Claims for lost years

David Regan considers the development of case law where a defendant's negligence has caused death

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Appeals in cases currently before the courts are likely to have profound consequences for litigation where the defendant's negligence has caused death or shortened the claimant's lifespan.

The Supreme Court is to revisit *Cookson v Knowles* [1979] AC 556 and may well be asked to revisit *Croke v Wiseman* [1982] 1 WLR 71. Solicitors acting in cases with fatal consequences urgently need to consider the immediate effects of these appeals, whatever their outcome.

Date of death

In late February 2015, the Supreme Court gave permission for a direct appeal on the issue of whether to overturn the much-criticised and now very aged judgment in *Cookson*. That decision fixed the multiplier for damages for dependency at the date of the death of the deceased rather than trial.

It has been widely criticised, both by the Court of Appeal in *A Train v Fletcher* [2008] EWCA Civ 413 and the Law Commission's 1999 report entitled 'Claims for wrongful death', as having the result of illogically reducing damages.

In *Knauer v Ministry of Justice* [2014] EWHC 2553, Mr Justice Bean adopted some of this criticism, but naturally held himself bound by *Cookson*. On appeal, the weight of existing authority creates a very good prospect that the Supreme Court will overturn the decision, so that the use of the multiplier in cases of fatal accidents accords with the rationale of the Ogden tables.

The difference in the multiplier between death and trial (often a factor of three to four or more) may have a significant effect on the level of damages awarded. Solicitors for claimants presently pleading schedules of loss and negotiating compromise agreements may well wish to hold fire or assume a change in the law. Where the case involves an infant, or other protected party, the court might be reluctant to approve settlement until the law is decided.

Shortened life

In *Totham v King's College Hospital* [2015] EWHC 97, the High Court has recently revisited the question of whether a child, whose life has been shortened by negligence, should be able to make a claim for damages for loss of earnings in the 'lost years' between the date when they will die as a result of the negligence and their life expectancy but for the breach of duty. This challenges the decision of the Court of Appeal in *Croke*.

The judgment in *Croke* has been widely criticised as placing awards of damages for children on a different basis than those which can be claimed by adults. In 2007, in its judgment in *Iqbal v Whipps Cross* [2007] EWCA Civ 1190, the Court of Appeal criticised *Croke* but held that it was bound by it, following which appeal to the House of Lords was compromised.

Mrs Justice Laing made many of the same criticisms in *Totham*, although she naturally accepted that she was bound by *Iqbal*. She lamented that it appeared that a profitless appeal to the Court of Appeal was likely to be necessary before the issue could be considered by the Supreme Court.

If the appeal progresses, overturning *Croke* will have profound consequences in such cases as those involving cerebral palsy. Solicitors acting for victims should now consider including claims for lost years in their schedules of loss to anticipate the likely change in the law. This is both because defendants may wish to 'buy off' the risk of appeal and due to the necessity of the court approving any settlement.

If *Croke* is overturned, awards of damages for children whose life is shortened by a breach of duty will be significantly greater than those made where the death occurs immediately at the time of the tort. Parents bringing a claim arising from the death of their child are almost inevitably unable to establish a dependency on the child's earning potential after the death. However, if *Croke* is overturned, parents acting as their child's litigation friend will be able to receive an award for their child's lost years if damages are awarded while the child lives. This will create a further anomaly in the operation of the Fatal Accidents Act 1976, systematic reform of which is long overdue.

Anonymity orders

Finally, in *JX MX v Dartford and Gravesham NHS Trust* [2015] EWCA Civ 96, the Court of Appeal has developed the law so that the making of an anonymity order should become normal in cases where an award of damages is made to a child or protected party. Protected litigants no longer need to show the existence of a specific risk of tangible harm to them, such as a risk of being exploited were it known that they had received a substantial award of damages. **SJ**