**A STEP TOO FAR? *WHITTINGTON HOSPITAL NHS TRUST V XX* [2020] UKSC 14**

**Summary**

This comment piece explores the decision in *Whittington Hospital NHS Trust v XX* [2020] UKSC 14. It argues that despite notable shifts in public policy in respect of the acceptability of surrogacy as a means of family formation in the last twenty years, the Supreme Court has taken a step too far in deciding that foreign commercial surrogacy is as widely socially accepted. This impacts on the reasonableness of any claim for damages in negligence for the costs of commercial surrogacy. It is posited that the issue of whether damages for foreign commercial surrogacy are reasonable or not will be the key battleground in future negligence cases of this type.

**Keywords**

Commercial surrogacy; damages; negligence; reasonableness; public policy

**Introduction**

*XX* is an unusual surrogacy case, being firmly based in tort law – specifically medical negligence. On the face of it, *XX* resembles an earlier case – *Briody* *v St Helen's and Knowsley Area Health Authority*[[1]](#footnote-1) – though there are both factual and contextual differences. Having been rendered infertile by the admitted negligence of the hospital, *XX* sought damages to cover the cost of commercial surrogacy in California. The issue was whether such damages are recoverable, especially given the Court of Appeal decision in *Briody*, which had ruled to the contrary. We argue here that the judgment in *XX* correctly recognises a notable shift in public policy in terms of how much more widely accepted surrogacy has become in the years since *Briody* but also that, in our view, the Supreme Court has misjudged the extent of this development and the judgment goes too far in finding that foreign commercial surrogacy is as widely socially accepted as it purports.

The issues raised in the case are inevitably of broader interest to surrogacy scholars, surrogacy organisations, campaigners for law reform, policy makers and more, particularly as they involve the contentious (and often contested) differences between commercial and altruistic surrogacy. ‘Altruistic’ is used here as shorthand for the prevalent model of domestic surrogacy, in which a surrogate is recompensed by the intended parents for expenses she incurs reasonably as a result of being a surrogate, but is not paid. One reason this is a ‘contested’ definition is because on the fringes of what may be recompensed – and which have been authorised by the family courts – lie things that may technically speaking not be ‘expenses’ incurred by the surrogate,[[2]](#footnote-2) such as the cost of a recuperative holiday for her and her family after the end of the pregnancy.[[3]](#footnote-3) By ‘commercial’, we mean those models of surrogacy common in some other jurisdictions (and for our purpose here the context is California) where surrogacy agencies and other third parties operate on a for-profit basis to facilitate surrogacy arrangements, which are usually enforceable. The surrogate is usually paid on a commercially explicit basis in such arrangements, which bear all the characteristics of a contractual transaction.

The case arose from the hospital’s failure – on multiple occasions between 2008 and 2013 – to detect and therefore treat the claimant’s cervical cancer. Once the errors had been discovered, the hospital assessed XX’s condition and considered that the cancer had advanced to such an extent that it was no longer possible for her to have surgery that would have preserved her ability to bear a child. Instead, she had to undergo chemo-radiotherapy that eventuated in her clinical infertility and inability to carry a child. Had she been correctly treated in 2008, experts attested that there would have been a 95% chance of a complete cure and that she would not have developed cancer at all.

It was XX’s case that she wanted to have four children, as both she and her husband had come from large families. On top of damages awarded for the pain, suffering, loss of amenity and permanent long-term physical and psychiatric injuries incurred, XX claimed damages in respect of the expenses of four pregnancies either in California or the UK using her own eggs (or donor eggs should the use of her cryopreserved eggs prove unsuccessful). By the time the case reached the Supreme Court, the issues to be decided concerned what would be the appropriate heads of loss and quantum of damages in this latter claim only. Specifically, since eight of XX’s eggs had been harvested and stored before she had embarked on chemotherapy, among other heads of loss claimed, she sought damages that would enable her and her partner to have children via surrogacy. Expert evidence said that on the balance of probabilities it was likely that the couple could have two children using the claimant’s cryopreserved eggs and her partner’s sperm, and two further children using donor eggs.[[4]](#footnote-4) XX’s preference was to enter a commercial surrogacy arrangement in California, because of the certainty provided by enforceable contracts, and the fact that intended parents can obtain a pre-birth order from a Californian court confirming their legal status as parents in relation to the child.[[5]](#footnote-5) She also did not like the idea that she would be ‘chosen’ by a surrogate in the domestic altruistic model, rather than the other way around, and said that ‘the idea of being at the mercy of someone else's choosing, and attending informal parties to meet surrogate mothers frighten[ed] her’.[[6]](#footnote-6) Her secondary position was that she would engage in non-commercial surrogacy in the UK should Californian surrogacy not be possible. Thus, while essentially a case about negligence and quantum, the decision may have wider implications for the operation of surrogacy in the UK.

