Neutral Citation Number: [2023] EWHC 1905 (KB)

Claim number: QB-2020-000769

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL
Date: 13th July 2023

Before:

MR JUSTICE RITCHIE

- -

BETWEEN

CCC
(Suing by her mother and litigation friend MMM)

Claimant

- and –

SHEFFIELD TEACHING HOSPITALS
NHS FOUNDATION TRUST

Defendant

Richard Baker KC and **Sarah Edwards** (instructed by **Taylor Emmet** solicitors) for the **Claimant**
Sarah Pritchard KC (instructed by **DAC Beachcroft** solicitors) for the **Defendant**

Hearing date: 12th July 2023

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APPROVED JUDGMENT

Judgment approved by the Court for handing down. This judgment will be handed down by the Judge remotely by circulation to the parties' representatives by email and released to The National Archives. The date and time for hand-down is deemed to be at 10:00 am on Monday 24th July 2023

Mr Justice Ritchie:

The Parties

1. The Claimant is a young girl aged 8 years and 4 months who sued the Defendant for damages for negligence resulting in her suffering cerebral palsy [CP]. Her mother is her litigation friend.

2. The Defendant runs the Royal Hallamshire Hospital, Sheffield and four years after her birth admitted that it was responsible for failing to prevent the Claimant suffering severe chronic partial hypoxic ischaemia before and during her birth, which caused the CP.

Background

3. I handed down judgment on quantum in this case on 12 July 2023. The quantum which I assessed was as follows: gross lump sum award: £6,866,615; Periodical Payments Order [PPO] for life: £394,940 pa index linked to ASHE 6115 at the 80th centile with the first indexation in December 2023.

Issues

4. There are two issues to determine. (1) Whether a Part 36 offer has been beaten. (2) Whether an appeal point should be certified for a leapfrog appeal to the Supreme Court.

The Part 36 issue

5. At the consequentials hearing the Claimant applied for an order under CPR Part 36 for: indemnity costs; an additional award and interest on costs and damages since the date of a Part 36 offer which the Claimant made on 24.5.2023. That offer was as follows: gross lump sum: £7,000,000 and a PPO: £360,000 pa. for life with the first indexation in December 2024.

6. On the simple figures, at trial, the Claimant beat her own PPO by a substantial amount (£34,940 pa) but failed to beat her lump sum offer which was too high by a substantial amount (£133,385).

7. The Claimant submitted that on the proper interpretation of Part 36 she had beaten her own Part 36 offer at trial. This was on the basis that if the PPO is capitalised into a lump sum by using the agreed lifetime multiplier used to calculate the lump sum value of the other heads of future loss (21.21), the capital value of the PPO would be £7,635,600 which when added to the lump sum offered (£7,00,000) comes to a total of £14,635,600. This total is less than the total lump sum value of the award which, if calculated in the same way by adding the lump sum of £6,866,615 to the capitalised value of the PPO: £8,376,677 (£394,940 x 21.21) makes a total capitalised value of £15,246,292.

8. So, the issue is: did the award amount to a judgment "*more advantageous to the Claimant"* than the Part 36 offer she made?

Part 36

9. The relevant parts of Part 36 are as follows:

> **"Costs consequences following judgment**
> **36.17**
> (1) Subject to rule 36.21, this rule applies where upon judgment being entered—
>
> (a) …
>
> (b) judgment against the defendant is at least as advantageous to the claimant as the proposals contained in a claimant's Part 36 offer.
>
> ..
> (2) For the purposes of paragraph (1), in relation to any money claim or money element of a claim, **"more advantageous" means better in money terms by any amount, however small, and "at least as advantageous" shall be construed accordingly**.
> (3) Subject to paragraphs (7) and (8), where paragraph (1)(a) applies, the court must, unless it considers it unjust to do so, order that the defendant is entitled to—
>
> (a) costs (including any recoverable pre-action costs) from the date on which the relevant period expired; and
>
> (b) interest on those costs.
>
> (4) Subject to paragraph (7), where paragraph (1)(b) applies, the court must, unless it considers it unjust to do so, order that the claimant is entitled to—
>
> (a) interest on the whole or part of any sum of money (excluding interest) awarded, at a rate not exceeding 10% above base rate for some or all of the period starting with the date on which the relevant period expired;
>
> (b) costs (including any recoverable pre-action costs) on the indemnity basis from the date on which the relevant period expired;
>
> (c) interest on those costs at a rate not exceeding 10% above base rate; and
>
> (d) provided that the case has been decided and there has not been a previous order under this sub-paragraph, an additional amount, which shall not exceed £75,000,

calculated by applying the prescribed percentage set out below to an amount which is—

(i) the sum awarded to the claimant by the court; or

(ii) where there is no monetary award, the sum awarded to the claimant by the court in respect of costs—

Amount awarded by the court	Prescribed percentage
Up to £500,000	10% of the amount awarded
Above £500,000	10% of the first £500,000 and (subject to the limit of £75,000) 5% of any amount above that figure.

(5) In considering whether it would be unjust to make the orders referred to in paragraphs (3) and (4), the court must take into account all the circumstances of the case including—

(a) the terms of any Part 36 offer;

(b) the stage in the proceedings when any Part 36 offer was made, including in particular how long before the trial started the offer was made;

(c) the information available to the parties at the time when the Part 36 offer was made;

(d) the conduct of the parties with regard to the giving of or refusal to give information for the purposes of enabling the offer to be made or evaluated; and

(e) whether the offer was a genuine attempt to settle the proceedings.

