

## Judging commercial surrogacy and public policy: an analysis of *Whittington Hospital NHS Trust v XX* (UK Supreme Court)

Irene Domenici, Christian Günther\*

JUDGING COMMERCIAL SURROGACY AND PUBLIC POLICY: AN ANALYSIS OF WHITTINGTON HOSPITAL NHS TRUST V XX (UK SUPREME COURT)

ABSTRACT: Our contribution offers an analysis of the UK Supreme Court judgment in the case of *Whittington Hospital NHS Trust v. XX*, regarding the possibility of considering the costs for commercial surrogacy arrangements in California as a recoverable head of damage. The commentary analyses the divergent conceptions of public policy and legal policy illustrated in the majority and dissenting opinions. In conclusion, an assessment is given of the scope and extent of the judgment, in the light of past cases and with a view to the possible influence of the decision on future claims for damages.

KEYWORDS: Surrogacy; UK Supreme Court; legal policy; public policy; ethics

SOMMARIO: 1. Introduction – 2. Summary of the case – 2.1. Case facts – 2.2. The Court’s judgment – 3. Ethics and the law: public policy v. legal policy – 3.1. Regulation on surrogacy in the UK – 3.2. Lady Hale’s multifaceted legal and public policy approach – 3.3. Legal policy in Lord Carnwath’s dissenting opinion – 3.3.1. Illegality of the claimant’s actions – 3.3.2. Coherence of the law and role of the legislature – 3.3.3. The moral view of the ordinary person – 4. Extent and scope of the decision.

### 1. Introduction

The potentially revolutionary nature of this case was palpable from the moment that it was first brought before the High Court of Justice<sup>1</sup>. Notably, this potential was then in fact realised by the ensuing Court of Appeal judgment, which marked the first time that the right to have a child using surrogacy arrangements was recognised as a head of damages in English tort law<sup>2</sup>. On the 1st of April 2020, the Supreme Court finally had the chance to rule on the issue and to decide whether this novel development should be upheld. Hereby, a particularly thorny question was not just whether the costs for surrogacy per se should be recoverable but, if so, whether this should also be extended to cover the cost of a foreign commercial surrogacy.

In the end, the Supreme Court decided the case by a narrow margin of three to two, with Lady Hale’s landmark majority judgment constituting a reversal of the position she had assumed almost twenty

\* Irene Domenici: PhD Student in Social Law at the Max Planck Institute for Social Law and Social Policy (Munich). Mail: [domenici@mpisoc.mpg.de](mailto:domenici@mpisoc.mpg.de); Christian Günther: PhD Student in Social Law at the Max Planck Institute for Social Law and Social Policy (Munich). Mail: [guenther@mpisoc.mpg.de](mailto:guenther@mpisoc.mpg.de).

<sup>1</sup> *XX v Whittington Hospital NHS Trust* [2017] EWHC 2318 (QB).

<sup>2</sup> M. WELSTEAD, *To Procreate, or Not, That Is the Question*, in *International Survey of Family Law*, 2018, 81.

years earlier in *Briody v St Helen's and Knowsley Area Health Authority*<sup>3</sup>. This had been the leading authority for the proposition that an award of damages for commercial surrogacy arrangements abroad was against public policy and thus must be refused by the courts.

Quite apart from the specific outcome however, the case is also significant for the fact that – in both the majority and minority judgments – there is a clear sense of the Supreme Court Justices grappling with a further fundamental issue; namely, the role of the courts in a pluralistic democratic society. What seems uncontentious amongst all parties is that the courts must be responsive to their jurisdiction's legal culture and must, to some degree, strive to balance an adherence to the legislature's intent with the need to do justice in the individual case and to protect citizens' rights and liberties. Inevitably this creates the danger of assuming «a role which may appear to be undemocratic»<sup>4</sup> and, naturally, this danger is heightened in a context such as the present where the courts must confront highly controversial ethical questions, with respect to which different segments of society occupy a range of positions.

We suggest that the two leading opinions diverge substantially in how they aimed to fulfil their constitutional function while, simultaneously, pre-empting this dangerous perception. As we will see, for the minority Lord Carnwath opted for a more cautious, conservative interpretation of “policy” that gave pride of place to legislative intent and attempted to focus on purely legal questions. By contrast, Lady Hale arguably utilised a broader conception of legal culture to engage more fundamentally with the wider ethical and social discourses.

## 2. Summary of the case

### 2.1. Case facts

After receiving a series of misdiagnosis by the Whittington Hospital, the claimant contracted cervical cancer and was left unable to procreate. The hospital admitted the negligent failure to diagnose the cancer in due time and a relevant claim was filed.

Having lost the ability to bear children herself, the claimant argued that the loss she suffered should be recoverable, inter alia, in the form of damages for the costs of making commercial surrogacy arrangements in California. In 2018, the Court of Appeal allowed her appeal against the first instance judgment, thus awarding her damages for the commercial surrogacy arrangements<sup>5</sup>.

The hospital's appeal to the Supreme Court raises three points. Namely, whether damages were recoverable for surrogacy arrangements in the UK using the claimant's own eggs, if so, whether damages could be recovered to fund surrogacies using donor eggs in the UK and, finally, whether this is valid also for surrogacy performed abroad.

