

## I. INTRODUCTION

In *Whittington Hospital NHS Trust v XX*, both Lady Hale and Lord Carnwarth drew comparisons with the House of Lords' approach to negligently-induced conception and birth in *McFarlane v Tayside Health Board*<sup>1</sup> and *Rees v Darlington Memorial Hospital NHS Trust*.<sup>2</sup> While those cases concerned whether the courts should award the maintenance costs of an unintended child, *XX* turned on the opposite issue entirely --- whether the courts should fund the creation of children for a woman negligently denied the ability to do so herself. The comparison was entirely apt, however, as both are areas of law in which the calculation of damages has been held to require direct engagement with questions of public or legal policy. But, while the influence of policy in *McFarlane* and *Rees* has been rightly criticized, it was legitimately a core issue in the *XX* litigation. This was so because in *XX*, the fundamental question was the appropriate way to compensate Ms X's lost fertility, and specifically whether it was right to award her the costs of making a commercial arrangement with a surrogate through an agency in California. Under the *Surrogacy Arrangements Act 1985* ('SAA') surrogacy is lawful, however a surrogacy arrangement is not enforceable by or against anyone making it.<sup>3</sup> A surrogate may be paid only 'reasonable expenses', and section 2 makes it a criminal offence to initiate or take part in negotiations to make a surrogacy arrangement on a commercial basis, although this prohibition does not extend to the potential surrogate and intended parents.<sup>4</sup> The law on surrogacy was amended by the *Human Fertilisation and Embryology Act 2008* ('HFEA 2008') to allow for the operation of non-profit surrogacy agencies that connect those intended parents with potential surrogates.<sup>5</sup> The policy underpinning the relevant law was rightly thought to be crucially relevant to whether the courts should make an award to enable a claimant to make good her loss by using her damages to purchase services in a way that would, to some extent, be illegal in this country. Hence, while the subject matter of the case is narrow, the decision in *XX* has broader implications about the relevance of public policy to damages awards, both in clinical negligence itself and more generally. It also raises important questions about how the law does and should value lost reproductive capacity.

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<sup>1</sup> [2000] 2 AC 59.

<sup>2</sup> [2004] 1 AC 309.

<sup>3</sup> *Surrogacy Arrangements Act 1985*, s.1A.

<sup>4</sup> *Surrogacy Arrangements Act 1985*, s.2(1).

<sup>5</sup> *Human Fertilisation and Embryology Act 2008*, s.59.

## II. THE CASE

Ms X was 29 when she was diagnosed with cervical cancer. Due to the defendant's (admitted) negligence in failing to detect the cancer earlier, she suffered much more severe consequences than she would otherwise have done. By the time the cancer was detected, fertility-preserving surgery was impossible. Devastated by this news, she postponed the treatment of her cancer to seek advice on whether her fertility might be preserved via surgery. It could not. In July 2013, she underwent ovarian stimulation and twelve of her eggs were harvested and cryopreserved. She and her partner intended to use his sperm to inseminate them and produce their own biological children via surrogacy. She then proceeded with chemo-radiotherapy, which left her uterus and ovaries so irreparably damaged, all possibility of her becoming pregnant or carrying a child was destroyed. The matter before the High Court was one of quantum only. Sir Robert Nelson awarded damages for her pain, suffering and lost amenity from the injuries, future loss of earnings, and costs of future treatment. The difficult question was whether she ought also to receive damages for the cost of engaging in a surrogacy arrangement.

The court heard that 'one of her central ambitions in life was to found her own family', and that were her surrogacy plans to fail, she risked relapsing into the anxiety and depression she had suffered due to her injuries. Ms X's preferred approach was to make a commercial arrangement with a surrogate in California, largely because in California such agreements are binding and intended parents can obtain 'pre-birth orders' confirming their status as legal parents. By contrast, the unenforceability of surrogacy agreements in the United Kingdom means intended parents face the risk that the surrogate, who is the legal mother, may refuse to give up the child.<sup>6</sup> Ms X hoped to ensure that she would not lose custody of any children born using her own eggs given that the eggs she had harvested were likely to achieve only two successful pregnancies. She also wanted to be able to choose her surrogate, which is permitted in California. She gave evidence that she could not bear the approach used in the United Kingdom, where potential surrogates and intended parents are introduced at informal parties and the surrogate chooses for whom she will carry a child. Ms X wanted to be in control of who would carry her children.

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<sup>6</sup> However, as is explained below at note 68, she would still not be guaranteed parenthood under English law of any child born in California, as she would still be required to apply for a parental order in this country for such status to be recognised here.

Despite this, she conceded that she wanted children badly enough that she would use the UK system if her claim was denied, even though to do so would cause her substantial stress. She therefore sought damages to cover the expense of four pregnancies to be achieved via commercial surrogacy in California, which would include a commercial fee, lawyers' fees and agency fees. This would be much more expensive than a UK arrangement. She would use her own eggs, but would use donor eggs if her own were insufficient to produce the four children she and her partner desired. The evidence suggested that she would probably achieve only two pregnancies using her eggs, and hence would need to use donor eggs to produce the further two children.

At first instance, Sir Robert Nelson considered himself bound by the very similar case of *Briody v St Helens and Knowsley Area Health Authority* (2001).<sup>7</sup> Ms Briody had also lost her ability to carry children due to negligence, and sought the cost of commercial surrogacy in California using both her own eggs and donor eggs, or alternatively the cost of surrogacy in the United Kingdom. The only relevant difference was that Ms Briody's chances of success with her own eggs were around 1%, while Ms X's were roughly 40%.<sup>8</sup> Ms Briody's claim for surrogacy costs, with both her own eggs and those obtained from a donor, failed in both the High Court and the Court of Appeal. Following *Briody*, Sir Robert Nelson refused the costs of Californian surrogacy, but awarded the reasonable expenses associated with a UK-based arrangement. He limited this to the cost of two surrogacies using the claimant's own eggs, as the evidence suggested she would achieve only two live births using her own eggs. He refused to award the cost of donor egg surrogacy. The claimant appealed the rejection of the Californian surrogacy and donor eggs surrogacy costs. The Hospital cross-appealed on the award for the costs of non-commercial surrogacy. The Court of Appeal awarded the full costs of the commercial surrogacy, including

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<sup>7</sup> *Briody v St Helens and Knowsley Area Health Authority* [2001] EWCA Civ 1010; *Briody v St Helens and Knowsley Area Health Authority* [2002] QB 856, CA.

<sup>8</sup> The evidence presented rightly suggested that her chances of conception with her own eggs, even if extracted immediately, were very low due to her advanced age. Ms X was in her 20s when her eggs were extracted, while Ms Briody was in her mid-40s. The likelihood of conception is strongly correlated with the age of the woman's eggs, not the age of the surrogate who would carry any embryo that might be created: see, eg, David B. Dunson et al., 'Changes with Age in the Level and Duration of Fertility in the Menstrual Cycle' (2002) 17 *Human Reproduction* 1399; Susan Bewley et al., 'Which Career First: The Most Secure Age for Childbearing Remains 20-35' (2005) 331 *British Medical Journal* 588; Nichole Wyndham et al., 'A Persistent Misperception: Assisted Reproductive Technology Can Reverse the "Aged Biological Clock"' (2012) 92 *Fertility and Sterility* 1044.

that using donor eggs, with a small reduction in the general damages.<sup>9</sup> The hospital then appealed to the Supreme Court against the award of the cost of surrogacy in California.

