THE HIGH COURT ORDERED that pursuant to CPR Rule 39.2(4), there shall not be disclosed in any report of these proceedings or other publication the name or address of the Appellant, the Appellant's Litigation Friend or other immediate family members, or any information that could lead to the identification of CCC or MMM. That order continues to apply.

Hilary Term
[2026] UKSC 5
On appeal from: [2023] EWHC 1770 (KB)

JUDGMENT

CCC (by her mother and litigation friend MMM) (Appellant) *v* Sheffield Teaching Hospitals NHS Foundation Trust (Respondent)

before

Lord Reed, President
Lord Briggs
Lord Burrows
Lord Stephens
Lady Rose

JUDGMENT GIVEN ON
18 February 2026

Heard on 11 and 12 February 2025

Appellant
Richard Baker KC
Sarah Edwards
(Instructed by Taylor Emmet (Sheffield Central))

Respondent
Paul Rees KC
Sarah Pritchard KC
(Instructed by DAC Beachcroft LLP (Newcastle))

LORD REED (with whom Lord Briggs agrees):

1. Introduction

1. The claimant suffered a severe brain injury as a consequence of hypoxia during her birth in 2015. The hypoxia resulted from clinical negligence for which the defendant health authority has accepted responsibility. The claimant has been entirely dependent on others since the time of her birth. There is no prospect of improvement. Her life expectancy is agreed to be 29.

2. At the trial on the issue of damages, the parties agreed that if the claimant had not sustained injury she would have had a normal life expectancy, that she was likely to have worked to the age of 68, and that she would have received some sort of pension for the remainder of her life. It was also agreed that she was likely to have gained GCSEs and higher qualifications from college or university leading to paid employment. The claimant's loss of earnings to the age of 29 was agreed to be £160,000, on the basis that, but for her injury, she would have entered the workplace after further education in a similar line of work to her aunts or her mother. There was unchallenged evidence as to their occupations, and that the claimant came from a very hard-working family background. There was also evidence that the claimant's brother, then aged 16, was doing well academically, planned to remain in the sixth form at school and hoped to read law at university. The agreed figure for loss of earnings to age 29 was approved by the judge, Ritchie J: [2023] EWHC 1770 (KB); [2024] 1 WLR 1307, para 171. The fact that professionally advised parties have been able to reach such an agreement is something to be borne in mind when considering assertions about the difficulties of proof in cases of this kind.

3. The parties also agreed that the judge was barred from making any award for pecuniary losses during the lost years (ie the additional years of life which the claimant would have enjoyed if she had not been injured), by reason of the decision of the Court of Appeal in *Croke v Wiseman* [1982] 1 WLR 71 to the effect that such awards cannot be made in cases where the claimant is a young child. In the circumstances, the judge declined to assess damages for the lost years, but granted a certificate for a leapfrog appeal to this court to enable the correctness of the decision in *Croke v Wiseman* to be brought under review: [2023] EWHC 1905 (KB). Permission to appeal to this court was then granted.

4. The principal question of law which the court has to decide is whether *Croke v Wiseman* is consistent with the earlier decisions of the House of Lords in *Pickett v British Rail Engineering Ltd* [1980] AC 136 ("*Pickett*") and *Gammell v Wilson* [1982] AC 27 ("*Gammell*"), the reasoning in which was not challenged.

5. The court has heard no argument as to the basis on which damages for pecuniary losses during the lost years are awarded: in particular, whether they are intended to compensate for the non-receipt in the future of economic benefits which, but for the injury, the claimant would have received during the lost years, or whether they are intended to compensate for the immediate diminution in the claimant's earning capacity, viewed as a capital asset. That is a matter which it would be desirable to clarify when the opportunity arises, as it may have implications for the damages recoverable in some cases.

6. The court has also heard little argument as to the method by which damages for the lost years should be assessed. Counsel for the claimant argued for an award based on the approach generally adopted in cases involving adult claimants: the application of an appropriate multiplier for the period of the lost years to a multiplicand representing the net annual income lost during that period, under deduction of personal living expenses. Counsel for the defendant's primary argument was that there should be no award at all in cases where the claimant is a young child, on the basis that the loss was speculative and incapable of quantification. Alternatively, counsel for the defendant argued for a small conventional award to signify a loss of choice, drawing an analogy with "wrongful birth" cases such as *Rees v Darlington Memorial Hospital NHS Trust* [2003] UKHL 52; [2004] 1 AC 309.

7. Proceeding, therefore, on the basis that the reasoning in *Pickett* and *Gammell* in relation to lost years claims is not in question on this appeal, there are a number of propositions on which all the members of the court are agreed:

(1) *Pickett* established, and *Gammell* confirmed, that damages for pecuniary losses during the lost years are recoverable in English law.

(2) Although the reasoning in *Pickett* may have been influenced by a concern about the position of the claimant's dependants, on the assumption, subsequently questioned in *Gregg v Scott* [2005] UKHL 2; [2005] 2 AC 176, para 182, that no dependants' claim under section 1 of the Fatal Accidents Act 1976 could subsist after the injured party had recovered damages for his injury, *Pickett* and *Gammell* do not restrict lost years damages to claimants who have, or may in future have, dependants.

(3) Lost years damages are in principle available to claimants who were injured during early childhood, provided that the loss can be proved in accordance with normal principles.

(4) To calculate damages for the lost years, it is usual to apply a multiplier derived from actuarial tables known as the Ogden Tables, reflecting the number of lost years (ie the difference between the claimant's actual life expectancy and the

> life expectancy which the claimant would have enjoyed but for the injury), but discounted so as to allow for the fact that a lump sum is being given now instead of periodical payments over those years (and also to allow for any contingencies not already taken into account), to a multiplicand reflecting the net annual loss during that period (ie the loss of annual income net of tax, and after deduction of the claimant's probable living expenses).

8. Against that background, the issue which the court has to decide is the correctness of the decision in *Croke v Wiseman* that lost years damages cannot be awarded to a young child. In order to address that question, it is necessary to place *Croke v Wiseman* in the context of the authorities which preceded and followed it.

2. The authorities

(1) The position prior to *Oliver v Ashman*

9. There is support in the authorities for the view that, at one time, damages for loss of earnings or loss of earning capacity, in a case where life expectancy was reduced, were assessed with regard to the probable working life of the claimant if he or she had not been injured. The earliest reported example appears to be *Phillips v London and South Western Railway Co* (1879) 5 QBD 78, concerned with a physician who had been severely injured in an accident, and whose life expectancy had been reduced. After reciting a passage from the trial judge's summing up, James LJ said at p 87:

> "That comes to this, you are to consider what his income would probably have been, how long that income would probably have lasted, and you are to take into consideration all the other contingencies to which a practice is liable. I do not know how otherwise the case could be put."

Brett and Cotton LJJ agreed.

10. In *Roach v Yates* [1938] 1 KB 256, where the claimant had suffered injuries which shortened his life expectancy and rendered him unfit for work, Slesser LJ said at p 268 that the proper approach was "first to consider what sum he would have been likely to make during his normal life if he had not met with the accident".

11. However, it is difficult to find any case in which the question was the subject of argument until *Harris v Brights Asphalt Contractors Ltd* [1953] 1 QB 617, where Slade J concluded that pecuniary claims for the lost years were impermissible. The opposite

view was subsequently taken by Streatfeild J in *Pope v D Murphy & Son Ltd* [1961] 1 QB 222. That divergence of views had to be resolved by the Court of Appeal in *Oliver v Ashman* [1962] 2 QB 210.

(2) *Oliver v Ashman*

12. In *Oliver v Ashman* the claimant had received a serious brain injury at the age of 20 months, and would require constant care for the rest of his life. His life expectancy was reduced. At first instance, Lord Parker CJ followed *Pope v D Murphy & Son Ltd* and proceeded on the basis that damages could be awarded for loss of earnings during the lost years: [1961] 1 QB 337. He acknowledged the difficulty of assessing such loss in the case of such a young a child (p 344):

> "What education would the parents have been able to give the child? If one or other of them died, would the education have been interrupted? If not, how far would the child have succeeded? What trade or profession would he take up and what would he have earned? There is no conceivable clue to that. The only guide, if it be any guide at all – and I do not think that it is – is that his father is working in an executive capacity making, I am told, £1,250 a year. In addition, there are questions of taxation and other matters, but whatever view one takes as to eventual earnings, the figure must in the case of such a young child be heavily discounted."

The Lord Chief Justice built an unspecified but evidently modest amount for the lost years into his award of general damages.

13. On appeal, the Court of Appeal had to decide which of *Harris v Brights Asphalt Contractors Ltd* and *Pope v D Murphy & Son Ltd* had been rightly decided. It favoured *Harris v Brights Asphalt Contractors Ltd*. In reaching that conclusion, the court relied on a dictum of Viscount Simon LC in the case of *Benham v Gambling* [1941] AC 157. That case concerned a claim for loss of expectation of life brought under the Law Reform (Miscellaneous Provisions) Act 1934 by the estate of a child of two and a half who was injured in a road accident and died later the same day. The Lord Chancellor explained at p 162 that the only issue with which the House was concerned was the assessment of damages for loss of expectation of life. He said at p 167:

> "Of course, no regard must be had to financial losses or gains during the period of which the victim has been deprived. The damages are in respect of loss of life, not loss of future pecuniary prospects".

The other members of the Appellate Committee agreed. The right to claim damages for loss of expectation of life was subsequently abolished by statute: Administration of Justice Act 1982, section 1.

14. In *Oliver v Ashman*, the Court of Appeal treated Viscount Simon's dictum as establishing that damages could not be recovered for pecuniary loss during the lost years. Although Lord Parker CJ was held to have erred in following *Pope v D Murphy & Son Ltd*, his award was upheld as being within reasonable limits.