<sup>3</sup> *Briody v St Helen's and Knowsley Area Health Authority* [2001] EWCA Civ 1010; [2002] QB 856.

<sup>4</sup> J. RAZ, *Ethics in the Public Domain: Essays in the Morality of Law and Politics*, Oxford, 1994, 375.

<sup>5</sup> *XX v. Whittington Hospital NHS Trust* [2018] EWCA Civ 2832.

## 2.2. The Court's judgment

The starting point for the Court's judgment was the general compensatory tort law principle, according to which, in the words of the Court, «[t]he object of damages in tort is to put the claimant, as far as possible, back in the position in which she would have been had the tort not been committed»<sup>6</sup>. However, it also stated that some heads of damages that would readily fall within that principle are nevertheless irrecoverable if the restoration of the status quo ante appears contrary to legal or public policy or can be regarded as unreasonable.

The Court applied this reasoning to the three issues raised by the hospital and found the claimed damages to be recoverable in all three cases.

In the case at hand, the claimant has lost her ability to bear her own children. Thus, in the first place, the Court is confronted with the issue of deciding whether surrogacy can be regarded as restorative of this condition.

According to the judges, this is certainly the case when the baby is conceived using the intended mother's own eggs, but it is also now the correct way of viewing the use of donor eggs. Lady Hale, in fact, applies an argument that suggests that the «right to have a child» should be divided into four dimensions: «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»<sup>7</sup>, and argues that a surrogacy agreement with donor's eggs is apt to restore two of the features at stake, thus making the relative damages recoverable.

Secondly, the Court assesses whether the recovery of damages in the three cases would be contrary to public or legal policy. As more fully discussed below (in section 3), the majority – but not the minority – concludes, on the basis of a variety of reasons, that the compensation of the costs of surrogacy, including commercial surrogacy, is no longer to be regarded as contrary to public policy<sup>8</sup>.

Finally, in assessing the reasonableness of the award of damages, the Court accepts the reasonableness of all costs in the present case. In doing so it refers to various issues: the likelihood of success<sup>9</sup>, the decision to opt for an arrangement abroad<sup>10</sup> and whether the costs could be regarded as excessive<sup>11</sup>.

## 3. Ethics and the law: public policy v. legal policy

### 3.1. Regulation on surrogacy in the UK

It is important to point out, as Lady Hale does in the dedicated *excursus* preceding the judgment, that surrogacy agreements in the UK are essentially unenforceable<sup>12</sup>. The legal maternity of the child is

<sup>6</sup> *Whittington Hospital NHS Trust v XX* [2020] UKSC 14, para. 1.

<sup>7</sup> *Ibid*, para. 47.

<sup>8</sup> *Ibid*, para. 53.

<sup>9</sup> *Ibid*, para. 48 and 53.

<sup>10</sup> *Ibid*, para. 53.

<sup>11</sup> *Ibid*.

<sup>12</sup> As explicitly provided by the Surrogacy Arrangements Act 1985, s. 1A.

ascertained according to the principle *mater semper certa est*<sup>13</sup> and therefore, to get legal parenthood of the child, the intended parents must apply for a parental order to a Court. In order to grant the transfer of parental responsibility to the commissioning parents, the Court shall check that the following conditions have been met: the free and full consent given by the legal parents, the existence of a biological link between the baby and at least one of the intended parents, that no payment was made exceeding the compensation of reasonable expenses<sup>14</sup>. Following those provisions, commercial surrogacy is deprived of its *raison d'être*: conferring (legal) parenthood on the commissioning parents. Nonetheless, such payments have been authorised retrospectively by the courts<sup>15</sup> for the sake of the child's welfare and best interest<sup>16</sup> and giving payments to a surrogate is not a criminal offence as such. In fact, negotiations for a surrogacy agreement on a commercial basis only constitute a criminal offence if a third party is involved in the commercial agreement as an agent or intermediary<sup>17</sup>.

### 3.2. Lady Hale's multifaceted legal and public policy approach

Having outlined the main aspects and structure of the majority's judgment above, this section focusses on offering a more comprehensive analysis of that crucial aspect of Lady Hale's analysis with which the dissenting minority disagreed. Namely, her finding regarding the public policy qualification – that awarding damages for the costs of a foreign commercial surrogacy would not «be contrary to legal or public policy». Her judgment is remarkable for several reasons in this respect. First, while her understanding of relevant policy considerations lies at the heart of the disagreement with Lord Carnwath, Lady Hale does not attempt to propose a definition of – or a rationale underlying – this central notion. Instead, it is left for us to infer a relatively broad conception of such considerations from her treatment of individual policy arguments. Second, Lady Hale's finding that the reimbursement of (foreign) commercial surrogacies is not contrary to public policy represents a departure from the position that she had previously elaborated herself in *Briody v St Helen's and Knowsley Area Health Authority*<sup>18</sup>, which had until then been the leading authority on that matter. Third, several aspects of her analysis present us with prescient insights into how difficult it can be for courts to grapple with matters of policy in legal judgments. This can no doubt be informative for those wishing to engage more widely with the question of the appropriate relation between legal and ethical reasoning.

For the purposes of ascertaining Lady Hale's relevant conception of policy, it is instructive how she begins her analysis of the public policy qualification. She does so by referencing a well-known application of this qualification – a case in which it was found that damages for the cost of bringing up a child,

<sup>13</sup> According to which the woman who bears gives birth to the child is also the legal mother, Human Fertilisation and Embryology Act 2008, s. 33.

