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A woman who has been rendered infertile by a defendant's wrong may wish to obtain damages for the cost of becoming a parent through a surrogacy arrangement. Such a claim, which has yet to be brought before an Australian court, would raise two partially overlapping issues under Australian law. First, the claim must satisfy the general requirement that a person who has suffered personal injury can only recover expenses that are necessary and reasonable. Secondly, the laws of the Australian jurisdictions except the Northern Territory regulate surrogacy arrangements and criminalise commercial surrogacy arrangements (where the surrogate mother is promised a fee in addition to the reimbursement of expenses). This regulation may impact upon the recoverability of the cost of a surrogacy arrangement through the concepts of coherence of the law and public policy. The most complex scenario, but also the most likely to arise in Australian personal injury litigation, is that of a plaintiff who lives in Australia and wishes to enter into a commercial surrogacy arrangement in a foreign country in which this is lawful. This article investigates the legal issues that may arise if a claim for the cost of a surrogacy arrangement is brought before an Australian court.

I Introduction

A person suffering wrongfully inflicted personal injury is generally entitled to damages for (among others) the cost of medical treatment and rehabilitation.[1] A person who has been rendered infertile by the injury and had previously intended to have a child or children may wish to obtain damages for the cost of assisted reproduction treatment.[2]

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1 See, eg, *Ziliotto v Hakim* [2013] NSWCA 359, [81]-[107].

2 The Victorian Assisted Reproductive Treatment Authority identifies the following types of assisted reproductive treatment: ovulation induction, artificial insemination, donor conception, in-vitro fertilisation, gamete intrafallopian transfer, intracytoplasmic sperm injection, preimplantation genetic testing and surrogacy: Victorian Assisted Reproductive Treatment Authority, 'Types of Treatment', *Fertility Treatment* (Website, 19 October 2020) <https://www.varta.org.au/information-support/assisted-reproductive-treatment/types-assisted-reproductive-treatment>.

There have been cases in which a male plaintiff who had wrongfully been rendered paraplegic or tetraplegic obtained damages for the cost of a fertility program that was necessary to achieve the pregnancy of his partner by using his sperm.[3]

A woman who has been rendered infertile by the wrong[4] of another person may seek to obtain damages for the cost of becoming a parent through a surrogacy arrangement. This is an arrangement in which, before the child is conceived, the intended parents and the surrogate mother (and her partner if she has one) agree that the surrogate mother will become pregnant with the intention that the child will, at birth, be handed over to the intended parents to be raised as their own. Under such an arrangement, the intended parents usually promise to make a payment to the surrogate mother. They may merely promise to reimburse the surrogate mother for the reasonable expenses she incurs in the pursuance of the surrogacy arrangement (altruistic surrogacy arrangement), or they may promise to reimburse those expenses and pay an additional amount (commercial surrogacy arrangement).[5]

A claim for damages for the cost of a surrogacy arrangement has yet to be brought before an Australian court. Such a claim would raise two broad issues under Australian law. First, a person who has suffered personal injury can only recover expenses that are necessary and reasonable.[6] A claim for the cost of a surrogacy arrangement must therefore be rejected unless the arrangement can in principle be regarded as a reasonable method of addressing wrongfully inflicted infertility and, if so, the particular surrogacy arrangement intended by the plaintiff is reasonable in her individual circumstances.[7]

Secondly, surrogacy is subject to detailed regulation in Australia except in the Northern Territory.[8] The intended parents may become the legal parents of the child (other than through adoption) only in cases of

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3 *Scarf v State of Queensland* [1998] QSC 233, [171]-[176]; *Dallas v P & M Denton Building Constructions Pty Ltd* [2003] NSWSC 833, [94]; *Mato v Zarkas* [2005] NSWSC 800, [42]; *Potts v Frost* (2011) 59 MVR 267, 321-2 [254]-[255]. See also *Denton v Transport Accident Commission* (2000) 2 VR 374 (cost of fertility program is to be compensated under no-fault scheme); *XX v Whittington Hospital NHS Trust* [2020] 2 WLR 972, 986 [44].

4 In particular medical malpractice (see, eg, *Namala v Northern Territory of Australia* (1996) 131 FLR 468), a motor accident (see, eg, *Bulpitt v Gough* (Supreme Court of South Australia, Full Court, Matheson, Olsson and Duggan JJ, 28 March 1991)) or the supply of a defective product (see the plaintiffs' allegations in *Moylan v Nutrasweet Co* [2000] NSWCA 337).

5 The terminology adopted in this article ('altruistic', 'commercial', 'intended parents', 'surrogate mother') is widely used in the literature and in Australian legislation.

6 *Sharman v Evans* (1977) 138 CLR 563, 573; *State Rail Authority of NSW v Brown* (2006) 66 NSWLR 540, [84]-[85]; *Potts v Frost* (2012) 22 Tas R 103, [118].

7 A surrogacy arrangement should not be regarded as reasonable unless it is carried out in a jurisdiction in which the interests of all parties are properly safeguarded: see, for English law, *XX v Whittington Hospital NHS Trust* [2020] 2 WLR 972, 988 [53].

8 The key features of the regulation will be referred to throughout this article. For an overview, see Tammy Johnson, 'Through the Looking-Glass: A Proposal for National Reform of Australia's Surrogacy Legislation' in Paula Gerber and Katie O'Byrne (eds), *Surrogacy, Law and Human Rights* (Routledge, 2016) 31, 34-42, 60-3.

domestic altruistic surrogacy.[9] At least in domestic cases, a promise by the intended parents to make a payment beyond the reimbursement of expenses is unenforceable and participation in commercial surrogacy is a criminal offence. The details differ between jurisdictions.

The two broad issues overlap in parts. Whether it is reasonable for a plaintiff to enter into a particular type of surrogacy arrangement will in part depend upon the way it is regulated. But it will also depend on other factors, for example the availability of a cheaper option to address the consequences of infertility. Conversely, the regulation of a particular type of surrogacy arrangement may impact upon the availability of damages for its cost not only through the requirement of reasonableness but also through the concepts of coherence of the law and public policy.

This article explores these issues.[10] It assumes that the place of litigation (the forum) is an Australian jurisdiction and that the law of the forum or of another Australian jurisdiction governs the defendant's liability under the forum's choice of law rules.[11] The jurisdiction whose law governs liability will be called the *locus delicti* and its law the *lex loci delicti*.[12] All types of surrogacy arrangement are discussed, but particular attention is given to the most common scenario, which is that of Australian residents entering into a commercial surrogacy arrangement in a foreign country in which this is lawful.[13] Views expressed by the Supreme Court of the UK in *XX v Whittington Hospital NHS Trust*[14] in relation to English law will be considered in the relevant context.

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9 In this article, a surrogacy arrangement carried out in Australia is referred to as a domestic case, and a surrogacy arrangement carried out in another country is referred to as an international case.

10 It does not discuss the merits of the regulation of surrogacy in Australia, on which there is a vast amount of literature; see, eg, Tammy Johnson (n 8) 31; Ronli Sifris, Karinne Ludlow and Adiva Sifris, 'Commercial Surrogacy: What Role for Law in Australia?' (2015) 23(2) *Journal of Law and Medicine* 275; Ronli Sifris, 'Surrogacy' in Ian Freckelton and Kerry Petersen (eds), *Tensions and Traumas in Health Law* (Federation Press 2017) 333.

11 Under the choice-of-law rules of the Australian common law, liability in tort is governed by the law of the place of the tort (*lex loci delicti*): *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503; *Regie National Des Usines Renault SA v Zhang* (2002) 210 CLR 491. In cases of negligence or trespass, the place of the tort is usually the place where the defendant acted or should have acted: *Dow Jones & Company Inc v Gutnick* (2002) 210 CLR 575, 606 [43]. See also Martin Davies et al, *Nygh's Conflict of Laws in Australia* (LexisNexis, 10th ed, 2020) [20.1]-[20.12].

12 This terminology is chosen because the claim is more likely to be brought in tort. If the claim is brought in contract, the *locus delicti* represents the jurisdiction whose law governs the contract in question. It is still assumed that this jurisdiction is the forum or another Australian jurisdiction.

13 For a comparison of the surrogacy laws of various countries including Australia, see Claire Fenton-Glynn and Jens M Scherpe, 'Surrogacy in a Globalised World: Comparative Analysis and Thoughts on Regulation' in Jens M Scherpe, Claire Fenton-Glynn and Terry Kaan (eds), *Eastern and Western Perspectives on Surrogacy* (Intersentia, 2019) 515; Katarina Trimmings and Paul Beaumont, 'General Report on Surrogacy' in Katarina Trimmings and Paul Beaumont (eds), *International Surrogacy Arrangements: Legal Regulation at the International Level* (Hart, 2013) 439.

