THE LOST YEARS

BEN HANDY AND CHRISTOPHER SHARP KC ON LOSS OF EARNINGS FOR CHILD CLAIMANTS

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In claims involving children who have suffered brain injury, one issue that can provide significant challenges is the claim for the loss of earnings that the child will not now be able to realise.

As Ritchie J recently put it in *CCC v Sheffield Teaching Hospitals NHS Foundation Trust* [2023] EWHC 1905 (KB) (at para 26, in which he dealt with the application for a 'leapfrog' appeal to the Supreme Court on this issue):

'Damages for lost years are awarded to injured, live claimants who will die earlier than they would have, as a result of the defendant's tortious acts or omissions. They are awarded for lost income during the lost years but the likely self-spend is deducted, leaving damages for the likely savings which the claimant would have accrued and possibly left in his or her will. This head of loss has been contentious since the 1960s.'

Where the child is very young, there is little material on which to build a model for a potential (but now lost) career; even in the case of a surviving but badly injured child. But where the child's life expectancy is reduced, there is the added issue of whether any claim can be made for the 'lost years'.

Case law

So far as the latter is concerned, the binding authority of the Court of Appeal in *Croke v Wiseman* [1982] 1 WLR 71 currently bars any action by a child claimant for earnings in the lost years; although an adult can make such a claim (*Pickett v British Rail Engineering* [1980] AC 136) subject to a deduction for the estimated living expenses that the claimant would have had (see, for example, *Harris v Empress Motors Ltd* [1984] 1 WLR 212).

The basis for the rejection of a claim by a child in *Croke* was that such a claim is speculative. However, the decision has been much criticised, and in *Iqbal v Whipps Cross University NHS Trust* [2007] EWCA Civ 1190 the Court of Appeal made clear that it was reluctant in accepting that it was bound by *Croke*. Permission was given to appeal to the House of Lords, but the appeal was compromised.

Laing J in *Totham v King's College Hospitals NHS Foundation Trust* [2015] EWHC 97 (QB), and William Davis J in *JR v Sheffield Teaching Hospitals NHS Foundation Trust* [2017] EWHC 1245 (QB), both gave reasoned explanations for rejecting *Croke*. In *Totham*, Laing J held she was bound by *Croke*, but in *JR v Sheffield*, William Davis J distinguished *Croke* (which he accepted was otherwise binding on him) on the facts, and made an award. The defendant appealed the decision, which also addressed the issue of accommodation, but the appeal was compromised so that no authoritative judgment emerged.

In *Croke* and in *Totham*, the child was aged seven with a life expectancy of about 40 years; while in *Iqbal* the child was nine at trial with a life expectancy to age 41. In *JR* the claimant was injured at birth but was 24 by the time of trial, with a life expectancy to age 70. The judge was therefore able to find that there was no need for speculation, as the claimant had already reached adulthood. The principles in *Pickett* therefore applied.

The interesting discussions therefore are those in *Iqbal* and in *Totham* (para 46-47).

In *Iqbal*, the Court of Appeal found that its earlier division in Croke had held a claim for earnings in the lost years by a catastrophically injured child was not permissible in principle, because there would never be any dependents; but both *Pickett* and *Gammell v Wilson* [1981] 1 All ER 578 established that the absence of dependents is not in itself a bar to a 'lost years' claim for an adult. The claim for lost years is in respect of the claimant's own loss, not in respect of anyone else's.

Thus, the decision in *Croke* was inconsistent with the previous House of Lords decisions (per Gage LJ para 46, and Rimer LJ at para 83 and 86).

There may be difficulties of proof (per Gage LJ at para 22 and per Lord Scarman in Pickett) but that does not bar the claim in principle. Further, it would be illogical to allow claims for adolescents and adults who did not have dependants, but to disallow such claims by a child. These conclusions (said Gage LJ) were further supported by Lord Scarman's observations in *Gammell v Wilson*.

However, as was made clear in *Gammell* and stressed in *Croke*, although the claim is available, proving it and establishing more than a nominal award may prove very difficult (see, for example, *Connolly v Camden and Islington Area Health Authority* [1981] 3 All ER 250, where Comyn J on the evidence awarded nothing, while the indications given in both *Pickett* and *Gammell* were that the assessment exercise in the case of a very young child was likely to be too speculative to justify more than a modest award, if any).

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Assessment techniques

Nevertheless, the techniques of assessment have moved on since *Pickett* and *Gammell*, and loss of earnings can now be measured using the actuarial science behind the Ogden Tables.

The principle of 100% recovery of damages for a victim of a tort enables a child to recover compensation for loss of earnings in the lost years, and any additional uncertainty can be allowed for in the calculation. It should not prevent the calculation. It is in such a context that the exercise in *JR v Sheffield* is a useful example of how to establish the claim, albeit that was a case involving a claimant who had achieved adulthood and the claim for the lost years was limited to pension loss.

Although it was impossible to determine what the precise level of the claimant's earnings would have been over his lifetime, had he not suffered brain damage at birth, nevertheless, based on the earnings and careers of his brother and cousins, and – importantly in that case - taking into account his outgoing personality, it was likely that he would have earned in excess of the median figure for a skilled tradesman; and there was no reason why the loss of pension should not be recoverable on that basis.

It is notable that there were many gaps in the evidence, such as his brother's payslips and what his cousins were earning (as opposed to what they had achieved or were achieving at university), and his father's less impressive earnings were ignored. The lesson is that to avoid a defendant being able to complain that the exercise is too speculative to provide a rational and rigorous basis of assessment, all possible data should be obtained and presented, and the earnings model should be based on as empirical a basis as possible.

Where the child is a little older, the school's pre-accident records will assist with building a picture of the claimant's 'but for' potential. An educational psychologist may be instructed to provide an analysis of what these records reveal and the extent to which they enable a court to identify the difference between what the claimant would have and will now achieve. A defendant may also wish to analyse these records to illustrate limitations, including any evidence of behavioural issues that might have limited the claimant's ability to succeed.

The issue may at last reach the Supreme Court (assuming the appeal is not compromised again). In *CCC* (above), Ritchie J reviewed the case law at some length, noted that *Gammell v Wilson* allows a lost years claim on behalf of a teenager, and noted the illogicality of refusing such a claim to an eight year old, but allowing her to claim if she does not bring her claim until she is 15.

In his review of the case law, he found that the Court of Appeal decision in *Croke* could be challenged on grounds that he found to be logical and to have a real prospect of success; he certified the matter to be one of public importance, and certified the appeal as satisfying the conditions for a leapfrog to the Supreme Court. It is understood that the Supreme Court has accepted the case.

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