<sup>14</sup> Human Fertilisation and Embryology Act 2008, s. 54.

<sup>15</sup> « [T]here is a tacit acceptance on the part of the courts that payments are ordinary, and inescapable, part of surrogacy arrangements, especially with the increase in international surrogacy», C. FENTON-GLYNN *Surrogacy in England and Wales*, in J. M. SCHERPE, C. FENTON-GLYNN, T. KAAAN, *Eastern and Western Perspectives on Surrogacy*, Cambridge, 2019, 121-122.

<sup>16</sup> It is «seldom in the child's interest for a court to explore the issue of payment carefully», S. R. LATHAM, *The United Kingdom Revisits Its Surrogacy Law in Hastings Center Report*, 50, 1, 2020, 6.

<sup>17</sup> Surrogacy Arrangements Act 1985, s. 2. This provision applies to agencies and middlemen, but also to legal professionals, see C. FENTON-GLYNN, *op. cit.*, 119.

<sup>18</sup> [2001] EWCA Civ 1010; [2002] QB 856.

which had resulted from a negligently performed vasectomy, should not be awarded on policy grounds<sup>19</sup>. In considering this finding she does not seek to identify a unifying rationale, simply stating that the judges offered «a variety of reasons»<sup>20</sup>. In the present case as well, Lady Hale presents us with a range of reasons for her finding that damages for a commercial surrogacy are not contrary to legal or public policy, without explicitly indicating the basis on which she is selecting them. This demonstrates a focus on the particular, rather than the general, and itself presents an interesting methodological contrast with the approach adopted in the minority's opinion, but it also leaves us with the crucial substantive task of describing and categorising the disparate factors that she draws upon in order to arrive at some more general principles that shape her notion of "legal and public policy". Unfortunately, her focus on particular policy arguments also makes it more difficult to identify precisely which factors influence her treatment of the "public policy qualification". On the one hand a group of factors is dealt with expressly in Lady Hale's analysis of the qualification in paragraphs [49] – [52] and these are unmistakably central to this treatment. On the other, there are several considerations that appear elsewhere in her judgment, for instance when she considers whether surrogacy is truly restorative of a woman's loss of fertility, but which are also policy matters and so closely related to the factors informing the public policy qualification that it seems fair to assume that they may have played some role in shaping this analysis. We begin by focussing on the former group, reflecting its undoubted relevance and significance, but then also provide a comprehensive consideration of the latter. Taking these together we then propose a more general categorisation, to yield some insight into the kinds of policy arguments that were arguably deemed relevant and appropriate to this specific legal analysis.

There are three kinds of factors specifically referred to by Lady Hale in her consideration of the qualification. First, the comparability of the types of costs that would be incurred for commercial surrogacy in California. Second, the fact that it is not against the law and, more specifically not criminal, for the commissioning parent or the surrogate to engage in acts that amount to arranging or assisting in the making of a commercial surrogacy<sup>21</sup>. At most there is a danger that courts would refuse to retrospectively authorise payments that exceed reasonable expenses and thus could not make a parental order in favour of the commissioning parent, but Lady Hale emphasises that this has never occurred in practice. Lastly, the broader legal, social and political developments regarding commercial surrogacy in the UK are considered, including: the courts' significant efforts to recognise the relationships created by commercial surrogacies, the government's (emerging) support of surrogacies as a way of creating family relationships and a reform proposal that would enable commissioning parents to be recognised as the parents of the child from birth, which is said to align UK law more closely with the Californian model and to suggest that the ethical barriers to properly regulated commercial surrogacy arrangements are not thought insuperable.

In addition to this clearly delineated group of policy arguments, Lady Hale's judgment also engages with similar arguments in several other instances. Most notably this occurs in the passages where Lady

<sup>19</sup> *McFarlane v Tayside Health Board* [2009] 2 AC 59.

<sup>20</sup> *Whittington Hospital NHS Trust v XX* [2020] UKSC 14, para. 42.

<sup>21</sup> As encapsulated in S2(1) Surrogacy Arrangements Act

Hale frankly confronts the aforementioned case of *Briody v St Helen's and Knowsley Area Health Authority*<sup>22</sup> where she had expressed the view that a claim for damages for the costs of a Californian surrogacy was «contrary to the public policy of this country clearly established in legislation»<sup>23</sup>. Although this decision was not binding on the Supreme Court, the similarity of the facts – and related legal arguments – called for a justification of the divergent outcome and this justification came, inter alia, in the form of an exposition of «developments in law and social attitudes which have taken place since then»<sup>24</sup>. Relevant legal developments included: allowing the involvement of non-profit bodies in surrogacy arrangements; changes in the law's idea of what constitutes a family and family life, as is evinced by the legal support of same-sex relationships and parenthood; provisions that extended parental leave and paternity pay to applications for a parental order and thus offered indirect support to surrogacy arrangements; the expression of positive attitudes towards surrogacy in government guidance; and the Law Commissions' proposed reforms to the law of surrogacy. On top of this there was an exposition of wider social developments, such as «the progress of the medicine and science of assisted reproduction»<sup>25</sup> which has resulted in an improved success rates, the «growing demand from [male same sex couples] for surrogacy arrangements»<sup>26</sup>, an increasing public familiarity and acceptance of assisted reproduction and gestational surrogacy as a means of founding a family (as recorded in a public opinion poll), the fact that assisted reproduction was both available on the NHS and commercially and that the express view of the Human Fertilisation and Embryology Authority did not suggest that surrogacy arrangements should be viewed with particular suspicion or should be discouraged.