14 *XX v Whittington Hospital NHS Trust* [2020] 2 WLR 972 ('*XX v Whittington Hospital*').

Parts II-V consider possible objections to compensation for the cost of some or all types of surrogacy arrangement. Part V considers the denial of compensation by direct resort to public policy. Parts II-IV consider other principles, such as the requirement of reasonableness, although some of those principles may in turn be based upon, or informed by, public policy. Part VI considers some issues that may arise in cases in which the cost of a surrogacy arrangement can in principle be recovered. It is assumed throughout that the surrogacy arrangement has yet to occur. However, the rules on the recoverability of the cost of a surrogacy arrangement will be the same where the arrangement has already occurred, except that the issue of uncertainty discussed in Part VI(C) cannot then arise.

II Objections to Compensation that Relate to Parentage

A. *The Plaintiff Must be a Genetic Parent of the Child*

It might be argued that a measure designed to address the consequences of the plaintiff's inability to bear a child herself can be necessary and reasonable only if it leads to the birth of a child that is genetically the plaintiff's child. This would exclude recovery for the cost of a traditional surrogacy arrangement (where the surrogate mother is the genetic mother of the child) or of a gestational surrogacy arrangement that involves the use of donor eggs.

The argument must be rejected. While a genetic relationship may have been crucial to the concept of family in the past, it is not a prerequisite today. Adoption and step-parenting are socially accepted and not uncommon, and the emotional relationship between adoptive parent and adoptive child and between step-parent and step-child is often the same as in the case of genetic parentage. In the case of surrogacy, where the intended parents initiate the pregnancy and obtain the child soon after the birth, they usually have the same emotional connection with the child as if one of them had carried the child, even if neither of them is a genetic parent of the child.[15] The pleasure of bringing up children as one's own may be a more important benefit of having children than the wish to perpetuate one's genes.[16]

B. *The Plaintiff Must be a Legal Parent of the Child*

It might be argued that a measure designed to remedy the loss of the opportunity to become the legal parent of a child (through bearing and

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[15] *XX v Whittington Hospital NHS Trust* [2019] 3 WLR 107, 135 [103] (King LJ); *XX v Whittington Hospital* (n 14) 987 [48]. The claim is supported by empirical studies: see, eg, Susan Golombok, *Modern Families: Parents and Children in New Family Forms* (Cambridge University Press, 2015) chapter 5 (review of UK study).

[16] *XX v Whittington Hospital* (n 14) 987 [47].

giving birth to the child) can be necessary and reasonable only if the measure results in the plaintiff becoming the legal parent of a child. It might thus be argued that the cost of a surrogacy arrangement cannot be recovered unless the plaintiff will be a legal parent of the child born under the arrangement.[17]

If accepted, this argument would significantly restrict the availability of compensation for the cost of a surrogacy arrangement. Leaving aside adoption, which may be possible even in cases of international commercial surrogacy,[18] Australian residents are unlikely to be recognised as the legal parents of a child born through a surrogacy arrangement except in cases of domestic altruistic surrogacy.[19]

However, the plaintiff's ability to become a legal parent of the child should not be a prerequisite for the recovery of the cost of a surrogacy arrangement. The loss suffered by the plaintiff because of infertility is not so much the inability to obtain a particular legal status but the inability to experience the joy and sense of fulfilment and responsibility that may be derived from raising a child. A surrogacy arrangement can remedy that loss.[20]

Intended parents are able to take custody of the child even though they are not the child's legal parents at birth. Where the child was born overseas, intended parents who live in Australia are able to bring the child into Australia, as genetic parenthood of one of the intended parents and consent by the surrogate mother (and her partner) are usually sufficient for the child to obtain Australian citizenship or a permanent visa.[21] Intended parents may obtain a parental responsibility order from an Australian court,[22] even in cases of international commercial surrogacy.[23] The court may order, for example, that the child live with the intended parents and that they have equal shared responsibility for making decisions about day-to-day issues and long-term issues relating to the child.[24] The remaining differences to the status of a legal parent should not render a surrogacy arrangement an

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17 Such an argument is made for English law by Rob Weir, 'Surrogacy; Simply Claim What's Reasonable; Analysing XX v Whittington Hospital NHS Trust' [2020] 3 *Journal of Personal Injury Law* 182, 185.

18 See *W: Re Adoption* (1998) 23 Fam LR 538.

19 See below, Part V(A) and (B). For a detailed analysis and criticism of the law: see Alexandra Harland and Cressida Limon, 'Recognition of Parentage in Surrogacy Arrangements in Australia' in Paula Gerber and Katie O'Byrne (eds), *Surrogacy, Law and Human Rights* (Routledge, 2016) 145.

20 See above (n 15) and accompanying text.

21 See the advice by the Department of Home Affairs at 'International Surrogacy Arrangements' (Webpage, 19 October 2020), <https://immi.homeaffairs.gov.au/citizenship/become-a-citizen/by-descent/international-surrogacy-arrangements>.

22 *Family Law Act 1975* (Cth) s 65C(c).

23 See, eg, *Hubert v Juntasa* [2011] FamCA 504; *Johnson v Chompunut* [2011] FamCA 505; *Hian and Jang* [2020] FamCA 171.

24 See, eg, *Hubert v Juntasa* [2011] FamCA 504; *Johnson v Chompunut* [2011] FamCA 505.

unnecessary or unreasonable method of addressing the effects of infertility.[25]

III No Compensable Loss Where the Surrogacy Agreement is Unenforceable

It might be argued that the enforceability of the surrogacy agreement is a prerequisite for the recoverability of its cost from the defendant. An argument to this effect can be made in two different ways. First, it might be argued that the plaintiff's entry into a surrogacy agreement does not lead to her suffering any loss except to the extent (if any) to which the surrogate mother has an enforceable claim against the plaintiff. Secondly, it might be argued that it would be incoherent for a legal system to regard a particular type of surrogacy agreement as unenforceable and yet to regard the cost of entering into such an agreement as recoverable loss. The first argument asserts the factual absence of loss; the second argument asserts the normative absence of compensable loss. The two arguments will be discussed separately.

A. *The Factual Absence of Loss*

It might be argued that the defendant cannot be legally liable to the plaintiff beyond the amount (if any) in which the plaintiff is legally liable to the surrogate mother (or the organisation that provides the surrogate mother). This argument is not one of public policy or coherence of the law, but simply the argument that there is no loss to be compensated except to the extent to which the surrogate mother has an enforceable claim against the plaintiff.

If this argument were accepted, the determination of the defendant's liability would require the court to determine the amount (if any) that the surrogate mother would most likely be able to compel (through a judicial process) the plaintiff to pay. This will depend on the rules (including the choice-of-law rules) for surrogacy agreements of the jurisdiction in which the surrogate mother would most likely bring the action, and if the plaintiff lives in a different jurisdiction, it will depend on whether that jurisdiction would enforce a foreign judgment obtained by the surrogate mother. Thus, if the plaintiff lives in a foreign jurisdiction whose law refuses to enforce any surrogacy agreement (even if altruistic), the surrogate mother (who lives in a different jurisdiction) may be unable to compel the plaintiff to pay anything and nothing could be recovered from the defendant.

There are two reasons for rejecting the argument under discussion. First, even if the plaintiff is not under a legal obligation to keep the

[25] A separate question is whether the law's denial of legal parentage indicates a public policy against the compensation of the cost of a surrogacy arrangement. Public policy is discussed below Part V.

promise she has made to the surrogate mother, the plaintiff will be under a moral obligation to do so.[26] A moral obligation to pay may be sufficient for the recoverability of that amount from the defendant under the Australian common law.[27] Secondly, if the defendant's liability is made dependent upon the factual ability of the surrogate mother to force the plaintiff to pay, all avenues open to the surrogate mother must be considered, not just a legal action. At least a part, and perhaps the whole, of the amount promised by the plaintiff will be due before the birth of the child. Thus, the plaintiff will have no choice but to make the promised payment, whether or not there is a legal obligation to do so, lest the pregnancy be terminated or the child withheld.

B. *The Normative Absence of Compensable Loss*

It might be argued that the cost of entering into a surrogacy agreement should not be regarded as compensable loss where the agreement is unenforceable. This argument does not deny that the plaintiff may well end up making a payment to the surrogate mother, but rejects the recoverability of any such expense by reference to the concept of coherence of the law, which the courts regard as being central in Australian law.[28] The argument asserts that it would be incoherent for the *lex loci delicti* to refuse to enforce a particular surrogacy agreement and yet to require a defendant to pay for the plaintiff's cost of entering into that agreement.[29] In order to determine the relevance of that argument to an Australian *locus delicti*, it is necessary to consider briefly the rules of the Australian jurisdictions on the enforceability of surrogacy arrangements, including the choice-of-law rules and the rules on the recognition of foreign judgments.