According to Lady Hale, there were three issues: were damages to cover surrogacy using the claimant's own eggs recoverable? If they were, should this include the cost of surrogacy using *donor* eggs? And whichever approach was taken, should the damages include the cost of surrogacy undertaken commercially in another country? This third issue involved complex questions about the extent to which United Kingdom policy on the commercial arrangement of surrogacy should have a bearing on which costs should be awarded.

### **III. SURROGACY COSTS AND THE NATURE OF MS X'S LOSS**

Lady Hale's first two issues raise the fundamental question of what is the nature of the loss when a woman is denied the ability to conceive and carry children? How that loss is understood is crucial, as the nature of the loss determines what compensation should be awarded. As Lady Hale emphasised in both *Briody* (in which she also appeared) and *XX*, tort damages should, in the words of Lord Blackburn in *Livingstone v Rawyards Coal Co*, be 'as nearly as possible ... 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'.<sup>10</sup> This was qualified by two principles, she explained: that some costs might be irrecoverable by reason of policy, and that 'in seeking to restore what has been lost, the steps taken must be reasonable ones and the costs thereby incurred must be reasonable'.<sup>11</sup>

In *Briody*, *all* costs associated with surrogacy, whether using her own eggs or those of a donor, were refused. Her own egg surrogacy costs were considered unreasonable as the chances of success were so low (1% or less) that it was not reasonable to fund an endeavour doomed to fail.<sup>12</sup> By contrast, in *XX*, Ms X's chances using her own eggs were substantial (40%) and hence there was support for recovery of own egg surrogacy at all levels as such costs were considered reasonable and could be compensated. Further, Lady Hale noted the 'dramatic ... developments

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<sup>9</sup> The original general damages award had been calculated on the basis of the loss of the claim for commercial surrogacy, and hence those damages could now be reduced in light of the award for these costs.

<sup>10</sup> (1880) 5 App Cas 25, 39

<sup>11</sup> *Whittington Hospital NHS Trust (Appellant) v XX* [2020] UKSC 14 at [14] per Lady Hale.

<sup>12</sup> *Briody v St Helens and Knowsley Area Health Authority* [2001] EWCA Civ 1010 at [30] per Ebsworth LJ.

in the law's ideas of what constitutes a family...'<sup>13</sup> and agreed with the view of King LJ in the Court of Appeal that there had been substantial social changes in the period since *Briody* was decided.<sup>14</sup> As a result of these social and legal shifts, artificial reproductive technologies, including surrogacy, had become more normalised and accepted as a means of creating a family.<sup>15</sup> Therefore, surrogacy was an entirely acceptable means to redress infertility and hence the cost (using her own eggs) was uncontentionably recoverable.

The more difficult question was whether the costs of surrogacy using *donor* eggs was recoverable. At first instance, Sir Robert Nelson felt himself bound to refuse the donor egg surrogacy costs in line with the decision of the Court of Appeal in *Briody*, where it was considered that such surrogacy was not restorative of the claimant's loss, but instead would give her something *different*. Echoing the reasoning of Lady Justice Hale (as she then was) in *Briody*, he said

The loss that the injured mother sustains is the inability to have her child, not *a* child [emphasis added]. The use of donor eggs is not therefore restorative of her loss. Even if that part of the decision were technically *obiter* I would adopt the reasoning of the Court of Appeal and reject any claim in respect of donor eggs.<sup>16</sup>

The Court of Appeal in *XX* disagreed, and felt that the shift in views social views on family creation and the meaning of parenthood rendered a distinction between surrogacy using her own eggs versus donor eggs 'entirely artificial' and declined to follow *Briody*.<sup>17</sup> When the matter came to the Supreme Court, Lady Hale, to her credit, did not attempt to defend her previous view on the issue, instead stating:

In *Briody*, I expressed the view that [donor egg surrogacy] 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). ... In my view it was probably wrong then and is certainly wrong now.<sup>18</sup>

She accepted that donor egg surrogacy using her partner's sperm would give Ms X two of the four things it had been argued a woman hopes from having a child—the pleasure of bringing up a child as her own, and the perpetuation of her partner's genes.<sup>19</sup> If this was the best that

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<sup>13</sup> *Whittington Hospital NHS Trust (Appellant) v XX* [2020] UKSC 14 at [29]–[30].

<sup>14</sup> *Whittington Hospital NHS Trust (Appellant) v XX* [2020] UKSC 14 at [32].

<sup>15</sup> *Whittington Hospital NHS Trust (Appellant) v XX* [2020] UKSC 14 at [34]–[35].

<sup>16</sup> *XX v Whittington Hospital NHS Trust* [2017] EWHC 2318 (QB) at [46].

<sup>17</sup> *XX v Whittington Hospital NHS Trust* [2018] EWCA Civ 2832 at [94] per McCombe LJ. King LJ and Nicola Davies LJ concurred.

<sup>18</sup> *Whittington Hospital NHS Trust (Appellant) v XX* [2020] UKSC 14 at [45].

<sup>19</sup> *Briody v St Helens and Knowsley Area Health Authority* [2002] QB 856, CA at [24].

might be achieved to make good the loss, she asked, why should the woman be denied it? In her view, Ms X should not.<sup>20</sup> Therefore, the cost of surrogacy using both Ms X's own eggs and donor eggs were recoverable.

This aspect of the decision in *XX* is welcome, not only because it reflects the movement towards wider acceptance of surrogacy as a legitimate means to have children, but also because it rejects the idea that a child conceived using donor eggs is somehow less the child of the parents who care for her than one who has a genetic connection with them.<sup>21</sup> It also evidences a much more satisfactory understanding of what, in fact, Ms X had lost as a result of her injuries. She had not simply lost her womb and the ability to make a genetically-related child; she had lost the ability to determine how and when she would build her family. This recognition, as will be discussed later, is a vital dimension to the determination of how women in this position ought to be compensated.

#### **IV. COMMERCIAL SURROGACY AND POLICY CONSIDERATIONS**

Ms X's preference for employing a surrogate on a commercial basis overseas gave rise to the third issue identified by Lady Hale: whether, as in *Briody*, the court should refuse to fund activities that were arguably against the policy underpinning both the SAA and the HFEA 1990 and 2008. In *Briody*, Mrs Justice Ebsworth in the High Court considered it wrong on policy grounds to make an award of damages that would effectively enable the claimant to 'acquire a child by methods which do not comply with [the provisions relating payments, adoption and surrogacy in the *Adoption Act 1976* and the *HFEA 1990*]'.<sup>22</sup> In her view, the defendants' negligence was not a sufficient reason to entitle Ms Briody to the cost of undertaking something that was illegal and unenforceable under English law.<sup>23</sup> On appeal in *Briody*, Lady Justice Hale

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<sup>20</sup> *Whittington Hospital NHS Trust (Appellant) v XX* [2020] UKSC 14 at [48].