Lastly, quite apart from considering wider social, legal and political trends, Lady Hale also does not shy away from incorporating pragmatic ethical evaluations of the underlying legal reality within her analysis. In this vein, she expresses that, given the differences between the UK and Californian regulation of commercial surrogacy arrangements, «it is scarcely surprising that the claimant's clear preference is for a commercial surrogacy arrangement in California»<sup>27</sup>. Similarly, she contemplates the existence of a spectrum of surrogacy arrangements. According to this, women should have the right to choose to use their body to act as surrogates for others but, at the same time, be protected from the dangers of exploitation and abuse by profiteering middlemen. It is an open question whether it is the current UK model or one more akin to the Californian system that facilitates this.

Having provided an extensive description of the range of policy arguments relied upon by Lady Hale, we now turn to offering a possible approach for their categorisation and initial evaluation. In this respect it bears emphasising that Lady Hale is evidently deeply concerned to establish that the award of damages is consistent, or at least not inconsistent, with the laws of the United Kingdom. This is most prominently displayed by her insistence that neither the pursuit of commercial arrangements by the commissioning parents and surrogates in the UK, nor abroad, are illegal. It is further reflected in the significance she attributes to the courts' (universal) recognition of the relationships created by such

<sup>22</sup> *Whittington Hospital NHS Trust v XX* [2020] UKSC 14, para. 23-39.

<sup>23</sup> *Ibid.*, para. 26.

<sup>24</sup> *Ibid.*, para. 28.

<sup>25</sup> *Ibid.*, para. 35.

<sup>26</sup> *Ibid.*, para. 31.

<sup>27</sup> *Ibid.*, para. 22.

surrogacies and, moreover, by the reference to proposed reforms. This could be said to evince a prospective desire to keep the court's jurisprudence in line with ongoing legal developments. This is the first important category of "policy" considerations that can be identified in the majority opinion because it is arguably the one that aligns most closely with that adopted by the dissenting minority, albeit there is evidently disagreement on whether awarding damages would in fact further or undermine the coherence of the legal system (see section 3.3.2.).

The key distinction between the two opinions in terms of "policy" emerges when we consider the further categories of concerns that the majority give weight to. Lady Hale does not limit herself to an analysis of legal coherence, but – as we saw – attempts to fit this into a broader framework of non-legal considerations, such as social attitudes (ascertained with the use of empirical data, but also through changes in the law, guidance and regulation), political developments and ethical evaluations. This broader view altogether shifts the tenor of the relevant analysis. For, although it is imaginable that awarding damages may positively promote the coherence of the legal system – as Lady Hale appears to suggest in considering the attitude of courts in recognising the relationships created by commercial surrogacies – the concern over coherence is predominantly a negative one. It will typically manifest itself in the form of the question: «would this award of damages create an inconsistency between two areas of law?»<sup>28</sup> and is naturally aimed at restricting such awards. By contrast, the multifaceted enquiry that Lady Hale engages in, while capable of accommodating such negative concerns, is further able to recognise that there are positive grounds for allowing an award of damages as well. In other words, when it comes to considering the public policy qualification to tort damages, a range of policy concerns are also able to play a positive, constructive role in supporting the relevant claim and not just a negative one in defeating it.

In consequence it seems likely that, when courts consider this qualification in future, there will be an increase in the number and complexity of the factors they must consider and they will have to conduct a more nuanced balancing exercise in considering them. Yet this nuanced and complex analysis, which is masterfully encapsulated in Lady Hale's judgment, arguably also reflects how the law must, on occasion, grapple with thorny and malleable ethical issues and, more particularly, how the common law courts can support the legal system in its adjustment to rapidly developing social attitudes and approaches to regulation. Moreover, it should be remembered that this policy analysis will still be heavily mediated through its position in the wider legal analysis and through the importance – if not dominance – that the concern for legal coherence played in the majority, not only the minority, judgment.

### 3.3. Legal policy in Lord Carnwath's dissenting opinion

While Lord Carnwath agrees with the majority of the Court on the recoverability of damages to fund surrogacy agreements within the UK, his dissenting opinion reaches a different conclusion on the third issue raised by the appeal. Namely, the award of damages for a commercial surrogacy arrangement performed abroad, such as in California, where this is not a criminal offence.

The judge expressly invokes the difference between legal policy and public policy and states that it is rather the coherence with legal policy that has to be checked in the current situation. According to

---

<sup>28</sup> This is for instance amply demonstrated in the cases of *Patel v Mirza* and *Gray v Thames Trains Ltd*, cited in the present case.

him, legal policy and public policy are therefore to be distinguished «even though moral considerations may play a part in both»<sup>29</sup>. In the following we explore several aspects of his dissenting opinion that appear to shape this conception of legal policy.