1 *The Enforceability of Surrogacy Agreements in Australia*

At common law, which applies in the Northern Territory, a promise by the intended parents to pay a fee in addition to the reimbursement of expenses is probably unenforceable.[30] All other jurisdictions have

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26 Many intended parents regard the lack of payment to the surrogate mother as morally questionable: see Emily Jackson et al, 'Learning from Cross-Border Reproduction' (2017) 25(1) *Medical Law Review* 23, 28-31.

27 *Blundell v Musgrave* (1956) 96 CLR 73, 79 (Dixon CJ).

28 *CAL No 14 Pty Ltd v Motor Accidents Insurance Board* (2009) 239 CLR 390, 406-10 [39]-[42]; *Miller v Miller* (2011) 242 CLR 446, 454 [15]; *Equuscorp Pty Ltd v Haxton* (2012) 246 CLR 498, 513 [23], 518 [34]. The rules of the *locus delicti* on the enforceability of surrogacy arrangements may also inform the public policy of the *locus delicti* in relation to the recoverability of the cost of a surrogacy arrangement. Public policy will be discussed below Part V.

29 A surrogacy agreement is not being enforced simply by awarding damages for its cost: Weir (n 17) 187.

30 See *A v C* (1978) 8 Fam Law 170, [1985] Fam LR 445; Mary Keyes, 'Australia' in Katarina Trimmings and Paul Beaumont (eds), *International Surrogacy Arrangements: Legal Regulation at the International Level* (Hart, 2013) 25, 38.

legislation providing that any surrogacy agreement is unenforceable except that the intended parents' promise to reimburse the surrogate mother for particular expenses can be enforced unless the surrogate mother decides to keep the child.[31] The statutes differ as to the items of expenditure that are expressly listed as being recoverable.

The statutes are silent as to the law that governs a cross-border surrogacy agreement. Australian courts can approach this issue in one of two ways.[32] One possibility is to regard the Australian rules as internationally mandatory and apply them to every surrogacy agreement before an Australian court. But this could lead to the application of the Australian law to a surrogacy agreement that has no connection with Australia (other than that it happens to be litigated in Australia). It is preferable for the courts to undertake a choice-of-law exercise and determine the proper law of the surrogacy agreement. The proper law of a contract is generally the legal system expressly or impliedly chosen by the parties or, where there is no choice or the choice is not valid, the legal system with which the contract has its closest and most real connection.[33]

It is not necessary to discuss how the closest connection of a surrogacy agreement ought to be determined and whether the parties ought to be permitted to choose a different law. But it needs to be discussed whether a court in the *locus delicti* is likely to enforce the intended parents' promise to pay a fee (in addition to reimbursing expenses) whenever that promise is enforceable under the foreign proper law of the surrogacy agreement. An Australian court can refuse to apply a particular foreign law where such an application would violate the public policy (*ordre public*) of the forum.[34] Public policy relates to fundamental values and is not violated simply because the foreign rules differ from the internal rules of the forum.[35]

There should be no public policy concern where the difference between the *lex loci delicti* and the foreign law relates merely to the

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31 *Surrogacy Act 2010* (NSW) s 6; *Surrogacy Act 2010* (Qld) s 15; *Surrogacy Act 2019* (SA) ss 9-13; *Surrogacy Act 2012* (Tas) s 10; *Assisted Reproductive Treatment Act 2008* (Vic) s 44(3); *Surrogacy Act 2008* (WA) s 7. Even though s 31 of the *Parentage Act 2004* (ACT) provides that a surrogacy agreement 'has no legal effect' other than that it may form the basis of a parentage order, the intended parents' promise to reimburse the surrogate mother for her reasonable expenses should be enforceable: see Mary Keyes, 'Cross-Border Surrogacy Agreements' (2012) 26(1) *Australian Journal of Family Law* 28, 38-9.

32 See Mary Keyes, 'Cross-Border Surrogacy Agreements' (2012) 26(1) *Australian Journal of Family Law* 28, 38 (preferring the choice-of-law approach).

33 *Bonython v Commonwealth* (1950) 81 CLR 486, 498 (PC); *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197, 217, 224, 259-60; *Akai Pty Ltd v People's Insurance Co Ltd* (1996) 188 CLR 418, 441-2; *Ship Sam Hawk v Reiter Petroleum Inc* (2016) 246 FCR 337, 400 [256], [258].

34 *Attorney-General (UK) v Heinemann Publishers Australia Pty Ltd* (1988) 165 CLR 30, 49-50 (Brennan J).

35 See, in the context of the recognition of foreign judgments, *LFDB v SM* (2017) 256 FCR 218, [43]; *Kok v Resorts World at Sentosa Pte Ltd* (2017) 323 FLR 95, 100-1 [15]-[18].

items of expenditure in relation to which a promise of the intended parents of reimbursement is enforceable. The surrogacy agreement is still altruistic, and the Australian jurisdictions are not in principle averse to altruistic surrogacy agreements.

A foreign law that considers a promise to pay a fee (in addition to reimbursing expenses) enforceable is more problematic. The laws of all Australian jurisdictions regard such a promise as unenforceable. They do so in order to prevent the commodification of children and the exploitation of vulnerable women. Arguably, these interests are sufficiently fundamental to be part of the public policy for choice-of-law purposes. However, the enforcement of an agreement governed by foreign law should not be refused on public policy grounds unless performance of the agreement affects the forum.[36] The performance of a surrogacy agreement affects Australia only if the fertilisation procedure is carried out here or the surrogate mother lives here during her pregnancy or the child is intended to live here.

The distinctions made for the question of when an Australian court may refuse to apply a foreign law on grounds of public policy should also be made for the question of when Australian law may invoke public policy to refuse to recognise a foreign judgment in favour of the surrogate mother.[37]

2 *Coherence of the Law*

It must now be discussed whether it would be incoherent for the *lex loci delicti* to regard the cost of entering into a surrogacy agreement as compensable to the extent to which a court in the *locus delicti* would refuse to enforce the agreement, or to recognise a foreign judgment enforcing the agreement, in accordance with the rules discussed in the previous section. This question is most relevant in practice where the plaintiff lives in Australia and intends to enter into a commercial surrogacy agreement, in which case a court in the *locus delicti* would refuse to enforce the plaintiff's promise of a fee (in addition to reimbursing expenses) or would refuse to recognise a foreign judgment enforcing that promise.

Coherence of the law requires at least that '[r]ules that belong to the same legal system must not prescribe different outcomes in relation to the same set of facts'.[38] Coherence in this basic sense is present in the circumstances under discussion. The rule 'the surrogate mother cannot enforce the plaintiff's promise of a fee' and the rule 'the fee promised by the plaintiff is compensable loss' do not prescribe different outcomes

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[36] Martin Davies, Andrew Bell, Paul Le Gay Brereton and Michael Douglas, *Nygh's Conflict of Laws in Australia* (LexisNexis, 10th ed, 2020) [18.42].

[37] See above n 35.

[38] Ross Grantham and Darryn Jensen, 'Coherence in the Age of Statutes' (2016) 42(2) *Monash University Law Review* 360, 363.

in relation to the same set of facts. One rule applies to the relationship between the surrogate mother and the plaintiff and the other rule applies to the relationship between the plaintiff and the defendant. The two relationships are independent of each other.[39]

Where, as in the present context,[40] the effect of particular statutory provisions on the common law is at issue, coherence of the law might be said to require the common law to give effect to the purpose of the statute. The High Court expressed this view in *Miller v Miller* ('*Miller*').[41] A car stolen by the plaintiff and the defendant was driven by the defendant with the plaintiff as a passenger. The defendant drove dangerously and struck a pole. The plaintiff suffered serious injuries. On the question of whether the defendant had owed the plaintiff a duty of care at common law, the High Court said that, if the plaintiff had been criminally liable for the defendant's criminal offence of dangerous driving,[42] the imposition of a duty of care on the defendant would not have been consistent with the purpose of the statute proscribing dangerous driving, the purpose being to deter and punish dangerous driving.[43]

This particular notion of coherence probably leads to the denial of compensation for the cost of entering into a surrogacy agreement to the extent to which a court in the *locus delicti* would refuse to enforce the plaintiff's promise to the surrogate mother. Awards of compensation for the cost of a commercial surrogacy arrangement would make the occurrence of such arrangements more likely. But the deterrence of commercial surrogacy arrangements must be one of the reasons why Australia's surrogacy statutes declare the intended parents' promise to pay a fee (beyond reimbursing expenses) unenforceable. Denying the intended parents' promise enforceability is not necessary to ensure that they do not have the power to force the surrogate mother to manage her pregnancy in a particular way or to relinquish the child; denying the

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39 If it is argued that there is a link between the two relationships because there is no loss to be compensated except to the extent to which the plaintiff incurs a legal liability towards the surrogate mother, then this is not a normative argument but the assertion of a factual absence of loss. This argument is rejected above, Part III(A).