(3) *Pickett v British Rail Engineering Ltd*

15. The decision of the Court of Appeal in *Oliver v Ashman* was in turn overruled by a majority of their Lordships in *Pickett*, on the basis that the Court of Appeal had misinterpreted *Benham v Gambling*. The decision in *Pickett* authoritatively established the recoverability of damages for loss of earnings during the lost years. That outcome was regarded as desirable in the interests of justice, as the appeal proceeded, rightly or wrongly, on the assumption that an award in favour of the victim of the tort in respect of his own loss would bar any subsequent claim by his dependants under section 1 of the Fatal Accidents Act 1976. On that view, if the damages recovered by the victim of the tort did not include damages for the lost years, then his dependants would be left without provision after his death.

16. However, the decision was reached on the basis of common law principles and after consideration of relevant authorities, as an examination of the speeches of the majority makes clear. Lord Salmon, for example, observed at p 154 that to ignore the lost years would be to ignore the long established principles of the common law in relation to the assessment of damages. Their Lordships also took account of the earlier decision of the High Court of Australia to similar effect in *Skelton v Collins* [1966] HCA 16; (1966) 115 CLR 94: a decision reached by common law reasoning, uninfluenced by any concern about a perceived lacuna in the protection afforded to dependants under English legislation.

17. The case of *Pickett* was concerned solely with the victim of the tort's inability to earn remuneration during the lost years, and did not raise any issue about deprivation of the capacity to receive other economic benefits, such as inheritances (a matter which troubled Lord Russell) or pensions (a matter which has subsequently been discussed in the Australian case law). In relation to the conceptual basis of the award, two strands of thinking can be seen in the speeches. Lord Wilberforce focused on an immediate diminution of earning power, viewed as a capital asset: he described the victim's capability to earn a living throughout his pre-injury working life as "an asset of present value", and as an interest with a value which could be assessed (pp 149-150). On that approach, the loss is immediate and is suffered by the living claimant. On the other hand,

Lord Salmon at p 152 and Lord Scarman at p 168 appear to have viewed the award as compensation for the non-receipt of a revenue stream which would have accrued in the future, analogous to a conventional award for loss of future earnings. As the latter approach appears to treat the loss as being suffered at a time when the claimant will have died, it has given rise to a debate over whether such awards have a logically coherent basis. The approach adopted may also have implications in relation to the treatment of other economic benefits which the claimant would or might have received during the lost years if he or she had then been living.

18. Importantly, for present purposes, *Pickett* did not concern a claimant who had been injured as a child: the claimant was a married man in his fifties with two children, who had developed mesothelioma as a result of exposure to asbestos at work. However, some of their Lordships referred, obiter, to the difficulties involved in proving loss of earnings during the lost years in claims brought by children.

19. Lord Wilberforce said at p 150 that, in the case of the adult wage earner, a rule which enabled the lost years to be taken into account came closer to the ordinary man's expectations than one which limited his interest to his shortened span of life. He added that he did not think that to act in that way created insoluble problems of assessment in other cases:

> "In that of a young child (cf *Benham v Gambling* [1941] AC 157), neither present nor future earnings could enter into the matter: in the more difficult case of adolescents just embarking upon the process of earning (cf *Skelton v Collins* (1966) 115 CLR 94) the value of 'lost' earnings might be real but would probably be assessable as small."

It was therefore Lord Wilberforce's view that no award in respect of the lost years could be made in the case of a young child, seemingly because the difficulties of assessment were greater than in the case of an adolescent or an adult. The observation was obiter, as the question did not arise for decision.

20. Lord Salmon considered that in the case of a young child "the lost earnings are so unpredictable and speculative that only a minimal sum could properly be awarded" (p 153). Referring to *Oliver v Ashman*, he added that "in the case of a child of such tender years, the amount of the earnings which he might have lost was so speculative and unpredictable that the sum in the award attributable to that element must have been minimal and could therefore be disregarded" (p 156).

21. Lord Scarman described the major objections to awards for loss of earnings during the lost years as including that "the plaintiff may be so young (in *Oliver v Ashman* [1962]

2 QB 210 he was a boy aged 20 months at the time of the accident) that it is absurd that he should be compensated for future loss of earnings" (p 169). His response to that objection was that it would be taken care of in the ordinary course of litigation: "a measurable and not too remote loss has to be proved before it can enter into the assessment of damages" (p 170).

22. In summary, therefore, *Pickett* did not decide that a claim by a young child for damages for pecuniary loss during the lost years was impossible as a matter of legal principle. On the contrary, the possibility of such a claim was acknowledged by Lord Salmon and Lord Scarman, although the difficulties involved in proof and assessment were also noted, and seem to have been regarded by Lord Wilberforce as insuperable.

(4) *Gammell v Wilson*

23. In *Gammell*, the House of Lords took the matter a stage further, by deciding that a victim's right to recover damages in respect of the lost years in accordance with *Pickett* could be asserted in a claim brought after the victim's death on behalf of his or her estate, under section 1 of the Law Reform (Miscellaneous Provisions) Act 1934. In the first appeal the deceased was a boy of 15. In the second appeal the deceased was a man aged 22, unmarried and living with his parents.

24. Only Lord Scarman made any observations about claims by young children, stating that "the lost years of earning capacity will ordinarily be so distant that assessment is mere speculation. No estimate being possible, no award – not even a 'conventional' award – should ordinarily be made" (p 78). He accepted that there would be exceptions: "a child television star, cut short in her prime at the age of five, might have a claim: it would depend on the evidence" (ibid). He went on to say that "in all cases it is a matter of evidence and a reasonable estimate based upon it" (ibid). Those observations, like the earlier comments in *Pickett*, indicate that the age of the victim is not as a matter of principle relevant to the question whether a claim can be made for the lost years, although it will evidently affect the nature of the evidence available in support of the claim.

25. The Law Reform (Miscellaneous Provisions) Act 1934 was amended soon after *Gammell* so as to prevent claims being made on behalf of the estates of deceased victims in respect of loss of income during the lost years: Administration of Justice Act 1982, section 4(2). However, it remained possible for claims for loss of earnings during the lost years to be brought by living victims.

(5) *Connolly v Camden and Islington Health Authority*

26. Lord Scarman's speech in *Gammell* influenced the decision in *Connolly v Camden and Islington Health Authority* [1981] 3 All ER 250, where a claim was brought on behalf of a four year old child who had suffered brain damage shortly after birth. The claim for lost years damages was assessed at nil. The judge accepted that "a child qualifies as such under this head of damage dependent on the ability to prove", and said that he could envisage an award being made to "the only son of a father who owns a prosperous business" or "the son who is born to a farmer who is able to leave the estate to the son" (p 256). The claimant, being the son of an unemployed plasterer, was less fortunate.

(6) *Croke v Wiseman*

27. The case of *Croke v Wiseman* concerned a claim brought on behalf of a child who had suffered a severe injury at the age of 21 months, causing total disability and a reduced expectation of life. The three members of the Court of Appeal each gave a judgment.

28. Lord Denning MR considered that no award should be made either for loss of lifetime earnings (ie the loss of earnings during the period of life remaining to the claimant following his injury) or for the lost years. No logical distinction could in his view be drawn between the two heads of damage in a case where a young child was injured. In each case the process of assessment was equally speculative (p 77).

29. Griffiths LJ considered that an award could be made for loss of lifetime earnings, but not for the lost years. Although it was difficult to assess an appropriate sum to award a young child for loss of future earnings, the courts frequently made such awards: for example, around 400 awards for loss of earnings had been made to children affected by thalidomide. In *Oliver v Ashman* itself, Lord Parker CJ's award for future loss of earnings had not been questioned. On the facts of the case before him, Griffiths LJ agreed with the judge that loss of future earnings could appropriately be assessed on the basis of the national average wage (p 83):

> "This child came from an excellent home, the father is an enterprising man starting his own business and the mother is a qualified teacher; they have shown the quality of their characters by the care they have given their child and their courage by the fact they have continued with their family even after this disaster befell them. The defendants cannot complain that they are unfairly treated if against this background the judge assumes the child will grow up to lead a useful working life and be capable of at least earning the national average wage."

30. As Griffiths LJ pointed out, the assessment of damages for the lost years involved an additional complication. Following the reasoning in *Pickett*, it was necessary to make an assessment of the claimant's living expenses during those years, which fell to be deducted from the lost earnings in order to quantify the damage suffered. However, it was for reasons of social policy that, in Griffiths LJ's view, a distinction should be drawn, in relation to claims for injuries suffered by children, between damages for loss of lifetime earnings and damages for the lost years.

31. In his view, there were compelling social reasons for making an award for the lost years in the case of a living claimant of mature years, as the damages would be available for the support of his dependants after his death. Griffiths LJ considered that it was that consideration which led to the result in *Pickett*; and the House of Lords had felt compelled to apply the same principle, in *Gammell*, to a claim brought on behalf of the estate of a deceased victim. In the case of a child, however, there were no dependants, and if the child was dead or the injuries were catastrophic, there would never be dependants. In such circumstances, Griffiths LJ said, "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" (p 82). On the other hand, in the case of a gravely injured child who was going to live for many years into adult life, there were compelling social reasons why a sum of money should be awarded for his future loss of earnings, as it would be available to provide a home for him and to feed him and to provide for such extra comforts as he could appreciate.

32. The third member of the court, Shaw LJ, made two important observations about the law of damages with which I would respectfully agree, and on which I will expand later in this judgment. The first was that "the principle of compensation which pervades the law of damages for tort ought apart from statutory modification or well-established authority to be consistently and uniformly applied" (p 84). Accordingly, addressing a point on which Lord Denning MR had laid emphasis, "[t]hat the victim may not be capable of using for his personal benefit the damages awarded for loss of earnings or loss of amenity is in a real sense irrelevant" (ibid).