(6) Where the court awards interest under this rule and also awards interest on the same sum and for the same period under any other power, the total rate of interest must not exceed 10% above base rate.

(7) Paragraphs (3) and (4) do not apply to a Part 36 offer—

(a) which has been withdrawn;

(b) which has been changed so that its terms are less advantageous to the offeree where the offeree has beaten the less advantageous offer;

(c) made less than 21 days before trial, unless the court has abridged the relevant period.

(8) …

Rule 36.18

(1) This rule applies to a claim for damages for personal injury which is or includes a claim for future pecuniary loss.

(2) An offer to settle such a claim will not have the consequences set out in this Section unless it is made by way of a Part 36 offer under this rule.

(3) A Part 36 offer to which this rule applies may contain an offer to pay, or an offer to accept—

(a) the whole or part of the damages for future pecuniary loss in the form of—

(i) a lump sum;

(ii) periodical payments; or

(iii) both a lump sum and periodical payments;

(b) the whole or part of any other damages in the form of a lump sum.

(4) A Part 36 offer to which this rule applies—

(a) must state the amount of any offer to pay or to accept the whole or part of any damages in the form of a lump sum;

(b) may state—

(i) what part of the lump sum, if any, relates to damages for future pecuniary loss; and

(ii) what part relates to other damages to be paid or accepted in the form of a lump sum;

(c) must state what part of the offer relates to damages for future pecuniary loss to be paid or accepted in the form of periodical payments and must specify—

(i) the amount and duration of the periodical payments;

(ii) the amount of any payments for substantial capital purchases and when they are to be made; and

(iii) that each amount is to vary by reference to the retail prices index (or to some other named index, or that it is not to vary by reference to any index); and

> (d) must state either that any damages which take the form of periodical payments will be funded in a way which ensures that the continuity of payments is reasonably secure in accordance with section 2(4) of the Damages Act 1996[4] or how such damages are to be paid and how the continuity of their payment is to be secured.
>
> (5) Rule 36.6 applies to the extent that a Part 36 offer by a defendant under this rule includes an offer to pay all or part of any damages in the form of a lump sum.
>
> (6) Where the offeror makes a Part 36 offer to which this rule applies and which offers to pay or to accept damages in the form of both a lump sum and periodical payments, the offeree may only give notice of acceptance of the offer as a whole.
>
> (7) If the offeree accepts a Part 36 offer which includes payment of any part of the damages in the form of periodical payments, the claimant must, within 7 days of the date of acceptance, apply to the court for an order for an award of damages in the form of periodical payments under rule 41.8.
>
> (Practice Direction 41B contains information about periodical payments under the Damages Act 1996.)"

10. The key words in these parts are "better in money terms".

Analysis

11. So what does "better in money terms" mean when we are dealing with a combined offer which includes a lump sum and a PPO? To determine this it may help to look at the various options available to the Claimant when making Part 36 offers. Firstly, Part 36 permits single offers and secondly, it permits combined offers.

Single offers

12. The Claimant may make one or more single lump sum offers to settle specific heads of loss. These are usually the heads for pain, suffering and loss of amenity and past loss, but also often encompass many future loss and expense heads. So, for instance, the future loss of earnings, the equipment and the accommodation claims are often pleaded as lump sums by using the relevant multiplier for life or for the relevant period. Such a lump sum offer may then be beaten at trial and, if it is, the Claimant can ask for the Court to award the Part 36 financial advantages on the relevant heads of loss and can seek indemnity costs for having to prove those heads of loss at trial. That process is clear enough.

13. By the same reasoning the Claimant can make a single PPO offer to cover some heads of loss. Usually, the claims for future care and case management are included but also deputy costs are sometimes included and, more rarely, future loss of earnings. If the Claimant is awarded a higher PPO at trial then she can ask for the Court to award the Part 36 financial advantages on those heads of loss and can seek indemnity costs for having to prove those heads of loss at trial.

Combined offers

14. The third alternative expressly permitted by Part 36 is the combined offer. By this route the Claimant makes a part 36 offer with both a lump sum and a PPO figure stated. This will settle all heads of loss if it is accepted. However, the offeree may only give notice of acceptance of the offer as a whole. So, the offeree cannot accept just the lump sum or just the PPO. This part of the Rules therefore gives me some guidance on nature of the combined offer. The valuation of a lump sum is dependent on the heads of loss therein. The value of a PPO is dependent on the heads of loss therein. There is cross over between the two. The PPO will not start until December in clinical negligence cases so a catch-up lump sum is necessary. In addition, there may be issues between the parties as to the multiplicand in the PPO or which the heads of loss should be included or excluded from the PPO. If these issues make separate offers a better route for the Claimant to take, tactics will dictate the making of separate offers. However, if a combined offer is made it is a "take it or leave it" offer. It seems to me to be inferred that no protection is gained unless both the lump sum and the PPO offers are beaten, because the quantification of each depends upon the multiplicands in each head and on which heads of loss are included in each part of the combined offer.

"Money terms value" [MTV]

15. How then should the Courts approach the MTV of a Part 36 offer? In relation to a single lump sum offer the pure figure is the MTV. In relation to a single PPO offer, likewise. In relation to a combined offer there are two options, either: (a) each bald figure is part of the the MTV and each must be beaten, or (b) if one is beaten and the other is not, the Court must determine the total MTV of the combined offer compared to the total MTV of the award.