**Context**

Commercial surrogacy has been prohibited in the UK since 1985. Organisations, brokers, facilitators and the like are prohibited from operating on a for-profit basis,[[7]](#footnote-7) and even lawyers must be careful not to draw up agreements or advise on surrogacy arrangements for a fee.[[8]](#footnote-8) Doing so risks criminal sanction. In California, on the other hand, there is a thriving surrogacy industry, fully commercialised, incorporating costs for all surrogacy matching and facilitation services, binding contracts, medical procedures, legal advice, counselling and payment to the surrogate herself. A Californian surrogacy ‘journey’ will likely cost well in excess of £100,000.[[9]](#footnote-9)

In the UK, surrogacy arrangements are unenforceable by or against any of the parties.[[10]](#footnote-10) The woman who gives birth is always the legal mother of the child and will automatically have parental responsibility for the child, whether or not she is also the genetic mother, unless or until a parental order is granted by the court.[[11]](#footnote-11) Though there is no direct prohibition on the payment of money to a woman acting as a surrogate, it is implicit that payments beyond ‘reasonable expenses’ are illegitimate, in that it is one of the conditions for the transfer of legal parenthood by a parental order that this has not occurred.[[12]](#footnote-12) Since 2008, non-profit surrogacy organisations have been allowed to charge a ‘reasonable fee’ to cover their administrative costs.[[13]](#footnote-13) Data show that a ‘normal’ amount that couples or individuals entering a domestic surrogacy arrangement might expect to incur in expenses payable to a surrogate is around £10,000-£15,000, though inevitably there is a range, as all surrogates’ circumstances differ and therefore the expenses they will incur are different.[[14]](#footnote-14) That said, even where intended parents enter into commercial agreements in other jurisdictions, when they later apply for a parental order, the court is able to retrospectively authorise any payments made - and routinely does.[[15]](#footnote-15) However, this is not always without comment because the court will often have some concerns about authorising payments where it might be said that the sum paid was excessive in a way that may overbear the surrogate’s ability to consent to a parental order.[[16]](#footnote-16) The court’s primary obligation is to consider the lifelong best interests of the child concerned – and judges have recognised that this is usually best served by legitimising the relationship with their parents and authorising the parental order, notwithstanding any commerciality within the arrangement. Hedley J captured this dilemma over a decade ago in *X&Y (Foreign Surrogacy)*:

‘I feel bound to observe that I find this process of authorisation most uncomfortable. What the court is required to do is to balance two competing and potentially irreconcilably conflicting concepts. Parliament is clearly entitled to legislate against commercial surrogacy and is clearly entitled to expect that the courts should implement that policy consideration in its decisions. Yet it is also recognised that as the full rigour of that policy consideration will bear on one wholly unequipped to comprehend it let alone deal with its consequences (i.e. the child concerned) that rigour must be mitigated by the application of a consideration of that child’s welfare. That approach is both humane and intellectually coherent. The difficulty is that it is almost impossible to imagine a set of circumstances in which by the time the case comes to court, the welfare of any child (particularly a foreign child) would not be gravely compromised (at the very least) by a refusal to make an order.’[[17]](#footnote-17)

In addition to such retrospective authorisations, there have been a significant number of cases which have challenged other aspects of the requirements intended parents must meet in order to be awarded a parental order.[[18]](#footnote-18) As a body of law, these serve to indicate that these determinants of legal parenthood are failing the children they are meant to protect. Even since the decision in XX was handed down on 1 April 2020, in *Re X (Parental Order: Death of Intended Parent Prior to Birth)*[[19]](#footnote-19) the court read down S54 to enable a parental order to be granted where the intended father had died while the surrogate was still pregnant. This ensured the child’s Article 8 and 14 rights guaranteed by the European Convention on Human Rights (ECHR) were protected. A subsequent judgment from Keehan J comprehensively set out when a court may read down the provisions of S54, and indicates clearly that not meeting many of the ‘requirements’ of S54 is not necessarily fatal to a parental order application.[[20]](#footnote-20) In *Re A*, among other things, one of the issues in respect of S54 was whether, at the time of the application, the intended parents could be found to be ‘two persons who are living as partners in an enduring family relationship’[[21]](#footnote-21) in circumstances where the applicants separated prior to the child being born and the father had never had any direct contact with the child. The court granted a parental order adopting a similar approach to Theis J in *Re X*. If it was not already clear that S54 needs legislative re-thinking,[[22]](#footnote-22) these cases – and the many that have gone before them – make it absolutely imperative. Were it not for the purposive approach to statutory interpretation to ensure the statute is read in a manner that is compatible with the ECHR, the individuals in these kind of cases would be left without any legal remedy, ultimately to the detriment of the children concerned.