<sup>21</sup> It is also worth noting that evidence suggests that children created via artificial reproductive technologies who do not share a genetic connection with both parents are not adversely affected by a lack of genetic connection. For example, one review of empirical studies on families created in this way found that 'no empirical evidence was found that the psychological adjustment of children in ... families [created using artificial reproductive technologies] differs from that of their counterparts in natural-conception families': H Bos and F van Balen, 'Children of the new reproductive technologies: Social and genetic parenthood' (2010) 81(3) *Patient Education and Counseling* 429.

<sup>22</sup> *Briody v St Helens and Knowsley Area Health Authority* [2001] EWCA Civ 1010 at [29].

<sup>23</sup> Inspired by Lord Steyn's invocation of the 'ordinary citizen' as an arbiter of right-minded policy in *McFarlane*, she opined that 'I do not think that the "traveler on the underground" would regard it as the business of the law of tort to provide a legal remedy doomed to almost inevitable failure and out-with our law': *Briody v St Helens and Knowsley Area Health Authority* [2001] EWCA Civ 1010 at [30].

(as she then was) considered that both the commercial arrangement of surrogacy, and the enforceability of surrogacy agreements were contrary to public policy in England, and hence the services Ms Briody might seek in California were themselves contrary to English policy. This would be so even if they were pursued outside the United Kingdom, although it is important to note that Lady Justice Hale treated this question with substantial nuance in her judgment.<sup>24</sup> The same policy questions naturally arose in *XX*, attended by the additional question of whether if these costs were denied, would it be appropriate for the cost of reasonable payments to a UK surrogate be covered as a minimum award?

In the High Court, Sir Robert Nelson considered himself bound by *Briody*, and refused to award the costs of commercial surrogacy as such ‘arrangements are still illegal in the UK and thus contrary to public policy’.<sup>25</sup> Lord Justice McCombe in the Court of Appeal, however, accepted that the law since *Briody* had become more accommodating of third party arrangements since the HFEA 2008 had amended the law to permit payments for arranging surrogacies through non-profit agencies.<sup>26</sup> The position on overseas commercial arrangements had also seemingly softened as the Family Courts had begun to retrospectively authorise commercial payments in relation to commercial surrogacies carried out abroad as permitted by s. 54 of the HFEA 2008, and then to grant parental orders in such cases.<sup>27</sup> Importantly, the courts had, he considered, become more relaxed about the making of such orders under s. 54 even when payments beyond reasonable expenses had been made to the surrogate.<sup>28</sup> In his view, both public policy and the social conditions with regard to surrogacy had changed, evidenced by moves to ‘normalise’ families created via surrogacy such as the extension of rights under the *Children and Families Act 2014*.<sup>29</sup> These shifts collectively suggested that ‘public policy’ no longer required ‘the law to set its face against the lawful resort to commercial surrogacy abroad—rather the contrary’.<sup>30</sup> He emphasised that the SAA was expressly limited to the prohibition of actions in the United

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<sup>24</sup> *Briody v St Helens and Knowsley Area Health Authority* [2002] QB 856, CA at [13]–[16]. Lord Justice Judge agreed that ‘...the entire surrogacy agreement was unlawful in the United Kingdom. The judge was being asked to award damages for the express purpose of enabling Ms Briody to be provided with the wherewithal to pay for an unlawful contractual arrangement. That is not a principled basis on which to make a compensatory award: *Briody v St Helens and Knowsley Area Health Authority* [2002] QB 856, CA at [39].

<sup>25</sup> *XX v Whittington Hospital NHS Trust* [2017] EWHC 2318 (QB) at [45].

<sup>26</sup> HFEA 2008, s.59 amending SAA 1985, ss.1, 2. An example of such an agency is Childlessness Overcome Through Surrogacy (COTS).

<sup>27</sup> *Re L* (2010) EWHC 3146 (Fam) and *Re C* (2013) EWHC 2408 (Fam).

<sup>28</sup> *XX v Whittington Hospital NHS Trust* [2018] EWCA Civ 2832 at [44], [45], [48]ff per McCombe LJ.

<sup>29</sup> See further *XX v Whittington Hospital NHS Trust* [2018] EWCA Civ 2832 at [52]–[53].

<sup>30</sup> *XX v Whittington Hospital NHS Trust* [2018] EWCA Civ 2832 at [49].

Kingdom, and that this was the clear intention of the enacting Parliament.<sup>31</sup> ‘The sole surviving object of the prohibition’, he felt, was ‘to render unlawful commercial surrogacy businesses in the UK and to subject those running [them]... to criminal liability.’<sup>32</sup> He took the view that the decision in *Patel v Mirza*<sup>33</sup> permitted him to consider whether the policy *now* reflected in the law should bar the civil claim. He opined that we should now see Ms X’s claim ‘in a different light from that which shone upon this court in *Briody*’.<sup>34</sup> To his mind, her intended actions were neither illegal, nor the ‘target of the current legislation’,<sup>35</sup> and hence it would be ‘overkill’ to allow a ‘notional aversion to a lawful act abroad by reference to a prohibition here’ to bar recovery.<sup>36</sup> There was no legal wrong here, nor would the integrity of the criminal and civil law be ‘endangered’ if Ms X’s claim were allowed in full.<sup>37</sup>

In the Supreme Court, Lady Hale emphasised that

The offences [under the SAA] ... 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.<sup>38</sup>

She therefore correctly set aside Lord Justice McCombe’s *Patel*-based argument, as there was no illegality involved in Ms X’s intended conduct.<sup>39</sup>

While Lady Hale agreed that the law was now more permissive in relation to third parties, she approached the question of whether the *commercial* elements of the claimed amount should be denied as against policy by considering which payments would be lawful if made in the United Kingdom. She found that the ‘reasonable expenses’ sought would be recoverable. Although the expenses in this case were higher than was usual (being commercial), they were still close to the kinds of payments made abroad that the courts had in the past retroactively authorised. Therefore, the only part that would be unlawful if paid in England were the payments to the Californian lawyers and to the commercial surrogacy agency. ‘To what extent,’ she asked,

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<sup>31</sup> *XX v Whittington Hospital NHS Trust* [2018] EWCA Civ 2832 at [55]; SAA, s. 2(1).

<sup>32</sup> *XX v Whittington Hospital NHS Trust* [2018] EWCA Civ 2832 at [56].

<sup>33</sup> *XX v Whittington Hospital NHS Trust* [2018] EWCA Civ 2832 at [56]; *Patel v Mirza* [2017] AC 467.

<sup>34</sup> *XX v Whittington Hospital NHS Trust* [2018] EWCA Civ 2832 at [68].

<sup>35</sup> *XX v Whittington Hospital NHS Trust* [2018] EWCA Civ 2832 at [70].

<sup>36</sup> *XX v Whittington Hospital NHS Trust* [2018] EWCA Civ 2832 at [73].

<sup>37</sup> *XX v Whittington Hospital NHS Trust* [2018] EWCA Civ 2832 at [74].

<sup>38</sup> *Whittington Hospital NHS Trust (Appellant) v XX* [2020] UKSC 14 at [21]. She recognised that they might risk being refused a parental order (and the agreement would of course be unenforceable).

<sup>39</sup> *Whittington Hospital NHS Trust (Appellant) v XX* [2020] UKSC 14 at [40].