33. The second, related, point addressed by Shaw LJ was whether different principles applied in relation to loss of future earnings where the victim of a tort was a young child. In relation to that question, he said (p 84):

> "I fail to see why there should be any difference in the principles which determine what are the bases for the recovery of damages whatever the age of the victim. The assessment of the measure of damages may be more or less difficult but the right of the plaintiff to an assessment of damages for that element of damage cannot be brushed aside. The obligation of the court to make the best assessment it can is not to be avoided

> by treating compensation for loss of future earnings in the case of a young child as being so speculative as not to deserve to be considered at all."

34. On the facts of the case, Shaw LJ agreed with Griffiths LJ that loss of lifetime earnings should be assessed on the basis that the plaintiff would have been likely to achieve average earnings. In relation to the lost years, Shaw LJ agreed with Griffiths LJ, notwithstanding the difficulty, as it seems to me, of reconciling the reasoning of Griffiths LJ with the observations of Shaw LJ which were quoted in paras 32 and 33 above. He said that he recognised the philosophical anomaly but would not seek to resolve it, being content to adopt Griffiths LJ's exposition of the practical justification. He added that there was a high measure of artificiality in the principles which were applied to "this intractable area of compensation" (p 85).

(7) *Jamil Bin Harun v Yang Kamsiah*

35. The case of *Jamil Bin Harun v Yang Kamsiah Bte Meor Rasdi* [1984] AC 529 was not cited to this court, but is of significance as a decision three years after *Gammell* in which the Privy Council, on an appeal from Malaysia, had no difficulty in accepting that an award for loss of future earnings could be made to a young child. The claimant had suffered severe brain damage when aged seven. Her life expectancy was not affected, and there was therefore no issue relating to the lost years, but she was incapable of ever working. An award in respect of loss of future earnings was upheld.

36. The advice of the Board (Lord Keith of Kinkel, Lord Edmund-Davies, Lord Scarman, Lord Roskill and Lord Templeman) was given by Lord Scarman. He noted that the failure to call any witness as to the child's family background or social circumstances had the inevitable result that the trial judge and, on appeal, the Federal Court had to make do with inference where they could have derived a measure of help from evidence. On the appeal to the Board, the defendant emphasised the lack of evidence and submitted that no court might rest its judgment on speculation. In that regard, reliance was placed on the dicta of Lord Wilberforce and Lord Salmon in *Pickett* which were cited at paras 19 and 20 above, on *Gammell*, and on the dissenting judgment of Lord Denning MR in *Croke v Wiseman*.

37. Lord Scarman distinguished the dicta in *Pickett* as being concerned only with "lost years" claims. He said nothing about his own remarks in *Gammell* (quoted at para 24 above). He referred to the decision of the majority in *Croke v Wiseman*, distinguishing loss of lifetime earnings from damages for the lost years, and holding that a child's loss of lifetime earnings was not to be treated as being so speculative that it could not be assessed. He expressed the Board's agreement with Griffiths LJ's statement at p 82 that, in the case of a gravely injured child, "[t]here are compelling social reasons why a sum

of money should be awarded for his future loss of earnings". Lord Scarman also referred to the earlier decision of the Court of Appeal in *Joyce v Yeomans* [1981] 1 WLR 549, in which an award for loss of future earning capacity was upheld in the case of a nine year old boy who had sustained a serious head injury.

38. The decisions to make awards for loss of earnings, or loss of earning capacity, in *Croke v Wiseman* and *Joyce v Yeomans*, and in the case before the Board, were approved. Lord Scarman said (p 537):

> "If damages are to be a fair and adequate compensation for a plaintiff who is expected to live for many years during which time he will be unemployable or his earning capacity substantially reduced, it will be necessary to assess his future loss, difficult though the task may be in cases where the victim is a child. Though difficult, the court must do the best it can upon the evidence."

39. In response to the submission that the court lacked an evidential basis for an award, Lord Scarman noted that there was clear evidence of the physical and mental consequences of the injury. The court below had used its knowledge of Malaysian circumstances to estimate the sort of earnings which the claimant could reasonably have expected to earn, without any special qualifications or skills. While it would have helped the court to have had evidence as to the present family and social circumstances, since it might have shown that this little girl had better prospects than average, any evidence given as to her future prospects would be as much a matter of inference and estimate as was the judgment of the court without such evidence. Lord Scarman concluded his discussion of this point (p 538):

> "The reality is that in most cases the court must form its estimate based upon its own knowledge of social conditions and upon evidence (which was available from the doctor and the school) of the present and past circumstances of the plaintiff."

(8) More recent authorities

40. In *Iqbal v Whipps Cross University NHS Trust* [2007] EWCA Civ 1190; [2008] PIQR P9 the Court of Appeal felt compelled to follow *Croke v Wiseman* and disallow a claim for the lost years by a young child who had been severely injured at birth. However, Gage LJ, with whom Laws LJ agreed, considered that *Croke v Wiseman* was not consistent with *Pickett* or *Gammell*. He also commented that he found it difficult to accept that if it was possible to assess prospective future loss of earnings for the lifetime of a

young child, it was not possible to assess damages for the lost years, even allowing for the difficulty of assessing the surplus. Rimer LJ gave a judgment to similar effect, explaining that in ruling out a claim for lost years merely because of the lack of actual or potential dependants, Griffiths LJ in *Croke v Wiseman* had reasoned inconsistently with the speeches of the majority in *Pickett*. The court granted permission to appeal to the House of Lords, but the appeal was then settled.

41. In *Totham v King's College Hospital NHS Foundation Trust* [2015] EWHC 97 (QB); [2015] Med LR 55, Elisabeth Laing J was also compelled to follow *Croke v Wiseman.* She commented that the decision in that case was inconsistent with the principle of full compensation. She also expressed agreement with Rimer LJ in *Iqbal v Whipps Cross University NHS Trust* that the policy justifications referred to in *Croke v Wiseman* were inconsistent with *Pickett* and *Gammell*. She observed that there was no rational basis for allowing lost years claims by adults but refusing to allow them when made by children.

42. In *R v Sheffield Teaching Hospitals NHS Foundation Trust* [2017] EWHC 1245 (QB); [2017] 1 WLR 4847, the claimant was severely injured during his birth, but the claim was not brought until he was an adult. The judge considered that there was a good prospect that he would enter into a relationship giving rise to dependency. In these circumstances the judge distinguished *Croke v Wiseman* and made an award for the lost years.

(9) Other jurisdictions

43. The court has been referred to authorities from Australia and Canada. As mentioned earlier, the decision in *Pickett* was influenced by the decision of the High Court of Australia in *Skelton v Collins*. That court disagreed with *Oliver v Ashman*, taking the view that a claimant whose life expectancy had been reduced as a result of an injury suffered an immediate loss of earning capacity in respect of the lost years, for which he or she should be compensated. The loss of earning capacity has been described in the later Australian case law as the diminution in the value of a capital asset of the claimant, namely his or her capacity to earn money from the use of personal skills: see, for example, *Amaca Pty Ltd v Latz* [2018] HCA 22; (2018) 264 CLR 505, para 89.

44. An example of a claim on behalf of a young child is the case of *Hills v State of Queensland* [2006] QSC 244, where the Australian court based its assessment of lost years damages on evidence of average earnings in an occupation which seemed appropriate in the light of the claimant's family background.

45. Like the High Court of Australia, the Supreme Court of Canada declined to follow the *Oliver v Ashman* approach: *Andrews v Grand & Toy Alberta Ltd* [1978] 2 SCR 229. As in Australia, it is not loss of earnings, but rather loss of earning capacity, for which

compensation must be made. The approach was summarised by Dickson J in *Andrews v Grand & Toy Alberta Ltd* at p 251: "A capital asset has been lost: what was its value?"

46. The later case of *Toneguzzo-Norvell v Burnaby Hospital* [1994] 1 SCR 114 concerned a lost years award to a child who was severely injured during her birth. The award was based on average earnings for women with the level of education which it was considered that the claimant might have had if she had not been injured, with an uplift to reflect the expectation that women's earnings would increase as greater equality was achieved between men and women. The Supreme Court also approved of a substantial deduction for living expenses during the lost years, following the approach adopted in Australia and England.

47. This court has also been referred to a number of more recent Canadian cases, mostly at first instance, concerned with the assessment of damages for female claimants who suffered severe injuries prior to or during their birth. In these cases, Canadian judges based their awards for the lost years on average earnings for a category of occupations considered appropriate in view of the educational attainment and occupations of the claimant's parents and siblings, and the extent to which the family was oriented towards achievement. The earnings statistics used were generally for female workers, but an uplift was made in some cases to reflect an assumption that the disparity between male and female earnings would diminish over time. In some cases, allowances were made for contingencies liable to affect female workers, such as the interruption of full-time employment in order to care for children. Conventional percentage deductions were made to allow for living expenses. See, for example, *Crawford v Penney* [2003] OJ No 89, *Ediger v Johnston* 2009 BCSC 386, and *Steinebach v Fraser Health Authority* 2010 BCSC 832.

3. The correctness of *Croke v Wiseman*

48. The decision of the majority in *Croke v Wiseman* that no award for the lost years should be made where the claimant was a young child was based, as explained above, on the absence of dependants. That reasoning is inconsistent both with legal principle and with the relevant authorities.

49. There is no reason of legal principle why a claimant's ability to obtain an award in respect of his own pecuniary losses should depend on the existence of dependants. The claim for lost years is in respect of the claimant's own loss, not in respect of anyone else's, and his or her right to damages is not in any way dependent on how they might be used. As Holroyd Pearce LJ said in *Oliver v Ashman* at p 224:

> "The plaintiff having made out his cause of action in negligence and proved his damages is entitled to his judgment. There is no

> condition that he should spend or use the damages. They are his to save or to spend or to dissipate in any useful or useless manner that he may choose. His needs or his ability to use his damages are, as it seems to me, irrelevant to their assessment."