Thankfully, the operation and regulation of surrogacy is currently under review by the Law Commission of England and Wales and the Scottish Law Commission, supported by the Department of Health and Social Care (DHSC).[[23]](#footnote-23) As well as there being problems with the requirements in S54, it is true to say that knowledge and understanding of surrogacy more generally have changed since the law was made. While the original Surrogacy Arrangements Act 1985 reflected an ambivalence towards surrogacy (as freely acknowledged by Mary Warnock, whose 1984 Report influenced the legislation),[[24]](#footnote-24) much has changed since. Additionally, the 1985 Act came about as a result of a knee jerk reaction to an unregulated international commercial surrogacy case.[[25]](#footnote-25) Non-traditional families and ways of forming families are now more widely accepted. This is perfectly illustrated by support given to surrogacy as a form of family building in Government guidance issued by the DHSC in February 2018, later updated in November 2019.[[26]](#footnote-26) Separate guidance exists both for the parties who enter into surrogacy arrangements and for those who care for them in medical settings. In the introduction to the first of these, it is clearly stated that:

‘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’.[[27]](#footnote-27)

Furthermore, when it was announced that there would be a review of surrogacy laws undertaken by the Law Commission, Professor Nick Hopkins, Law Commissioner for England and Wales observed:

‘Our society has moved on from when surrogacy laws were first introduced 30 years ago and, now, they are not fit for purpose. For many, having a child is the best day of their lives and surrogacy can be the only option for some who want a genetic link to the baby. But the issues are difficult and there is no quick fix. Now we want all those with an interest to get involved and help us make the law fit for the modern world.’[[28]](#footnote-28)

**XX: The issues for the court**

In the assessment of damages hearing in the High Court, the argument that XX should be awarded damages to enter into a commercial surrogacy arrangement that would be unlawful in this jurisdiction was rejected.[[29]](#footnote-29) Sir Robert Nelson considered himself bound by the Court of Appeal decision in *Briody* [2001],[[30]](#footnote-30) which had ruled that damages to cover the cost of commercial surrogacy were not recoverable as this would be contrary to public policy. In addition, following *Briody*, surrogacy using donor eggs was not truly restorative of the claimant’s position or what had been lost as a result of the negligence.[[31]](#footnote-31) However, damages for the cost of non-commercial domestic surrogacy was both restorative and in line with public policy. Damages were awarded that would allow the claimant to undertake two domestic surrogacy arrangements, considering what reasonable expenses payable to the surrogate(s) would be plus other costs, including legal advice. On this basis, the claimant was awarded £37,000 plus VAT for each arrangement. The judgment therefore could be said to reflect the position of the existing law and policy towards surrogacy: a recognition of surrogacy as a legitimate form of family building, with an underlying antipathy towards commercial surrogacy. Despite the fact that the family court routinely retrospectively authorises payments made commercially in other jurisdictions,[[32]](#footnote-32) Sir Robert Nelson seemed less inclined to be seen to be actively endorsing commercial surrogacy. He said:

‘I am clear in my conclusion that in so far as the claim for Californian surrogacy expenses is concerned, it must fail. I am bound by *Briody* on this issue. Commercial surrogacy arrangements are still illegal in the UK and thus contrary to public policy’.[[33]](#footnote-33)

The claimant appealed against the rejection of her claim for commercial surrogacy and the use of donor eggs. Whittington Hospital Trust 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.[[34]](#footnote-34)

The case eventually made its way to the Supreme Court in December 2019, perhaps serendipitously (given that she had given the lead judgment in *Briody* (as Hale LJ)) becoming the final case heard by Lady Hale before her retirement. There were three issues which remained to be decided.[[35]](#footnote-35) The first two related to what may or may not be considered appropriate heads of loss: was it possible to recover damages to cover the cost of surrogacy arrangements using the claimant's own eggs and, if so, could the claimant also recover damages for the cost of entering arrangements using donor eggs? The third was more of a policy point: in either event, can such damages extend to the cost of commercial surrogacy in a country where this is not unlawful?

The Supreme Court dismissed the appeal, finding unanimously for XX on the first two issues. However, the Court was split 3:2 on the third issue. Lady Hale gave the majority judgment (with whom Lords Kerr and Wilson agreed). Lord Carnwath delivered a judgment dissenting on the third question, with which Lord Reed agreed. Describing the existing law on surrogacy as ‘fragmented and in some ways obscure’,[[36]](#footnote-36) Lady Hale’s judgment explained that surrogacy arrangements are completely unenforceable in the UK; that the surrogate mother is always the child's legal parent unless and until a court makes a parental order transferring legal parenthood to the intended parents; and that the making of surrogacy arrangements on a commercial basis is prohibited.

**Commentary**

1. *Restitutio in integrum*

The question of whether damages for surrogacy – in particular using donor eggs – would be truly restorative of the claimant’s loss arises from the position that tortious damages are based on the principle of *restitutio in integrum*. Put simply, this means that damages must, as far as is possible to achieve in monetary terms, restore a party injured by the negligence of another to the situation which would have prevailed had no negligence occurred. Though this is the starting principle, there are two main qualifications:

1. Damages will not be recoverable where such recovery would be contrary to public policy, and
2. In attempting to restore the loss, both the steps proposed to be taken and the costs incurred in taking those steps must be reasonable.