‘should [these fees] taint all of the items in the bill?’ Seemingly, they should not as she considered that all of the commercial costs should be recoverable because none of these payments were unlawful if made in the United Kingdom (save the fees), and it was not unlawful to make the arrangements (and pay those fees) overseas. Further, it was not the policy of the legislation to criminalise the intended parents’ actions,<sup>40</sup> and there was a clear move in this country towards further supporting the use of surrogacy via the Law Commission’s proposed new pathway to parenthood which would enable intended parents to be legal parents from birth.<sup>41</sup> These factors, plus the increasing social acceptance of surrogacy, led her to conclude that it was no longer contrary to policy to award such damages. The only potential ethical barrier was the risk of exploitation and commodification, but this, she felt, was insufficient to bar.<sup>42</sup> This should not, she warned, be regarded as meaning any such costs would always be awarded. Such an award would be made only when the proposed programme of treatments are ‘reasonable’ and that it would be ‘reasonable for the claimant to seek the foreign commercial arrangements proposed rather than to make arrangements within the United Kingdom’. This latter requirement would be unlikely to be fulfilled ‘unless the foreign country has a well-established system in which the interests of all involved, the surrogate, the intended parents and any resulting child, are properly safeguarded’. Finally, the costs involved must also be ‘reasonable.’<sup>43</sup> The majority agreed and the appeal on this issue was dismissed.

Lord Carnwarth (with whom Lord Reed agreed) took a different view. While he agreed that the commercial surrogacy proposed was not unlawful, either abroad or in this country, he maintained that the policy issue remained.<sup>44</sup> He considered that there were issues of ‘legal policy’ and also coherence in the law, citing with approval Lord Millett’s comments to this effect in *McFarlane*, and also similar comments from Lord Hoffman and Lord Rodger in *Gray v Thames Trains Ltd*<sup>45</sup> and those of Lord Mance and Lord Neuberger in *Patel*.<sup>46</sup> On this basis, he considered that it would ‘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’.<sup>47</sup>

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<sup>40</sup> *Whittington Hospital NHS Trust (Appellant) v XX* [2020] UKSC 14 at [50].

<sup>41</sup> Law Commission and Scottish Law Commission, *Building families through surrogacy: a new law* (Law Commission CP244, Scottish Law Commission DP167, 2020), 156ff.

<sup>42</sup> *Whittington Hospital NHS Trust (Appellant) v XX* [2020] UKSC 14 at [52].

<sup>43</sup> *Whittington Hospital NHS Trust (Appellant) v XX* [2020] UKSC 14 at [53].

<sup>44</sup> He therefore also agreed that *Patel* was not relevant.

<sup>45</sup> *Whittington Hospital NHS Trust (Appellant) v XX* [2020] UKSC 14 at [63].

<sup>46</sup> *Whittington Hospital NHS Trust (Appellant) v XX* [2020] UKSC 14 at [64].

<sup>47</sup> *Whittington Hospital NHS Trust (Appellant) v XX* [2020] UKSC 14 at [66].

Perhaps attitudes had changed, but the law had not changed in any way that meant the conclusion in *Briody* on commercial surrogacy should be now be abandoned. ‘In short,’ he stated, ‘I consider that the decision of the Court of Appeal was correct in 2001, and remains correct today’.<sup>48</sup> Consequently, compensating a claimant to enable them do something that was against the law of this country was necessarily against public policy, and making such an award would create incoherency or inconsistency between the civil and criminal laws.

Which view is to be preferred? Taking the strands of argument in turn, we might first question, as Kirsty Horsey and Andrew Powell have, whether attitudes to commercial surrogacy have ‘moved on’ as far as the Court of Appeal and Supreme Court suggested and if they have not, this may reduce the support of the view that the relevant policy has evolved.<sup>49</sup> But even if attitudes have moved on, the argument based on a shift in *public* attitudes is beside the point if the policy as reflected in the law still stands, and Lord Carnwarth’s view on this is therefore probably more convincing. If public attitudes have changed, then policy might need to follow and the legislation be amended, but that is not an answer to whether what Ms X intended to do was against the *current* policy underpinning the law on surrogacy *as it stood at that time*.

The stronger approach on the policy question was the engagement in the Supreme Court with the courts’ fairly liberal approach to the making of parental orders in surrogacy cases, as there we might consider a shift in legal policy to be in evidence. As Lady Hale put it, ‘the courts have bent over backwards to recognise the relationships created by surrogacy, including foreign commercial surrogacy’.<sup>50</sup> She made this point in the context of the numerous developments seen since *Briody* that were, she felt, indicative of a shift in policy in relation to commercial surrogacy. However, this argument is perhaps less convincing than it seems. Under English law, the surrogate is the legal mother of the child, and the intended parents may apply for parental status to be transferred to them under s.54 of the HFEA 2008. Before such an order can be made, the court must be satisfied that, amongst other things, the surrogate ‘freely and unconditionally consented to the making of the order’, and that no money or benefit has changed hands (other than reasonable expenses).<sup>51</sup> Section 54(8)(d) requires the court to satisfy

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<sup>48</sup> *Whittington Hospital NHS Trust (Appellant) v XX* [2020] UKSC 14 at [67].

<sup>49</sup> Kirsty Horsey and Andrew Powell, ‘A Step Too Far? *Whittington Hospital NHS Trust v XX* [2020] UKSC 14 [commentary]’ (2020) *Medical Law Review* doi:10.1093/medlaw/fwaa037, 1–2.

<sup>50</sup> *Whittington Hospital NHS Trust (Appellant) v XX* [2020] UKSC 14 at [52].

<sup>51</sup> Ss 54(6), (8). These consent requirements extend to ‘any other person who is a parent of the child but is not one of the applicants (including any man who is the father by virtue of section 35 or 36 or any woman who is a parent by virtue of section 42 or 43)’, but this is not relevant in the context of *XX*.

itself that no money or benefit (other than for reasonable expenses) has been given or received, but allows the court to retrospectively authorise payments made for commercial surrogacy arrangements to enable it to make such an order.<sup>52</sup> Hedley J noted in *X & Y (Foreign Surrogacy)* [2008], that while Parliament had not indicated the basis on which this might be done, ‘it is difficult to see what reason Parliament might have had in mind other than the welfare of the child under consideration’.<sup>53</sup>

The refusal of such orders is, in theory, a means for the courts to support the SAA’s policy against commercial surrogacy. In choosing *not* to refuse parental orders, the implicit suggestion in Lady Hale’s point is that the courts’ decisions reflect a softening in the law’s policy towards commercial arrangements. However, with respect, this is not entirely convincing. Hedley J in *X & Y* pointed out that in making a parental order determination, the court is required to make ‘the child’s welfare, throughout his life’ their ‘paramount consideration’.<sup>54</sup> Quite rightly, then, the family courts have considered that if retrospectively authorising such payments was necessary to permit the making of a parental order where doing so would be in the child’s best interests, then they have of course done so. Indeed, what else could they do, asked Lady Hale, ‘when confronted with a *fait accompli*?’<sup>55</sup> These authorisations should not, then, be regarded as demonstrating that the law’s policy on commercial surrogacy has fundamentally changed from that enshrined in the SAA.<sup>56</sup> Rather, they are better understood as a reflection of the courts’ commitment to ensuring that the child’s welfare remains at the centre of its decision-making in the context of surrogacy, even if this means they must effectively support a practice

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<sup>52</sup> See, eg, Hedley J’s dicta to the effect that the court was permitted to retrospectively authorize such payments: *X & Y (Foreign Surrogacy)* [2008] EWHC 3030 at [19] (applying the equivalent s.30(7) under the HFEA 1990). He cited with approval Wall J’s view on this expressed in *Re C (Application by Mr and Mrs X under Section 30 of the Human Fertilisation and Embryology Act 1990)* [2002] 1FLR 909.