### 3.3.1. Illegality of the claimant's actions

One crucial point is that it would be against legal policy to award damages if the actions of the claimant would be illegal. Referring to previous case law, Lord Carnwath maintains that “coherence of the law” especially requires consistency between the civil and criminal law systems of any given jurisdiction<sup>30</sup>. Therefore, a «civil court should bear in mind that it is desirable for the criminal and civil courts to be consistent in the way that they regard what the claimant did»<sup>31</sup>. In the case at hand, the civil court should refuse to find that heads of damages are recoverable if this would promote actions that, if taken in the jurisdiction where the court is sitting, would conflict with the criminal law<sup>32</sup>.

A possible flaw in the argumentation here seems to be the criterion adopted to measure the coherence of the law. What should be relevant is, in fact, the criminality of the actions that the claimant is actually going to take. In this regard, the claimant's conduct of travelling abroad to enter a surrogacy agreement is in no way criminally relevant in the United Kingdom<sup>33</sup>. On the contrary, after a child has been born thanks to such agreements abroad, it is possible for the commissioning parents to be recognised as legal parents through a parental order of the court.<sup>34</sup> Indeed, the commercial surrogacy in the present case has always been meant to be undertaken in a jurisdiction in which it is not criminalised and where it is offered more protection by the law. The alternative for the claimant would otherwise have been to use non-commercial arrangements in the UK<sup>35</sup>.

Therefore, it is true that the claimant's action regarding a commercial surrogacy would be illegal if taken in the UK, but it is also true that she never intended to undertake them there, precisely because the UK's legal framework lacks comparable protections for such agreements. We would argue that relying upon a fictional case in which the claimant opts for a (criminalised) commercial surrogacy in the UK is, in fact, beside the point.

### 3.3.2. Coherence of the law and role of the legislature

It has been pointed out, however, that the courts' toleration of commercial surrogacy agreements undertaken abroad only stems from the respect that they must give to the best interests of the child which has already been born. In this sense, the rationale of the parental order regulations is linked to

<sup>29</sup> *Whittington Hospital NHS Trust v XX* [2020] UKSC 14, para. 62.

<sup>30</sup> *Ibid*, para. 64-65.

<sup>31</sup> *Ibid*, para. 65.

<sup>32</sup> *Ibid*, para. 66.

<sup>33</sup> *Ibid*, para 21: «The offences, however, 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>34</sup> It is sufficient that «either or both of the applicants [...] be domiciled in the United Kingdom», Human Fertilisation and Embryology Act 2008, s. 54(4)(b).

<sup>35</sup> *Ibid.*, para. 5.



the paramount importance given to the child's well-being and this rationale would not be applicable in a case in which the claimant is only seeking a surrogacy (i.e. where no child has been born yet<sup>36</sup>). One could, therefore, argue that it would be improper to instrumentalise proceedings that are intended to promote the welfare of the child to create additional situations that would otherwise be strongly discouraged, but which in turn necessitate the courts to act inconsistently to protect a child's welfare. This could, in fact, result in acting against the choice of the legislature, undermining the coherence of the legal system and, ultimately, going against legal policy.

In this regard, the principle of legal coherence requires all organs of the same legal system to adopt a consistent standpoint<sup>37</sup> and, in particular, it could be argued that the relevant position should be consistent with the one adopted by the Parliament as a result of the democratic process. In fact, in a case – such as the present – that involves such a controversial subject matter and an accompanying high degree of ethical disagreement, the Court could be criticised for granting protection and encouraging a situation that the democratic process deliberately refused to positively support<sup>38</sup>. In this sense, there might be a legitimate worry that the Court is acting in breach of what was decided in the democratic process.

Although this concern is not voiced expressly by Lord Carnwath, some statements in his dissenting opinion point clearly in this direction. For instance, when defining legal policy he in fact states that «[i]t is difficult to think of a better guide to where to draw the line in a highly sensitive area such as this than that indicated by Parliament»<sup>39</sup>, thus invoking the primacy of a democratically-made decision in matters of a highly sensitive nature in which moral judgments play a major role<sup>40</sup>. The possibility to recover damages to fund commercial surrogacy is, for him, strongly dependent on the state of the law<sup>41</sup>.

On the other hand, a proactive role of the courts in ethically controversial matters can be crucial for doing justice in the individual case. The ethical acceptability of certain techniques in a society is, in fact,

<sup>36</sup> The point was raised in the judgment of the Court of Appeal, *XX v. Whittington Hospital NHS Trust* [2018] EWCA Civ 2832, para. 49. See J. L. M. TAYLOR, *International Commercial Surrogacy as a New Head of Tortious Damage: XX v Whittington Hospital NHS Trust* [2018] EWCA CIV 2832 in *Medical Law Review*, 28, 1, 2020, 206.

<sup>37</sup> One aspect of the coherence of the law being «the desirability of different organs of the same legal system adopting a consistent approach to the same events», *Whittington Hospital NHS Trust v XX* [2020] UKSC 14, para. 65.

<sup>38</sup> It has been argued that the essential law surrounding the morally controversial issue of surrogacy «is a matter of political judgment to be made by the domestic legislature», M. HEDLEY, *The Legal Implications of International Surrogacy Agreements: A View from the Bench in England and Wales*, in J. M. SCHERPE, C. FENTON-GLYNN, T. KAAAN, *Eastern and Western Perspectives on Surrogacy*, Cambridge, 2019, 142.

<sup>39</sup> *Whittington Hospital NHS Trust v XX* [2020] UKSC 14, para. 63.