40 Except in the Northern Territory, where the enforceability of a surrogacy agreement is governed by the common law.

41 *Miller v Miller* (2011) 242 CLR 446 ('*Miller*').

42 Pursuant to the *Criminal Code* (WA) s 8, the plaintiff's participation in the joint criminal enterprise of stealing the car made her criminally liable for the dangerous driving as a probable consequence of the enterprise unless she withdrew from the enterprise before the dangerous driving. Since the plaintiff, prior to the crash, had asked twice to be let out of the car, the High Court (Heydon J dissenting) held that she had withdrawn from the joint criminal enterprise, and that the defendant owed her a duty of care from that point.

43 See *Miller* (n 41), 480 [94], 481-2 [101].

surrogate mother's promise enforceability is sufficient for that purpose.[44]

The High Court's approach in *Miller* is problematic. Since different statutes pursue different, and sometimes conflicting purposes, it is not possible for the common law to give maximum effect to the purpose of every statute. As Andrew Fell argues, coherence of the law should be understood as consistency in the normative reasons or considerations on which different rules are based.[45] The common law must respect the relative weight that the legislature has given to every reason for and against a statutory rule; beyond that, the statute is silent.[46] Fell explains that whatever the reasons for and against imposing criminal liability for stealing and dangerous driving, they are unlikely to include reasons that favour or disfavour liability in negligence, and imposing liability in negligence is not inconsistent with the statute even if the purpose of the statute favours the opposite outcome.[47] Applying Fell's concept in the present context, whatever the reasons for or against the enforceability of a commercial surrogacy agreement, they are unlikely to include reasons that favour or disfavour the recognition of the intended mother's cost as a loss compensable in actions for personal injury, and regarding the cost as compensable is not inconsistent with the statutory rule of unenforceability even if the purpose of that rule favours the opposite outcome.[48]

Nevertheless, the concept of coherence of the law adopted by the High Court in *Miller* is likely to exclude compensation of the cost of a surrogacy arrangement to the extent to which a statute of the *locus delicti* proscribes the enforcement of the plaintiff's promise to make a payment to the surrogate mother. It is thus likely to exclude compensation for the payment of a fee (beyond reimbursing expenses) except where the Northern Territory is the *locus delicti* or where the surrogacy arrangement has no connection with Australia.

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44 The key reason for the unenforceability of surrogacy agreements (except for the reimbursement of costs) is to ensure that the intended parents do not have the power to force the surrogate mother to manage her pregnancy in a particular way or to relinquish the child: Explanatory Notes, Surrogacy Bill 2009 (Qld) 4, citing Investigation into Altruistic Surrogacy Committee, Queensland Parliament, *Report* (2008) 71. See also Victorian Law Reform Commission, *Assisted Reproductive Technology and Adoption* (Final Report, March 2007) 188-9.

45 Andrew Fell, 'The Concept of Coherence in Australian Private Law' (2018) 41(3) *Melbourne University Law Review* 1160, 1174-9. The view that coherence of the law requires more than the absence of contradiction is also advanced by Grantham and Jensen, (n 38) 360.

46 Fell (n 45) 1180, 1185. Fell gives the example of a statute that permits abortions for women born in odd years and prohibits it for women born in even years. This is incoherent. Since the applicable reasons (those favouring abortion and those disfavouring abortion) are the same for both sets of women, the relative weight given to each reason must also be the same.

47 Fell (n 45) 1190.

48 For similar reasons, it may not be incoherent for the common law to refuse to enforce a particular surrogacy agreement and yet to regard the cost of entering into such an agreement as compensable.

IV Objections to Compensation that are Based on the Criminal Law

The cost of a surrogacy arrangement may not be recoverable where the participation in the type of surrogacy arrangement intended by the plaintiff constitutes a criminal offence under the *lex loci delicti* or perhaps some other law.

Under Victorian law, it is a criminal offence for a surrogate mother to receive any material benefit or advantage other than reimbursement for the 'prescribed costs' actually incurred.[49] Under the laws of the other Australian jurisdictions except the Northern Territory,[50] the mere entering into a 'commercial' surrogacy agreement is a criminal offence.[51] A surrogacy agreement is 'commercial' if the intended parents promise to make a payment in addition to the reimbursement of the expenses that are permitted to be reimbursed. Since the laws of the jurisdictions differ slightly as to those expenses, they also differ slightly as to what surrogacy agreements are prohibited. For example, the reimbursement of lost income is permitted by the laws of the states,[52] but probably not by the law of the Australian Capital Territory.[53] The criminal prohibitions of the Australian Capital Territory, New South Wales and Queensland have extraterritorial effect, as it is sufficient for their application that the offender is ordinarily resident in the jurisdiction.[54]

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49 *Assisted Reproductive Treatment Act 2008* (Vic) s 44. The 'prescribed costs' are set out in the *Assisted Reproductive Treatment Regulations 2019* (Vic) reg 11.

50 Health care practitioners in the NT (as well as the rest of Australia) must not participate in commercial surrogacy arrangements as these are considered ethically unacceptable by the National Health and Medical Research Council, *Ethical Guidelines on the Use of Assisted Reproductive Technology in Clinical Practice and Research* (2017) 65.

51 *Surrogacy Act 2010* (NSW) s 8; *Surrogacy Act 2010* (Qld) s 56; *Surrogacy Act 2019* (SA) s 23; *Surrogacy Act 2012* (Tas) s 40; *Surrogacy Act 2008* (WA) s 8; *Parentage Act 2004* (ACT) s 41. For calls for decriminalisation of commercial surrogacy, see, eg, Kathleen Simmonds, 'Reforming the Surrogacy Laws of Australia: Some Thoughts, Considerations and Alternatives' (2009) 11(1) *Flinders Journal of Law Reform* 97; Anita Stuhmcke, 'The Regulation of Commercial Surrogacy: The Wrong Answers to the Wrong Questions' (2015) 23(2) *Journal of Law and Medicine* 333.

52 *Surrogacy Act 2010* (NSW) s 7(3)(e); *Surrogacy Act 2010* (Qld) s 11(2)(f); *Surrogacy Act 2019* (SA) s 11(1)(b) (subject to regulations); *Surrogacy Act 2012* (Tas) s 9(3)(f); *Assisted Reproductive Treatment Regulations 2019* (Vic) reg 11(1)(e). *Surrogacy Act 2008* (WA) s 6(3)(b).

53 Section 40 of the *Parentage Act 2004* (ACT) refers to 'expenses' connected with - shortly - a pregnancy or child. Lost income would not normally be regarded as 'expenses'.

54 *Parentage Act 2004* (ACT) s 45; *Surrogacy Act 2010* (NSW) s 11; *Surrogacy Act 2010* (Qld) s 54(b). See *Dudley v Chedi* [2011] FamCA 502, [16], [44]; *Findlay v Punyawong* [2011] FamCA 503, [32]; *Johnson v Chompunut* [2011] FamCA 505, [13]. For a detailed analysis and criticism of the extraterritorial offences, see Anita Stuhmcke, 'Extra-Territoriality and Surrogacy: The Problem of State and Territory Moral Sovereignty' in Paula Gerber and Katie O'Byrne (eds), *Surrogacy, Law and Human Rights* (Routledge, 2016) 65.

Even though Australian residents regularly engage in international commercial surrogacy,[55] no person has ever been prosecuted under the extraterritorial laws just mentioned.[56] But this does not justify treating actions that are criminally prohibited as if they were permitted. The decision on whether a certain crime is prosecuted is based on the public interest in prosecution and the effective use of public resources. A decision not to prosecute Australian residents for engaging in international commercial surrogacy does not negate the legislature's decision to criminally prohibit such conduct, and the legislature's decision may still impact upon the recoverability of the cost of commercial surrogacy.

The criminal laws of various jurisdictions may be relevant in different ways. It is necessary to distinguish between the case where the surrogacy arrangement proposed by the plaintiff contravenes the criminal law of any jurisdiction (actual criminality) and the case where the surrogacy arrangement proposed by the plaintiff does not contravene the criminal law of any jurisdiction but would, if carried out in the *locus delicti*, contravene the criminal law of the *locus delicti* (hypothetical criminality).

A. *Actual Criminality*

This category concerns a surrogacy arrangement the participation in which constitutes a criminal offence under the law of any jurisdiction.