50. That fundamental principle of the law of damages was recognised in *Pickett*, where the proposition that lost years damages were confined to claimants with dependants was expressly rejected by Lord Wilberforce at p 150 ("He may not have dependants"), Lord Salmon at p 154 ("the law can make no distinction between the plaintiff who looks after dependants and the plaintiff who does not"), Lord Edmund-Davies at p 162 ("regardless … of whether he has dependants"), and Lord Russell at p 166 ("the question of the lost years must be answered in the same way in a case of a plaintiff without dependants").

51. That is not to deny that a rational distinction might be drawn in cases of this kind, for reasons of social policy, between persons with dependants and persons without dependants. However, in the absence of any legal principle which could justify drawing such a distinction, doing so for reasons of social policy lies within the domain of the legislature rather than the courts.

52. Although the reasoning in *Croke v Wiseman* is unsatisfactory, counsel for the respondents sought to support the decision on the basis that the assessment of damages for the lost years, where the claimant is a young child, is a matter of speculation. That was the basis of Lord Denning MR's dissenting judgment in *Croke v Wiseman*, although Lord Denning extended that reasoning also to the claim for loss of lifetime earnings.

53. It is trite law that, as a general principle, the damages to be awarded for loss caused by tort are compensatory. In broad terms, and subject to any relevant limitations on recovery (for example, such as may arise in some cases from the limited scope of the duty owed, or from the need for recoverable losses not to be too remote a consequence of the tort), the claimant is entitled to be placed in the position he or she would have been in if the tort had not been committed. A classic statement of this principle is that of Lord Blackburn in *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25, 39:

> "I do not think there is any difference of opinion as to its being a general rule that, where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation."

That general principle applies just as much where the claimant was injured as a young child as where the claimant was injured as an adult. The court cannot properly exclude the recovery of compensatory damages, as a matter of principle, on the ground of the claimant's age.

54. A precise assessment of the loss suffered is not always possible. That was recognised by Lord Blackburn in *Livingstone v Rawyards Coal Co* when he spoke of getting "as nearly as possible" to the sum which would restore the claimant to the same position as he would have been in if he had not sustained the wrong. Similarly, Lord Shaw of Dunfermline spoke in *Watson, Laidlaw, & Co Ltd v Pott, Cassels & Williamson* 1914 SC (HL) 18, 29-30 of restoration by way of compensation being "accomplished to a large extent by the exercise of a sound imagination and the practice of the broad axe", and of the attempt of justice "to get back to the status quo ante in fact, or to reach imaginatively, by the process of compensation, a result in which the same principle is followed".

55. When a young child suffers an injury such as that suffered in the present case, he or she suffers actionable damage there and then. The causation of damage is established beyond question. The court has then to assess an appropriate award of damages to compensate the child for the consequences of that injury. The effects of the injury on the child's physical and mental capacities, and on his or her life expectancy, can normally be established with reasonable confidence by expert evidence. The pecuniary loss caused by the injury is more difficult to assess, because there are many more contingencies involved in the attempt to forecast the child's likely earnings (and, in relation to the lost years, the likely living expenses) if he or she had not been injured. But that is always true of a claim based on the loss of future earnings or of earning capacity: even in the case of an adult claimant, the future is uncertain and subject to countless contingencies. Such a claim is always for the loss of something which was uncertain. Whether the claimant is an adult or a child, the uncertainty is taken into account in the court's assessment. That assessment must, of course, be based on evidence or, to the extent that it is legitimate, judicial knowledge (as was held in *Jamil Bin Harun v Yang Kamsiah*). But the law does not insist on proof that events would in fact have taken a particular course.

56. Difficulty of assessment is no reason for awarding no damages or merely nominal damages. As Bowen LJ said in *Ratcliffe v Evans* [1892] 2 QB 524, 532-533:

> "In all actions accordingly on the case where the damage actually done is the gist of the action, the character of the acts themselves which produce the damage, and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved. As much certainty and particularity must be insisted on, both in pleading and proof of damage, as is reasonable, having regard to the circumstances and to the

> nature of the acts themselves by which the damage is done. To insist upon less would be to relax old and intelligible principles. To insist upon more would be the vainest pedantry."

That principle was reaffirmed more recently in *One Step (Support) Ltd v Morris-Garner* [2018] UKSC 20; [2019] AC 649, para 38:

> "Evidential difficulties in establishing the measure of loss are reflected in the degree of certainty with which the law requires damages to be proved".

57. Accordingly, where it is clear that the claimant has suffered substantial loss – as the injured child undoubtedly has – but the evidence does not enable it to be precisely quantified, the court must assess damages as best it can on such evidence as is reasonably available. It has to do so, notwithstanding that the loss cannot be measured precisely or with certainty, if the compensatory principle is to be honoured.

58. For these reasons, the views expressed, obiter, in *Pickett* and *Gammell* that an award for the lost years cannot be made in the case of a child, because it is too speculative (except in special circumstances, such as those of a child actor), are inconsistent with the general compensatory principle. For the same reasons, the approach adopted by Lord Denning MR in *Croke v Wiseman* to claims for lost lifetime earnings, and pecuniary losses during the lost years, brought by claimants who have been injured as children, cannot be accepted. It contradicts the principles which I have described to refuse on principle to make any award of damages to a claimant injured as a child, either in respect of lifetime earnings or in respect of the lost years. The evidential difficulties caused by the defendant, in inflicting a severe injury on a young child, should not be allowed to deprive the child of just compensation. The court has to assess damages as best it can on the available evidence.

59. In that regard, it is significant that developments in the assessment of damages since *Pickett* and *Gammell* have reduced the difficulties of assessment of lost years claims by children. One relevant development has been the use of actuarial tables, of increasing sophistication, since *Wells v Wells* [1999] 1 AC 345. Although the utility of that approach is inherently limited, as actuarial evidence speaks in terms of group experience and cannot speak as to the individual claimant, nevertheless it has reduced the difficulty of determining an appropriate multiplier where a loss will be sustained in the distant future.

60. Another important development, illustrated by *Croke v Wiseman* itself, has been the use of statistical evidence of average earnings as a guide to what a child might have gone on to earn if he or she had not been injured and had enjoyed a normal life expectancy and normal capabilities. This kind of evidence has also become more sophisticated over

time. Since *Croke v Wiseman*, it has become common for evidence to be led, as in the Australian and Canadian cases, bearing more directly on the situation of the particular claimant. It may include evidence about the educational achievements, occupations and attitudes of the claimant's parents and siblings, and evidence about the average earnings of a suitably tailored category of individuals. This approach is not open to the same objection as the approach adopted in *Connolly v Camden and Islington Health Authority*, where the court was prepared to countenance making awards for the lost years to the sons of businessmen and farmers, on the assumption that they would inherit the position and earnings of their fathers, but not to the claimant son of a plasterer. Evidence about a range of likely outcomes, based on family circumstances and attitudes, is not mere prejudice or stereotyping. Such evidence is likely to assist the court in making the best assessment it can of the loss suffered by the particular individual who has brought the claim. In short, the techniques of assessment have moved on considerably since *Pickett* and *Gammell*, and even since *Croke v Wiseman* and *Jamil Bin Harun v Yang Kamsiah*.

61. In the present case, for example, the evidence available, including evidence about the claimant's family background, has enabled the parties to reach agreement, as explained earlier, about the educational qualifications which she would have obtained but for her injuries, the type of employment which she would have entered after completing her education, the age at which she would have retired, and the fact that she would have received a pension from the date of her retirement until the date of her death. The parties' agreement also extends to the claimant's loss of lifetime earnings, based on evidence of average earnings of women in the range of employments which was considered appropriate in the light of the claimant's family circumstances.

62. Counsel for the respondents submitted that awards for the lost years in the case of child claimants involved a greater degree of speculation than awards for loss of lifetime earnings because of the need to estimate the claimant's probable living expenses. That argument is unpersuasive. Once the probable income has been assessed, the appropriate deduction to make in respect of living expenses need not present any greater difficulties in the case of a claimant who is a child than in the case of an adult. In practice, in cases brought by adults, a conventional percentage is generally applied to the net earnings on a rough and ready basis. There is no reason why a similar approach cannot be applied in cases brought by children, as is the practice in other jurisdictions.

63. Finally, one might observe that the attempt to exclude claims for the lost years where they are brought by young children invites the question where the line is to be drawn. In reality, because the distinction sought to be drawn between claims by young children and claims by older children or adults has no basis in legal principle, the court cannot draw a line. Whatever the age of the claimant, it has to assess just compensation as best it can on the material which is reasonably available.

4. Conclusion

64. For these reasons, I consider that the decision to refuse to award damages for the lost years in *Croke v Wiseman* was incorrect and should be overruled. The present appeal should be allowed, and the case remitted to the trial judge in order for damages for the claimant's lost years to be assessed.

LORD BURROWS (concurring)

1. Introduction

65. I agree with Lord Reed that *Croke v Wiseman* [1982] 1 WLR 71 ("*Croke*") should be overruled, and that this appeal should be allowed and the case remitted to the trial judge. This judgment, which was written before I had read the judgment of Lord Reed, sets out my own reasoning in coming to that conclusion. It can be seen that Lord Reed's and my essential reasoning are similar.

66. This case concerns damages for the "lost years" consequent on an actionable personal injury. "Lost years damages" may be awarded where the injury has reduced the claimant's expectation of life. They are awarded for the pecuniary loss (loss of earnings, and loss of pension, minus living expenses) that the claimant is regarded as suffering by reason of his or her shortened life expectancy. It was accepted by the House of Lords in *Pickett v British Rail Engineering Ltd* [1980] AC 136 ("*Pickett*"), where the claimant was a 53-year-old man with a reduced life expectancy of one year, that damages for the lost years are recoverable in English law. The Court of Appeal's earlier decision to the contrary in *Oliver v Ashman* [1962] 2 QB 210 was overruled. *Pickett* was confirmed by the House of Lords in *Gammell v Wilson* [1982] AC 27 ("*Gammell*") where the lost years claim was held to survive for the benefit of the injured person's estate in an action brought under the Law Reform (Miscellaneous Provisions) Act 1934 ("the 1934 Act") (although that decision, on survival of the lost years claim, has subsequently been legislatively reversed). Since *Pickett*, lost years awards have become commonplace.