<sup>40</sup> This concern is indeed often manifested in cases of ethically controversial matters: «[i]ndeed, such is the growth of new and complex decisions confronting the courts that some judges have expressed their concern that they are increasingly being invited to make decisions which contain significant ethical questions; matters which, for at least some of the judiciary, should be decided by Parliament rather than by courts», S. A. M. MCLEAN, *Law, Ethics and Healthcare*, in R. E. ASHCROFT, A. DAWSON, H. DRAPER, J. R. MCMILLAN, *Principles of Health Care Ethics, Second Edition*, Chichester, 2007, 194.

<sup>41</sup> «So long as that remains the state of the law on commercial surrogacy in this court, it would not in my view be consistent with legal coherence for the courts to allow damages to be awarded on a different basis», *Whittington Hospital NHS Trust v XX* [2020] UKSC 14, para. 67.

fluid and constantly changing over time. The failure of the legislature to detect these changes in time is, to a certain extent, unavoidable<sup>42</sup>, but can be accounted for in the courts' assessments. In particular, regulation of artificial reproductive technologies remains difficult to adjust to societal views since «regulators will encounter a plurality of values and priorities, some of which are likely to prove genuinely irreconcilable»<sup>43</sup>. Against this background, it takes certainly some time to build legitimacy of regulatory choices through public consultation and the search for a compromise.

In this sense, the judiciary can be the first detector of a given ethical development in society. The recognition of current developments in legal policy is a beneficial tool that the courts can use to make sure that «compensation for victims is not unduly restricted by policies which may have become entrenched over time»<sup>44</sup>.

And indeed, shifts in the societal acceptance of the practice have been detected by many legal scholars who have recently been strongly advocating for a reform of the regulation surrounding surrogacy<sup>45</sup>. Just last year, the Law Commission of England and Wales and the Scottish Law Commission<sup>46</sup> concluded an extensive public consultation on their proposals to reform surrogacy laws in the UK<sup>47</sup>. Although much confidence is placed in the work of the Commissions<sup>48</sup>, and rightly so, the timeline of this reform proposal confirms the concerns expressed above. In fact, the assessment of the public response and the preparation of a final report as well as of a draft Bill are expected to last until early 2022<sup>49</sup>.

<sup>42</sup> The response of the legislator to social and technological change can be slow due to many different factors, See G.E. MARCHANT ET AL. (ed.), *The Growing Gap Between Emerging Technologies and Legal-Ethical Oversight*. As put by C. CASONATO, *The Essential Features of 21st Century Biolaw* in E. VALDÉS AND J. A. LECAROS (ed.), *Biolaw and Policy in the Twenty-First Century*, Cham, 2019, 77: «One first risk on the part of the law [...] is to stay silent or still, paralyzed by both scientific unfamiliarity and ethical disorientation».

<sup>43</sup> C. GAVAGHAN, *Reproductive Technologies and the Search for Regulatory Legitimacy: Fuzzy Lines, Decaying Consensus, and Intractable Normative Problems*, in R. BROWNSWORD, E. SCOTFORD, K. YEUNG (ed.), *The Oxford Handbook of Law, Regulation and Technology*, Oxford, 2016, 993.

<sup>44</sup> J.L. M. TAYLOR, *op. cit.*, 207.

<sup>45</sup> «There is a widespread consensus amongst practitioners, academics, and even the judiciary, that the current law surrounding surrogacy in England and Wales is deeply unsatisfactory», C. FENTON-GLYNN, *op. cit.*, p. 133. See, *inter alia*, A. ALGHRANI, D. GRIFFITHS, *The regulation of surrogacy in the United Kingdom: the case for reform*, in *Child and Family Law Quarterly*, 29, 2, 2017, 165-186; H. PROSSER, N. GAMBLE, *Modern surrogacy practice and the need for reform*, in *Journal of Medical Law and Ethics*; 4, 3, 2016, 257-274; K. HORSEY, *Not withered on the vine: The need for surrogacy law reform* in *Journal of Medical Law and Ethics*; 4,3, 2016, 181-196 and E. JACKSON, *UK Law and International Commercial Surrogacy: 'the very antithesis of sensible'*, in *Journal of Medical Law and Ethics*; 4, 3, 2016, 197-214.

<sup>46</sup> Independent bodies created by the Law Commissions Act 1965 to make recommendations surrounding needed legal reforms.

<sup>47</sup> LAW COMMISSION OF ENGLAND AND WALES, SCOTTISH LAW COMMISSION, *Building Families Through Surrogacy: A New Law, Summary of Consultation Paper*, accessible on <https://s3-eu-west-2.amazonaws.com/lawcom-prod-storage-11jxou24uy7q/uploads/2019/06/Surrogacy-summary.pdf>, (last visited 20/04/2020).

<sup>48</sup> K. HORSEY, N. SMITH, A. MCLELLAN, S. NORCROSS, A. J. POWELL, S. JONES, *Further evidence for reform Surrogacy in the UK: Second Report of the Surrogacy UK Working Group on Surrogacy Law Reform*, December 2018, accessible on <https://kar.kent.ac.uk/71557/1/Surrogacy%20in%20the%20UK%20nd%20Report%202018.pdf>, (last visited 20/04/2020); S. R. LATHAM, *op. cit.*

<sup>49</sup> Updates on the project status can be found here: <https://www.lawcom.gov.uk/project/surrogacy/> (last visited 20/04/2020).

