**Amel Alghrani and Craig Purshouse, ‘Damages for Reproductive Negligence: Commercial Surrogacy on the NHS?’ (2018) Law Quarterly Review (forthcoming).**

Although attitudes towards surrogacy itself have softened over time, one constant in English law and policy, ever since the *Warnock* *Report* expressed disapproval of the practice in 1984, is that *commercial* surrogacy is considered objectionable. Hedley J. summed up the position in *Re X* [2008] EWHC 3030; [2009] Fam. 71: “whilst commercial surrogacy is unlawful, surrogacy itself is not” (at [3]). The decision by the Court of Appeal in *XX v Whittington Hospital NHS Trust* [2018] EWCA Civ 2832 to award damages representing the cost of undertaking a commercial surrogacy arrangement therefore comes as a surprise.

The poignant facts of the case are as follows. Due to defective analyses of smear tests and biopsies, the defendant hospital failed to detect the claimant’s (Ms X) cervical cancer. She was eventually diagnosed but because of the delay in diagnosis, she was unable to have fertility-saving surgery, which otherwise would have been available to her. As she wished to be a biological mother, prior to the treatment for the cancer, Ms X underwent a cycle of ovarian stimulation and egg harvest, producing 12 eggs that were then cyropreserved by vitrification.

The claimant’s surgery and chemo-radiotherapy caused irreparable damage to her uterus and ovaries and she entered premature menopause. She also suffered severe radiation damage to her bladder and bowel, leading to occasional incontinence and the treatments also led to vaginal stenosis and atrophy of the vaginal tissues (making intercourse extremely painful and thus impossible). Following treatment, Ms X was determined to proceed with her plans to found a family with her partner and sought to achieve this via a surrogacy arrangement. Surrogacy is the practice where one woman the surrogate mother gestates a child for another individual, or couple (intended parents), with the intention of handing it over after birth and parental responsibility being transferred (s 1(2) Surrogacy Arrangements Act (SAA) 1985). Ms X had decided to opt for a commercial surrogacy arrangement in California, where the practice is lawful and well-established and surrogacy contracts legally binding. By way of contrast, commercial surrogacy arrangements are unlawful in the UK and such agreements not legally enforceable.

Ms X brought a claim against the defendants for their negligence in failing to detect the cancer and part of this claim was for the cost of a commercial surrogacy arrangement in California or, if such damages were not awarded, the cost of a non-commercial agreement in the UK. The claim was for four pregnancies using Ms X’s own cryopreserved eggs or, if necessary, with donor eggs and her partner’s sperm. Liability was admitted and the key issue in the case was the correct measure of damages.

In seeking the cost of a commercial surrogacy in California, a potential stumbling block for Ms X was that similar issues had arisen in a previous Court of Appeal decision, *Briody v St Helens and Knowsley Area Health Authority*[2001] EWCA Civ 1010;[2002] QB 856, where the defendant’s negligence had led to the claimant losing her uterus. Like Ms X, she claimed damages in respect of the cost of a commercial surrogacy arrangement in California. It was held that while surrogacy itself was not contrary to public policy (at [11] per Hale L.J.), Ms Briody could not recover the costs of a Californian surrogacy because the chance of success was low and commercial surrogacy arrangements did not comply with English law and so were contrary to public policy (at [15]).

At first instance in *XX*, the trial judge, Sir Robert Nelson, held that the High Court was bound by the decision in *Briody* and thus the claim for expenses of a Californian surrogacy had to fail, given that commercial surrogacy arrangements remain illegal in the UK and thus remain contrary to public policy. However, he distinguished the present case from that of *Briody* in permitting the costs of a non-commercial domestic surrogacy arrangement. The latter was not contrary to English law, or public policy and Ms X’s chances of success were higher than Ms Briody’s. Ms X was, of course, free to spend her damages however she wished so there would be nothing to stop her spending her damages for pain and suffering on a commercial surrogacy agreement in another in California. Ms X appealed the ruling.

Reversing the judgment in part, the Court of Appeal (McCombe, King and Nicola Davies LL.J.) held that Ms X could recover the cost of surrogacy in California and that the judge was wrong to differentiate an arrangement using Ms X’s own eggs and one using donor eggs (he had only awarded damages for the former). Damages for pain, suffering and loss of amenity were reduced from £160,000 to £150,000 as the higher figure reflected Ms X’s complete loss of fertility, which was no longer accurate if the Californian arrangement could occur (account was taken of the chance that the Californian arrangement may not be successful).

This note will focus on whether the Court of Appeal was correct to award damages for an overseas commercial surrogacy arrangement. First, it is necessary to give a brief overview of the law of surrogacy in this country in order to appreciate how this decision allowed the ban on commercial surrogacy in UK law to be subverted.