67. However, there is one area where lost years awards have not been made. This is where the injured claimant is a young child. No lost years damages have been awarded to a young child following the decision of the Court of Appeal in *Croke*, where, at trial, the injured claimant was a seven-year-old with a reduced life expectancy of 40.

68. In this case, the claimant was injured at birth. She was aged eight at trial and, as a result of her injuries, has a reduced life expectancy of 29. This is a leapfrog appeal, direct to the Supreme Court from the High Court. This course has been taken because counsel for the appellant, Richard Baker KC, has accepted that *Croke* would be binding before

the Court of Appeal but submits that that decision is inconsistent with the law on lost years laid down by the House of Lords in *Pickett* and *Gammell* and should therefore be overruled by the Supreme Court.

69. It should be made clear at the outset that we have not been asked by counsel for the respondent, Paul Rees KC, to overrule *Pickett* or to restate the law on lost years laid down in *Pickett.* Rather, Mr Rees submits that the present law on lost years damages should continue as is, namely that lost years awards can be made except to young children; and that that exception is justified because the assessment of the lost years award in the case of a young child is entirely speculative.

70. The structure of this judgment begins with a brief examination of the facts before turning to consider the relevant law, which requires a close analysis of a number of cases.

2. Facts

71. The claimant (who is the appellant) is a young girl. By her mother (acting as her litigation friend) she has sued the defendant for damages for the tort of negligence that caused her severe spastic cerebral palsy. The defendant (who is the respondent) runs the Royal Hallamshire Hospital in Sheffield and has admitted that it was negligent in failing to prevent the claimant suffering a hypoxic brain injury, at the time of her birth on 6 February 2015, which resulted in the cerebral palsy. On 14 August 2020, judgment on liability was entered for the claimant with damages to be assessed.

72. The claimant is affected by pain and spasms, profound learning difficulties, severe visual impairment, respiratory impairment and epilepsy. It was common ground that her injuries would greatly impair her life expectancy. Shortly before the trial on quantum, the parties agreed a life expectancy to age 29 and this was accepted by the judge, Ritchie J: see his judgment, dated 12 July 2023, [2023] EWHC 1770, at para 171.

73. The claimant is entirely dependent upon her family and a team of professional carers for care and support. At para 8 of his judgment, Ritchie J paid tribute to her mother for her hugely impressive devotion and determination to make the claimant's life as full and enjoyable as possible. I would like to echo that tribute.

74. Until the claimant's birth, her mother worked full-time as a beautician. There was no evidence at the trial regarding her father's working history; the relationship broke down after the claimant's birth and he has no contact with the claimant or her mother. In her first witness statement, dated 27 September 2021, the mother confirmed that she would have encouraged the claimant to go to university. There was also witness statement evidence that the claimant's older brother (then aged 16) was doing well academically,

planned to remain in the sixth form at school and hoped to read law at university; and that the mother came from a very hard-working family background. The mother's sisters worked full-time as, respectively, a senior procurement specialist and a staff nurse. The evidence as to the mother's own previous work history and attitude to work, the educational progress of the claimant's brother and the family's employment history was not challenged.

75. There was no suggestion from either party that the claimant would, in her injured state, have any dependants. As is set out in the agreed statement of facts for this appeal, the parties agreed that, had the claimant not sustained injury, she would have had a normal life expectancy and was likely to have worked to the statutory retirement age and would have received some sort of pension for the remainder of her life thereafter. It was also agreed between the parties that she was likely to have gained GCSEs and higher qualifications from college or university leading to paid employment.

76. The award for future loss of earnings was agreed at £160,000 until age 29 and approved by Ritchie J: see his judgment at para 171. He explained that the basis for that award was that, uninjured, the claimant would have gone to college and entered the workplace in a similar line of work to her aunts or mother.

77. The claimant also sought lost years damages in the amount of £823,506. This was set out in the claimant's schedule of loss. That total figure was calculated by adding the claimant's estimated earnings of £34,262 net per annum until normal retirement age to £17,500 net per annum for loss of pension during retirement. A 50% reduction was then applied in the claimant's schedule of loss as the deduction for the claimant's living expenses in the lost years. The defendant does not accept that, even if lost years damages can here be awarded (which it disputes), the claimant's assessment is correct; and Ritchie J, in his leap-frog judgment [2023] EWHC 1905; [2024] 1 WLR 1307, at para 45, said that the actual value of the lost years award would be "substantially lower" than the sum claimed.

78. Both parties agreed that the trial judge was bound by the decision of the Court of Appeal in *Croke* so that no award for the lost years could be made in this case where the severely injured claimant was a young child. Ritchie J did not assess what, if any, damages he would have awarded for the lost years had he not been bound by *Croke*.

79. Overall, Ritchie J awarded the claimant a lump sum of £6,866,615 and periodical payments of £394,940 per annum.

80. On 24 July 2023, Ritchie J granted a leap-frog certificate pursuant to section 12(1) of the Administration of Justice Act 1969, on the issue of whether the claimant, as a child

aged eight at trial, could be awarded lost years damages. Permission for the leap-frog appeal was given by the Supreme Court on 8 January 2024.

3. *Oliver v Ashman*

81. Prior to the decision of the Court of Appeal in *Oliver v Ashman*, there had been conflicting first instance decisions as to whether lost years damages could be awarded to any claimant. These included *Harris v Brights Asphalt Contractors Ltd* [1953] 1 QB 617 (Slade J) denying that there could be such an award; and *Pope v D Murphy & Son Ltd* [1961] 1 QB 222 (Streatfeild J) accepting that there could be such an award and, on the facts, making such an award.

82. In *Oliver v Ashman*, the claimant was aged four at the time of the trial. He had been badly injured in a road accident at the age of 20 months. He suffered a serious brain injury and would require constant care for the rest of his life. His expectation of life was reduced from about 60 years to about 30 years. At first instance, Lord Parker CJ, following *Pope v D Murphy & Son Ltd*, had included lost years damages within the award. But the Court of Appeal (Holroyd Pearce, Willmer and Pearson LJJ), while upholding the sum of damages awarded as being not too high overall, decided that no damages should have been awarded for the lost years. The essential reasoning was that to award damages for the lost years as a pecuniary loss was inconsistent with the decision in *Benham v Gambling* [1941] AC 157. The House of Lords had there awarded damages for loss of expectation of life and that decision was interpreted as precluding any additional sum for the lost years. Lost years damages were also regarded by the Court of Appeal as being objectionable in principle not least because the injured claimant would not be alive to incur the loss of earnings.

83. Given the issue that we have to decide, it is noteworthy that, in *Oliver v Ashman*, the young age of the claimant did not appear to feature as a relevant factor in the reasoning denying the claimant lost years damages; and, indeed, a lost years award had been made by Lord Parker CJ at first instance.

4. *Pickett*

(1) General

84. Mr Pickett contracted mesothelioma caused by exposure to asbestos dust during the course of his work. His employer admitted liability but disputed quantum. Mr Pickett was 53 years old at the date of trial and married with two children. His life expectancy had been reduced to one year. He obtained judgment but without any lost years damages being awarded. Before an appeal, including on the question of the lost years damages, he

died. Mr Pickett's widow carried on the appeal proceedings in her capacity as administratrix of his estate. In line with *Oliver v Ashman*, the Court of Appeal refused to award any lost years damages.

85. The House of Lords (Lord Russell dissenting) allowed Mrs Pickett's appeal on the lost years issue and overruled *Oliver v Ashman*. Lost years damages, calculated by assessing the injured claimant's loss of earnings during the lost years minus his living expenses, should have been awarded. The case was therefore remitted to the High Court for that element of the damages to be assessed. It was held that the Court of Appeal in *Oliver v Ashman* had misinterpreted *Benham v Gambling* because the award for loss of expectation of life had been a conventional sum for non-pecuniary loss and was therefore not inconsistent with a lost years award which compensated pecuniary loss. In any event, a lost years award was held to be justified in principle as a loss suffered by the living claimant. Support was drawn from the High Court of Australia's decision in *Skelton v Collins* (1966) 115 CLR 94 in which Windeyer J, at p 129, had explained that the relevant loss was the destruction or diminution of the claimant's earning capacity including for the period of expected life cut short by the tort.

(2) No need for dependants

86. There are passages in the speeches of Lord Wilberforce and Lord Salmon in *Pickett* which indicate that their Lordships were particularly concerned with the potential injustice to the dependants of the deceased if lost years damages were to be denied. On the facts, Mr Pickett had a wife who was financially dependent on him (as to some extent may have been his two adult children). Had he already died from the tortiously inflicted mesothelioma before his action had proceeded to judgment, his dependants would have had a claim for their financial loss of dependency caused by his wrongful death under the Fatal Accidents Act 1976 ("the 1976 Act"). That is, they would have been entitled to recover for their pecuniary loss (Mr Pickett's loss of earnings minus his living expenses) consequent on his death. But, as Mr Pickett had brought a claim for his personal injury which had proceeded to judgment prior to his death, no claim could be brought by his dependants for his death under the 1976 Act. This was because it was assumed that the correct interpretation of the wording of section 1(1) of the 1976 Act ruled that out: ie the judgment or a settlement would mean that the wrongfully caused death would not be "such as would (if death had not ensued) have entitled the person injured to maintain an action and recover damages in respect [of the death]". It followed that, unless Mr Pickett could recover lost years damages, his dependants would stand to lose out if he died, as a result of the tort, after judgment or settlement. Viewed in this way, one might say that the recognition of the availability of lost years damages was driven by a policy concern to ensure that dependants were compensated for their loss.