### 3.3.3. The moral view of the ordinary person

When introducing his dissenting opinion, Lord Carnwath references the case of *Rees v Darlington Memorial Hospital NHS Trust*<sup>50</sup>, which had previously applied the public policy qualification. The direct quotations that he gives from this judgment provide a helpful illustration of Lord Carnwath's conception of legal, as distinguished from public, policy. For, it emerges from these quotes that the concept of legal policy is at least partially based on «what would be morally acceptable to the ordinary person»<sup>51</sup>. In this sense, providing moral criteria of distributive justice and identifying what the ordinary citizen regards as morally good, just, fair and reasonable would be «simply routes to establishing the legal policy»<sup>52</sup>.

This appears to be one of the most problematic aspects of Lord Carnwath's advocacy for an independent category of "legal policy". In fact, this qualification of policy seems to be based on moral and ethical categories rather than legal considerations. Moreover, in a modern liberal democracy there are several problematic issues that are inherently connected with the use of the moral viewpoint of the ordinary citizen as a yardstick to establish legality or legitimacy.

An investigation of the problematic nature of this argument requires, first of all, some reflections on the concept of the moral acceptability of the ordinary person.

Especially in morally controversial cases, in fact, it would be simplistic to sustain that there is such a thing as the moral view of the ordinary person. On the contrary, the plurality of moral standpoints is a prominent and permanent feature of a democratic society that is composed of individuals that hold a variety of religious, philosophical and moral views<sup>53</sup>. Against this background, the regulatory choices of the state could not be based merely on one single moral position, since that would go against the role of the legal system in a pluralistic society composed by morally autonomous individuals<sup>54</sup>. This holds true even if the morality of the ordinary person is viewed as the reflection of the moral attitudes of the majority<sup>55</sup>.

On the other hand, we might consider the ordinary citizen as capable of recognising the acceptability of several different ethical positions and of taking into account moral pluralism. In this case, his moral acceptability would rather be based on a sort of «common ethical denominator»<sup>56</sup>. However, questions remain open as to whether the court is well placed to identify this common ethical denominator. In fact, courts are not a representative state organ and cannot make use of the tools of the democratic

<sup>50</sup> *Rees v Darlington Memorial Hospital NHS Trust* [2003] UKHL 52; [2004] 1 AC 309.

<sup>51</sup> *Whittington Hospital NHS Trust v XX* [2020] UKSC 14, para. 62.

<sup>52</sup> *Whittington Hospital NHS Trust v XX* [2020] UKSC 14, para. 61.

<sup>53</sup> J. RAWLS, *Political liberalism*, New York, 1993, 36. Rawls refers to this circumstance as «the fact of pluralism», *Id.*, *The Idea of an Overlapping Consensus* in *Oxford Journal of Legal Studies*, 7, 1, 1987, 4.

<sup>54</sup> «In a modern liberal democracy, [the right to dictate to individuals a moral position] presents a major problem of legitimacy. What gives lawmakers, in Parliament or the courts, the right to promote or proscribe a particular course of action in the face of controversy?», J. MONTGOMERY, *The Legitimacy of Medical Law*, in S. A. M. MCLEAN (ed.), *First do No Harm: Law, Ethics and Healthcare*, London, 2016, 2; see, also, S. A. M. MCLEAN, *Law, Ethics and Healthcare*, *cit.*, 193 ff.

<sup>55</sup> J. MONTGOMERY, *op. cit.*, 13 ff; C. GAVAGHAN, *op. cit.*, 993 ff.

<sup>56</sup> As put by C. GAVAGHAN, *op. cit.*, 993.

process, such as public consultations on law reforms. Moreover, «in any value-laden discretionary decision, account must also be taken of the values of the individual trial judge»<sup>57</sup>. In fact, unlike other cases where the standard of the ordinary person has been used in common law<sup>58</sup>, in this case highly controversial moral choices would have to be taken that go beyond what could be considered just and reasonable and rather involve the intimate beliefs of each individual.

For these reasons, it seems that the best way to understand the concept of what is morally acceptable to the ordinary citizen, in Lord Carnwath's view, is to read it in conjunction with the argument of legal coherence. This could be done by claiming that the courts should rely on parliamentary intent to establish the standard for what is morally acceptable to the ordinary citizen. This would arguably serve to align his reasoning more closely with the wider argument and the fundamental position defended throughout the dissenting opinion: that there is a distinct category of "legal policy", with controversial ethical evaluation being left to the democratic process and the legislature.

#### 4. Extent and scope of the decision

The final matter that will be especially important for the British courts to ascertain going forward, relates to the extent to which this case will influence the award of tort damages in the future, especially in relation to the public policy qualification. This involves two questions: first, what scope is there for the analysis conducted here to be applied more generally, by courts awarding tort damages in cases other than those relating to surrogacy? Second, in cases where surrogacy is argued to be restorative of a claimant's loss that has been negligently caused by a relevant defendant, what are the chances that the current outcome will be replicated: when will the courts award such damages as the ones that were awarded here for undertaking a commercial surrogacy abroad?