16. The Claimant submits that the correct way to determine the total MTV of the combined Part 36 and the total award is to capitalise the PPO by using the agreed life multiplier and then by adding that total to the lump sum. In my judgment, the first defect in that approach is that in many cases the parties will disagree on the multiplier, indeed in this case the parties disagreed until the door of Court, so the Court would have to use the awarded multiplier and that did not exist at the time of the Part 36 offer. The second defect in that approach is that the whole purpose of a PPO is to order a multiplicand only

and to avoid using a multiplier, because life expectation is so uncertain and because the Claimant is likely to die either before or after the disputed estimates for life expectation. Thus, reintroducing the multiplier to determine the MTV of the PPO is contrary to principle. The final defect in that approach is that combined offers should not, in my judgment, be treated differently from single offers in relation to MTV. The MTV of a single offer PPO is the figure stated as the multiplicand. The same should apply to combined offer MTVs.

17. The Claimant submits that using the multiplier will resolve an injustice. Her Part 36 offer had a total MTV (using the basis suggested) much lower than the total value of the award. Ignoring that would be unfair to the Claimant. In my judgment that is not a real unfairness. The reasons why are as follows. Firstly, the Claimant could have made individual offers. Her PPO offer would have been beaten at trial and she would have gained the Part 36 advantages as a result. She chose not to do so. Secondly, had she made a single lump sum offer she would have failed to beat it. So she would not have received the Part 36 advantages. The combined offer which she chose to make was not the same as two individual offers, so it did not have the same result. The aim of the combined offer was to settle the whole claim by estimating the value of the two different forms of award. The estimate was not successful.

18. I was informed by both leading counsel that there is no prior authority on this point. Certainly chapter 25 in *Kemp & Kemp, Personal Injury Law Practice and Procedure* makes reference to no authority on the point and has no editorial upon it. Nor does the White Book. The principles behind Part 36 were explained in *OMV Petrom v Glencore* [2017] EWCA Civ. 195, namely that the inducements in Part 36.17 are to encourage good practice and to create an incentive to settle issues and claims by using sanctions and rewards. In my judgment, commensurate with those objectives, the system by which the MTV of and offer is to be determined should be kept simple and clear and should fulfil those objectives. I accept Miss Pritchard's submissions to the effect that the MTV of a combined offer is simple and has two parts: the figure for the lump sum and the figure for the PPO. No capitalisation of the PPO is relevant to the MTV. For an offeror to beat her Part 36 combined offer, she has to beat both parts. If she wishes protection for each part then individual offers can be made.

Conclusions

19. In my judgment the MTV of the Claimant's Part 36 was as stated on the face of it. At trial the Claimant beat the PPO part of the combined offer but failed to beat her lump sum offer, so the combined Part 36 offer was not beaten. Therefore, the Part 36 rewards and incentives are not appropriate and I award the Claimant her costs on the standard basis for the claim.

20. I note here that at the consequentials hearing I gave my reasons for refusing to award the Claimant's costs of the claim on the indemnity basis under CPR Part 44 r.44.3.

The Leapfrog Appeal application

21. In paragraph 172 of my judgment on the claim I ruled as follows:

> "172. **Future lost savings in the lost years** The Claimant claimed her lost income in her lost years at half of £34,262 npa until normal retirement age and, in addition, one half of £17,500 npa for loss of pension during her retirement. No submissions were made on this head of loss. Both parties agreed I am bound the decision of the Court of Appeal in *Croke v Wiseman* [1981] 3 All ER 852. I was asked to assess the damages in case the Claimant appeals to the Supreme Court by leapfrog. I decline to do so in the light of the agreement that I have no power to make the award. The conflicting case law and principles on assessment are not a matter for off the cuff judgments."

22. At the consequentials hearing the Claimant applied for a certificate for a leapfrog appeal. The *Supreme Court Practice Direction* 1 states:

> **"Leapfrog Appeals**
>
> 1.2.17 Appeals in civil matters may exceptionally be permitted to be made direct to the Supreme Court under sections 12 to 16 of the *Administration of Justice Act 1969* ... These appeals are generally called leapfrog appeals.
>
> 1.2.18 Such appeals are permitted only if the relevant statutory conditions are satisfied and the Supreme Court grants permission.
>
> 1.2.19 The relevant statutory conditions are set out in section 12(3) and (3A) of the *Administration of Justice Act 1969*, …"

23. The power to grant such a certificate is set out in S.12 pf the *Administration of Justice Act 1969.* This provides:

> **"12 Grant of certificate by trial judge.**
> (1) Where on the application of any of the parties to any proceedings to which this section applies the judge is satisfied—

> (a) that the **relevant conditions** are fulfilled in relation to his decision in those proceedings [F1or that the conditions in subsection (3A) ("the alternative conditions") are satisfied in relation to those proceedings], and
>
> (b) that a **sufficient case for an appeal** to the [F2Supreme Court] under this Part of this Act has been made out to justify an application for leave to bring such an appeal, F3...
>
> the judge, subject to the following provisions of this Part of this Act, may grant a certificate to that effect.
>
> (2) This section applies to any civil proceedings in the High Court which are either—
>
> (a) proceedings before a single judge of the High Court [F4(including a person acting as such a judge under section 3 of the M1Judicature Act 1925)], or
>
> (b) F5
>
> (c) …
>
> (3) Subject to any Order in Council made under the following provisions of this section, for the purposes of this section the relevant conditions, in relation to a decision of the judge in any proceedings, are that a point of law of general public importance is involved in that decision and that that point of law either—
>
> (a) … or
>
> (b) is one in respect of which the **judge is bound by a decision of the Court of Appeal** or of the [F2Supreme Court] in previous proceedings, and was fully considered in the judgments given by the Court of Appeal or the [F2Supreme Court] (as the case may be) in those previous proceedings."