87. Lord Wilberforce said the following at p 146:

> "The Fatal Accidents Acts [allow] proceedings [to] be brought for the benefit of dependants to recover the loss caused to those dependants by the death of the breadwinner. The amount of this loss is related to the probable future earnings which would have been made by the deceased during 'lost years.' This creates a difficulty. It is assumed in the present case, and the assumption is supported by authority, that if an action for damages is brought by the victim during his lifetime, and either proceeds to judgment or is settled, further proceedings cannot be brought after his death under the Fatal Accidents Acts. If this assumption is correct, it provides a basis, in logic and justice, for allowing the victim to recover for earnings lost during his lost years."

88. Making the same point, Lord Salmon said at p 152 that, because of the assumption as to the barring of the 1976 Act claim:

> "It follows that it would be grossly unjust to the plaintiff and his dependants were the law to deprive him from recovering any damages for the loss of remuneration which the defendant's negligence has prevented him from earning during the 'lost years'."

89. However, while that may have been the driving policy, it is clear and very important to appreciate that, in terms of the law laid down, the House of Lords did not restrict lost years damages to situations where the injured claimant has, or will have, dependants. To the contrary, four of the five Law Lords expressly rejected the proposition that lost years damages were so restricted.

90. Hence Lord Wilberforce said at pp 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."

91. Similarly, Lord Salmon said at p 154:

> "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."

92. Again, Lord Edmund-Davies said the following 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 … 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."

93. The dissenting judge, Lord Russell, was also clear and succinct on this point. He said at p 166:

> "It has, my Lords, correctly been remarked that though in the instant case the plaintiff had dependants who (it was assumed) were barred from a Fatal Accidents Act claim by the judgment, the question of the lost years must be answered in the same way in a case of a plaintiff without dependants."

(3) Young children?

94. What, if anything, did their Lordships say about the availability of lost years damages for young children?

95. With the exception of Lord Wilberforce at p 150 (who seemed to suggest, on the face of it erroneously, that, in the case of a young child, no damages for loss of earnings could be awarded even for the claimant's lifetime let alone for the lost years), their Lordships were not saying that, as a matter of law, there could be no lost years award to a young child. Rather on the best interpretation (although this is not entirely clear) all would depend on the normal need to prove loss and, on the particular facts, an award for the lost years could be made to a young child albeit that it would be likely to be minimal.

96. Lord Salmon said the following at pp 153-154:

> "The amount awarded [for the lost years] will depend upon the facts of each particular case. They may vary greatly from case to case. At one end of the scale, the claim may be made on behalf of a young child or his estate. In such a case, the lost earnings are so unpredictable and speculative that only a minimal sum could properly be awarded. At the other end of the scale, the claim may be made by a man in the prime of life or, if he dies, on behalf of his estate; if he has been in good employment for years with every prospect of continuing to earn a good living until he reaches the age of retirement, after all the relevant factors have been taken into account, the damages recoverable from the defendant are likely to be substantial. The amount will, of course, vary, sometimes greatly, according to the particular facts of the case under consideration."

97. Similarly, Lord Scarman appeared to accept that there could be a lost years award to a young child but that, whether there would be such an award and its amount, would depend on the normal need to prove loss. After referring to the objection being put that, in the case of a young child, "it is absurd that he should be compensated for future loss of earnings" (p 169), Lord Scarman's response was as follows at p 170:

> "[That] .. objection will be taken care of in the ordinary course of litigation: a measurable and not too remote loss has to be proved before it can enter into the assessment of damages."

5. *Gammell*

98. In *Gammell*, a boy aged 15 and a young man aged 22 were killed in a road accident and a work accident respectively. Actions were brought by the father and the parents respectively both on behalf of the estates of the deceased under the 1934 Act and as dependants under the 1976 Act. The main question for the House of Lords was whether the lost years damages claim, accepted in *Pickett*, survived for the benefit of the estate in a claim under the 1934 Act. It was held that it did so survive. On the facts, this meant that the damages under the 1934 Act exceeded those under the 1976 Act. Therefore, applying the established law on the deduction under a 1976 Act claim of overlapping damages under a 1934 Act claim (see, eg, *Murray v Shuter* [1976] QB 972), no damages were here recoverable under the 1976 Act.

99. Of direct relevance to what we have to decide is that their Lordships upheld the award for the lost years that had been made at first instance. This was so despite the deceased in the first case being aged 15 when he was killed (although he had started working at the age of 14).

100. Despite grave concerns about the degree of speculation involved, their Lordships, as in *Pickett*, are best interpreted as having regarded the availability and assessment of lost years damages as turning on the evidence and the normal need to prove loss.

101. Lord Edmund-Davies at p 71, in upholding the awards made, counselled "moderation in assessing such claims so as to reflect the high degree of speculation inevitably involved".

102. Lord Fraser at p 72 said:

> "The process of assessing damages in such cases [young men with no established earning capacity or settled pattern of life] is so extremely uncertain that it can hardly be dignified with the name of calculation; it is little more than speculation. Yet that is the process which the courts are obliged to carry out at present."

103. Most important of all, because he alone referred to the case of a young child, was Lord Scarman. At p 78 he said:

> "In the case of a young child, the lost years of earning capacity will ordinarily be so distant that assessment is mere speculation.

> No estimate being possible, no award—not even a 'conventional' award—should ordinarily be made. Even so, there will be exceptions: a child television star, cut short in her prime at the age of five, might have a claim: *it would depend on the evidence*." (Emphasis added.)

104. It is important to add that none of their Lordships attached any significance to whether or not, for the purposes of the lost years award, the deceased did, or did not, have dependants.

105. The actual decision in *Gammell* was legislatively overturned by the Administration of Justice Act 1982. By section 4(2) of that Act, amending section 1(2) of the 1934 Act, the damages recoverable by the estate of the injured person shall not include "any damages for loss of income in respect of any period after that person's death". The particular problem following *Gammell* was that, where those taking under the estate and the dependants were different (they were the same on the facts of *Gammell*), a defendant might have to pay out very substantial damages under both the 1934 Act (for the lost years) and the 1976 Act (for the financial dependency). In other words, there could be significant double liability. It was to overcome that problem that, by reason of the legislative reform, a lost years claim no longer survives for the benefit of the estate under the 1934 Act.

6. *Connolly v Camden and Islington Area Health Authority* [1981] 3 All ER 250 ("*Connolly*")

106. Although *Connolly* was a first instance decision, Comyn J's judgment merits careful attention because he was faced, pre-*Croke* and only a few months after *Gammell*, with many of the same issues in interpreting *Pickett* and *Gammell* that we have to confront in this appeal.

107. The claimant, who at trial was four years old, had been brain damaged shortly after birth by being negligently given an overdose of anaesthetic. His life expectancy had been reduced to 27.5 years. One of the main questions was whether he was entitled to lost years damages.

108. Comyn J explained that he had read and reread *Pickett* and *Gammell* and, having cited a passage from Lord Scarman in *Gammell*, he went on to say at p 256:

> "What am I to deduce from these cases in regard to a child of, to take the present case, nearly five? Is it being said by their Lordships as a matter of law binding on me that there is no

> claim possible in respect of such a child except in purely exceptional circumstances, such as I would call, perhaps somewhat old-fashionedly, the Shirley Temple type of case? *I do not think that can be so.* Other courts in this building deal with children up to the age of 16, sometimes to 18 and exceptionally beyond. *I do not think, with respect, that any hard and fast rule can be laid down, and I think a child qualifies as such under this head of damage dependent on the ability to prove.* It is difficult enough in the case of a teenager or a middle-aged person to prove something for lost years. It is more difficult for a child, but I can envisage, with respect, far more examples than the Shirley Temple case or that of a television star. I can envisage the only son of a father who owns a prosperous business. I can envisage the son who is born to a farmer who is able to leave the estate to the son. I can envisage a number of situations where the court can look at something and find that there are lost years to be compensated for.
>
> It is not my intention in this judgment to seek to contribute to the wealth of learning on this subject or to turn my judgment into a sort of Law Quarterly Review article on this subject. But what I hold, and hold clearly, is that *Pickett v British Rail Engineering Ltd* and *Gammell v Wilson* give this little boy a head of claim for lost years, but on the material before me I am going to follow precisely the way counsel for the health authority put it, which I believe expressly states the law, not that there is no claim but that there is a claim but I assess it at nil." (Emphasis added).

109. Comyn J's analysis of *Pickett* and *Gammell* is, in my view, compelling and is entirely consistent with what I have said above about those cases. Having said that, it was infelicitous to express his conclusion that there was a claim on the facts but "I assess it at nil." That conclusion would have been better expressed by saying, simply, that, on the facts and evidence, the claimant had failed to prove any loss during the lost years. Looked at in the light of the more sophisticated approach to proof of loss taken today (see para 121 below) that seems controversial. But the important point was that Comyn J was, in my view, correct that *Pickett* and *Gammell* did not lay down a rule that, as a matter of law, young children cannot be awarded lost years damages. Rather such an award can be made depending on the evidence and the application of the normal principles and practice on proof of loss.

7. *Croke*: is it inconsistent with *Pickett* and *Gammell*?

110. So we come to *Croke*. This is the Court of Appeal decision that we are asked by the appellant to overrule as being inconsistent with *Pickett* and *Gammell*.

111. The claimant was a seven-year-old boy at trial. When he was 21 months old, he had suffered a severe brain injury caused by medical negligence. He had a reduced life expectancy to age 40. He had, and would have, no dependants. The trial judge, Michael Davies J, had awarded him £45,000 for loss of future earnings (and it would appear – although there is no full report of his judgment – that none of that sum was for the lost years). The defendant appealed on the grounds that various aspects of the award, including that for loss of future earnings, were too high.