<sup>53</sup> *X & Y (Foreign Surrogacy)* [2008] EWHC 3030 at [20].

<sup>54</sup> He reasoned that s.30(7) (and by analogy the same would apply to s.54 orders), that ‘it seems reasonable that the court should adopt the ‘lifelong’ perspective of welfare in the *Adoption and Children Act 2002* rather than the ‘minority’ perspective of the *Children Act 1989*’, by which he meant *Adoption and Children Act 2002* s1(2), as applied and modified by the *Human Fertilisation and Embryology (Parental Orders) Regulations 2018* Sch 1 Para 2.

<sup>55</sup> *Whittington Hospital NHS Trust (Appellant) v XX* [2020] UKSC 14 at [16].

<sup>56</sup> As Horsey and Powell note that in the conditions for parental orders for transfer of parenthood, ‘it is implicit that payments beyond ‘reasonable expenses’ are illegitimate’ and ought not to have been made: Kirsty Horsey and Andrew Powell, ‘A Step Too Far? *Whittington Hospital NHS Trust v XX* [2020] UKSC 14 [commentary]’ (2020) *Medical Law Review* doi:10.1093/medlaw/fwaa037, 3–4.

that the SAA 1985 speaks against.<sup>57</sup> They are simply acting for the child when placed in an invidious position.<sup>58</sup>

Lady Hale's focus was on whether the policy itself had shifted, and therefore how firm a stance the Supreme Court ought to take in relation to Ms X's proposed course of action. However, her analysis would, with respect, have been more convincing if she had tackled head on the concerns about commercial surrogacy that underpin the policy behind the SAA and which have been examined in the subsequent jurisprudence. The caveats she placed on when awards could be made were clearly informed by these, yet they were given little real attention in the majority judgment.

The policy underpinning the SAA derives in large part from the concerns raised in by the Report of the Committee of Inquiry into Human Fertilisation and Embryology ('Warnock Report'), published in 1984. The Warnock Committee regarded surrogacy as 'intrinsically wrong, and likely to lead to trouble, if not to disaster, for all the parties involved, including the child' and hence ought not to be condoned. These concerns were exacerbated by the

numerous stories in circulation about highly profitable commercial surrogacy agencies in the United States, and off-shoots of such agencies appeared poised to establish themselves in the UK, advertising for surrogates and sending out particulars to would-be users, often in glaringly sexist terms, with fees to be paid through the agency.<sup>59</sup>

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<sup>57</sup> As Claire Fenton-Glynn rightly points out, the law as it stands puts judges *explicitly* in the position of having to balance public policy concerns about commercial surrogacy with the welfare of the child.: Claire Fenton-Glynn, 'What price a child? Recovering damages in tort for international surrogacy' (2017) (December) *Family Law* 1293, 1294. Amel Alghrani and Craig Purshouse rightly observe: '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': Amel Alghrani and Craig Purshouse, 'Damages for reproductive negligence: commercial surrogacy on the NHS? [casenote]' (2019) 135(Jul) *Law Quarterly Review* 405, 409–10. Kirsty Horsey and Andrew Powell offer an excellent examination of the application of s.54 and the courts' willingness to make parental orders despite some of its requirements not being met. They argue (rightly) that 'that S54 needs legislative re-thinking': see Kirsty Horsey and Andrew Powell, 'A Step Too Far? *Whittington Hospital NHS Trust v XX* [2020] UKSC 14 [commentary]' (2020) *Medical Law Review* doi:10.1093/medlaw/fwaa037, 5.

<sup>58</sup> It is worth noting that the Law Commission in its recent consultation paper on surrogacy (jointly with the Scottish Law Commission) provisionally proposed that there 'should be no prohibition against charging for negotiating, facilitating and advising on surrogacy arrangements'. On payments to surrogates, at this stage the Law Commission has indicated that it does not regard the asking 'whether the law should permit commercial or altruistic arrangements?' as a helpful approach, and instead at this stage is inviting views on a spectrum of payments that might be made to surrogates. It explained that given the level of uncertainty around payments, it felt collecting information on views was a better approach at this stage, but it did emphasise that 'the current situation cannot be left unchanged': Law Commission and Scottish Law Commission, *Building families through surrogacy: a new law* (Law Commission CP244, Scottish Law Commission DP167, 2020), [9.135]; [15.2].

<sup>59</sup> M Warnock, *Making Babies: Is There a Right to Have Children?* (Oxford, 2003), 88–90.

Committee chair Mary Warnock later reported that some on the Committee, herself included, took the view that the emergence of commercial surrogacy was like to be ‘extraordinarily exploitative of the women involved’ and that ‘[e]ven though they might have chosen to act as surrogates, the motives of these women would have been commercial, and the whole enterprise seemed to trivialise and vulgarize childbirth’.<sup>60</sup>

In facing the unenviable choice of whether to authorise payments in commercial surrogacy arrangements to enable a parental order to be made, the courts have explored these concerns in some depth. In particular, Hedley J’s dicta in *Re S*<sup>61</sup> offers a detailed analysis of such issues in the context of an application for a parental order in respect of twins born by surrogacy in California, where a substantial amount of money had been paid for the arrangement.<sup>62</sup> He identified three areas of concern in relation to commercial surrogacy of which the courts should be mindful. The first concern was the use of commercial arrangements made elsewhere to circumvent the laws on assigning parenthood in this country. Courts should not be supporting arrangements that enable parents to avoid the safeguards in place the transfer of parenthood from the surrogate to the intended parents. Second was the question of whether to authorise payments where this involved the court in ‘anything that looks like the simple payment for effectively buying children overseas’. Commercial surrogacy gives rise to the possibility of ‘baby-selling’, which has widely noted is obviously objectionable.<sup>63</sup> Third was the importance of avoiding the exploitation of surrogates by ensuring that the court did not authorise payments that ‘might look modest in themselves’ but which are ‘in fact of such a substance that they overbear the will of a surrogate’.<sup>64</sup>

Rather than simply considering whether the general policy had shifted, or whether it was simply not problematic for Ms X to pursue her plans given that it was not technically unlawful if she did so elsewhere, a much more fine-grained consideration of whether her course of action raised the concerns at which the policy was actually directed should also have been undertaken.

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<sup>60</sup> M Warnock, *Making Babies: Is There a Right to Have Children?* (Oxford, 2003), 88–90.

<sup>61</sup> [2009] EWHC 2977 (Fam), [2010] 1 FLR 1156.