The clearest scenario is where the plaintiff's participation in the surrogacy arrangement contemplated by her would render her criminally liable under the *lex loci delicti*. An example would be a plaintiff who is ordinarily resident in Queensland (the *locus delicti*) and is seeking compensation for the cost of entering into a commercial surrogacy arrangement with a surrogate mother living in California. Regardless of whether an award of compensation in those circumstances would render the *lex loci delicti* incoherent, compensation should be denied on the ground that an activity that renders the plaintiff criminally liable under the *lex loci delicti* is not a

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55 In 2016, the Department of Immigration and Border Protection estimated that it dealt with about 250 offshore surrogacy cases every year; see House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *Surrogacy Matters: Inquiry into the Regulatory and Legislative Aspects of International and Domestic Surrogacy Arrangements* (April 2016) [1.69]. However, some countries that Australians used to travel to for commercial surrogacy arrangements (India, Nepal and Thailand) have outlawed commercial surrogacy arrangements with foreigners; see Australian Human Rights Commission, *Inquiry into the Regulatory and Legislative Aspects of Surrogacy Arrangements: Submission to the House of Representatives Standing Committee on Social Policy and Legal Affairs* (17 February 2016) [172]-[176].

56 House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia, *Surrogacy Matters: Inquiry into the Regulatory and Legislative Aspects of International and Domestic Surrogacy Arrangements* (April 2016) [1.71].

necessary and reasonable measure to address personal injury.[57] A defendant should not be required to fund criminal activity.

The same principle should apply where the person incurring criminal liability under the *lex loci delicti* is someone other than the plaintiff. Even if it is only the surrogate mother who incurs criminal liability (as under Victorian law) or only the medical professionals involved in the fertilisation procedure, the cost of the surrogacy arrangement should not be regarded as a necessary and reasonable expense.

The same principle should also apply where it is a legal system other than the *lex loci delicti* that criminalises participation in the surrogacy arrangement contemplated by the plaintiff.[58] Consider again a plaintiff who is ordinarily resident in Queensland and is seeking compensation for the cost of entering into a commercial surrogacy arrangement with a surrogate mother living in California. Even if the *locus delicti* is an Australian jurisdiction other than Queensland, the plaintiff's cost of entering into the surrogacy arrangement should not be regarded as a necessary and reasonable expense.

In summary, the cost of a surrogacy arrangement that involves criminal conduct should not be regarded as a necessary and reasonable expense, whoever is the person that is criminally liable and whichever legal system imposes the criminal liability.

B. *Hypothetical Criminality under the Lex Loci Delicti*

The type of surrogacy arrangement now to be discussed has three features. First, it is intended to take place outside Australia. Secondly, no person will incur criminal liability under the law of any jurisdiction by participating in the surrogacy arrangement as intended. Thirdly, if the surrogacy arrangement were to take place in the *locus delicti* (everything else remaining the same), the plaintiff or someone else would be criminally liable under the *lex loci delicti*. An example would be a plaintiff who resides in Tasmania (the *locus delicti*) and intends to enter into a commercial surrogacy arrangement with a surrogate mother living in California. No person will incur criminal liability in these circumstances as the Tasmanian criminal prohibition does not have extraterritorial effect. But the plaintiff would be criminally liable under Tasmanian law if the same arrangement were to occur in Tasmania.

In a different context, the impact of hypothetical criminality was considered in *Waks v Cyprys*.[59] The plaintiff was sexually abused as a child by the defendant at a Melbourne college, as a result of which the

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57 See, for Canadian law, *Wilhelmson v Dumma* (2017) 96 BCLR (5th) 120, [374].

58 The same view seems to have been taken for English law in *XX v Whittington Hospital* (n 14) 985 [40].

59 [2020] VSC 44.

plaintiff developed major depression and dependency on alcohol, marijuana and other drugs. He moved to Israel, where a medical practitioner in compliance with Israeli law prescribed medicinal cannabis for the plaintiff because it assisted him with his anxiety and sleeping issues. Forbes J in the Supreme Court of Victoria refused to include in the damages the cost of the past and of future prescription of medicinal cannabis in Israel, for two reasons. First, her Honour pointed to the absence of evidence that the prescription of medicinal cannabis in circumstances of polysubstance abuse is desirable, and said that absent such evidence she could not be satisfied that an award of damages would be reasonable.[60] This was simply an application of the general principle that an expense must be necessary and reasonable in order to be recoverable. Secondly, Forbes J observed that Victorian law governed liability, and that there was no evidence that a medical practitioner in Victoria might be approved to prescribe medicinal cannabis in the plaintiff's circumstances.[61]

Forbes J in *Waks v Cyprys* thus expressed the view that the cost of a measure that addresses the effects of personal injury cannot be recovered where that measure would involve criminal activity if it were to take place in the *locus delicti*, even though the measure did, or is intended to, take place in a foreign country in which it is legal. Forbes J did not explain exactly why she considered the criminal law of the *locus delicti* relevant.

Perhaps Her Honour was invoking the concept of coherence of the law. This concept was invoked by the minority of the UK Supreme Court in *XX v Whittington Hospital NHS Trust*.[62] Lord Carnwath (dissenting), with whom Lord Reed PSC agreed, said that the objective of coherence or consistency between the civil law and the criminal law of a legal system would not be achieved if the civil courts awarded damages on the basis of conduct which, if undertaken in that country, would offend its criminal law.[63] This view is not convincing, however, whatever notion of coherence of the law is adopted. In order to assess whether the civil law and the criminal law of a legal system are consistent with each other, all rules need to be considered, including the rules on the territorial reach of the criminal law. The circumstances now under discussion involve hypothetical (as opposed to actual) criminality precisely because the conduct in question is beyond the territorial reach

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60 Ibid [135].

61 Ibid [136].

62 *XX v Whittington Hospital* (n 14).

63 Ibid 992 [66]. Lord Carnwath proceeded on the premise that someone would have incurred criminal liability under English law if the plaintiff had entered into a commercial surrogacy arrangement in England rather than California. However, only third parties promoting surrogacy on a commercial basis can incur criminal liability under English law, not the intended parents or the surrogate mother: *Surrogacy Arrangement Act 1985* (UK) s 2(2). Lord Carnwath must thus have assumed that such third parties would have been involved.

of the criminal law of the *locus delicti*. It is difficult to see why it should be incoherent if the civil law of a jurisdiction grants compensation for the cost of a measure that is not subject to the criminal law of that jurisdiction.[64]

Therefore, hypothetical criminality under the *lex loci delicti* does not affect the recoverability of the cost of a surrogacy arrangement through the concept of coherence of the law. Whether it does so through the concept of public policy will be discussed in the next Part.

V Public Policy as a Bar to Compensation

Compensation for a head of loss may be denied on grounds of public policy.[65] What is meant here is not that the public policy of an Australian jurisdiction bars the application of the law of damages of a foreign country in a particular case, but that the public policy of an Australian jurisdiction informs the law of damages of the same jurisdiction.

The relevant jurisdiction is the *locus delicti*. Where the forum is not the *locus delicti*, the forum's public policy is irrelevant. Section 118 of the *Australian Constitution* prohibits the courts of one Australian jurisdiction from refusing to apply the law of another Australian jurisdiction on grounds of public policy.[66]

The public policy of a legal system must be derived from the rules of law of that system. A legal system's public policy in relation to surrogacy must be derived from the way in which surrogacy is regulated. The most important aspect is whether participation in a surrogacy arrangement is criminalised either for all or some types of surrogacy. Other relevant aspects are whether the intended parents are recognised as the legal parents of the child and whether the surrogate mother can enforce the intended parents' promise of payment. The relevant rules of the Australian jurisdictions distinguish between altruistic and commercial surrogacy and between domestic and international surrogacy. It is therefore necessary to discuss the four categories separately. No distinction will be made between a surrogacy arrangement carried out in the *locus delicti* and a surrogacy arrangement carried out elsewhere in Australia. The public policy

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64 Anthony Searle and Anne Kavanagh, 'Commercial Surrogacy: The Birth of a New Head of Loss in Clinical Negligence Claims' [2019] (October) *Family Law* 1186, 1194-5; John Lucas M Taylor, 'International Commercial Surrogacy as a New Head of Tortious Damage: *XX v Whittington Hospital NHS Trust* [2018] EWCA Civ 2832' (2020) 28(1) *Medical Law Review* 197, 205 (who argues that the denial of compensation would create incoherence within the civil law); Weir (n 17), 187.

65 See, eg, *Caltex Oil (Australia) Pty Ltd v The Dredge Willemstad* (1976) 136 CLR 529, 606 (Murphy J); *Cattanach v Melchior* (2003) 215 CLR 1, 86-9 [236]-[242] (Hayne J).

66 *Merwin Pastoral Co Pty Ltd v Moolpa Pastoral Co Pty Ltd* (1933) 48 CLR 565, 577, 587-8; *Breavington v Godleman* (1988) 169 CLR 41, 81, 96-7, 116, 150; *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, 533 [64]; *Sweedman v Transport Accident Commission* (2006) 226 CLR 362, 403-4 [35].

position should not differ between those two categories, considering the close relationship between the Australian jurisdictions and the ability of Australian residents to move freely throughout Australia.

