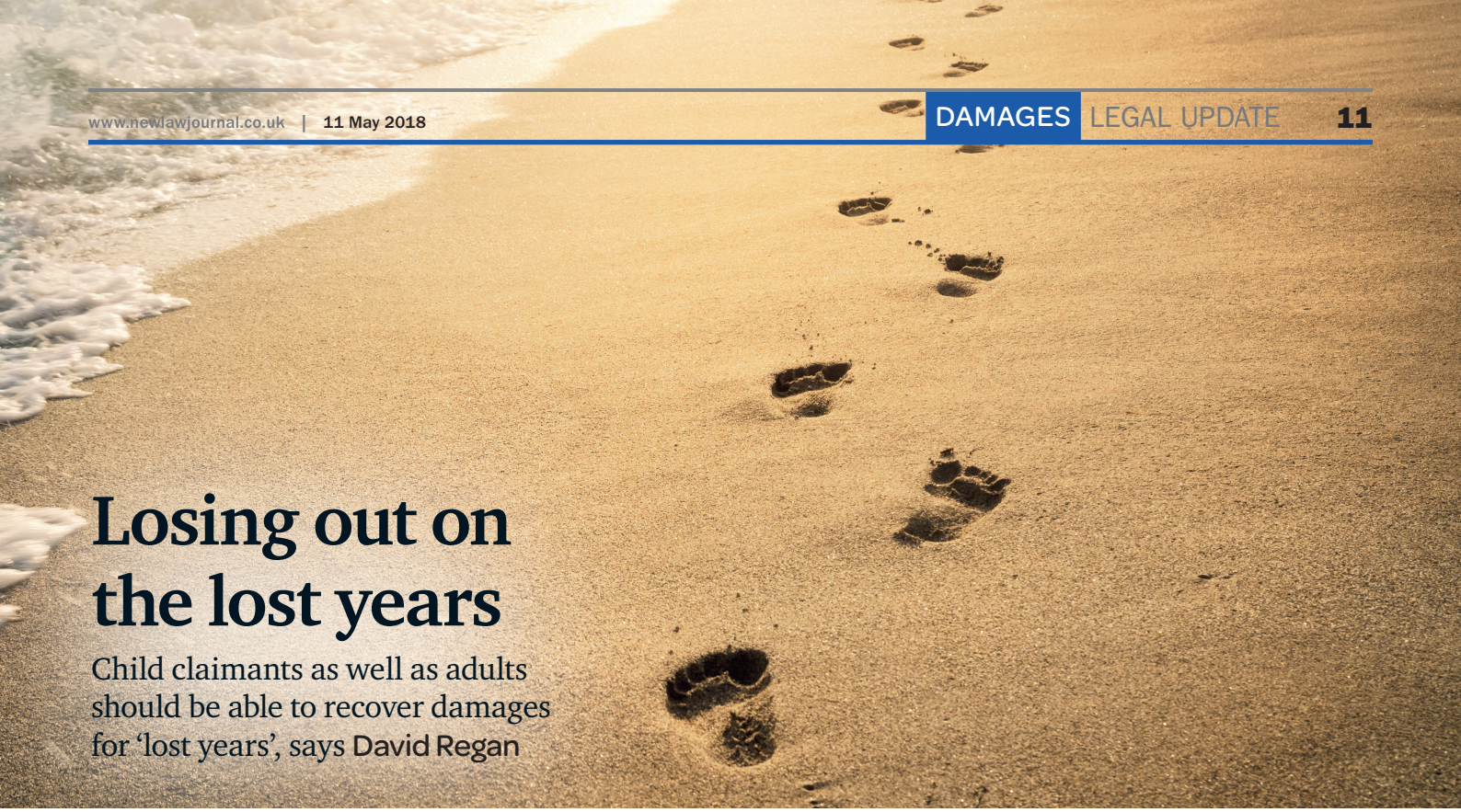

Losing out on the lost years

Child claimants as well as adults should be able to recover damages for 'lost years', says David Regan

IN BRIEF

▶ Argues that child claimants should be able to recover damages for loss of earnings (lost years).

Few aspects of the law relating to damages for serious personal injury have caused as much confusion and are as poorly understood as claims for 'lost years'. In such cases, damages are awarded to a living claimant whose life has been shortened by a tort, for the loss of earnings in the time where, but for the tort they would have been alive. The law as it currently stands has evolved in an uncertain fashion, so that at present adult claimants are able to recover such damages while child claimants cannot. This situation is illogical to the degree that it verges on bringing the law into disrepute. Both the Court of Appeal and an increasing number of High Court decisions have lamented it, but the Supreme Court has yet to have an opportunity to consider the issue.