Two stage test

24. It is clear that there is a two stage test. Firstly, I must determine whether the relevant conditions is satisfied. Secondly, I must determine whether a sufficient case is made out.

25. In addition to the requirements of section 12, the Court must be satisfied that, if no certificate was granted, the case would be a proper one for granting permission to appeal to the Court of Appeal. Section 15(3) o*f the Administration of Justice Act 1969* provides:

> "Where by virtue of any enactment apart from the provisions of this Part of this Act, no appeal would lie to the Court of Appeal

> from the decision of the judge except with the leave of the judge or of the Court of Appeal, no certificate shall be granted under section 12 of this Act in respect of that decision unless it appears to the judge that apart from the provisions of this Part of this Act it would be a proper case for granting such leave."

Relevant conditions

Is there a point of law of general public importance and is there are binding Court of appeal decision?

26. 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.

Adult lost years claims

27. The leading authority for this head of claim is the decision of the House of Lords in *Pickett v British Rail* [1980] AC 136. Damages for the lost years were awarded to an adult claimant. The Claimant was 51 and contracted mesothelioma at work. He had a very short life expectation. But for the disease he would have worked to age 65. The Judge at first instance was bound by a previous decision in *Oliver v Ashman* [1962] 2 QB 210, so could not award damages for the lost savings during the lost years. A five Judge House of Lords decided by a majority (Lord Russell of Killowen dissenting, Lords Wilberforce, Salmon and Edmund-Davies in the majority) that an injured plaintiff was entitled to recover damages for loss of earnings during the lost years but that those damages should be computed after deduction of his probable living expenses during that period. Lord Wilberforce examined the authorities and posed the question thus at p 148:

> "As to principle, the passage which best summarises the underlying reasons for the decision in *Oliver v. Ashman* [1962] 2 Q.B. 210 is the following per Willmer L.J. at p. 240:
>
> > "... what has been lost by the person assumed to be dead is the opportunity to enjoy what he would have earned, whether by spending it or saving it. Earnings themselves strike me as being of no significance without reference to the way in which they are used. To inquire what would have been the value to a person in the position of this plaintiff of any earnings which he might have made after the date when ex hypothesi he will be dead strikes me as a hopeless task."

> Or as Holroyd Pearce L.J. put it, at p. 230: "... what is lost is an expectation, not the thing itself." My Lords, I think that these are instinctual sentences, not logical propositions or syllogisms - none the worse for that because we are not in the field of pure logic. It may not be unfair to paraphrase them as saying: "Nothing is of value except to a man who is there to spend or save it. The plaintiff will not be there when these earnings hypothetically accrue: so they have no value to him." Perhaps there are additional strands, one which indeed Willmer L.J. had earlier made explicit, that the whole process of assessment is too speculative for the courts to undertake: another that the only loss is a subjective one - an emotion of distress: but if so I would disagree with them. Assumptions, chances, hypotheses enter into most assessments, and juries had, we must suppose, no difficulties with them: the judicial approach, however less robust, can manage too. and to say that what calls for compensation is injured feelings does not provide an answer to the vital question which is whether, in addition to this subjective element, there is something objective which has been lost. But is the main line of reasoning acceptable?"

28. On the issue of whether the existence of dependents is a relevant factor Lord Wilberforce stated as follows at p 149 - 150:

> "The respondent, in an impressive argument, urged upon us that the real loss in such cases as the present was to the victim's dependants and that the right way in which to compensate them was to change the law (by statute, judicially it would be impossible) so as to enable the dependants to recover their loss independently of any action by the victim. There is much force in this, and no doubt the law could be changed in this way. But I think that the argument fails because it does not take account, as in an action for damages account must be taken, of the interest of the victim. Future earnings are of value to him in order that he may satisfy legitimate desires, but these may not correspond with the allocation which the law makes of money recovered by dependants on account of his loss. He may wish to benefit some dependants more than, or to the exclusion of, others - this (subject to family inheritance legislation) he is entitled to do. He may not have dependants, but he may have others, or causes, whom he would wish to benefit, for whom he might even regard himself as working. One cannot make a distinction, for the purposes of assessing damages, between men in different family situations."

29. So, the legitimate desires of the Claimant were the factor Lord Wilberforce considered more weighty. This is, to an extent, a human rights approach. Finally, Lord Wilberforce ruled as follows:

> "My Lords, in the case of the adult wage earner with or without dependants who sues for damages during his lifetime, I am convinced that a rule which enables the "lost years" to be taken account of comes closer to the ordinary man's expectations than one which limits his interest to his shortened span of life. The interest which such a man has in the earnings he might hope to make over a normal life, if not saleable in a market, has a value which can be assessed. A man who receives that assessed value would surely consider himself and be considered compensated—a man denied it would not. And I do not think that to act in this way creates insoluble problems of assessment in other cases."

30. Lord Edmund-Davies ruled as follows at p 162:

> "... I prefer not to complicate the problem by considering the impact upon dependants of an award to a living plaintiff whose life has been shortened, as to which see section 1 (1) of the Fatal Accidents Act 1976; *Murray* v. *Shuter* [1976] Q.B. 972 and *McCann* v. *Sheppard* [1973] 1 W.L.R. 540. For our present consideration relates solely to the personal entitlement of an injured party to recover damages for the "lost years," regardless both of whether he has dependants and of whether or not he would (if he has any) make provision for them out of any compensation awarded to him or his estate. With respect, it appears to me simply not right to say that, when a man's working life and his natural life are each shortened by the wrongful act of another, he must be regarded as having lost nothing by the deprivation of the prospect of future earnings for some period extending beyond the anticipated date of his premature death."