Domestically, the law governing surrogacy has developed in a haphazard fashion and piecemeal changes made over the years have resulted in a regulatory framework that is contradictory and confusing for all involved. The Law Commission is currently considering reform of this area. Part of the confusion stems from the fact that while the Surrogacy Arrangements Act 1985 prohibits commercial surrogacy, making it illegal to negotiate surrogacy arrangements on a commercial basis (s 2), the surrogate and the intended parents are not caught by this prohibition. Nor, due to an amendment by the Human Fertilisation and Embryology Act (HFEA) 2008 are non-profit-making bodies (s 2A, SAA 1985).

The rules for obtaining legal parenthood of a child created via surrogacy are also complex - the surrogate is the child’s legal mother and the only way for Ms X and her partner to acquire legal parenthood is via a parental order, or adoption. A parental order may be refused if the surrogate has been paid more than reasonable expenses, but the courts can authorise such payments (s 54(8) HFEA 2008). In practice, there is yet to be a case where a parental order has been refused on this basis. This is unsurprising, usually by the time an application for a parental order is made the child will be living with the intended parents and the surrogate will have relinquished the child. In addition to the ban on commercial surrogacy, such arrangements are also legally unenforceable thus making it a legally uncertain route of founding a family. Although a rare occurrence, the surrogate could renege at any point in the process and refuse to relinquish the child. In such circumstances a Child Arrangement Order could be sought under the Children and Families Act (*Re Z (Surrogacy Agreements) (Child Arrangements Orders)* [2016] EWFC 34; [2017] 1 F.L.R. 946) or adoption (section 1 Adoption and Children Act 2002). if it is in the child’s lifelong welfare to reside with the intended parents. By way of contrast, in California surrogacy is run along commercial lines and the contracts are binding on the parties. It is therefore a much safer bet for intended parents, such as Ms X.

Returning to *XX,* the Court of Appeal overturned the first instance ruling and permitted recovery of the costs of a commercial surrogacy arrangement in California. The Court of Appeal held the law:

banning commercial surrogacy, relates solely to acts undertaken in the UK, and even then only to a limited extent: there is no indication of an intention on the part of Parliament to give the section extraterritorial effect (at [55]).

Furthermore, the Court reiterated that the Surrogacy Arrangements Act 1985 does not legislate for countries other than the UK and the intended parent is not caught by the criminalisation provisions (at [70]). Preventing recovery would mean the claimant would not be fully compensated and so would constitute “overkill” (at [72]).

McCombe L.J. is correct that the illegality defence does not apply to Ms X. The Surrogacy Arrangements Act 1985 does not have extraterritorial effect and the provisions prohibiting commercial surrogacy do not catch the surrogate and intended parents. There are good reasons for this. Whatever one thinks of commercial surrogacy, it would be undesirable to throw a new-born child’s intended parents and the surrogate mother in gaol and place the child in care when the intended parents are perfectly capable of looking after it (see Margaret Brazier, *Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulation* (Cm 4068, 1998) (*Brazier*) at [4-50]).

Yet while Ms X would not act illegally by taking part in a commercial surrogacy arrangement in California, such an arrangement would be illegal if it was performed in this country, even if it is other parties – and not the claimant herself – who would break the law. The Court of Appeal acknowledged that domestic law prohibits commercial surrogacy businesses ‘in circumstances in which we have no standards set for their operation, no licensing arrangements and no regulatory policing of day to day operation’ (at [56]). The reason why there are no such standards, licensing arrangements and regulating policing of commercial agencies in the UK is not because it is beyond our ability to do so, but because Parliament sees such profit-making practices as undesirable, whether regulated or otherwise. Altruistic surrogacy is not contrary to public policy, but binding contracts and the involvement of profit-making third parties is something Parliament has legislated against. Surrogacy arrangements are not enforceable domestically because English law allows the surrogate to change her mind and, if the child’s welfare interests demand it, keep the child. The law can accept that the intended parents should not be criminalised without wishing to encourage *commercial* surrogacy.

There are many activities that are lawful in other countries that would be unlawful if they took place in this jurisdiction. Purchasing drugs is decriminalised in Portugal, managing brothels is lawful in New Zealand and assisted suicide is permitted in Switzerland. People undertaking such activities abroad, would not face prosecution here. But this does not mean that it is reasonable to expect a defendant to pay for a claimant to engage in such behaviour. We should probably emphasise that we are not taking a moralistic attitude to surrogacy (or, for that matter, drugs, sex work or assisted dying). Indeed, the first named author has previously argued that English law be reformed to allow for payment of a “moderate fee” to surrogates in addition to “reasonable expenses” (Alghrani and Griffiths, (2017) 29 C.F.L.Q. 165) and the second named author has advocated using the law of unjust enrichment to enable intended parents to recoup money when the surrogate reneges on the deal (see Purshouse and Bracegirdle, (2018) 26 Med. L. Rev. 557). Rather, our argument is that if the law is defective, then it should be reformed.