The court had to satisfy itself whether an award of damages to cover the cost of surrogacy arrangements would be restorative of the claimant’s loss when such arrangements are lawfully made and the claimant’s own eggs were to be used. Lady Hale explained that, while once there may have been an argument against this, changing times and social attitudes meant that such arguments would no longer be sustainable.[[37]](#footnote-37) In relation to the potential for the costs of surrogacy using donor eggs to be awarded, and whether this too would be restorative of the claimant’s loss, Lady Hale acknowledged that in her lead judgment in *Briody* (as Hale LJ) she had considered this not to be the case. Lady Justice King in the Court of Appeal in *XX* had disagreed, saying that ‘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’.[[38]](#footnote-38) In the Supreme Court, Lady Hale agreed, going on to say that her view on this in *Briody* ‘was probably wrong then and certainly wrong now’.[[39]](#footnote-39)

A comparison was made between awarding the costs of donor-egg surrogacy with an award covering the cost – deemed analogous – of a prosthetic limb:

‘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’.[[40]](#footnote-40)

In addition, Lady Hale went on to consider exactly what it was a woman might hope for in having a child, which she defined as ‘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’.[[41]](#footnote-41) Surrogacy using donated eggs would give the claimant two out of four of those experiences, including the one that Lady Hale clearly stated is the most important – bringing up the child as one’s own. Based on these considerations, Lady Hale found that subject to there being a reasonable prospect of success, damages for the costs of domestic surrogacy using either the claimant’s own eggs or donor eggs could be awarded.[[42]](#footnote-42)

Despite the unanimity on the *principle* that public policy considerations may limit the principle of *restitution in integrum*, what this judgment hasn’t done is to explore the concept of public policy in the context of reproductive matters more generally, and specifically when the harm is to reproductive autonomy. A brief comparison is made by Lady Hale with *McFarlane v Tayside Health Board* [2000].[[43]](#footnote-43) In that case, though the Inner House of the Court of Session (Scotland) held that a couple who become pregnant following negligent advice concerning a vasectomy were able to recover damages for the cost of bringing up the resulting child, the House of Lords ruled that the costs of bringing up a healthy child are *not* recoverable, as this would be contrary to public policy. As Lady Hale notes, ‘[t]hey 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.’[[44]](#footnote-44) The decision in *McFarlane*  is however distinguishable from *P*arkinson v St James and Seacroft University Hospital NHS Trust where a child was conceived following a negligent sterilisation and the child born had a number of disabilities (not attributable to the negligence).[[45]](#footnote-45) The Court of Appeal was bound by the earlier House of Lords decision, ruling that recovering costs for rearing a healthy child must fail, but allowed for the recovery of additional costs for raising a child with disabilities. Perhaps, in the light of these judgments, such decisions on policy regarding ‘wrongful birth’ ought to be revisited; there being a clear legal tension between restoring the claimant to their original position in cases concerning fertility and medical negligence. The corollary is that that public policy arguments thwart the notion a claimant should be entitled to recover damages for an *unplanned* child, in contrast to the claimant in *XX* being able to recover (potentially substantial) damages for a *planned* child.

1. *Public policy and commercial surrogacy*

The public policy issue under consideration in *XX* was recognised by the Court as ‘the most difficult question’.[[46]](#footnote-46) The question was whether damages could be given for the cost of commercial surrogacy in a country where such an arrangement would not be unlawful. It was noted that existing law does not prohibit people from entering into commercial surrogacy arrangements overseas. As the 1985 Act does not criminalise intended parents for taking part in commercial surrogacy, the surrogacy arrangements in California which the claimant intended to enter into would not involve the commission of any criminal offence in either the UK or any other jurisdiction.[[47]](#footnote-47)

Lady Hale observed that there have been a number of ‘quite dramatic’ societal developments since *Briody* [2001]. In *Briody*, she had ruled against the award of damages for overseas commercial surrogacy as being contrary to public policy. Since then, she acknowledged, the use of assisted reproduction techniques is now widespread and has become more socially acceptable. In particular, Lady Hale relied on the fact that the courts have made every effort to recognise family relationships created by surrogacy, including foreign commercial surrogacy, in the granting of parental orders. She detailed how the government now supports surrogacy as a lawful and legitimate way of creating families and how the Law Commissions have provisionally proposed a new pathway for surrogacy which, if accepted, would enable children born from surrogacy to be recognised as the child of the intended parents from birth.[[48]](#footnote-48) The overriding tenor of her judgment was therefore that where there is a foreign commercial surrogacy, intended parents and children born via surrogacy would and should be afforded maximum legal recognition.