31. Lord Salmon considered the rationale thus at p 154:

> "I recognise that there is a comparatively small minority of cases in which a man whose life, and therefore his capacity to earn, is cut short, dies intestate with nothing or has made a will excluding

> dependants, leaving all his money to others or to charity. Subject to the family inheritance legislation, a man may do what he likes with his own. Certainly, the law can make no distinction between the plaintiff who looks after dependants and the plaintiff who does not, in assessing the damages recoverable to compensate the plaintiff for the money he would have earned during the "lost years" but for the defendant's negligence. On his death those damages will pass to whomsoever benefits under his will or upon an intestacy. I think that in assessing those damages, there should be deducted the plaintiff's own living expenses which he would have expended during the "lost years" because these clearly can never constitute any part of his estate. The assessment of these living expenses may, no doubt, sometimes present difficulties, but certainly no difficulties which would be insuperable for the courts to resolve—as they always have done in assessing dependency under the Fatal Accidents Acts."

Teenagers' lost years claims

32. The judgment in *Pickett* did not expressly deal with lost years claims by the estates of injured, unmarried teenagers. Judgment was handed down in *Gammell v Wilson* by the House of Lords and reported at [1982] 2 AC 27. Both Claimants were deceased, one was 15 and the other 22 at the date of death. The issue was described thus by Megaw LJ in the Court of Appeal in *Gammell* at p 32:

> "But in an action by the victim, brought and resulting in judgment during his lifetime, he can now, as a result of the decision in *Pickett* v. *British Rail Engineering Ltd.,* obtain damages, not only including a sum for shortened expectation of life, but also including a sum referable to what he could have earned in the lost years: the years in which, by reference to his shortened expectation of life, it is to be assumed that he will not be able to earn anything. The first stage of the argument before us on this first issue is whether the decision of the House of Lords in *Pickett's* case expressly or by inference either decides, or by way of obiter dictum expresses the view, that a case such as the present falls to be decided in the same way as *Pickett* v. *British Rail Engineering Ltd.* [1980] A.C. 136: that is, that the plaintiff in his action under the Act of 1934 is entitled to recover damages referable to lost earnings in the lost years."

Megaw LJ made his ruling at p 39 thus:

> "In my opinion, that view of the meaning and intention of section 1 (2) (c) of the Act of 1934 receives confirmation from the concluding words of the paragraph: "... except that a sum in respect of funeral expenses may be included." If the victim, before his death, brought his action and obtained judgment, I see no reason why, if he saw fit to claim it, he should not be entitled to recover damages for anticipated funeral expenses, if only on the basis of acceleration: just as he would be entitled to recover damages for the earnings of the lost years, as *Pickett* v. *British Rail Engineering Ltd.* has decided."

The House of Lords upheld the decision, Lord Diplock ruling thus at p 62:

> "Where the deceased is as young as in these two cases (15 and 22 years respectively) the law requires the judge to indulge in what can be no better than the merest speculation about what might have happened to the deceased during a normal working life-span if he had not been prematurely killed."

Further at p 65 Lord Diplock poignantly stated this:

> "My Lords, if the only victims of fatal accidents were middle-aged married men in steady employment living their lives according to a well settled pattern that would have been unlikely to change if they had lived on uninjured, the assessment of damages for loss of earnings during the lost years may not involve what can only be matters of purest speculation. But as the instant appeals demonstrate and so do other unreported cases which have been drawn to the attention of this House, in cases where there is no such settled pattern - and this must be so in a high proportion of cases of fatal injuries - the judge is faced with a task that is so purely one of guesswork that it is not susceptible of solution by the judicial process. Guesses by different judges are likely to differ widely - yet no-one can say that one is right and another wrong."

Thus, teenagers are entitled to claim damages for their lost years.

Childrens' lost years claims

33. This brings me to *Croke v Wiseman* [1982] 1 WLR 71. Both *Pickett* and *Gammell* were cited in *Croke.* At the trial before me, the Claimant accepted and the Defendant submitted that this Court was bound by the decision of the Court of Appeal in *Croke.*

34. In *Croke* a seven year old boy, who was injured at age 21 months, had a life expectancy limited to between 20 and 40 years by the tortious act. He claimed damages, inter alia, for his lost savings in his lost years. He suffered injuries similar to the Claimant in the case before me. Lord Denning MR described the claimant's condition thus (in the first paragraph which was unnumbered):

> "His brain does not function at all. He is blind. He is paralysed in all four limbs. He cannot stand. He cannot talk. He can only lie on his mother's lap or on the floor. Just like a baby of less than a year old. He has to wear nappies all the time for he is doubly incontinent. There is no hope of any improvement. He does know his mother's voice and shows he loves her, just as a baby does. He is totally dependent on her for everything— for feeding, washing, changing and dressing—just like a little baby."