Conceptualisation

The underlying problem is that claims for lost years have given rise to difficulties in conceptualisation. Why should a person receive an award for their loss of earnings in years in which they will not be alive and have no direct needs themselves? Damages for pain, suffering and loss of amenity focus almost completely on the lifelong aspects of injury—and seldom on their life-shortening effect. The sufferer of psychological symptoms caused by the reduction in life expectancy arising from an injury will be able to recover damages for that psychological distress *in their lifetime* but not in any meaningful way for the fact that their life is shortened. The victim of a road traffic accident who lingers in a coma in hospital for several days receives an award which is almost notional. In consequence, recovering damages for lost earnings in a period when the victim will not be alive appears odd, when that same victim is not compensated for the fact of that reduced life expectancy itself.

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In many cases the issue is skated over even for adult claimants, particularly where the reduced life expectancy is short and any claim will be overtaken by a dependency claim under the Fatal Accidents Act 1976. This tendency has been compounded by the fact that historically, awards for 'lost years' cases have been lower than those made under the Fatal Accidents Act. But in some cases, claims for lost years are a vital component of damages. With medical advances, a patient with a negligent misdiagnosis of cancer may expect an increasing—if still radically curtailed—life expectancy. She may have no dependents and will almost inevitably have urgent needs for her own provision. If she wishes to achieve a final settlement within her lifetime and would have enjoyed an earnings capacity, her award should include at least the consideration of a claim for lost years, a need which expressly drove the creation of such provision.

Evolution & history

The evolution of the law of damages for lost years claims has suffered from a lack of firm theoretical underpinning. It was developed by the House of Lords in the late 1970s in the wake of the Fatal Accidents Act. It began with a living male victim of mesothelioma, who had living dependants, and who was able to recover his lost earnings during his lost years for the benefit of those dependents, *Pickett v British Rail Engineering Ltd* [1979] 1 All ER 774. This was swiftly, but briefly broadened to allow the parents of deceased child victims to receive damages on behalf of the estate for their children's notional future earnings as a loss to the estate, *Gammell v Wilson* [1981] 1 All ER 578. The effect of *Gammell* would have been to allow the beneficiaries of an estate to claim for the deceased's lost years, potentially in competition with any dependents, and even in their absence and thus where no Fatal Accidents Act action could be brought. The overall effect of this was illogical and it was swiftly reversed in 1982 by Parliament, which amended the Law Reform (Miscellaneous Provisions) Act 1934 by inserting s 1(2)(a), so that it now expressly prevents the estate of a deceased person recovering damages for their lost years after death.

The jurisprudential grounding for adult claims for lost years thus answered the question that the deceased suffered no loss after death, with the proposition that the purpose of the award was to allow the deceased to provide for his or her actual or possible dependants. This has fed the quantification of such claims, where the court tries to identify the deceased's surplus income to provide for such dependents once living expenses are removed. For little reason, this has conventionally been lower in lost years claims (50%) than those under the

Fatal Accidents Act (66%–75%), a distinction illustrating the lack of a coherent approach.

The question of whether a child would be able to claim damages for lost years *in their lifetime* remained open for a brief period after *Pickett*, before being resolutely answered in the negative by the Court of Appeal, presided over by Lord Denning, *Croke v Wiseman* [1981] 3 All ER 852. That claimant suffered devastating injuries from hypoxic brain damage consequent on cardiorespiratory arrest negligently caused in hospital at the age of 21 months. His expectation of life was then 40 years and, while making proper provision for his care, the court resolutely declined to make an award for lost years. The twin rationales of the decision were that it was wrong in principle to make an award for the notional dependents of a child who in fact would never have any. Added to this, the court doubted its ability to quantify such an uncertain award when the victim was so young at the date of the injury that it could not be determined what he would have earned or whether or not he would have been likely to have had any children. Lord Denning observed that this was a response to a need for 'sense and justice' in the law of damages arising from death, and enjoined his fellow judges with the words of the hymn, 'Ye fearful saints fresh courage take'.