The first question draws our attention to the fact that the present case was rather exceptional in invoking the public policy qualification for tort damages in the first place. That this is a rare occurrence is amply demonstrated by the relatively few cases that were referred to in the respective judgments, which chiefly included: *Briody v St Helen's and Knowsley Area Health Authority*<sup>59</sup>, *Patel v Mirza*<sup>60</sup>, *Gray v Thames Trains Ltd*<sup>61</sup> and *McFarlane v Tayside Health Board*<sup>62</sup>. The former has been dealt with above and, as was noted there, also concerned an award of damages for various surrogacy arrangements. Regarding *Patel v Mirza*, this was a case dealing with the illegality defence in contract law. However, it is notable that both Lady Hale and Lord Carnwath declined to place any reliance on it, suggesting also

<sup>57</sup> M. HEDLEY, *op. cit.*, 135.

<sup>58</sup> For instance, a well-known figure in British jurisprudence is «the man on the Clapham omnibus» (a statement attributed to Lord Bowen in *McQuire v Western Morning News Co Ltd* [1903]). He is taken to represent the reasonable person for the purposes of ascertaining whether a defendant has acted unreasonably and thus made himself guilty of the tort of negligence. Of course it is noticeable that even in this relatively innocuous visualisation of an abstract individual, the use of the masculine is indicative of certain preconceptions, and nowadays the practice is to refer to the reasonable *person*. With this caveat in mind, however, it seems evident that the ascertainment of this individual is less ethically charged and less likely to engender ethical controversy.

<sup>59</sup> See n. 3.

<sup>60</sup> [2016] UKSC 42; [2017] AC 467

<sup>61</sup> [2009] UKHL 33; [2009] 1 AC 1339

<sup>62</sup> See n. 19.

that, conversely, the present case will only have a limited relevance to future decisions in that context. The third case, *Gray v Thames Trains Ltd*, related to a claimant who had committed a criminal offence after suffering from post-traumatic stress disorder from the defendant's action and attempted to claim damages, inter alia, for his consequent imprisonment. However, this case was also distinguished clearly by both Supreme Court Justices, since that claim for damages was based on a (very serious) illegal, criminal act. The argument for legal coherence was clearly decisive in this context – there could be no discrepancy between criminal and civil law in such cases. This leaves only the *McFarlane* case, whose facts are summarised above, as one where the analysis of the present case would have been directly relevant and capable of playing a significant role beyond the current context. Therefore, although it is difficult to predict in what circumstances a defendant might attempt to avail himself of the public policy qualification, the circumstances in which the court will entertain this argument appear to be very limited and Lady Hale's incorporation of a more claimant-friendly analysis certainly do not bode well for defendants' success chances in this respect.

This leaves us only with the question of whether claimants in similar positions to the one in the present case will be capable of straightforwardly recovering for commercial surrogacies going forward, now that it is clear that the public policy qualification is not an insuperable bar to such claims. However, in this respect the prospects arguably look more dire than one may suppose and Lady Hale was very emphatic in highlighting a number of «limiting factors»<sup>63</sup> that will complicate such recovery. First of all, it was emphasised that the sums sought to be recovered must be reasonable and, although the point was not argued here, it was implied that future awards may have to be lower to be considered reasonable in this sense. Second, there must be good reason for thinking that – bar the relevant negligence – the claimant would have had the relevant number of children<sup>64</sup>. Third, it must be reasonable for the claimant to seek to have a commercial surrogacy abroad, rather than utilising the UK system. This caveat may appear trivial, given Lady Hale's aforementioned sympathy with the claimant's preference for the Californian system, but it could potentially be a substantial hindrance to recovery. This is because Lady Hale emphasised that the other system would have to be “well-established” and must sufficiently safeguard the interests of all those involved. Arguments were not heard on this in the present case, which dealt with a matter of principle, but Lady Hale expressed doubts whether even the Californian system would always meet this standard.

In consequence we must hold that, in spite of an important departure from the previous status quo – which, under *Briody*, imposed a general bar on the recovery of tort damages for commercial surrogacies abroad – the practical effect of this revision of the public policy qualification is likely to remain more limited than one may at first suppose. The relevance of the analysis will likely be restricted to a limited range of contexts and even within these there will be several hurdles to recovery that must be carefully considered and navigated by claimants.

Finally, in terms of scope, the present case has generated one novel and interesting unanswered question. Namely, given the unenforceability of a commercial contract between the commissioning parent(s) and the surrogate within the UK, how would a court respond to a claim for damages that was

<sup>63</sup> *Whittington Hospital NHS Trust v XX* [2020] UKSC 14, para. 53.

<sup>64</sup> Here these “good reasons” constituted the claimant and her partner growing up in large families and the claimant's sister having ten children, *Whittington Hospital NHS Trust v XX* [2020] UKSC 14, para. 5.

brought with such a UK-contract in mind? Awarding damages in that scenario would create a more blatant inconsistency between contract and tort law and, at least in theory, it would allow for a claimant to obtain such damages, arrange the surrogacy and yet retain the sum. On the other hand, if courts refuse to grant such damages this surely creates an anomalous and undesirable position whereby commissioning mothers/parents who have been left unable to procreate by a relevant tort, could perfectly legally make arrangements for commercial surrogacy domestically, but would be forced into making (potentially much more expensive) arrangements abroad just to reclaim the expenses involved. Such difficulties suggest that the public policy qualification perhaps has some work to do yet.