It is obviously important to highlight the differences in background context between *Briody* and *XX*. When *Briody* was decided in 2001, as now, the Surrogacy Arrangements Act 1985 prohibited commercial surrogacy. The Court of Appeal heard *Briody* three years after the Brazier Report was published,[[49]](#footnote-49) in which commercial surrogacy had again been posited as problematic, and concerns had been raised about exactly what ‘reasonable expenses’ payable to surrogates could entail. Further, the case was seven years before changes to who could in fact become parents via a parental order were made by the Human Fertilisation and Embryology Act 2008, coming in to force in April 2010. This was (although it can be criticised for not going far enough) clearly a liberalisation and a recognition of non-traditional family formation.[[50]](#footnote-50) It was a similar amount of time before the first surrogacy case highlighting the problems that could arise when couples sought commercial surrogacy overseas. In *X & Y (Foreign Surrogacy)* the payment made to the Ukrainian surrogate clearly exceeded ‘reasonable expenses’. As highlighted above, Hedley J, in considering whether to authorise the payments and allow the parental order, had to choose between this and the welfare of a child who would be ‘stateless and parentless’ if he did not.[[51]](#footnote-51) Only two years later, the lifelong welfare interests of surrogate born children was made the primary consideration for the court.[[52]](#footnote-52) Since *X & Y*, as the Supreme Court noted, there have been significant numbers of foreign commercial surrogacy arrangements retrospectively authorised by the courts in the granting of parental orders.[[53]](#footnote-53) And, from 2019, in a further liberalisation single applicants have been able to obtain a parental order, as long as they are genetically related to the child.[[54]](#footnote-54)

These examples, as well as changes in attitude highlighted by Lady Hale, clearly show that surrogacy arrangements in 2020 take place in a very different context than they did in 2001. However, it is a big leap from these observations to the conclusion that damages for foreign commercial surrogacy would not now be contrary to public policy, as Lady Hale concluded.[[55]](#footnote-55) Altruistic surrogacy was almost assumed to be risky but the pros and cons of domestic surrogacy were not explored at any length in *XX* where the essential, or only, issue was the legal principle of recoverability in law. Obviously these become more important given the outcome in *XX* both in terms of the result and the fact that Lady Hale indicated that such damages awards would not be immediately forthcoming in every case and that there were limiting factors on the principle, based on reasonableness, as outlined above.[[56]](#footnote-56) Both the treatment programme and the costs involved must be ‘reasonable’; and it must be ‘reasonable’ for a particular claimant to seek the foreign commercial arrangements proposed rather than to enter a surrogacy arrangement within the UK. Even then, it would presumably only be reasonable if the proposed destination has a well-established system in which the interests of all involved, including the child, are properly safeguarded, as Lady Hale acknowledged:

‘regulated 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’.[[57]](#footnote-57)

Thirdly, the costs involved must also be ‘reasonable’. This is likely to be the ‘meat’ of many such future claims – it is hard to see that such inflated costs would be reasonable unless there was a particular and legitimate reason the claimant felt unable to pursue domestic surrogacy, and this is what defendants will have to push back on.

Lord Carnwath, in his dissenting opinion (with which Lord Reed agreed), said that whilst there have been many changes in society's attitudes to families and family formation, he considered that public attitudes remain deeply divided on the topic of commercial surrogacy and would therefore have followed *Briody*. This seems to us to be correct. He also considered it to be ‘contrary to principle for the civil courts to award damages on the basis of conduct which, if undertaken in this country, would offend its criminal law’.[[58]](#footnote-58) Additionally, despite it not being about illegality, he found that the case raised broader questions about legal coherence, in particular the consistency and parity between civil and criminal law. As there had been no change in the laws on commercial surrogacy which led to the refusal of damages in *Briody*, he viewed it inconsistent with ‘legal coherence’ to allow damages to be awarded on a different basis: ‘the law must aspire to be a unified institution, the parts of which – contract, tort, the criminal law – must be in essential harmony’.[[59]](#footnote-59)

**Conclusion**

Some have seen the decision in *XX* as an endorsement of commercial surrogacy, latching on to Lady Hale’s ‘change of mind’ in this respect. However, it is not this at all. While acknowledging and welcoming the changes in society since *Briody*, Lady Hale’s comments about California and commercial surrogacy are actually rather ambivalent. Arguably, her suggestions about ‘reasonableness’ signify that she imagines situations in which such claims would be unreasonable, and raise issues which continue to be intrinsic to the public policy objection to commercial surrogacy. It is both telling and somewhat paradoxical that in the new framework proposed in the Law Commissions’ consultation document indicates that there are no plans to allow commercial surrogacy agencies to operate domestically, and that this was not explored within the judgment, given that it goes to the question of policy. It might be that this judgment has come too soon (or is a step too far) in relation to what public policy is or is not.

Lady Hale and the majority’s exhortation regarding ‘reasonableness’, however, goes some way to remove this decision as being seen as an endorsement of commercial surrogacy *per se*. Rather, it can be understood merely as an acknowledgement that in *some* situations it may be reasonable for a claimant to pursue commercial surrogacy overseas rather than to undertake altruistic surrogacy at home. It will be interesting to see how future courts decide what is reasonable and what is not. Evidently, it will not be reasonable to award the costs of surrogacy in a jurisdiction where the regulatory regime does not provide the expected safeguards. This would seem, on the face of it at present, to leave the US (particularly California) as the primary target for such claims, which is interesting in relation to the final aspect of the reasonableness equation, given that it is probably among the most expensive commercial surrogacy destinations. It is probably true to say that the ‘cheaper’ commercial surrogacy destinations have fewer safeguards than we might like – including for the women who act as surrogates.[[60]](#footnote-60) This is brought into sharp relief in jurisdictions where ‘cheaper’ and more questionable arrangements take place that subsequently prohibit commercial surrogacy to foreigners (e.g. India, Thailand, Mexico) and a new ‘market’ emerges elsewhere replicating similar vulnerabilities. Further, how will the reasonableness or otherwise of such increased cost be measured? By comparison to the cost of altruistic domestic surrogacy? If so, it is difficult to see how something that would potentially cost ten times as much is a reasonable sum to expect defendants to pay. What evidence will be required to demonstrate reasonableness? Presumably expert testimony, in which case the cost of litigation will inevitably rise. It is therefore not hard to imagine that, in some cases at least, claims such as those made in *XX* will not be considered reasonable.