35. Griffiths LJ observed (at 82) that there was no prospect of the claimant having child dependants in the future and provided that as a reason for not awarding lost years damages:

> "I do not read those passages in the speeches of their Lordships in *Pickett's case* and *Gammell v. Wilson* [1981] 2 W.L.R. 248 in which they stress the difficulty of assessing an award of damages for the lost years in the case of a child as having general application to the claims of all children whose earning capacity has been diminished. In attempting to assess the value of a claim for the lost years, the court is faced with a peculiar difficulty. Not only does it have to assess what sum the plaintiff might have been earning, but it also has to make an assessment of the sum that would not have been spent upon the plaintiff's own living expenses and would have, therefore, been available to spend upon his dependants. In the case of a living plaintiff of mature years whose life expectation has been shortened and who has dependants, there are compelling social reasons for awarding a sum of money that he knows will be available for the support of his dependants after his death. It was this consideration that led to the result in *Pickett's case*. As a consequence of the decision in *Pickett's case*, the House

> of Lords in *Gammell's case* felt compelled to apply the same principle to a claim brought on behalf of the estate of the deceased person. If it could be shown that part of the deceased's income was available to be spent on his dependants, then a claim for that part of the income was available to cover the lost years of working life. In the case of a child, however, there are no dependants, and if a child is dead there can never be any dependants and, if the injuries are catastrophic, equally there will never be any dependants. It is that child that will be dependent. In such circumstances, it seems to me entirely right that the court should refuse to speculate as to whether in the future there might have been dependants for the purpose of providing a fund of money for persons who will in fact never exist. It was this consideration that led me in *Kandalla v. British European Airways Corporation* [1981] Q.B. 158 to refuse to assess a sum for the lost years in respect of two unmarried doctors by speculating as to whether or not in the future they would have married and set aside some part of their income for husbands or children. I refused to enter into the realm of speculation about an impossible and hypothetical situation."

36. The ratio of the case might be summarised thus: that in the case of a severely disabled child, who could not and never would acquire financial dependants the claim for lost years damages was not permissible.

37. The Applicant asserts that the reasoning in *Croke* was incorrect. The basis of recovery identified in *Pickett* did not involve determination of whether or not the claimant will acquire dependents (if he or she presently has none) or whether they will be provided for in a will. It was on a human rights style basis instead. This inconsistency of reasoning and result was emphasised by the Court of Appeal in *Iqbal v. Whipps Cross University NHS Trust* [2007] EWCA Civ 1190. Gage LJ observed:

> "25 In summary, in my opinion, the effect of *Pickett* is to hold that claims for loss of earnings in the lost years are permissible and that such claims are not restricted to adult wage earners with dependants. A claim by the estate of an adult or adolescent wage earner without dependants can clearly be made. I also have no doubt that *Pickett* does not as a matter of principle rule out claims made by the estate of deceased young children. The decision does however point to the difficulties of proof and assessment of such claims but those difficulties do not alter the underlying principle.

> These conclusions are in my judgment reinforced by the observations of Lord Scarman in *Gammell v Wilson* 1982 AC 27 ."

At paragraph 35:

> "35. In my judgment, *Gammell* makes quite clear, what might be said to be less clear from *Pickett*, that the age of a victim is not as a matter of principle relevant to the issue of whether or not a claim can be made for the lost years. Further, the lack of dependants cannot be a factor which defeats a claim for damages for loss of earnings in the lost years. When it comes to the assessment of damages for the lost years the issues are evidential and not matters of principle. In my view *Gammell* assists, by way of further explanation, the speeches of the House on this topic in *Pickett.*"

And at paragraph 45:

> "45 …In my judgment, on any fair reading of the whole of the passage which I have cited above, Griffiths LJ was holding that claims for the lost years by a young child are not permissible. It seems to me that this is a statement of principle. The reason given for doing so is that the injuries are so catastrophic that there can never be any dependants. In my view, it is clear that Griffiths LJ regarded the absence of the prospective existence of dependants in the case of a young child as fatal to a claim for damages for loss of earnings in the lost years. Accordingly, it seems to me that this must be interpreted as a holding of principle and not a matter of evidence to be considered when assessing such damages."

Finally ruling at para. 46 thus:

> "46. Having reached the above conclusion, and after paying all due deference to the decision of such a distinguished constitution of this court, in my opinion the decision in *Croke v Wiseman* is not consistent with the decisions of the House of Lords in *Pickett* and *Gammell*. I would add that I find it difficult to accept that if it is possible to assess prospective future loss of earnings for the lifetime of a young child, even allowing for the difficulty of assessing the surplus, it is not possible to assess damages for the lost years."

In relation to whether the Court of Appeal should or could overturn the decision in *Croke* and the normal rule that it cannot do so, Gage LJ ruled as follows:

> "64. However broad or narrow the test may be I am quite satisfied that in this case the court ought not to depart from the normal rule. *Croke v Wiseman* was decided after the court had been referred to both *Pickett* and *Gammell.* It is obvious from the judgments that the members of the court had heard full argument on those decisions. Although I have concluded that the decision is inconsistent with both *Pickett* and *Gammell,* I am not prepared to hold that the circumstances in this case are so rare and exceptional that this court is entitled not to follow it. Nor, even if permitted to do so, would I hold that the decision in *Croke v Wiseman* was manifestly wrong. I accept that this claimant may be reluctant to invest in the cost of an appeal to the House of Lords but in my judgment that is not a sufficiently strong reason to depart from the normal rule. In my view, the error, if error it be, must be corrected by the House of Lords."

38. Permission to appeal to the Supreme Court was granted in *Iqbal*. The result was revealed in 2015, by Laing J, when she commented on the issue in *Totham v. King's College Hospital NHS Foundation Trust* [2015] EWHC, 97 (QB), thus:

> "45. In *Iqbal v Whipps Cross University Hospital NHS Trust [2007] EWCA Civ 1190 the Court of Appeal* held that the first instance judge in that case had been bound, and that it was bound, by *Croke*, but that *Croke* (and, in particular the reasoning I have just referred to) was inconsistent with two decisions of the *House of Lords, Pickett v BREL [1980] AC 136* and *Gammell v Wilson* [1982] AC 227 . The Court of Appeal granted permission to appeal to the House of Lords but the appeal was then settled.
> 46. I must follow *Croke*. In the light of the views of the Court of Appeal in *Iqbal*, I make two points only. First, I consider that the decision in Croke is inconsistent with the principle of full compensation which I have already mentioned. Second, I respectfully agree with Rimer LJ in Iqbal that the policy justifications referred to in *Croke* (see above) are inconsistent with *Pickett* and *Gammell*.