A. *Domestic Altruistic Surrogacy*

Altruistic surrogacy occurring in Australia is not criminalised, and the intended parents' promise to reimburse the surrogate mother's reasonable expenses is enforceable (although there is some variation among the jurisdictions as to the items of expenses that can be reimbursed). Any public policy concern can only come from the regulation of legal parentage.

Legislation in each Australian jurisdiction provides that a woman who has become pregnant through a fertilisation procedure (which is the case for a surrogate mother) is a legal parent of the child at the time of birth, and so is her partner if the partner consented to the procedure.[67] It is irrelevant whether the woman or her partner is a genetic parent of the child. A genetic parent who is not the birth mother or her partner is not a legal parent at the time of birth. These provisions were enacted for cases in which the birth mother is also the intended mother, but the provisions have been retained in the context of surrogacy to preserve the surrogate mother's right to change her mind about relinquishing the child to the intended parents.[68]

The Northern Territory does not have any legislation under which the intended parents can become the legal parents of the child (other than through adoption). However, the legislature's failure to actively facilitate surrogacy arrangements does not by itself indicate an intention to deter such arrangements. The law of the Northern Territory does not have a public policy against domestic altruistic surrogacy.

Statutes in the other jurisdictions enable the intended parents in cases of altruistic[69] surrogacy to obtain a parentage order transferring

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67 *Parentage Act 2004* (ACT s 11; *Status of Children Act 1996* (NSW) s 14; *Status of Children Act 1978* (NT) ss 5C-5F; *Status of Children Act 1978* (Qld) ss 17-19; *Family Relationships Act 1975* (SA) s 10C; *Status of Children Act 1974* (Tas) s 10C; *Status of Children Act 1974* (Vic) ss 10C-10E; *Artificial Conception Act 1985* (WA) ss 5-7; See *Re Michael (Surrogacy Arrangements)* (2009) 41 Fam LR 694.

68 NSW Legislative Council Standing Committee on Law and Justice, *Legislation on Altruistic Surrogacy in NSW* (2009) [6.146]. The position is supported by Jenni Millbank, 'Rethinking "Commercial" Surrogacy in Australia' (2015) 12(3) *Journal of Bioethical Inquiry* 477, 485-6. Other commentators prefer a surrogacy model under which the intended parents are the legal parents from birth; see, eg, Kirsty Horsey, 'Challenging Presumptions: Legal Parenthood and Surrogacy Arrangements' (2010) 22(4) *Child and Family Law Quarterly* 449; Liezl van Zyl and Ruth Walker, 'Surrogacy, Compensation, and Legal Parentage: Against the Adoption Model' (2015) 12(3) *Journal of Bioethical Inquiry* 383.

69 Taken literally, s 18 of the *Surrogacy Act 2019* (SA) permits parentage orders for commercial as well as altruistic surrogacies, as it only requires the presence of a 'lawful surrogacy arrangement' and the requirements of a 'lawful surrogacy arrangement' set out in s 10 do not include the absence of a promise to pay a fee. However, such a promise is

legal parenthood from the surrogate mother (and her partner where applicable) to the intended parents.[70] The application for the parentage order must be made within six months[71] of the birth of the child and the making of the parentage order must be in the best interests of the child. There are further requirements in relation to matters such as the age, residence and/or citizenship of the surrogate mother or the provision of counselling, which vary considerably between the jurisdictions.[72]

It may be difficult to decide whether the interests protected by these further conditions are sufficiently strong to indicate a public policy against the compensation of the cost of a surrogacy arrangement that does not comply with the conditions. But this question need not be pursued. It is difficult to imagine that a plaintiff will reveal to the court an intention to enter into a domestic altruistic surrogacy arrangement in violation of the regulatory requirements. If a plaintiff does reveal such an intention, compensation should be denied on the ground that the surrogacy arrangement intended by the plaintiff is not a reasonable measure to address her infertility.

In conclusion, public policy will rarely (if ever) bar compensation of the cost of a domestic altruistic surrogacy arrangement.

B. *International Altruistic Surrogacy*

Where the plaintiff lives in a foreign country and intends to enter into an altruistic surrogacy arrangement there, no Australian jurisdiction can have a public policy against the compensation of the cost of the arrangement, although any criminalisation of the arrangement by the foreign law would prevent the arrangement from constituting a reasonable measure to address the plaintiff's infertility.[73]

Where the plaintiff lives in Australia and intends to enter into an altruistic surrogacy arrangement in a foreign country (in which such an arrangement is lawful), there is neither actual nor hypothetical criminality under the law of any Australian jurisdiction,[74] and the laws of all Australian jurisdictions enforce in principle the plaintiff's

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unenforceable (s 11) and the entering into a commercial surrogacy arrangement is a criminal offence (s 23). The legislature seems to have taken the view that parentage orders are confined to altruistic surrogacies; see South Australia, *Parliamentary Debates*, House of Assembly, 1 August 2019, 6967-8 (Vickie Chapman, Deputy Premier and Attorney-General).

70 *Parentage Act 2004* (ACT) ss 24-26; *Surrogacy Act 2010* (NSW) ss 14-38; *Surrogacy Act 2010* (Qld) ss 21-23; *Surrogacy Act 2019* (SA) ss 10, 18; *Surrogacy Act 2012* (Tas) ss 14-16; *Status of Children Act 1974* (Vic) ss 20-24; *Surrogacy Act 2008* (WA) ss 13-22. Federal law recognises a parentage order made under state or territory law: *Family Law Act 1975* (Cth) s 60HB.

71 It is 12 months in South Australia: *Surrogacy Act 2019* (SA) s 18(2)(a).

72 The requirements in the various jurisdictions are discussed by Jenni Millbank, 'The New Surrogacy Parentage Laws in Australia: Cautious Regulation or "25 Brick Walls"?' (2011) 35(1) *Melbourne University Law Review* 165, 178-85.

73 See above, Part IV(A).

74 For the meaning of actual criminality and hypothetical criminality, see above, Part IV.

promise to pay the surrogate mother's expenses. Any public policy against the compensation of the cost of the surrogacy arrangement can only be derived from the regulation of legal parentage of the child.

Intended parents living in Australia are not generally able to be recognised as the child's legal parents in cases of international surrogacy (leaving aside adoption).[75] This is because Australian courts usually apply Australian law (the law of the jurisdiction in which the intended parents reside) to determine legal parentage.[76] Under Australian law, the intended parents are not the legal parents of the child at birth.[77] The law of the Northern Territory does not provide for parentage orders. The laws of the other jurisdictions do provide for parentage orders in cases of altruistic surrogacy, but only if at least one of the following is present: the surrogate mother lives in the jurisdiction,[78] the fertilisation procedure is carried out in the jurisdiction,[79] the surrogate mother is an Australian citizen or permanent resident,[80] the counselling is provided by a counsellor who has been accredited in the jurisdiction[81] or is the member of an Australian association,[82] or legal advice is provided by an Australian practitioner.[83] These requirements are not satisfied in cases of international surrogacy. However, the inability of Australian residents to become the legal parents of the child in cases of international altruistic surrogacy is the result simply of the courts and legislatures failing to actively facilitate international altruistic surrogacy rather than their conscious decision to prevent it. There is no public policy against the compensation of the cost of an international altruistic surrogacy arrangement.

C. *Domestic Commercial Surrogacy*

In the case of commercial surrogacy carried out in Australia, the laws of all Australian jurisdictions refuse to recognise the intended parents

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75 Mary Keyes, 'Surrogacy in Australia' in Jens M Scherpe, Claire Fenton-Glynn and Terry Kaan (eds), *Eastern and Western Perspectives on Surrogacy* (Intersentia, 2019) 83, 101. For a criticism of this position and a suggestion for reform, see Jenni Millbank, 'Resolving the Dilemma of Legal Parentage for Australians Engaged in International Surrogacy' (2013) 27(2) *Australian Journal of Family Law* 135.

76 See, eg, *Gough v Kaur* [2012] FamCA 79, [7]. The absence of a proper choice-of-law exercise is criticised by Mary Keyes and Richard Chisholm, 'Commercial Surrogacy – Some Troubling Family Law Issues' (2013) 27(2) *Australian Journal of Family Law* 105, 120.

77 See above, Section A.

78 *Surrogacy Act 2012* (Tas) s 16(2)(g). If this requirement is not satisfied, the court can still make a parentage order if this is in the best interests of the child: *Surrogacy Act 2012* (Tas) s 16(3).

79 *Parentage Act 2004* (ACT) s 24(a); *Status of Children Act 1974* (Vic) s 20(1)(a).

80 *Surrogacy Act 2019* (SA) s 10(3)(c).

81 *Surrogacy Act 2012* (Tas) s 47; *Surrogacy Regulations 2019* (WA) s 3.