<sup>62</sup> *Re S* [2009] EWHC 2977 (Fam), [2010] 1 FLR 1156, [7] per Hedley J. Hedley J had to face exactly the conundrum raised in *XX*: ‘what [is] proper approach ... where those who cannot do something lawfully in this country ... go overseas to do it perfectly lawfully according to the country in which the surrogacy is carried into effect and then seek the retrospective approval of this country for something which, as I say, could not have been done here’.

<sup>63</sup> See, eg, Claire Fenton-Glynn, ‘Surrogacy: Why the world needs rules for “selling” babies’ *BBC News*, 26 April 2019, <https://www.bbc.co.uk/news/health-47826356> (accessed 7 April 2021).

<sup>64</sup> *Re S* [2009] EWHC 2977 (Fam), [2010] 1 FLR 1156, [7] per Hedley J.

For, in fact, Ms X's intended arrangement *might* raise the first concern, as she sought an arrangement in California in part to attempt to avoid the constraints on assignment of parenthood under the SAA. In California, it was argued, she could obtain the security of the pre-birth order ensuring her parentage and her arrangement with the surrogate would also be legally enforceable. As the Law Commission has noted, this is a common motivation of those who seek surrogacy arrangements outside the United Kingdom. Indeed, the Commission has commented that it hopes its proposed reforms will allay such concerns and hence mean fewer intended parents feel the need to obtain services outside this country.<sup>65</sup> While the Law Commission has now proposed to amend some aspects of the law on this point, particularly a pathway to recognise intended parents at the legal parents from birth, and to support recognition of legal parenthood across borders (where appropriate),<sup>66</sup> this concern remains legitimate, for it reflects the long-standing view of the courts that the welfare of the child should be central to the determination of a parental order, not the intended parent's desires. In making the award, the Supreme Court knowingly enabled Ms X to try to avoid this important dimension of the SAA provisions, despite this being a recognised concern in relation to commercial surrogacy. It would seem, then, that the award facilitated Ms X doing something clearly against policy in this country. It is true that an application for a parental order is always required when a child has been born via an international surrogacy arrangement if the intended parents are to be recognised as the legal parents in the United Kingdom, *even if* the intended parent is recognised as the legal parent in the child's country of birth.<sup>67</sup> So in one sense, the overseas surrogacy arrangement would not in fact enable her to avoid this aspect of the SAA. However, she would still take the benefit of the Californian law in that jurisdiction and potentially elsewhere, and this alone means that in enabling her to pursue surrogacy abroad, the Supreme Court did in one sense support an approach to parentage and surrogacy that the legislature in this country has deemed against policy. This is true even though her use of the Californian surrogate would likely have made no practical difference to whether or not she could obtain a parental order to transfer legal parenthood to her in this country.<sup>68</sup>

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<sup>65</sup> Law Commission and Scottish Law Commission, *Building families through surrogacy: a new law* (Law Commission CP244, Scottish Law Commission DP167, 2020), [3.102], [16.1], [16.2].

<sup>66</sup> Law Commission and Scottish Law Commission, *Building families through surrogacy: a new law* (Law Commission CP244, Scottish Law Commission DP167, 2020), Chapter 8.

<sup>67</sup> Law Commission and Scottish Law Commission, *Building families through surrogacy: a new law* (Law Commission CP244, Scottish Law Commission DP167, 2020), [16.4].

<sup>68</sup> The Law Commissions assert (very probably rightly), that in cases of international surrogacy 'The paramount consideration of the welfare of the child means that save in the most egregious of case – for example, where there

Also, it would not, in fact, meet Lady Hale’s own caveat that the proposed programme in which the interests of all involved are properly safeguarded, for one of the key elements of the Californian arrangement was that the agreement would be enforceable against the surrogate. It is hard to see how the surrogate’s interests are then ‘properly safeguarded’ under such a system, and again this is very much against the policy in this country. Lady Hale’s caveats require that it be ‘reasonable’ for the claimant to seek foreign commercial arrangements rather than make arrangements them within the United Kingdom, but if the policy in this country is in part about protecting the surrogate, then how can it be reasonable to pursue services *explicitly* to avoid some of the protections for surrogates in this country? This is a paradox on which further clarity would have been welcome.<sup>69</sup>

On the second concern, Lady Hale’s caveats go a long way to capture this in requiring the proposed programme to be well-regulated, and hence not a simple transaction where money is paid to ‘buy’ a baby. Nor was there any suggestion on the facts that there was any risk of this in the arrangement Ms X wished to make. So on this point, her proposed action was not problematic. The third concern that the surrogate not be exploited nor her freedom to consent compromised is of course quite intertwined with the concern about ‘baby-selling’. In the cases on parental orders, the courts do focus closely on whether the surrogate gave consent freely, whether the level of payment may have undermined this, the level of support she had,<sup>70</sup> whether the payments were disproportionate to reasonable expenses, and whether the applicants were

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was a real concern of child trafficking – a parental order will be made as long as the criteria for the order are met.’: Law Commission and Scottish Law Commission, *Building families through surrogacy: a new law* (Law Commission CP244, Scottish Law Commission DP167, 2020), [16.4]. They also note that ‘The difficulties that arise in international surrogacy arrangements cannot fully be addressed by national law. Ultimately, only an international convention, as exists in respect of inter-country adoption,<sup>10</sup> can ensure a uniformity of approach to guard against exploitation.’ (at [16.8]).

<sup>69</sup> It is also not clear whether the decision means that commercial surrogacy under Californian law is now regarded as reasonable in general, or whether a case-by-case assessment of each *provider* and *arrangement* will still be needed. By contrast, the Law Commissions’ proposal to enable the Secretary of State to waive the need for a parental order to be obtained in some cases of international surrogacy is likely to provide a more effective, clear incentive for intended parents to pursue surrogacy in jurisdictions that protect the interests of surrogates and children. They have proposed that the Secretary of State have the power to ‘provide that the legal parenthood of intended parents of children born through international surrogacy arrangements established under the law of a particular country will be recognised in the UK, without the need for the intended parents to make a parental order application in this jurisdiction’. This would require the Secretary of State to be satisfied that the ‘domestic law and practice in the country in question provides protection against the exploitation of women acting as surrogates, and for the welfare of the child, that is at least equivalent to that provided in UK law’ (Law Commission and Scottish Law Commission, *Building families through surrogacy: a new law* (Law Commission CP244, Scottish Law Commission DP167, 2020), [16.91], [16.92]. I am grateful to the anonymous reviewer who suggested the inclusion of these points.

<sup>70</sup> For a useful analysis of this reasoning, see Claire Fenton-Glynn, ‘Outsourcing Ethical Dilemmas: Regulating International Surrogacy Arrangements’ (2016) 24(1) *Medical Law Review* 59, 68.

acting in good faith towards the surrogate.<sup>71</sup> These concerns, too, are captured by Lady Hale's caveats and there was no suggestion on the facts that Ms X's specific plans would give rise to these issues. However, some explicit consideration of this would also have been welcome, as it could then have been more convincingly argued that Ms X's proposed arrangements did not give rise to either of the concerns about commercial surrogacy that are clearly evident in the case law. This would have been particularly welcome as a means to tease out the relationship between the making of parental orders and the lack of criminalisation of the *intended parents* seeking a commercial arrangement in the SAA. For as was recognised, Ms X would do nothing wrong even in this country if she employed a surrogate on a commercial basis, but even so, when she sought a parental order, had the payments been very high, the courts would have been directed to consider this and would, rightly, have considered it a concern.