That said, the impact of this judgment, if there is one beyond NHS Trusts having to fight an immediate flurry of claims for damages to pay for (commercial) surrogacy based on loss of fertility caused by negligence, may be lessened by the Law Commissions’ eventual proposals. Expected now in 2022, their recommendations, should they follow even vaguely what is hinted at in the original consultation, would create a pathway to parenthood via domestic surrogacy that recognises the intended parents as the legal parents from birth. Individuals and couples who follow the pathway would no longer need to apply for a parental order.[[61]](#footnote-61) The pathway includes such protective measures as (potentially) regulated non-profit surrogacy organisations, able to offer support and guidance to all parties, recommendations that the parties seek independent legal advice and implications counselling (though arguably one or both of these may not always be necessary) and better guidance/transparency about what costs a surrogate might entail on her journey. There may also be relaxed rules on advertising for or to become a surrogate.

Such improvements should go some way to removing the uncertainty that many prospective intended parents currently face when considering domestic surrogacy. It is often this uncertainty – especially the uncertainty about whether they may ever become parents at all, as the surrogate is the legal mother – that drives intended parents overseas in the first place. Binding contracts and laws that state the surrogate is *not* the mother must be very attractive. But this does not make damages for the cost of entering such arrangements reasonable, particularly when the cost so far exceeds the costs of domestic surrogacy.

1. [2001] EWCA Civ 1010. [↑](#footnote-ref-1)
2. Or about which reasonable people may have differing opinions about whether such expense is objectively reasonable. The Law Commissions identify in their joint consultation that ‘stakeholders expressed the view that the current law, which permits intended parents to pay surrogates “expenses reasonably incurred”, is