82 *Surrogacy Act 2010* (Qld) s 19.

83 *Surrogacy Act 2010* (NSW) s 36.

as the legal parents of the child and render the intended parents' promise of a fee (in addition to the reimbursement of expenses) unenforceable.

In the law of the Northern Territory, the position as to parentage is simply the result of the legislature's failure to legislate on surrogacy, and the unenforceability of the intended parents' promise of a fee is the position that the common law is assumed to take. The legislature has not enacted any legislation criminalising commercial surrogacy or indeed disfavouring it in any other way. It is difficult to find a clear public policy of the Northern Territory's legal system against the compensation of the cost of a domestic commercial surrogacy arrangement apart from cases where the law of another jurisdiction imposes criminal liability.[84]

In the laws of the other Australian jurisdictions, the denial of legal parentage and the unenforceability of the intended parents' promise of a fee are both found in legislation. The legislatures have thus made a conscious decision to disfavour domestic commercial surrogacy. Indeed, they have criminalised it. This should give rise to a public policy against the compensation of the cost of a domestic commercial surrogacy arrangement.

D. *International Commercial Surrogacy*

The type of surrogacy which is most likely to arise in Australian personal injury litigation but for which it is most difficult to determine the public policy position is that of commercial surrogacy carried out in a foreign country in which it is lawful.

The law of the Northern Territory does not bar compensation for the cost of such an arrangement on public policy grounds, apart from cases where the law of another jurisdiction imposes criminal liability.[85]

It is more difficult to determine the public policy position under the laws of the other Australian jurisdiction. Those laws have a public policy against commercial surrogacy carried out in Australia.[86] It does not necessarily follow that they also have a public policy against commercial surrogacy carried out overseas. No legal system can expect all other legal systems to make exactly the same public policy choices that it has made. However, there may be interests that a legal system regards as so fundamental that it protects them even if the relevant event occurs in another jurisdiction.

The criminalisation of commercial surrogacy, bolstered by the non-enforceability of the promise of a fee and the denial of legal parentage to the intended parents, indicates that the protected interests (to prevent the commercialisation of children and the exploitation of vulnerable

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84 See above, Part IV(A).
85 See above, Parts IV(A) and V(C).
86 See above, Part V(C).

women) are regarded as fundamental. The question arises whether these interests are regarded as in need of protection regardless of where in the world the commercial surrogacy arrangement is carried out. The answer to this question is not obvious and may depend upon whether the child is intended to live in Australia.

Where the plaintiff lives in the foreign country and the child is intended to live there, the surrogacy arrangement does not affect Australia and the Australian jurisdictions should accept the policy decision that the foreign legal system has made in relation to commercial surrogacy. It is noteworthy that intended parents who lived overseas during the surrogacy arrangement and obtained a foreign court order that declares them to be the legal parents of the child may have that order recognised in Australia; public policy does not generally bar such recognition even in cases of (lawful) commercial surrogacy.[87] Nor should public policy bar compensation for the cost of a surrogacy arrangement in those circumstances.

The position is more difficult where the plaintiff lives in Australia and intends to bring the child to Australia. In those circumstances, neither the fertilisation procedure nor the surrogate mother's pregnancy would affect Australia. It could be argued that Australian law should not seek to protect a surrogate mother who lives overseas. On the other hand, the surrogacy arrangement would affect Australia, as the child is intended to live in Australia and the circumstances of the child's birth would become known to the community in which the child would live. This factor is more significant as the child is the centre of a surrogacy arrangement. On balance, compensation of the cost of the surrogacy arrangement should be barred on public policy grounds.

The view advanced here differs from the view taken for English law by the majority of the UK Supreme Court in *XX v Whittington Hospital NHS Trust*.[88] The majority held that English law did not have a public policy against the award of damages for the cost of a commercial surrogacy arrangement that an English resident intended to enter into in California.[89] Two key reasons for the majority's view were the fact that neither the plaintiff nor the surrogate mother would have been

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87 *Re Grosvenor* [2017] FamCA 366, [31]-[32]; *Sigley v Sigley* (2018) 57 Fam LR 347, [32]-[33]. See also *Family Law Act 1975* (Cth) s 69S(1A) and *Family Law Regulations 1984* (Cth) sch 4, 4A: a person is presumed to be the parent of a child if a court in a prescribed country has so found. But none of the prescribed countries is a commercial surrogacy destination for Australian residents. Being named as a parent on the child's foreign birth certificate raises no presumption of parentage under Australian law: *Ellison v Karnchanit* (2012) 48 Fam LR 33, [70].

88 *XX v Whittington Hospital* (n 14), overturning *Briody v St Helens and Knowsley Area Health Authority* [2002] QB 856; See also *Wilhelmson v Dumma* (2017) 96 BCLR (5th) 120 [374].

89 For a different view, see Amel Alghrani and Craig Purshouse, 'Damages for Reproductive Negligence: Commercial Surrogacy on the NHS?' (2019) 135 (July) *Law Quarterly Review* 405, 410.

criminally liable even if the arrangement had taken place in England,[90] and the fact that the plaintiff (and her partner) would be able to obtain a parental order (transferring parentage) from an English court.[91] This differs from the position in the Australian jurisdictions under discussion, where domestic commercial surrogacy is criminalised and parentage orders are not possible in cases of international commercial surrogacy.[92]

In conclusion, where the plaintiff intends to enter into a commercial surrogacy arrangement carried out in a foreign country in which it is lawful, public policy bars compensation of the cost of the arrangement if the *lex loci delicti* criminalises commercial surrogacy and the child is intended to live in Australia.[93]

VI Other Issues

Where the cost of a surrogacy arrangement is in principle recoverable, there are still some other issues that may arise. These will now be discussed.

A. *Failure to Mitigate Loss through Adoption*

The victim of a tort or breach of contract may not recover damages for loss that could have been avoided by taking reasonable measures.[94] A defendant might argue that the plaintiff could avoid the cost of a surrogacy arrangement by adopting a child. Such an argument would not succeed. A surrogacy arrangement enables the plaintiff to raise a child from the age of about six months, which is the best possible substitute for the plaintiff's lost ability to carry a child and raise the child from birth. For adoption to provide a similar benefit, the plaintiff (and her partner) will have to adopt an infant, which will rarely be

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90 *XX v Whittington Hospital* (n 14), 980 [19], [21].

91 *XX v Whittington Hospital* (n 14), 978-9 [16], where Baroness Hale observed that parental orders are routinely granted in cases of commercial surrogacy, as English courts give preference to the welfare of the child and retrospectively authorise the payment of a fee; see *Human Fertilisation and Embryology Act 2008* (UK) ss 54(8), 54A(7). See, eg, *Re C (Parental Order)* [2014] 1 FLR 757.

92 *Dudley v Chedi* [2011] FamCA 502, [28]-[32]. This does not seem to deter Australians from engaging in international commercial surrogacy: Jackson et al (n 26), 46. New federal legislation permitting (under conditions) parentage orders in cases of international commercial surrogacy has been recommended by the Family Law Council, *Report on Parentage and the Family Law Act* (2013) ch 3. See also Anita Stuhmcke, 'New Wine in Old Bottles and Old Wine in New Bottles: The Judicial Response to International Commercial Surrogacy in the United Kingdom and Australia' in Kirsty Horsey (ed), *Revisiting the Regulation of Human Fertilisation and Embryology* (Routledge, 2015) 200.

93 If the cost of an Australian resident entering into a commercial surrogacy arrangement overseas is not considered irrecoverable on this ground, there will still be the question of whether the cost (including the cost of multiple travels to the foreign country) is reasonable in the circumstances; see *XX v Whittington Hospital* (n 14) 988 [53].

94 Eg, *Tuncel v Renown Plate Co Pty Ltd* [1976] VR 501, 503–4; *Arnott v Choy* (2010) 56 MVR 390, 422 [155]; *Powercor Australia Ltd v Thomas* (2012) 43 VR 220, [52]–[53].

possible. Even if the adoption of an infant is practically possible, the process is complex and can be lengthy, and the cost may not be significantly lower than the cost of a surrogacy arrangement. The plaintiff's preference for a surrogacy arrangement rather than adoption cannot be regarded as unreasonable.

B. *Deduction of Saved Expenditure on Plaintiff's Pregnancy*

If the cost of a surrogacy arrangement is recoverable, there must be a deduction of the amount of expenses that the plaintiff would have incurred had she carried a child herself.[95] This follows from the general principle that expenses that an injured person saves by reason of the injury must be deducted from the financial loss caused by the injury, at least where there is a correlation between the loss and the saved expenses.[96] This does not necessarily, or even usually, rule out damages for the cost of an altruistic surrogacy arrangement, as the expenses incurred by the surrogate mother may well be higher than the cost that a pregnancy of the plaintiff would have generated. In particular, the surrogate mother's pregnancy requires artificial insemination. It is also possible that the surrogate mother undergoes medical tests more frequently than the plaintiff would have done or uses more expensive medical services.