Had the Supreme Court approached the issues in this way, it could have addressed more directly what seems to be implicit in the majority judgment, particularly the way Lady Hale's conditional approach was framed: that commercial surrogacy is not *necessarily* or *inherently* problematic, but is to be resisted when it has the kinds of problematic impacts noted by Hedley J. If those impacts are absent, then it can be regarded as acceptable (and hence not of the kind that the SAA aims to sanction). This is, in effect, what Lady Hale's caveats suggest. An acknowledgement of this would have been a much stronger way to reason why an award would not be against policy in *this* case, but might be in others, without having to try to argue that the policy in this country had shifted when that is not an entirely convincing view.

What should we take from this analysis? The majority's failure to really engage with the enforceability of arrangements issue is disappointing, and there were potentially better ways to approach the policy debate. What is clear is that the majority did feel that attitudes to commercial surrogacy had shifted to such an extent that it did not think it right to use this case as a means to argue that commercial arrangements should not be supported. It could, however, have used this opportunity to speak against commercial surrogacy and reject Ms X's claim to make this statement, because unlike the courts being asked to authorise payments to make parental orders, there was no *fait accompli* here. The Supreme Court could have refused the award to signal support for the policy against commercial surrogacy generally and so deter

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<sup>71</sup> This approach follows Hedley J's analysis and was laid out by Justice Theis in *Re P-M* [2013] EWHC 2328. I am grateful to Cressida Auckland for reminding me of this point.



women like Ms X from pursuing it. But would it have had this effect? And should the Supreme Court have done more to attempt to achieve that effect? Arguably, it would have been fairly ineffective as a general deterrent, as claims such as Ms X's are not the context in which the majority of commercial surrogacy occurs. It also does not appear that the majority would have wanted to use this opportunity to support the SAA's position on commercial surrogacy in any case.

In making the award (with caveats) the Supreme Court actually supported Ms X to pursue surrogacy in a well-regulated, less exploitative jurisdiction by funding her sufficiently. One might wonder whether a woman in Ms X's position who is not made an award would then have been more likely to pursue surrogacy in a cheaper, less well-regulated jurisdiction. A refusal to award on the policy ground of the objectionable nature of commercial surrogacy might then have had the perverse effect of driving her towards exactly the kind of surrogacy that is the real target of this policy because without funding, she would not have been able to purchase better, less exploitative services.<sup>72</sup> On this, we should take account of Claire Fenton-Glynn's point that that English domestic policy on commercial surrogacy has implications elsewhere, and stringent restrictions here do in way a fuel the existence of poorly regularly, exploitative markets elsewhere.<sup>73</sup> Lady Hale's balanced position walks a careful line between avoiding such impacts, while remaining mindful of the need to avoid what exactly *is* objectionable about commercial surrogacy — harm to the child and exploitation of the surrogate. It is only a pity that she did not engage more closely with the issue of enforceability. For, despite the liberal approach on parental orders, the policy here is still to place the child's welfare at the heart of parentage decisions, and the Californian arrangements entirely go against this. The Supreme Court seems to have set this largely aside and focused on the monetary dimension, when arguably it should have focused on the dimension to the arrangement that would undermine *any* court's ability to determine disputed parentage in favour of the child's interests. The the Supreme Court did strike an understandable balance on the commercial dimension, allowing an award where this would seemingly not lead to exploitation, while reserving the right to refuse in a future case if a real risk of exploitation did arise. However, in taking this approach the majority failed to adequately engage with the issue of enforcement of the arrangement

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<sup>72</sup> I am grateful to Cressida Auckland for suggesting this point.

<sup>73</sup> Claire Fenton-Glynn, 'Outsourcing Ethical Dilemmas: Regulating International Surrogacy Arrangements' (2016) 24(1) *Medical Law Review* 59, 60. The Law Commissions' proposal on waiving the need for a parental order to be obtained in some cases noted above is one potentially useful response to this valid concern.

against a surrogate who might change her mind. The award facilitated a situation in which a surrogate, albeit one in another jurisdiction, will be made vulnerable in exactly the manner that the law in this country prohibits.

It is worth noting that if the Law Commission's proposed new pathway to parenthood that would allow intended parents to be legally confirmed as the child's parents before conception does go ahead, fewer intended parents may feel the need to pursue surrogacy overseas and hence this issue may be less problematic. Importantly, the new pathway would not be open to international surrogacy arrangements. The proposed new approach enables parties to enter into a surrogacy agreement before the child is conceived, and then have legal parenthood conferred on the intended parents before conception if certain requirements are met. Even then, however, the Commission emphasises that the agreement would not itself confer legal parenthood on the intended parents as it is vital that the child's status remains a matter for the law to decide.<sup>74</sup> It is clearly a central tenet, then, that enforceable agreements to determine parenthood are not the future in this country, and hence the issue ought to have been dealt with more directly. Regardless, had Ms X been able to obtain such an order, many of her concerns about risking her scant supply of eggs in a surrogacy arrangement might have been alleviated, although her lack of autonomy to choose her surrogate would have remained. That said, the outcome is in general to be welcomed as it ensured Ms X was fully compensated, which, for reasons that will be explored in the next section, is a particularly valuable outcome.<sup>75</sup>

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<sup>74</sup> The pathway would operate *in addition* to the existing provision that allows the parental orders to be made post-birth. Under the proposed new pathway, the intended parents would be the child's parents at birth (although the surrogate would retain the right to object to this for a fixed period post-birth). Parents would be permitted to access this new pathway if various requirements were met, and if so, they would then have no need to apply for a parental order – their parentage of the child would arise at birth, rather than via judicial determination post-birth. See further: Law Commission and Scottish Law Commission, *Building families through surrogacy: a new law* (Law Commission CP244, Scottish Law Commission DP167, 2020), 156ff. esp [8.8], [9.126]. This seems in part to be based on a reading of the UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which holds that motherhood should be transferrable by way of private agreement. See further Y Ergas, "Babies without Borders: Human Rights, Human Dignity, and the Regulation of International Commercial Surrogacy" (2013) 27 *Emory International Law Review* 117, 161–2. I am grateful to Kate Hampshire for this point.

<sup>75</sup> Two further concerns have been raised with the outcome that are worth noting. Kirsty Horsey and Andrew Powell have rightly pointed out that it means that future claims are likely to involve debate over 'reasonable' costs look like. As they say, costs are unlikely to be deemed 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': Kirsty Horsey and Andrew Powell, 'A Step Too Far? *Whittington Hospital NHS Trust v XX* [2020] UKSC 14 [commentary]' (2020) *Medical Law Review* doi:10.1093/medlaw/fwaa037, 12. To these concerns can be added the problem that the need for arrangements to be 'reasonable' will require the court to consider all the aspects of the planned surrogacy, essentially judging the surrogacy regimes outside England. Adverse judgements have the potential to be incendiary.

