a matter of principle, but it should certainly not be taken for granted that a court would always sanction the sorts of sums of money which have been claimed here.

54. With those caveats, therefore, I would dismiss this appeal.

LORD CARNWATH: (dissenting) (with whom Lord Reed agrees)

55. I am grateful for Lady Hale's full exposition of the facts, and of the legislative and policy background. This enables me to deal with the remaining issues between us relatively briefly, without in any way diminishing the impact of these tragic events on the claimant, or the seriousness of the legal issues to which they give rise.

56. On the first two issues identified by Lady Hale (para 8), I agree with her reasoning and conclusions. I differ only on the last issue: damages to fund the cost of commercial surrogacy arrangements in a country (in this case California) where this is not unlawful. As I think Lady Hale accepts, her conclusion on that issue is a departure from the clear, indeed emphatic, position on this issue, expressed in 2001 in her leading judgment in *Briody v St Helens and Knowsley Area Health Authority* [2001] EWCA Civ 1010; [2002] QB 856.

57. It is important to note that in *Briody* there was a difference between the claimant's case as presented to the judge, and as sought to be advanced in the Court of Appeal. Before the judge it was based solely on a proposed commercial surrogacy agreement in California (para 4). Before the Court of Appeal, as Lady Hale noted (para 9), the claimant had abandoned the Californian agreement and sought leave to adduce evidence of a proposed surrogacy arrangement through the self-help group,

COTS (Childlessness Overcome Through Surrogacy), governed by English law. Having observed that "English law on surrogacy is quite clear", that "the activities of commercial surrogacy agencies are unlawful", and that it is "an offence for any person to take part in negotiating surrogacy arrangements on a commercial basis" (para 10), and having reviewed the varying practice round the world, she had "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." (para 15)

By contrast, she found it impossible to say that the claimant's new proposals were "contrary to public policy in that sense" (para 16). The remainder of the judgment is devoted largely to that aspect.

58. We are not of course bound by that decision even as respects commercial surrogacy. But I do not understand it to have been seriously questioned as a reflection of the law and policy as it stood at the time. However, in her present judgment, Lady Hale has described the "dramatic" developments in law and social attitudes (para 28ff) which lead her to conclude ultimately that it is "no longer contrary to public policy" to award such damages (para 53).

59. I agree with her (para 40) that the resolution of this issue is not assisted by reference to recent judgments of this court on the scope of the illegality defence (such as *Patel v Mirza* [2016] UKSC 42; [2017] AC 467). A commercial surrogacy arrangement, such as is proposed, is not in itself unlawful in the country in which it would take place. Nor is the claimant's participation in such an arrangement from this country. For that reason I agree that the case cannot be likened directly to a case like *Gray v Thames Trains Ltd* [2009] UKHL 33; [2009] AC 1339, which involved a serious criminal offence by the claimant. However that is not the end of the enquiry. As Lady Hale recognises (para 42), there is a further question of legal or public policy perhaps best exemplified by *McFarlane v Tayside Health Board* [2000] 2 AC 59.

60. It is not easy to extract a single ratio to support the conclusion in that case that the damages could not extend to the cost of bringing up a healthy but unwanted child. However further light was cast by the speeches in *Rees v Darlington Memorial Hospital NHS Trust* [2003] UKHL 52; [2004] 1 AC 309, in which the House had to consider the application of the *McFarlane* principles to the birth of an unwanted child to a mother with a severe visual handicap. Lord Bingham (para 6) spoke of the different approaches and different reasons adopted by the members of the House in

McFarlane but thought it "clear that all of them were moved to adopt it for reasons of policy (legal, not public, policy)". He explained:

> "The policy considerations underpinning the judgments of the House were, as I read them, an unwillingness to regard a child (even if unwanted) as a financial liability and nothing else, a recognition that the rewards which parenthood (even if involuntary) may or may not bring cannot be quantified and a sense that to award potentially very large sums of damages to the parents of a normal and healthy child against a National Health Service always in need of funds to meet pressing demands would rightly offend the community's sense of how public resources should be allocated. Kirby J was surely right to suggest in *Cattanach v Melchior* [2003] HCA 38, para 178) that:
>
> > 'Concern to protect the viability of the National Health Service at a time of multiple demands upon it might indeed help to explain the invocation in the House of Lords in *McFarlane* of the notion of 'distributive justice'."

61. To similar effect Lord Steyn said (para 29):

> "The House did not rest its decision on public policy in a conventional sense … Instead the Law Lords relied on legal policy. In considering this question the House was bound, in the circumstances of the case, to consider what in their view the ordinary citizen would regard as morally acceptable. Invoking the moral theory of distributive justice, and the requirements of being just, fair and reasonable, culled from case law, are in context simply routes to establishing the legal policy."