C. *The Effect of Uncertainty*

1 *Uncertainty as to the Plaintiff's Future Decision*

It may be uncertain whether the plaintiff will actually enter into a surrogacy arrangement.

In cases of personal injury, damages will not be awarded for the cost of a measure where the chance of that measure being carried out is so low as to be regarded as speculative.[97] Where the chance is between 1 and 99%, the uncertainty will not be resolved on the balance of probabilities, but the court will make an award proportionate to the degree of probability of the measure being carried out.[98] These rules

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95 Such a deduction was not made in *XX v Whittington NHS Hospital Trust* [2018] PIQR Q2, [53]. No explanation was given. A likely explanation is that the claimant, had she been pregnant, would have made use of the free services of the UK's National Health Service.

96 See *Skelton v Collins* (1966) 115 CLR 94 (an injured person whose life expectation has been shortened by the injury may recover damages for the loss of earnings in the 'lost years', but the saved cost of maintaining the injured person during the 'lost years' must be deducted); *Sharman v Evans* (1977) 138 CLR 563, 577 (the calculation of loss of earning capacity must involve a deduction of expenses that would have been necessary to exercise the earning capacity, such as cost of special clothing or transportation to and from work).

97 *Malec v JC Hutton Pty Ltd* (1990) 169 CLR 638, 643. See, eg, *Potts v Frost* (2011) 59 MVR 267 321 [252].

98 *Malec v JC Hutton Pty Ltd* (1990) 169 CLR 638, 642-3.

apply not only to medical treatment[99] but also to other measures such as the modification of the home of a disabled plaintiff.[100] They must also apply to the cost of a surrogacy arrangement. Thus, no damages should be awarded where the chance of the plaintiff entering into a surrogacy arrangement is so low as to be speculative.[101] Otherwise, a proportionate award will be made. For example, where there is a 25% chance that the plaintiff will enter into a particular surrogacy arrangement, the court will award 25% of the cost of that arrangement.

Any deduction to reflect the possibility that the plaintiff will not enter into a surrogacy arrangement should be made before the deduction of the expenses the plaintiff has saved by not carrying a child herself, as it is certain that the plaintiff has saved those expenses.[102]

2 *Uncertainty as to the Birth of a Child*

It may be certain that the plaintiff will enter into a surrogacy arrangement, but uncertain whether such an arrangement will result in the birth of a child. In particular, it may be uncertain, in the light of the age and health of the plaintiff and her partner, whether a fertilisation procedure will be successful. The amount of damages cannot be reduced to reflect the possibility of the surrogacy arrangement not resulting in the birth of a child, because the plaintiff will incur the entire cost either way. However, if the probability of the surrogacy arrangement resulting in the birth of a child is very low, damages for the cost of the arrangement may be denied altogether on the ground that the entering into such an arrangement is not a necessary and reasonable measure to address the effects of the plaintiff's infertility.[103]

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99 Eg *Amoud v Al Batat* (2009) 54 MVR 167, 167-8 [2], 173 [35]; *Avopiling Pty Ltd v Bosevski* (2018) 98 NSWLR 171 [166]-[169]. For fertility treatment, see *Potts v Frost* (2011) 59 MVR 267, 321-2 [253]-[255].

100 *Marsland v Andjelic* (1993) 31 NSWLR 162, 176.

101 See *Hornberg v Horrobin* [1998] QCA 283, where Demack J (dissenting) rejected the claim for the cost of employing a nanny to care for future children to be acquired through adoption or surrogacy, on the ground that the plaintiff's severe injuries made it unlikely for her ever to have children; the majority in the court rejected liability and did not discuss the assessment of damages. For Canadian law, see *Sadlowski v Yeung* (2008) 166 ACWS (3d) 177, [133].

102 Where it is uncertain that the plaintiff would have had a particular number of children in the absence of the defendant's wrong, a deduction must be made to reflect this uncertainty. This deduction must be made after the deduction of the expenses the plaintiff has saved by not carrying a child herself, as both loss and saved expenditure are subject to the same degree of uncertainty.

103 Damages were denied in *Briody v St Helens and Knowsley Area Health Authority* [2002] QB 856, 866-7 [22], where the chance of success was 1%. This aspect of *Briody* was not overruled in *XX v Whittington Hospital* (n 14); see *XX v Whittington Hospital* (n 14) 986 [44], 987 [48].

D. *Infertility as an Aspect of Non-Pecuniary Loss*

Loss of fertility is the loss of an amenity and will generally be reflected in the award for non-pecuniary loss.[104] As Hale LJ has said: 'In the case of a woman who has always wanted children, to be deprived forever of the chance of having and bringing up those children is a very serious loss of amenity quire separate from the pain and suffering caused by the injury'.[105] If the cost of a surrogacy arrangement is fully compensated, the plaintiff's infertility should not be a major aspect of the award for non-pecuniary loss, as the plaintiff is given the money to have a child or children through surrogacy and thus avoid (most of) the non-pecuniary loss that would otherwise flow from her infertility.

If there is uncertainty as to whether the plaintiff will actually avoid the non-pecuniary consequences of her infertility through a surrogacy arrangement, a proportionate award should be made. The award should reflect any uncertainty as to whether the plaintiff will enter into a surrogacy arrangement and whether the arrangement will result in the birth of a child.[106] For example, if there is a 50% chance of the plaintiff entering into a surrogacy arrangement and a 50% chance of such an arrangement resulting in the birth of a child, there should (in addition to an award of half of the cost of the surrogacy arrangement) be an award of 75% of the (additional) amount that would be awarded for the non-pecuniary consequences of the plaintiff's infertility if no damages were awarded for the cost of the surrogacy arrangement.[107]

VII Conclusion

A claim for the cost of a surrogacy arrangement in Australian personal injury litigation would raise a number of issues under Australian law. The surrogacy arrangement must be an adequate substitute for the plaintiff's lost ability to carry a child herself and must be a necessary and reasonable measure to address the effects of her infertility. This should not require the plaintiff to be a genetic or legal parent of the child born under the surrogacy arrangement.

There are three grounds that should bar compensation of the cost of a surrogacy arrangement depending on the circumstances. First, to the extent to which a statute of the *locus delicti* proscribes the enforcement of the plaintiff's promise to make a payment to the surrogate mother, coherence of the law (as understood by the High Court in *Miller v Miller*) requires the denial of compensation of the plaintiff's cost.

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104 *Bulpitt v Gough* (Supreme Court of South Australia, Full Court, Matheson, Olsson and Duggan JJ, 28 March 1991); *Namala v Northern Territory of Australia* (1996) 131 FLR 468. For Canadian law, see *Sadlowski v Yeung* (2008) 166 ACWS (3d) 177, [130]-[131].

105 *Briody v St Helens and Knowsley Area Health Authority* [2002] QB 856, 865-6 [18].

106 See, for English law, *XX v Whittington Hospital NHS Trust* [2019] 3 WLR 107, 137 [113].

107 For the combination of multiple uncertain events, see *Heenan v Di Sisto* (2008) Aust Torts Reports 81–941, [50].

Secondly, a surrogacy arrangement that involves criminal activity should not be regarded as a necessary and reasonable measure, whoever is the person committing the offence and whichever jurisdiction imposes the criminal liability. Finally, compensation of the plaintiff's cost should be denied by direct reference to public policy where the child is intended to live in Australia and the *lex loci delicti* criminalises the type of surrogacy arrangement intended by the plaintiff.

None of these grounds excludes compensation for the cost of an altruistic surrogacy arrangement, whether domestic or international.

The first two grounds mentioned exclude compensation for the plaintiff's cost in almost all cases of domestic surrogacy.[108]

In a case of international commercial surrogacy, the plaintiff's cost can be compensated only if the plaintiff does not reside in the Australian Capital Territory, New South Wales or Queensland (as the criminal prohibitions of those jurisdictions have extraterritorial effect), and either the Northern Territory is the *locus delicti* or the child is not intended to live in Australia.

The position is thus complex, reflecting the differences among the Australian jurisdictions in respect of the regulation of surrogacy. A uniform regulation of surrogacy throughout Australia is desirable and would remove some of the complexities of the question of whether the cost of a surrogacy arrangement can be compensated in personal injury litigation. However, as long as commercial surrogacy remains criminalised in Australia, the question of whether public policy bars compensation for the cost of an international commercial surrogacy arrangement will remain a disputed issue, unless legislation sets out the circumstances in which the cost of a surrogacy arrangement is compensable.

[108] Compensation may not be barred where the Northern Territory is both the *locus delicti* and the place where the surrogacy arrangement is carried out, and the plaintiff does not reside in the Australian Capital Territory, New South Wales or Queensland.