112. The majority of the Court of Appeal (Griffiths and Shaw LJJ) reduced the judge's assessment of loss of future earnings from £45,000 to £25,000. Lord Denning, dissenting, held that no damages should be awarded for loss of future earnings, whether within the claimant's expected lifetime or in the lost years, because they would serve no purpose and were too speculative.

113. As regards whether there should have been any award of lost years damages, Griffiths LJ's essential reasoning (and Shaw LJ was content to agree with him) was that, as a matter of law, lost years damages should not be awarded to a young child where there are no dependants and, because of the nature of the injury, there never will be any dependants. Griffiths LJ said the following at p 82:

> "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 the 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."

114. In the light of what has been said above, Griffiths LJ's approach clashed with *Pickett* and *Gammell* because those cases did not require there to be dependants for an award of lost years damages. While that may have been the driving policy force for allowing an award of lost years damages, it was made clear in *Pickett* that the presence or real prospect of dependants was not a necessary condition for the award of lost years damages. More specifically, *Pickett* and *Gammell* did not lay down a rule of law barring lost years claims by young children who do not have and will not have dependants. The approach in *Pickett* and *Gammell* was that the availability and assessment of lost years damages turns on the normal need to prove loss. *Croke* was therefore inconsistent with *Pickett* and *Gammell*.

115. Before moving on to consider the case law subsequent to *Croke*, it may be helpful at this stage, given its central importance, to examine how pecuniary loss is proved in the context of personal injury claims.

8. Proof of loss

116. What are the relevant normal principles and practice on proof of loss? That is, how does a claimant prove his or her pecuniary loss consequent on an actionable personal injury?

117. At a high level of generality, it is clear that the courts do not apply a balance of probabilities approach to proof of such loss. Rather the loss is assessed proportionate to the chances. The difficulty of assessment is not itself a bar to recovery but there is a de minimis cut-off where the loss claimed is on the facts merely fanciful or entirely speculative. See generally, eg, *Davies v Taylor* [1974] AC 207 (a fatal accident case), especially at p 212 per Lord Reid, at p 219 per Viscount Dilhorne, and at p 220 per Lord Simon of Glaisdale; and *Clerk and Lindsell on Torts*, 24th ed (2023), paras 26-13 – 26-14.

118. In practice, at a granular level, the calculation of damages for future pecuniary loss in personal injury cases is normally carried out through the so-called "multiplier" method. An assessment is made of the net annual loss, which is known as the "multiplicand". The multiplicand is then multiplied by the appropriate "multiplier". The calculation of the multiplier begins with the number of years during which the relevant loss is likely to endure. There is then an adjustment (generally using the "discount rate" set by the Lord Chancellor as provided for in the Damages Act 1996, as amended by the Civil Liability Act 2018) to take account of the fact that the claimant receives a lump sum which can be

invested. There may then be a further reduction for the "contingencies of life" other than mortality (for example, that the claimant might in any event have been unemployed or sick).

119. Very importantly, the House of Lords in *Wells v Wells* [1999] 1 AC 345, which of course was many years after *Croke*, laid down that it is appropriate in working out the correct multiplier to make use of the actuarial "Ogden Tables". Some 15 years earlier, Oliver LJ had famously said in *Auty v National Coal Board* [1985] 1 WLR 784, 800-801, that in this context:

> "the predictions of an actuary can be only a little more likely to be accurate (and will almost certainly be less entertaining) than those of an astrologer."

120. In 1982 a joint working party of lawyers and actuaries was set up, under the chairmanship of Sir Michael Ogden QC, to produce tables specifically geared to the assessment of damages for future pecuniary loss in personal injury and death actions. The eighth edition of the Ogden Tables ("Actuarial Tables for Use in Personal Injury and Fatal Accident Cases") was published in 2020 (and updated in 2022). The Ogden Tables give actuarially accurate multipliers, applying various discount rates, according to the age of the claimant at the date of the trial. The acceptance of the Ogden Tables was spelt out by Lord Lloyd in *Wells v Wells* at p 379. He said:

> "I do not suggest that the judge should be a slave to the tables. There may well be special factors in particular cases. But the tables should now be regarded as the starting-point, rather than a check. A judge should be slow to depart from the relevant actuarial multiplier on impressionistic grounds, or by reference to 'a spread of multipliers in comparable cases' especially when the multipliers were fixed before actuarial tables were widely used."

121. Clearly, the practice on proof of loss has developed. It is much more sophisticated than it was at the time of *Pickett*, *Gammell* and *Croke*. The use of actuarial evidence is standard practice which means that awards based on averages, as the best starting approach, is now accepted and applied on a daily basis in the assessment of damages for personal injury.

122. Finally, it should be noted that a multiplier approach is not always used for calculating future pecuniary loss. For example, "*Smith v Manchester* awards" (named after the leading case, *Smith v Manchester Corporation* (1974) 17 KIR 1, and compensating for a handicap in the labour market) are normally assessed in a broad-brush

way, awarding directly a lump sum, without first trying to fix a multiplier and multiplicand. Another well-known example is *Blamire v* S*outh Cumbria Health Authority* [1993] PIQR Q1 where the Court of Appeal held that there were so many imponderables that the judge had been entitled not to apply the conventional multiplier approach in assessing the claimant's future pecuniary loss and instead to apply a broad-brush approach. That a court is entitled to decide that it has no real alternative to applying such a broad-brush approach, even after *Wells v Wells* and even outside the context of compensating for a handicap in the labour market, is shown by, for example, *Ward v Allies & Morrison Architects* [2012] EWCA Civ 1287; [2013] PIQR Q1 and *Irani v Duchon* [2019] EWCA Civ 1846; [2020] PIQR P4, in which *Blamire* was followed. In the latter case, at para 22, a test of "no real alternative [to a broad-brush approach]" was approved (derived from what Keene LJ had earlier said in *Bullock v Atlas Ward Structures Ltd* [2008] EWCA Civ 194, at para 21). See generally *McGregor on Damages*, 22nd ed (2024), paras 41-071 – 41-073.

9. The relevant case law on lost years subsequent to *Croke*

123. There are four particular relevant features of the case law subsequent to *Croke*. First, the courts have expressed dissatisfaction with the decision in *Croke* but, by reason of the doctrine of precedent, have considered themselves bound to apply it to deny lost years damages to young children. Second, there have been cases in which lost years awards have been made to adolescents. Third, there has been a decision awarding lost years damages because, although the claimant suffered a brain injury at birth, at the time of trial he was 24. Fourth, the courts have clarified how one calculates the deduction for living expenses in the lost years. It is clear that the deduction of living expenses is calculated differently as between a claim for lost years damages and a dependency claim under the 1976 Act.

(1) Dissatisfaction with *Croke* but bound to apply it

124. The leading case here is the Court of Appeal's decision in *Iqbal v Whipps Cross University Hospital NHS Trust* [2007] EWCA Civ 1190; [2008] PIQR P9 ("*Iqbal*"). The claimant was aged nine at the date of trial. He suffered from cerebral palsy caused by the defendant's negligence at the time of his birth. His agreed life expectancy was to age 41. The Court of Appeal (Laws, Gage and Rimer LJJ) held, overturning the decision at first instance, that no lost years damages could here be awarded because of the decision in *Croke*. But Gage LJ (with whom Laws LJ agreed) and Rimer LJ made clear that they considered *Croke* to be inconsistent with *Pickett* and *Gammell*.

125. In a penetrating analysis, Gage LJ said the following at para 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."

126. Turning to *Croke*, he said this at paras 45 and 46:

> "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.
>
> Having reached the above conclusion … 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."

127. Having concluded that the doctrine of precedent meant that he was bound by *Croke*, Gage LJ concluded at para 64 by saying "the error, if error it be, must be corrected by the House of Lords."

128. Similarly, Rimer LJ stressed that the decision in *Croke* was inconsistent with *Pickett* and *Gammell* but that precedent required *Croke* to be applied and that it was a matter for the House of Lords whether any error should be corrected.

129. Similar views were taken, subsequent to *Iqbal*, by Laing J in *Totham v King's College Hospital NHS Foundation Trust* [2015] EWHC 97.

(2) Lost years awards to adolescents

130. Subsequent to *Croke,* lost years awards have been made to adolescents in a number of cases. These include *Wooding v Torbay DC* [1992] CLY 1558, where lost years damages were awarded to a 16-year-old boy subject to a discount of 75% for living expenses; and *Eagle v Chambers* [2003] EWHC 3135 (QB), where lost years damages were awarded to a female claimant, aged 17 at the time of the accident, subject to a discount of 50% for living expenses. It should also be recalled that in *Gammell* itself the lost years award, albeit made to the estate, was in respect of a 15-year-old.

(3) *R v Sheffield Teaching Hospitals NHS Foundation Trust* [2017] EWHC 1245 (QB); [2017] 1 WLR 4847

131. The striking feature of this case is that, while by reason of the defendant's medical negligence at birth the claimant suffered a brain injury causing cerebral palsy, he waited over 20 years – but within three years of his being 18 and therefore within the limitation period – to commence his claim. William Davis J awarded him lost years damages because, while considering himself bound by *Croke*, he was able to distinguish that decision and to apply *Pickett* because the claimant at trial was aged 24. That meant that far less speculation as to his lost years was needed than if the claim had been brought when he was still a young child. Moreover, although the judge accepted that this was irrelevant applying *Pickett*, in contrast to *Croke*, there was a good prospect that the claimant would have dependants.