Perhaps thankfully, judicial quotation from the hymnal has fallen out of fashion. However noble the sentiment, the result of *Croke* has been to produce a distinct lack of sense in the law. For almost 40 years adult claimants have been able to recover damages for lost years, while child claimants have not. The obvious inconsistency is stark. In *Pickett*, albeit *obiter,* the House of Lords expressly contemplated that adults without dependents at the time of the tort would nevertheless be able to recover lost years damages to allow them to provide for future dependents, a practice that has been subsequently followed. Why, when such an adult might well have had no demonstrable intention to have had children, should they be able to recover for their notional future provision, when a child victim, who may be only a few years younger, cannot?

The lower courts

In recent years the lower courts have grown increasingly restless when confronted with the problem. The Court of Appeal has found itself bound by *Croke*, despite its inconsistency with *Pickett* and *Gammell*, while expressing the need for a decision by a higher court, *Iqbal v Whipps Cross University NHS Trust* [2007] EWCA Civ 1190. These sentiments have been echoed by the High Court, perhaps most powerfully by Laing J, who desired but was unable to effect a direct appeal to the Supreme Court, *Totham v Whipps Cross University NHS Trust* [2007] EWCA Civ 1190. Where it has been able to do so, the High Court has been willing to chip away at the effect of *Croke*, most recently awarding lost years in circumstances where the infant victim of severe spastic cerebral palsy reached adulthood during the course of the litigation, *JR v Sheffield Teaching Hospitals NHS Foundation Trust* [2017] EWHC 1245. The suggestion that this would lead victims to defer proceedings tactically was dismissed as highly unlikely given the need to meet their significant needs during their childhood. Yet the availability of damages for lost years merely because the child has reached adulthood before trial illustrates the irrationality of the original rule. The other, more practical erosion of *Croke* has occurred due to advances in clinical knowledge. Infants suffering hypoxic brain injury, and in particular cerebral palsy, have had steadily increasing expectations of life, sometimes approaching 70 years. Their natural ability to recover lost earnings in their lifetime as of right, is serving to limit *Croke* to some extent.

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The developing decisions of the lower courts amount to a powerful critique of *Croke*, and indeed of the past theoretical underpinning of lost years claims. They are essential to allow the living victim to conclude proceedings in their lifetime and to provide for their dependants. But this is only an expression of the principle that there should be full compensation for the injury, and that recovering damages for lost earnings during lost years is no more than the provision of full compensation to the claimant herself. This removes the question of whether or not there may be future dependents entirely. Damages are awarded for the lost surplus earnings simply for the deceased. 'Full compensation' is presently guiding the approach on a number of fronts, including the concern to provide a remedy in claims for accommodation following the provision of a negative discount rate which renders obsolete the settled law providing for its cost. Both issues have profound effects for severely injured child claimants.

It is hard to see how the Supreme Court, when it is able to do so, would not award damages for lost years to child claimants. These are routinely being sought in cases of cerebral palsy, for the very practical purpose of achieving a more advantageous settlement from a defendant unwilling to risk an appeal to the Supreme Court. It may indeed become increasingly difficult for the High Court to accept a significant discount on the value of such an aspect of a settlement on approval hearing.

Legislation?

The only alternative is legislation. The difficulty is that to achieve a just outcome, it would have to have retrospective effect. While this is rightly exceptional in principle, doing so for lost years cases relates not to the availability of the underlying action, but only to the calculation of damages arising from it. Parliament took such retrospective action negatively in 1982 to prevent an estate recovering for lost years. It did so positively in 2006 to create a statutory remedy for victims of malignant mesothelioma in which the test to establish causation—intrinsic to the underlying remedy itself—was modified (s 3 of the Compensation Act 2006).

But reform should not happen in a piecemeal fashion. For more than 40 years the law of damages for cases of fatality has required fundamental review, and received only sporadic attention. Under the Fatal Accidents Act 1976, civil partners and their children now very properly qualify as dependants and receive bereavement awards, but partners outside of a legal relationship continue to suffer statutory discrimination providing less advantageous damages, as well as a specific higher test to qualify as a dependent at all. The recommendations of the Law Commission have simply been ignored. The provision of a new fatal accidents act would allow the rationalisation of claims for lost years with those of dependency brought after death, providing for a similar basis of their calculation. It would also allow a consistent and more rational approach to cases where a victim's death has been brought forward by injury, whether this is by seconds or decades. The need for such legislation should not halt the Supreme Court's rationalisation of the law for lost years in the interim. Yet it may hasten the day when damages for pain, suffering and loss of amenity are brought into line with the principle of full compensation, and properly reflect the fact that an injury has caused loss of life. NLJ

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