> …
> 48. "Other things being equal, this is a point which should be resolved by the Supreme Court. It would save the parties time and costs if Eva were able to appeal directly to the Supreme Court, rather than having to appeal first to the Court of Appeal, which would again be bound to dismiss the appeal, as it did in Iqbal . No such appeal is possible in this case as the Trust will not consent to it. If those advising Eva wish to pursue it, they will have to appeal to the Court of Appeal first."

Submissions

39. The Claimant contended that the grounds for the leapfrog appeal are made out. (1) this is a point of law of general public importance. (2) The Court of Appeal have identified a substantial inconsistency between their decision in *Croke* and the two superior decisions of the House of Lords, but after full argument considered itself bound by its own decision. The Claimant submits that *Croke* is wrong and that the inconsistency should no longer be permitted to persist in the law of the United Kingdom.

40. The Defendant made no verbal submissions on the application for a certificate at the hearing. I requested written submissions and in those the Defendant focussed on part two of the test, whether a sufficient case is made out. I shall deal with "sufficient case" below. However, in the Defendant's opening skeleton Miss Pritchard wrote as follows:

> "*"Croke v Wiseman [1982] 1 WLR 71* remains good law and is binding upon this Court. It is acknowledged that there has been some judicial "disquiet" in other authorities as to the effect of *Croke* in entirely depriving an infant C of any lost years claims. The inconsistency of *Croke* with the cases of *Gammell* and *Pickett* (per C's schedule) was noted and considered by the Court of Appeal in *Iqbal v Whipps Cross University NHS Trust [2017] EWHCA Civ 1190*. The Court of Appeal considered that it was obliged to follow *Croke* and disallowed the claim. Unless and until a decision of the Supreme Court intervenes (or there is some statutory reform), this Court is bound by the decision in *Croke* and no award under this head is permissible."

Conclusions on stage 1: the relevant conditions

41. In my judgment the Claimant has a realistic prospect of success in submitting that the clearly identified clashes of principle, reasoning and result between the prior decisions of

the House of Lords and the decision in *Croke* brings the law into potential disrepute due to being unresolved over such a long period of time. Just by asking: "Where does the age dividing line start?" discloses the potential unfairness. If 8 is too young and 15 is old enough to receive damages for lost years, is the cut off point age 12? If so, why?

42. I also not that *Croke* prohibits a child aged 8 with cerebral palsy from bringing a claim for lost years but permits the same child to succeed if she waits until she is 15 and then starts the action. This inconsistency is also potentially illogical.

43. I consider that this is a point of general public importance. It will affect many hundreds of people per annum who are seriously injured by tortfeasors and have reduced life expectancy, a significant cohort of which are children.

44. I consider that the issue has been fully argued and considered in the Court of Appeal and that Court has made it's concern plain and has decided that it cannot overturn its own decision in *Croke*.

45. The pleaded claim for lost years has a value of over £800,000. The real value will be substantially lower because the agreed but for income was lower and the self-spend deduction may be 50% or higher, but in any event the sums involved are not insignificant.

46. I certify that in my judgment the appeal satisfies the relevant conditions in S.12. I also consider that the conditions necessary to grant permission to appeal to the Court of Appeal are satisfied.

Stage 2: has a sufficient case been made out?

47. At stage two, I must be satisfied that a sufficient case is made out to justify an appeal under S.12(1) of the AJA 1969. No factors are set out in the Act to explain what this might mean. Some guidance was provided by Megarry J. in *Inland Revenue v Church* [19875] 1 WLR 251, at p 272.

> "I would add this. I think that where the requirements of the section are satisfied, it is nevertheless within the judicial discretion of the judge whether or not to grant the certificate: for section 12 (1) provides that where the requirements are satisfied the judge "may" grant the certificate, and I can see no grounds for saying that this is one of the limited class of cases in which "may" in effect means "must." In the normal course of events, on an appeal the House of Lords has before it the judgments both at first instance and in the Court of Appeal; and I can well imagine cases

> where on an application for a certificate the judge might consider it desirable that the members of the House of Lords should, in addition to having his own judgment before them, have the benefit of the decision and judgments of the Court of Appeal. This is especially so in cases where there have been disputed questions of fact, for then the case will have been argued before the facts have been found. Each side must argue before the judge on the different bases of whatever facts the judge may by possibility find, and so they may not be prepared with the full range of authorities and arguments which are appropriate to the facts as ultimately found. In such cases, the judgments in the Court of Appeal, given after the case has been argued on ascertained facts, can be expected to be of especial assistance to the House. This consideration, however, is less apposite to revenue cases, where in the normal course the arguments and authorities put before the judge are based on the facts found by the commissioners. Nevertheless, there may be other circumstances in which, even in revenue cases, the judge may think it desirable that the case should not reach the House of Lords unless it has first gone to the Court of Appeal. One such instance, I think, is where the judge considers that although the case is within the letter of section 12, he does not consider that it falls within the spirit. In the present case, even if I am wrong in holding that the case fails to satisfy the second of the relevant conditions, I feel little doubt that it fails to fall within the spirit of that condition. Accordingly, I would in any event have refused to grant the certificate. The application accordingly fails."