## V. FULLY COMPENSATING LOST REPRODUCTIVE CAPACITY

As we have seen, Lady Hale in the Supreme Court did engage with the question of what Ms X had lost and therefore how it might be appropriately made up to her, and she took an expansive approach to this in allowing the award for surrogacy using donor eggs. However, she should, with respect, have gone much further and considered more deeply how the way Ms X's loss is understood inter-relates to the question of whether the court should have supported her to engage in a surrogacy practice that the law in this country does not look upon with favour. Damages should endeavour to return the claimant to her pre-tort position, and that should not be understood simply as the ability to carry a child herself. It needs to be understood that Ms X lost more than this; she lost the ability to have children in the manner she would wish to do so. The impact of this loss of autonomy infuses her claim --- she wanted the ability to choose who would carry her child, she wanted the security of knowing that she would be the parent of the child who was born. Such concerns do not even arise for a woman who can carry her own child; she is secure in the knowledge that *she* can carry her baby, and that *she* will be their mother upon birth. That certainty and security are part of what Ms X lost as a result of the negligence, and their importance to her are vividly evident in the way she framed her loss and what she claimed she would need to redress it. Her desire to engage a surrogate in California was entirely driven by her need to regain some of the control of her reproduction the negligence had taken from her.

This was not the focus of the Supreme Court's reasoning, but for several reasons the decision would have been substantially improved if it had been. For one, the Californian arrangement *did* circumvent the part of the English law (and practice) that was the most objectionable to Ms X — the ability to be assured that she would be secure in her parentage of the child born. She actively wanted to avoid this part of the law, which whatever softening there has been on authorised payments, which could deny her parentage if the surrogate refused to give up the child and it was in the child's interests to stay with his or her birth mother.

It would have been welcome to see the Supreme Court tackle head on the tension between protecting the surrogate and child, and recognise the harms experienced by intended parents who are denied parentage. This loss of control was part of Ms X's loss, and to fully compensate her, the award needed to return to her as much of that lost autonomy as possible because her damage was not merely the inability to have children, but the ability to have control over how

she had them. Had the Supreme Court restricted her award to the costs of surrogacy under the English law they would have supported her only to pursue having children via an arrangement that returned far less autonomy and security to her than the full award would give her. One reason that an award for commercial surrogacy would be more fully restorative of her loss (and hence puts her in pre-tort position) is that before the tort was committed, she had control over how she reproduced. Her injury took that from her. The English law on surrogacy restored some of her capacity to have children, but in a manner that would force her to accept a person who is a stranger and not of her choosing to undertake the intimate process of bearing her a child. Employing a commercial surrogate she had chosen herself would restore her some control, and in giving her a choice of surrogate, thereby restore some of the intimacy and personal control of her reproduction that she had lost. In this sense, the award made was the closest it could come, to paraphrase Lord Blackburn, to putting Ms X in the same position she would have been but for the wrong. Reasoning on the issues in this way would have focused the court's judgment more acutely and more appropriately on what it would take to restore Ms X to her position before the negligence.

Secondly, pre-tort, if she wanted a child and was fertile, she could be secure in the knowledge that that child born (by her) would be her legal child. An award merely for English surrogacy would have been a poor substitute because she would have been much more at the whim of the surrogate and the courts, were it to be the case that the surrogate refused to give up her parental status. She would have had comparatively little security. While the enforceability of the surrogacy arrangement in California would not have offered her the same level of security (particularly, it would not have guaranteed her parentage in the United Kingdom), it would have been a much closer analogue for the security of having own child, and more fully restorative to her previous position. She certainly would have *felt* more secure. The majority's position would have been strengthened by an acknowledgement of these elements of her loss, and the fact that Californian surrogacy arranged commercially was, to her mind, the best prospect to give her back what she had lost. But to do so would also have meant the majority's view would conflict with the other key policy aspects of the English law: that the child's welfare is paramount, and that it is for the law to determine parentage. However, a direct exploration of this and greater consideration of the Law Commission's reforms in relation to it would have been welcome. Most valuable would have been a head-on engagement with this tension, which would have required the Supreme Court to deal directly with the first of Hedley J's concerns about surrogacy. It is regrettable that it did not really do so, as this was needed for

a proper consideration of whether to make an award that did fall foul of that policy aspect of the law on surrogacy.

Had this argument been made, the Supreme Court would also have better recognised that the full award could far better capture the subjective dimensions of her loss — what she in particular had lost, which was her ability to make her own decisions about her reproduction as far as was possible. Ms X had very understandable reasons for seeking to address her loss in the way she wished to, and in awarding her the full costs, the Supreme Court happily in effect made an award that valued her loss *as she experienced it*. While in many ways, damages awards are not made subjectively, a legitimate criticism of the way the courts have responded to harm in the reproductive context is their failure to account for the deeply subjective nature of these harms. Overt recognition of the fact that *for Ms X*, commercial surrogacy of this kind was needed to properly redress the harm she had suffered would have been a welcome move towards a better approach to damage in this context.<sup>76</sup> As we have seen in other areas of law applied to reproduction, a failure to put the person and their subjective experience of their loss at the centre of the inquiry leads to awards that fail to capture the harm they have suffered.<sup>77</sup>

## VI. CONCLUSION

The Supreme Court's decision in *XX* is to be welcomed, as it takes a liberal approach to understanding (and hence compensating) Ms X's loss, which resulted from the grievous injuries she suffered due to the defendant's negligence. It also does away with the unhappy emphasis on the need for a genetic connection between a mother and her child found in *Briody*, and hence represents an understanding of parenthood that is much more in line with modern, accepting views. However, the reasoning in support of the decision would have been strengthened by focusing more on the woman at the centre of the events and what she herself had lost. At its heart, negligence's role is restore to those what others have, through their carelessness, taken from them. She was clear in what she needed for that to be achieved, and a more full appreciation of *all* that she had lost would have made this evident. This could, then, have been drawn upon to meet the basic tenets of tort recovery, and bolster the arguments for

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<sup>76</sup> See further Nicky Priaulx's excellent work on autonomy and reproduction: N. Priaulx, 'That's One Heck of an "Unruly Horse" Riding Roughshod over Autonomy in Wrongful Conception' (2004) 12 *Feminist Legal Studies* 317.

<sup>77</sup> I have made this argument elsewhere in the context of negligently-induced conception: Cressida Auckland and I Goold, 'Claiming in Contract for Wrongful Conception' (2020) 136 *Law Quarterly Review* 45 [Case Note].

making an award that enabled her to do something lawful elsewhere, yet against policy in this country. Even further, this decision demonstrates why a full appreciation of what has been lost is vitally important.

Had she been awarded simply the cost of surrogacy in England, this would have made good her ability to have a child, but such an award would have woefully undercompensated her by failing entirely to capture the *individual* and what she had lost. While there needs to be objectivity in the calculation of awards, damages awards must and do account for the value of what the individual claimant has themselves lost. Like the widely criticised conventional award for lost autonomy in *Rees*, an award that covered only surrogacy in this country would have fallen foul of the same problems --- failing to value the individual loss. Hence the references to *McFarlane* and *Rees* were particularly apt --- as instances where policy concerns led the House of Lords to deny recovery for maintenance costs on poorly articulated moral grounds. Here, however, we see the Supreme Court take a more open, nuanced approach to the policy question, and thereby avoid being locked into a one-dimensional approach to the question. They reached the correct outcome, though had they emphasised the need to restore what she herself had lost more, they would have reached it by much more welcome reasoning.