   unclear and uncertain’ and that they ‘have seen payments … being made to surrogates which appear beyond the everyday understanding of an “expense.”’ (Law Commission of England and Wales and Scottish Law Commission, *Building families* *through surrogacy: a new law. A joint consultation paper* (June 2019) para. 1.46). [↑](#footnote-ref-2)
3. *Re A, B and C (UK surrogacy expenses)* [2016] EWFC 33. [↑](#footnote-ref-3)
4. It is here that one of the significant factual differences between this case and *Briody* arises: in *Briody* it had been found that the likelihood of fertilisation using Ms Briody’s own eggs was so low that the costs claimed were not reasonable. [↑](#footnote-ref-4)
5. Note, however, that although outlined in the High Court judgment this way (*XX v Whittington Hospital NHS Trust* [2017] EWHC 2318 (QB) at [31]), while such a birth order may confer legal parenthood under Californian law, it does not do so in the UK. Intended parents must still apply for a parental order in the UK if they wish to be recognised as the child’s legal parents. [↑](#footnote-ref-5)
6. *ibid.* at [32]. [↑](#footnote-ref-6)
7. Surrogacy Arrangements Act 1985, S2. [↑](#footnote-ref-7)
8. *JP v LP & Others* [2014] EWHC 595 (Fam), at [7]. [↑](#footnote-ref-8)
9. See Horsey, K., *Surrogacy in the UK: further evidence for reform: Second Report of the Surrogacy UK Working Group on Surrogacy Law Reform* (Surrogacy UK, December 2018), p.41; Law Commissions (n ? above), para. 3.107. Jadva, Prosser and Gamble found that a significant reason for *not* going ahead with surrogacy in the US, despite initially considering it, was the cost (‘Cross-border and domestic surrogacy in the UK context: an exploration of practical and legal decision-making’ (2018) 4 *Human Fertility*, at 5). Among the respondents to their study, they also found that ‘[p]arents who had undergone surrogacy in the USA had spent more money on surrogacy’ than others, with a median spend of £120,000 (p.8). [↑](#footnote-ref-9)
10. Surrogacy Arrangements Act 1985, S1A (inserted by S36 Human Fertilisation and Embryology Act 1990). [↑](#footnote-ref-10)
11. S33 Human Fertilisation and Embryology Act 2008 and S2(2)(a) of the Children Act 1989. The position regarding the legal father (or second legal parent) at birth is more complicated, depending on whether the surrogate is married or in a civil partnership at the time. Intended parents must meet certain requirements (outlined in S54 or S54A Human Fertilisation and Embryology Act 2008 as appropriate) in order to obtain a parental order, a bespoke order transferring legal parenthood from the surrogate to the intending parent(s) in cases of surrogacy. For those who cannot, adoption is a possibility, but not in all cases – see e.g. *B v C (Surrogacy – Adoption)* [2017] EWFC 17 and *B (Adoption: Surrogacy and parental responsibility)* [2018] EWFC 86. [↑](#footnote-ref-11)
12. Human Fertilisation and Embryology Act 2008, S54(8). See Sally Sheldon and Kirsty Horsey, who identify that ‘no criminal offence is committed by either the surrogate mother or the intending parents if payments are made. The enforcement mechanism lies in the possible refusal of a Parental Order’ (‘Still hazy after all these years: The law regulating surrogacy’ (2012) *Medical Law Review* 20 (1): 67, at 77). [↑](#footnote-ref-12)
13. Surrogacy Arrangements Act S2(2A)-(2C), inserted by HFE Act 2008 S59(4), acknowledged in the judgment at [19]. [↑](#footnote-ref-13)
14. See Horsey, K, n9 above, pp 38-39. In *Re A, B and C (UK Surrogacy expenses)* [2016] EWFC 33 Russell J stated that there was no ‘universally acceptable figure to pay for surrogacy expenses in the UK’ (at [3]). [↑](#footnote-ref-14)
15. E.g. *X & Y (Foreign Surrogacy)* [2008] EWHC 3030 (Fam); *Re C (Parental Order)* [2013] EWHC 2413 (Fam), [↑](#footnote-ref-15)
16. However the court acknowledges that the amount will vary, e.g. in *X & Y (Foreign Surrogacy)* (*ibid*), Hedley J observed that ‘[t]he whole basis of assessment will be quite different in say urban California to rural India’ and in Re S [2009] EWHC 2977 that the ‘*c*ourt should be astute not to be involved in anything that looks like the simple payment for effectively buying children overseas. That has been ruled out in this country and the court should not be party to any arrangements which effectively allow that.’ He added that a court hearing an application for a parental order will need to be ‘astute to ensure that sums of money which might look modest in themselves are not in fact of such a substance that they overbear the will of a surrogate.’ [↑](#footnote-ref-16)
17. [2008] EWHC 3030 (Fam) (at [24]). [↑](#footnote-ref-17)
18. In respect of one challenge which was beyond the court’s remit, the Human Fertilisation and Embryology Act 2008 (Remedial) Order 2018 came into force on 3 January 2019, which introduced S54A into the Human Fertilisation and Embryology Act 2008 to allow applications for a parental order to be made by a single applicant, where they were able to satisfy the requirement that the gametes of the applicant were used to bring about the creation of the embryo (S54A(1)(b)). [↑](#footnote-ref-18)
19. [2020] EWFC 39. [↑](#footnote-ref-19)
20. *Re A (Surrogacy: s.54 Criteria)* [2020] EWHC 1426 (Fam), see especially [54] onwards. [↑](#footnote-ref-20)
21. S54(4)(a) [↑](#footnote-ref-21)
22. A point in fact made as early as 1998 by Professor Margaret Brazier in her Government-commissioned review of surrogacy (*Surrogacy: Review for Health Ministers of Current Arrangements for Payments and Regulation, Report of the Review Team*, Cm 4068 (HMSO, London 1998)). [↑](#footnote-ref-22)
23. Note 4, above. [↑](#footnote-ref-23)