62. Lord Millett also spoke of "legal policy" (para 105):

> "In their speeches [in McFarlane] the individual members of the Appellate Committee all based this conclusion on legal policy, though they expressed themselves in different terms. My noble and learned friend, Lord Steyn, spoke of distributive justice; he asked himself what would be morally acceptable to

the ordinary person. Others spoke of what was 'fair, just and reasonable' - which expresses the same idea. I spoke openly of legal policy. I said, at p 108:

> 'The admission of a novel head of damages is not solely a question of principle. Limitations on the scope of legal liability arise from legal policy, which is to say "our more or less inadequately expressed ideas of what justice demands" (see Prosser & Keeton on Torts, 5th ed (1984), p 264). This is the case whether the question concerns the admission of a new head of damages or the admission of a duty of care in a new situation. Legal policy in this sense is not the same as public policy, even though moral considerations may play a part in both. The court is engaged in a search for justice, and this demands that the dispute be resolved in a way which is fair and reasonable and accords with ordinary notions of what is fit and proper. It is also concerned to maintain the coherence of the law and the avoidance of inappropriate distinctions if injustice is to be avoided in other cases.'

Others too made it clear that this was not the same as public policy in the traditional sense of that expression. It would not have been contrary to public policy to award damages to the pursuers in *McFarlane* any more than it would be contrary to public policy to award damages for breach of contract beyond the limits imposed by the rule in *Hadley v Baxendale* (1854) 9 Exch 341. But in both cases the denial of damages rests upon policy considerations."

63. It seems clear therefore that the issue is seen as one of "legal policy", to be determined by the courts. It is more difficult to identify the criteria which the court is to use for that purpose. In the present context I find most helpful Lord Millett's emphasis on maintaining "the coherence of the law". In that respect the present case seems to me easier than either *McFarlane* or *Rees*. It is difficult to think of a better guide to where to draw the line in a highly sensitive area such as this than that indicated by Parliament.

64. Although this case is not concerned with illegality as such, the underlying principle of coherence or consistency in the law is of broader application. Although, as noted above, *Gray v Thames Trains Ltd* is not directly relevant, the speeches of Lord Hoffmann and Lord Rodger contain a valuable discussion of the underlying

principle. The same idea is echoed in some of the judgments in *Patel v Mirza* (see para 155 per Lord Neuberger; para 191 per Lord Mance: "the law must aspire to be a unified institution, the parts of which - contract, tort, the criminal law - must be in essential harmony" quoting McLachlin J in *Hall v Hebert* [1993] 2 SCR 15, 175-176).

65. Lord Rodger, in particular, referred in *Gray* to "the desirability of different organs of the same legal system adopting a consistent approach to the same events" (para 76). He continued:

> "77. In *British Columbia v Zastowny* [2008] 1 SCR 27, 38, para 23, Rothstein J treated the need to preserve the integrity of the justice system, by preventing inconsistency in the law, as a matter of judicial policy that underlay the ex turpi causa doctrine. In other words, in the circumstances of that case the application of the ex turpi causa doctrine helped to promote the more fundamental legal policy of preventing inconsistency in the law. That such a policy exists is beyond question. In *Zastowny* and the preceding cases, the need was to ensure that the civil and criminal courts were consistent in their handling of the plaintiff's criminal conduct and its consequences. But that is simply one manifestation of a desirable attribute of any developed legal system. In classical Roman law the jurists were at pains to ensure that the various civil law and praetorian remedies worked together in harmony in relation to the same facts. One of the hallmarks of a good modern code is that its provisions should interrelate and interact so as to achieve a consistent application of its overall policy objectives. Complete harmony may well be harder to achieve in an uncodified system - hence the constant attention paid by the classical jurists to the problem - since different remedies will have developed at different times and in response to particular demands. But the gradual drawing together of law and equity in English law illustrates the same pursuit of harmony and consistency. And, certainly, the courts are conscious that inconsistencies should be avoided where possible. So, for instance, a court should not award damages in tort if a contractual claim based on the same events would be excluded by some term in the contract between the parties. Similarly, a court should not give a remedy on the ground of unjust enrichment if this would be tantamount to enforcing a contract which the law would treat as void in the circumstances. Likewise, in the present case, when considering the claim for loss of earnings, a civil court should bear in mind that it is desirable for the criminal and civil courts to be

> consistent in the way that they regard what the claimant did. As Samuels JA observed in *State Rail Authority of New South Wales v Wiegold* [(1991)] 25 NSWLR 500, 514, failure to do so would generate the sort of clash between civil and criminal law that is apt to bring the law into disrepute."

66. As that passage makes clear, the objective is consistency or coherence between the civil and criminal law within a particular system of law. The fact that the laws of other jurisdictions and other systems may reflect different policy choices seems to me beside the point. It would in my view be contrary to that principle for the civil courts to award damages on the basis of conduct which, if undertaken in this country, would offend its criminal law.

67. It is true that there have been striking developments in society's approach to many issues affecting family life, including surrogacy, as the Law Commission's comprehensive report demonstrates. There 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. It is also apparent from recent studies that public attitudes remain deeply divided (see for example the Second Report of the Surrogacy UK Working Group on Surrogacy Law Reform (December 2018). 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. In short, I consider that the decision of the Court of Appeal was correct in 2001, and remains correct today.

68. I would therefore allow the appeal on the third issue.