48. This guidance, on the need for consideration by the Court of Appeal instead of leapfrog, does not assist me when considering the stage one condition of a Court of Appeal decision which creates the issue in the first place. Particularly where the Court of Appeal have reconsidered the issue since the problematic decision and ruled that it cannot overturn its previous decision.

49. The Respondents relied on the judgment of Jay J in *Henderson v Dorset Healthcare University NHS Foundation Trust* [2016] EWHC 3275 (QB). The Claimant, who had schizophrenia, stabbed her mother. She pleaded guilty to the offence of manslaughter on the grounds of diminished responsibility. She sued the Defendant for damages. The parties agreed that but for the Defendant's negligence the stabbing would not have occurred. The Defendant argued that the entirety of the claim was irrecoverable on the grounds of illegality. Jay J refused to grant a section 12 AJA 1969 certificate. He found

that s12(3)(b) AJA 1969, was fulfilled, but s12(1)(b) AJA 1969, was not met because the Claimant had not made a 'sufficient case'. His reasoning was:

> "103. I do not accept the Claimant's submission that the test applied by the Supreme Court in relation to applications for permission to appeal to itself applies to applications for section 12 certificates. The sub-section requires the ascertainment of a "sufficient case" which, to my mind, entails a range of considerations, some merits-based, some discretionary.
> 104. I do not accept Mr Moon's submission that there would be some value in the Court of Appeal considering this issue. I have boldly stated that the Court of Appeal would be constrained to agree with me that it is bound by the majority in *Gray*.
> 105. Overall, I see some merit in the Claimant's core contention that it is disproportionate on the facts of her case to deny recovery on public policy grounds. However, I am not persuaded that she has made out a sufficient case that this is so. To my eyes, the key point is the manner in which the Supreme Court has looked at *Gray* in its subsequent jurisprudence, and in particular has failed to say anything about Lord Phillips' second reservation.
> 106. It follows that I must refuse to issue a certificate under section 12 of the *Administration of Justice Act 1969*. I also refuse permission to appeal to the Court of Appeal…"

50. I take into account that public policy is relevant to the decision at stage two. The Respondents made the following submissions:

> "… the test for whether a sufficient case is made out involves a range of considerations, some merits-based and some discretionary.
>
> The case law indicates that Courts have granted permission in circumstances:
>
> Where there is a novel statutory interpretation issue, it is undesirable in terms of cost and time for an application to be made to the Court of Appeal and it would be better for the Supreme Court itself to decide if it would be assisted by a fully reasoned judgment from the Court of Appeal, see

> *Hodkin v Registrar General of Births, Deaths and Marriages* [2012] EWHC 3751 (Admin).
>
> Where there is a novel statutory interpretation issue that draws into question compatibility of UK law with EU law, where the issue was previously to be considered by the Supreme Court but was not because of an intervening CJEU decision and where many potential claims are involved see *Moreno v MIB No 2* [2015] EWHC 1142 (QB) at §10-12.
>
> Where there are a large number of claims bound by a House of Lords decision and the ECHR has come to a different decision in the same case, see *Al-Waheed v MOD* [2014] EWHC 2714 (QB).
>
> The Courts have not granted permission:
>
> Where there are no conflicting decisions and it is highly unlikely prior case law would be overthrown, see *A NHS Trust v X* [2021] EWHC 65 (Fam**).**
>
> On the basis of the manner in which the Supreme Court has looked at the contested authority in its subsequent jurisprudence, see *Henderson v Dorset Healthcare University NHS Foundation Trust* [2016] EWHC 3275 (QB)."

51. Whilst that review of previous decisions is interesting background, none of those cases assist me in determining what the grounds for "sufficient case" are in this case. I have wondered long and hard whether the Court of Appeal would be the correct first stage for such an appeal on the basis that society has moved on and values have changed. But in the light of *Iqbal*, which was decided only 16 years ago it is clear to me that the normal route to the Court of Appeal had been firmly shut down by the Court of Appeal.

52. I have considered Practice Direction 3 to the *Supreme Court Rules* and paragraph 3.6 relating to leapfrog appeals. I consider that it is arguable that: (1) it does not appear likely that any additional assistance could be derived from a judgment of the Court of Appeal; and (2) the case was considered in the previous cases set out above by the Court of Appeal on adequate argument; and (3) this case is unlikely to be distinguishable from the previous decisions in the Court of Appeal.

53. So what are the constituent elements of the "sufficient case" test where (1) the Court of Appeal has made a decision which is challenged on grounds I have found to be logical and to have a real prospect of success and (2) where the Court of Appeal have been asked to reconsider its earlier decision and decided it is bound be precedent and (3) where I have already found that the point has general public importance? This Court could hide behind the general catch all phrase of considering "all the circumstances of the case" but I do not find that adds anything of substance. In my judgment the sufficient case test is to interpreted in this case and referring to asking whether there is any reason in justice or public policy to say "no" to leapfrog. Looking at the fact that the Defendant is "insured" by the state, the Claimant is a brain damaged child who lacks capacity and the fact that liability was admitted, I can find no such factor.

Conclusion

54. I certify that the issue of whether the Claimant (a child aged 8 at trial) is entitled to claim for damages for the lost savings she would have accrued from her income/earnings/profits during her lost years (after her likely date of death and before her but for date of retirement) is fit to justify an application for leave from the Supreme Court. I also grant conditional leave to appeal to the Court of Appeal if the Supreme Court refuse leave to appeal in the leapfrog.

Ritchie J
21 July 2023