The Court of Appeal supported the argument that the defence of illegality did not apply in the present case by reliance upon the Supreme Court decision of *Patel v Mirza* [2016] UKSC 42; [2017] A.C. 467 which was interpreted as giving the Court of Appeal “a fresh opportunity to examine the ‘public policy’ behind the bar to this particular civil claim which was held to exist 17 years ago in *Briody*” (at [57] per McCombe L.J.). *Patel* was an unjust enrichment case involving money transferred pursuant to an illegal agreement but a nine-member panel of the Supreme Court considered the defence of illegality across private law.

The majority, endorsing a policy-based or balancing approach, maintained that the essential rationale behind the defence was whether the public interest would be harmed by permitting a claim. In assessing this, there are three things to consider:

1. …the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim,
2. …any other relevant public policy on which the denial of the claim may have an impact and
3. …whether denial of the claim would be a proportionate response to the illegality’ (at [120]).

Within this framework “various factors may be relevant, but it would be a mistake to suggest that the court is free to decide a case in an undisciplined way” (at [120] per Lord Toulson).

*Patel* is undoubtedly a landmark case but it is arguable that it does not justify a reconsideration of *Briody* as the defence of illegality was not a hurdle in that case. Neither Ms X nor Ms Briody would have acted illegally at the time *Briody* was decided. Instead, *Briody* was concerned with the separate issue of whether awarding damages was contrary to public policy. *Patel* is not necessarily relevant to the latter question. With respect to the Court of Appeal, it went beyond the scope of *Patel* in departing from the binding authority of *Briody* on this occasion.

Even if a departure from *Briody* was permissible, we might question the Court of Appeal’s reasoning in this respect.Noting that authorisation of payments when granting a parental order was already possible at the time *Briody* was decided (at [47]), McCombe L.J. maintained that ‘”hings have certainly moved on in the exercise of that jurisdiction” (at [48]). The case of *Re C (Parental Order)* [2013] EWHC 2408; [2014] 1 F.L.R. 757, where Theis J. approved payments for 95,000 USD when making a parental order, was taken as indicating that “the law has advanced considerably in approving retrospectively payments made in connection with surrogacy” (at [48]).

Furthermore, “social conditions have moved on” (at [51]), with parental orders no longer being restricted to married couples. As such, the court must ask itself “whether the law is achieving a necessary coherence and consistency in sticking rigidly to a perception of public policy formulated even a few years ago” (at [54]).

Times may have changed since 2001 in many respects, but not in ways that are particularly pertinent to this issue of whether *Briody* was correctly decided. Firstly, *Re C* is not the landmark decision that the Court of Appeal portrays it to be. Payments in excess of reasonable expenses were approved at the time of *Briody* (See *Brazier* at [5.3]). If English law takes a flexible approach to surrogacy and approving payments, it is because such restrictions are meaningless when faced with an existing child whose lifelong welfare requires parental responsibility to be transferred to the intended parents. This does not indicate that the law supports commercial surrogacy as much as it supports the child’s welfare interests: “[o]nce a child is settled with the commissioning couple and attached to them, the child’s welfare will inevitably be a family court judge’s priority” (*Brazier* at [3.10]).

Secondly, transformations in societal stances towards unmarried and gay couples and single parents do not indicate attitudes towards commercial surrogacy have changed. In fact, a recent report from Surrogacy UK, based upon responses by surrogates and intended parents, opposed a commercial model (see Kirsty Horsey, *Second Report of the Surrogacy UK Working Group on Surrogacy Law Reform* (2018) p 68).

Illegality was therefore a red herring. Instead, the crux of the dispute is whether damages should be awarded. Assessment of damages involves a “value judgement” (*Heil v Rankin* [2001] QB 272; [2000] 3 All E.R. 138 at [25] per Lord Woolf MR) and policy concerns are relevant here. For example, in *Pritchard v JH Cobden Ltd.* [1988] Fam. 22; [1987] 1 All E.R. 300 the Court of Appeal refused on grounds of public policy to award the claimant costs associated with divorce that resulted from his personal injury. As noted earlier, there are convincing reasons for not awarding the costs of a Californian surrogacy in this case: doing so undermines English law’s policy of discouraging commercial surrogacy.

Finally, it is noteworthy that the Court of Appeal handed down judgment in *XX* only two days after its decision in *ARB v IVF Hammersmith* [2018] EWCA Civ 2803. This breach of contract case followed *McFarlane v Tayside Health Board* [2000] 2 A.C. 59; [1999] 4 All E.R. 961 in declaring that the costs of raising an unwanted healthy child born as a result of the defendant’s wrongdoing are irrecoverable. In *Rees v Darlington Memorial NHS Hospital Trust* [2003] UKHL 52; [2004] 1 A.C. 309,Lord Bingham believed the policy behind this was 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” (at [6]). We might question an approach that transfers scarce NHS funds to commercial surrogacy agencies in California so that a child can be *created,* but balks at providing the existing children born as a result of medical negligence with a decent quality of life. The natalist leanings of English negligence law appears to respect people’s wishes to have children, but not their desire to avoid parenthood.