24. *Report of the Committee of Inquiry into Human Fertilisation and Embryology* (1984) Cmnd 9314. Baroness Warnock, later changed her position. In 2002, she said that the view of the majority was likely ‘over-influenced’ by scare stories about commercial surrogacy agencies in the US ‘poised to establish themselves in the UK’ which seemed to the Committee to be ‘extraordinarily exploitative of the women involved’ (Warnock, M., *Making Babies: Is There a Right to Have Children?* (Oxford: Oxford University Press), 88-89). The late Lady Warnock also become one of the supporting signatories (along with Professor Margaret Brazier and Susan Golombok, who were both on the later Committee of Inquiry which led to the publication of the Brazier Report) of both the 2015 (*Surrogacy in the UK: Myth Busting and Reform*) and 2018 (*Surrogacy in the UK: Further Evidence for Reform*) published by the Surrogacy UK Working Group on Law Reform. [↑](#footnote-ref-24)
25. *In re C (A Minor) (Wardship: Surrogacy*) [1985] FLR 846, also known as the ‘Baby Cotton case’. [↑](#footnote-ref-25)
26. The first is contained in ‘The surrogacy pathway: surrogacy and the legal process for intended parents and surrogates in England and Wales’ and the second in ‘Care in surrogacy: guidance for the care of surrogates and intended parents in surrogate births in England and Wales’ (both available at https://www.gov.uk/government/publications/having-a-child-through-surrogacy). These are highlighted in the judgment at [34]. [↑](#footnote-ref-26)
27. ‘The surrogacy pathway’ (*ibid.*), p.4. [↑](#footnote-ref-27)
28. Law Commission of England and Wales, ‘Surrogacy laws set for reform as Law Commissions get Government backing’ 4 May 2018 (available at https://www.lawcom.gov.uk/surrogacy-laws-set-for-reform-as-law-commissions-get-government-backing/). [↑](#footnote-ref-28)
29. *XX v Whittington Hospital NHS Trust* [2017] EWHC 2318 (QB). [↑](#footnote-ref-29)
30. N3 above. [↑](#footnote-ref-30)
31. In *Briody*, the Court of Appeal considered that donor-egg surrogacy would place the claimant in a completely *different* position, as ‘neither the child nor the pregnancy would be hers’. In addition, the prospects of fertilisation using the claimant’s own eggs were considered to be so low that the costs claimed were not reasonable in any case. [↑](#footnote-ref-31)
32. See e.g. *Re B (Foreign Surrogacy)* [2016] EWFC 77 (India); *AB (Foreign surrogacy – children out of the jurisdiction)* [2019] EWFC 22 (Iran); *R and S v T (Surrogacy: Service, Consent and Payments)* [2015] EWFC 22 (Ukraine). [↑](#footnote-ref-32)
33. At [45]. [↑](#footnote-ref-33)
34. [2018] EWCA Civ 2832. [↑](#footnote-ref-34)
35. Set out at [8]. [↑](#footnote-ref-35)
36. At [9]. [↑](#footnote-ref-36)
37. At [44]. [↑](#footnote-ref-37)
38. At [103]. See also Lady Hale’s judgment in *Re G (Children) (Residence: Same Sex Partner)* [2006] UKHL 43 where she identified three types of parenthood: gestational parenthood, biological parenthood and social and psychological parenthood. [↑](#footnote-ref-38)
39. At [45]. [↑](#footnote-ref-39)
40. At [46]. This passage of the judgment could perhaps have been phrased more carefully, as it could be taken to imply that a child born from the use of donated gametes ‘is not as good as’ a genetically related child. [↑](#footnote-ref-40)
41. At [47]. [↑](#footnote-ref-41)
42. At [48]. [↑](#footnote-ref-42)
43. 2 AC 59. [↑](#footnote-ref-43)
44. At [42]. [↑](#footnote-ref-44)
45. [2001] EWCA Civ 530. [↑](#footnote-ref-45)
46. At [47]. [↑](#footnote-ref-46)
47. At [40] and [51]. [↑](#footnote-ref-47)
48. Law Commission of England and Wales, ‘Surrogacy reforms to improve the law for all’ 6 June 2019 (available at https://www.lawcom.gov.uk/surrogacy-reforms-to-improve-the-law-for-all/) [↑](#footnote-ref-48)
49. See note X, above. [↑](#footnote-ref-49)
50. As further background, the Civil Partnerships Act was enacted in 2004. It was not until 2013 that same-sex marriage was recognised (Marriage (Same Sex Couples) Act 2013). [↑](#footnote-ref-50)
51. At [13]. [↑](#footnote-ref-51)
52. Human Fertilisation and Embryology (Parental Orders) Regulations 2010 (now 2018). [↑](#footnote-ref-52)
53. Though it should be noted there are no endorsements of such arrangements, only observations that S54(8) seems no longer to be fit for purpose in the light of the 2010 Regulations (now 2018) where welfare considerations tip the balance. [↑](#footnote-ref-53)
54. Human Fertilisation and Embryology Act 2008 (Remedial) Order 2018. This followed *Re Z (no.2)* [2016] EWHC 1191 (Fam), where it was ruled that the inability of single applicants to obtain a parental order was incompatible with the single applicant and the child’s rights guaranteed by the ECHR. [↑](#footnote-ref-54)
55. At [52]-[53]. [↑](#footnote-ref-55)
56. At [54]. [↑](#footnote-ref-56)
57. At [53]. [↑](#footnote-ref-57)
58. At [66]. [↑](#footnote-ref-58)
59. At [64], quoting Lord Mance in *Patel v Mirza* [2016] UKSC 42 (at [191]), in turn quoting McLachlin J in *Hall v Hebert* [1993] 2 SCR 15, 175-176. [↑](#footnote-ref-59)
60. See Law Commissions (note ? above), para. 2.52 and subsequent. For a recent example (albeit with problems exacerbated by the effects of Covid-19) see ‘The stranded babies of Kyiv and the women who give birth for money’ *The Guardian* 15 June 2020, available at https://www.theguardian.com/world/2020/jun/15/the-stranded-babies-of-kyiv-and-the-women-who-give-birth-for-money, and ‘8 Arrested in Russia's First Surrogacy Probe’ *The Moscow Times* 3 August 2020, available at https://www.themoscowtimes.com/2020/08/03/8-arrested-in-russias-first-surrogacy-probe-a71049. [↑](#footnote-ref-60)
61. Notably, in terms of the public policy arguments and whether the Supreme Court could be said to have got that ‘wrong’, it is proposed that UK-based intended parents who enter an overseas arrangement would *not* be on the pathway, and thus would continue to need to apply for a parental order. Unlike overseas adoption in certain jurisdictions, there is not a proposal for there to be automatic recognition of surrogacy arrangements that have taken placed in jurisdictions approved by the UK Government (see the Adoption (Recognition of Overseas Adoptions) Order 2013). [↑](#footnote-ref-61)