

Are commercial surrogacy costs recoverable?

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

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Liability was admitted by the Trust in May 2016 in respect of negligent reporting of cervical smear tests in 2008 and 2012 and cervical biopsies in 2012. Once the cervical cancer was detected in 2013, it was too advanced for the surgery which would have allowed XX to bear her own children and she required chemo-radiotherapy treatment which resulted in infertility. XX delayed her cancer treatment so that eggs could be harvested. This appeal concerned the damages payable for infertility.

XX chose a commercial surrogacy arrangement in California, where it is legal to pay a woman to be a surrogate. This arrangement is not legal in the UK where only reasonable expenses may be paid to the birth mother, using her own eggs and not those of a donor. The High Court Trial Judge awarded reasonable damages for own-egg surrogacy in the UK only. On appeal the Court of Appeal overturned the first instance ruling and allowed the recovery of costs of a commercial surrogacy in California and the use of donor eggs.

The Trust then appealed to the Supreme Court to overturn this judgment and the Supreme Court decision was handed down on 1 April 2020.

The Trust's Appeal

Lady Hale set out the three focuses of the appeal:

1. Are damages to fund surrogacy arrangements using the claimant's own eggs recoverable?
2. If so, are damages to fund UK 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 Decision

By a majority, the Supreme Court dismissed the appeal. The reasoning is as follows:

1. In the UK, the surrogate mother is always the child's legal parent unless the court makes a 'parental order' transferring legal parenthood to the commissioning parents. Surrogacy arrangements on a commercial basis in the UK are banned but this does not stop commercial surrogacy arrangements abroad. Nothing which the claimant proposed to do involves a criminal offence either here or abroad. It is difficult to see why, when the prospects of success are reasonable, and the claimant has delayed her cancer treatment so that the eggs may be harvested, the claim should not succeed. Damages to fund commercial surrogacy arrangements using the claimant's own eggs are recoverable.

2. Whilst not as good as using the mother's own eggs, using donor eggs is the closest we 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 can be claimed for the reasonable costs of UK surrogacy using donor eggs.
3. Awards of damages for commercial surrogacy are no longer contrary to public policy, but this does not mean that they will always be awarded. Limiting factors such as the proposed programme of treatment must be reasonable, it must be reasonable to seek the foreign commercial arrangements proposed rather than to make arrangements in the UK and the foreign country should have a well-established system in which the interests of all involved, including the child, are properly safeguarded and thirdly, the costs involved are reasonable. Damages to fund the cost of commercial surrogacy arrangements in a country where it is not unlawful, subject to the limiting factors being considered, are recoverable.

Comment

This is undoubtedly a very difficult case. The admitted negligence resulted in XX's infertility and left her seeking alternative ways of starting a family.

The decision has the potential to see more claims for commercial surrogacy arrangements in cases where fertility has been affected. Whilst awards will be dependent on the factors identified above, damages for commercial surrogacy are now recoverable.

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