



# Is UK law changing the way it views commercial surrogacy arrangements?



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*A review of the recent Supreme Court decision in  
Whittington Hospital NHS Trust v XX [2020] UKSC 14*

Although this a civil law (negligence) decision rather than a family law case, the judgment in *Whittington* has some interesting potential policy implications for surrogacy law, particularly in view of the current review being undertaken by the Law Commissions of England & Wales and Scotland, which looks likely to transform UK law on parenthood in surrogacy cases.

XX, the claimant in *Whittington*, sought compensation from the NHS after a series of medical failures left her unable to carry a pregnancy. She sought financial compensation sufficient to enable her and her partner to have a child through surrogacy. What makes the case interesting is that she sought funding to cover a number of surrogacy journeys, not in the UK, but in the USA (and specifically in California).

In California, which is often characterised as supporting “commercial surrogacy”, surrogacy agreements are legally recognised, surrogacy agencies operate for profit, and surrogates can be compensated for their inconvenience. As a result, intended parents can engage professionals to provide matching services and ensure that all parties are screened, prepared, informed and legally advised. Parents also have legal certainty given the status of the agreement with their surrogate, and know they will be their child’s legal parents immediately from birth.

The system for regulating surrogacy in California is very different to that in the UK, which is often characterised as supporting only “altruistic surrogacy”. In the UK surrogacy arrangements are informal, based on trust without surrogacy agreements being legally recognised. The surrogate who gives birth is the legal mother of the child she gives birth to, and must consent to the transfer of parenthood after the birth. Profit-making surrogacy agencies are prohibited, and the post-birth family law mechanism for transferring parenthood (parental orders) expects the family court to ensure that only reasonable expenses have been paid (although in reality the boundaries are ill-defined and unenforced by the family court). In the UK, the murky legal framework means that informal surrogacy arrangements are frayed with vulnerability for everyone, and there is a significant shortage of surrogates willing to help.

It has become common over the past 15 years for parents from the UK to choose international surrogacy over UK surrogacy options, with approximately half the parental orders made by the family court now concerning children born outside the UK. Research conducted by Cambridge University and surrogacy agency Brilliant Beginnings in 2018 found that the most commonly cited reasons why parents from the UK had chosen to go overseas for surrogacy were the lack of professional services for matching in the UK

(69%), the lack of legal certainty (67%) and the shortage of UK surrogates (40%). (“Cross-border and domestic surrogacy in the UK context: an exploration of practical and legal decision-making”, Jadva, Prosser and Gamble (2018), *Human Fertility*, 1-12.)

Like many other UK intended parents who need to conceive through surrogacy, XX did not want to engage with the UK surrogacy system, and wanted her negligence compensation to enable her to choose the Californian option instead. This was controversial, both because the cost was significantly more (a surrogacy journey in California costs £150,000 to £200,000, compared with £30,000 to £60,000 in the UK), and because historically the UK has taken a strong public policy stance against compensated and commercially-arranged surrogacy.

## The Supreme Court’s decision

At first instance in the High Court XX was awarded damages sufficient to cover two surrogacy journeys in the UK using her own eggs. XX’s appeal to claim for commercial surrogacy and the use of donor eggs was allowed in the Court of Appeal, but the NHS then appealed. The case went to the Supreme Court, which had to decide if it would award compensation to fund surrogacy using XX’s own eggs, surrogacy using donor eggs and finally if the compensation could cover the cost of commercially-arranged compensated surrogacy in a country where this practice was legal.

The Court discussed that the purpose of compensation in clinical negligence cases is to put the individual in the position she would have been in had she not suffered negligence. However, the courts cannot award compensation for something that is illegal or contrary to public policy.

Whether the court should award compensation for surrogacy with XX’s own eggs was relatively straightforward. The judges accepted that surrogacy was now a widespread and accepted assisted reproduction technique and that compensation should be awarded, provided that there were reasonable prospects of success.

The court also agreed to award compensation for surrogacy using donor eggs. In the earlier 2001 case of *Briody v St Helen’s & Knowsley Area Health Authority* [2001] EWCA Civ 1010, compensation for the use of donor eggs was refused on the basis that it was not “truly restorative of what the claimant had lost” due to the loss of genetic link. However, the Supreme Court now considered that changes in society and law since 2001 meant that the idea of family had moved on and that there were now many different kinds of modern families. Compensation for egg donation was awarded.

The final question, whether to allow compensation to be awarded for an international commercial surrogacy arrangement, was the most controversial question. In 2001 in *Briody* compensation for commercial surrogacy had been refused because it was decided that commercial surrogacy was against public policy. However, the Supreme Court

in *Whittington* noted that since then the Family Court had considered a significant number of cases involving international surrogacy (beginning with *Re X and Y* [2008]

***“The Supreme Court said that it was perfectly legal for UK parents to start or grow their families through international commercial surrogacy arrangements and that many chose to do so.”***

EWHC 3030 (Fam)), in which parents from the UK had conceived through commercial surrogacy arrangements in countries like the USA, Ukraine and Georgia, and subsequently sought the court’s authorisation of such arrangements via a parental order. There had not been a single case in which the Family Court had refused a parental order on grounds of public policy, and this meant that commercial surrogacy was now in reality routinely accepted by the UK legal system. The Supreme Court therefore took a different view to the court in *Briody*. It said that it was perfectly legal for UK parents to start or grow their families through international commercial surrogacy arrangements and that many chose to do so. The Court could therefore award compensation for an international surrogacy arrangement if the cost involved was reasonable and the country in question had a well-established system which properly safeguarded the interests of all involved – as California does.

## Implications for surrogacy law in the UK?

The Supreme Court acknowledged that both the law and public opinion had made positive strides in accommodating modern families. Whilst this case does not change the law on surrogacy in the UK, it is significant to see the highest-ranking Court in the UK acknowledge the benefits of a well-established surrogacy law framework which aims to protect the interests of all involved. Where “commercial surrogacy” used to be considered against public policy, it is now increasingly accepted that the more thoroughly-regulated surrogacy framework it offers in places like California is both legitimate and unavailable in the UK.

The Law Commissions of England & Wales and Scotland (the UK’s independent statutory bodies which review out-of-date laws and recommend whether and how they should be reformed) are currently carrying out an extensive review of surrogacy law in the UK and their final report is expected in 2022. It will be interesting to see whether, in view of the changing attitudes acknowledged by the Supreme Court, they conclude that legally-recognised and regulated surrogacy (in which both surrogates and professionals can be compensated for their efforts) should be permitted in the UK too.

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