132. Mr Baker, for the appellant in the case before us, submitted that William Davis J's judgment illustrates how anomalous *Croke* is because, had the claim for the lost years damages been brought when the claimant was a young child, it could not have succeeded. There is force in that submission. But it should be noted that, as William Davis J made clear, there is no question in this type of case of claimants being encouraged to delay the commencement of proceedings in order to recover lost years damages. As he said at para 34:

> "For over 20 years R's parents struggled to look after him in inadequate accommodation without any real assistance. Their efforts are hugely to be commended. However, I have no doubt that they would have preferred the kind of assistance which now is forthcoming as a result of these proceedings and the defendant's admission of liability. The same must apply to any parents in their position. No-one in their position would delay issuing proceedings to allow their child to reach adulthood to permit a 'lost years' claim of relatively modest proportions."

(4) Calculating the living expenses deduction

133. It was laid down in *Pickett* that the lost years award would involve calculating the estimated loss of earnings during the lost years and then deducting the estimated living expenses of the claimant. There were initial doubts as to how the deductible living expenses in the lost years were to be calculated. In some first instance decisions (eg *Benson v Biggs Wall & Co Ltd* [1983] 1 WLR 72; *Clay v Pooler* [1982] 3 All ER 570) it was held that the same approach should be adopted as where calculating damages under the 1976 Act: ie the living expenses are what the claimant would have spent *exclusively* on himself or herself (the theory being that the dependants would have benefited from the rest of the claimant's money). But that approach was inconsistent with the reasoning in *Pickett* that the lost years award was not to compensate dependants. Those decisions were therefore overruled in *Harris v Empress Motors Ltd* [1983] 1 WLR 65 where the Court of Appeal considered that, as regards lost years damages, one should deduct as living expenses what the claimant would have spent in maintaining himself at the standard of living appropriate to his case (the theory being that he would have the rest of his income free to spend as he wished). In contrast to an assessment under the 1976 Act, a pro rata amount of his family expenditure, eg expenditure on housing, heat, and light, should therefore be deducted. It follows that the deduction for living expenses for a lost years award will tend to be higher than under a 1976 Act claim.

134. In practice, both under the 1976 Act and for lost years awards there is normally a rough and ready percentage reduction made to the multiplicand for the after-death period as a method of deducting for living expenses. So, for example, in a 1976 Act claim the practice is for there to be a 33% reduction where there is one dependant and 25% where there is more than one dependant.

135. In *Housecroft v Burnett* [1986] 1 All ER 332, where a 16-year-old girl was very badly injured, the Court of Appeal considered that an alternative to deducting notional living expenses from notional earnings and multiplying by the lost years multiplier, was to add one or a half to the multiplier for the lost years and then to multiply the full multiplicand with no living expenses deduction. But it would appear that the percentage discount from the multiplicand for lost years earnings is the generally preferred methodology.

10. Should *Croke* be overruled?

136. From the above examination of the relevant case law, I conclude that the ratio decidendi (ie the rule explaining the result) of *Croke* was incorrect because it was in conflict with the law laid down in *Pickett* and *Gammell*. I have explained that inconsistency at para 114 above. This is strongly supported, subsequent to *Croke*, by

Iqbal: see paras 124 - 128 above. It follows that, as we have not been asked to overrule *Pickett* or *Gammell*, it is *Croke* that must be overruled.

137. There are other difficulties with the reasoning of Griffiths LJ in *Croke*. In particular, it proves too much. If the central question is whether the injured claimant has or will have dependants, it would make no sense to confine non-recovery to children because adults may be in the same position of not having dependants. Moreover, once one accepts that the availability of lost years damages does not turn on whether there are or will be dependants, but instead depends on proof of loss, it is plain that one cannot draw a sharp line at "children" or "young children". The difficulties of proof of loss do not conform to the boundaries of those categories, which are in any event, in this context, ill-defined.

138. Mr Rees, for the respondent on this appeal, essentially rested his case on the proposition that lost years awards to young children should not be made because to do so would *always* involve excessive speculation. Put another way, it was argued that to prove such a loss is *always* merely fanciful and entirely speculative.

139. I do not accept that that is correct particularly in the light of the increased sophistication of assessment in the realm of personal injury. As I have also indicated at para 137 above, that submission involves an impossible search for a cut-off point. Mr Rees was not suggesting that a 16-year-old is precluded from a lost years award and in *Gammell* the person, who had been killed and whose lost years claim survived, was a 15-year-old. As we have seen, subsequent to *Croke* there have been awards of lost years damages to adolescents.

140. It is also hard to see that, if it is acceptable for a young child to recover damages for loss of future earnings, as it clearly is, there can be any insuperable objection, on grounds of the assessment being too uncertain, to a young child recovering lost years damages. I therefore agree with the thrust of the following passage in *Personal Injury Schedules: Calculating Damages* 4th ed, (2018) at p 546 (footnotes omitted):

> "Just because a child's loss occurs further in the distance does not mean it is any less real than the loss suffered by an adult. Methods of calculation now exist which enable reasonably accurate calculations of loss, albeit that the loss in question does not arise until many years in the future. Where a pecuniary loss is shown to exist, the principle of full compensation requires the court to do its best to assess the value of that loss with as much precision as possible. Now that appropriate tools exist to assist courts and practitioners to perform assessments of future losses more accurately, the fact that a child's 'lost

> years' claim may not occur for many years is no longer a sufficient argument for preventing a court from undertaking this assessment. If, for example, a child claimant has a life expectancy reduced to the age of 30 by catastrophic injury, he may claim in principle for a loss of the earnings between adulthood at 18, and death at 30. It is difficult to understand by what principle losses beyond 30 are any more speculative and should not be recoverable for the rest of the anticipated working lifespan of the claimant."

141. Mr Rees submitted that it was particularly difficult to assess the living expenses of a young child in the lost years that need to be deducted in working out the lost years damages. But, as I have explained, these are conventionally based on a rough-and-ready percentage discount and, as Mr Baker for the appellant argued, there is no reason to think that such an approach cannot be sensibly used in respect of young children even if the percentage discount is high because of the high degree of uncertainty involved.

142. Therefore, the reasoning of Griffiths LJ in *Croke* cannot be upheld. No doubt the consequence of overruling *Croke*, and the acceptance that damages for lost years can be awarded to young children, will be that actuarial evidence will be relied on by claimants in an attempt to satisfy proof of the lost years loss. Indeed, in the light of the more sophisticated method of assessment that is now used in personal injury cases, it seems extremely unlikely that a court will consider that, where there has been a reduced life expectancy, a claim for lost years by a young child cannot be proved. The difficulties of proving the loss of earnings in the lost years are not significantly greater than in respect of the lifetime lost earnings of a young child and that is an exercise that is routinely carried out. But I would anticipate that, assuming a multiplier approach is being used, there will be a high deduction from lost earnings for living expenses. I also accept that, because of the high degree of uncertainty involved, a court may be entitled to decide that it has no real alternative to taking a broad-brush approach (as explained in para 122 above) rather than the usual multiplier approach.

11. Revisiting *Pickett*

143. As I have already explained, we were not asked by Mr Rees to overrule *Pickett* or to restate what it laid down. Rather we have been faced with an acceptance that lost years awards are valid and that *Pickett* was correct to have overruled *Oliver v Ashman*.

144. Nevertheless, I am of the view that a reconsideration of *Pickett* and *Gammell* is called for. As the political realities mean that it is most unlikely that this will be taken up by the Legislature, even after a review by the Law Commission, it is to be hoped that, following on this decision, there will be an opportunity in a future case to consider *Pickett*

afresh with a seven-person court and full submissions on its merits and demerits. In particular, it strikes me as important to consider in detail two interconnected issues.

145. The first and most fundamental is whether there is any convincing justification for treating a lost years award as compensating a pecuniary loss of the injured claimant. Lost years damages are controversial when viewed as compensating the claimant's own loss because they cut across the normal principle that there can be no loss to the claimant suffered after the claimant's death. The claimant can suffer no pecuniary loss (or non-pecuniary loss) once he or she is dead. As it is put in *McGregor on Damages* at para 41-119, "Wages in heaven should not be awarded when they are not needed on earth." It follows that there is a strong argument that it is difficult to justify the lost years award when viewed as compensation for a loss of the claimant. Hence, the former view taken, that there should be no lost years damages, by Slade J in *Harris v Brights Asphalt Contractors Ltd* and by the Court of Appeal in *Oliver v Ashman*.

146. As a supposed justification for lost years damages, Streatfeild J said in *Pope v D Murphy & Son Ltd*, at p 231, that:

> "If I were to hold anything else, I feel very strongly that I should be giving the tortfeasor here, the defendant, the benefit of his own wrong, and that I decline to do."

But that is a punitive rationale which is out of line with the compensatory aim of damages.

147. It would appear that, to counter the objection that the claimant suffers no loss because he or she will not be alive to suffer the loss, one may have to accept the approach of treating the claimant as if an objective capital asset whose life expectancy and hence value and earning capacity have been diminished by the injury. Viewed in this way, a loss of earning capacity may be said to have been suffered by the claimant, while alive. But it may not be easy to justify conceptualising a human being in this way.

148. The second issue is whether *Pickett* should be reinterpreted as allowing lost years claims only as a means of compensating dependants. That is, if there are and will be no dependants, no lost years damages should be awarded, even if the claimant is an adult. Put another way, if one were to recognise the force of what has just been said above on the first issue, might *Pickett* nevertheless be regarded as correct on its facts because there were dependants who would lose out if there were no lost years damages awarded? This fits with the explanations of the policy justification given in *Pickett* itself (see paras 86-89 above). There are also more recent obiter dicta of Lord Phillips in *Gregg v Scott* [2005] UKHL 2; [2005] 2 AC 176, at paras 178-182 that may be said to offer some support for this approach (although this was not mentioned in any of the other four judgments). Furthermore, this view has the strong support of *McGregor on Damages* at para 41-119:

> "The point of principle is that the lost years award does not apply where there is no real prospect of dependency … That applies as much to adults as it does to children."

See also, eg, Ogus, *The Law of Damages* (1973) pp 185-187; and Alistair Macduff, "Loss of earnings in the 'lost years'" (2007) JPIL 242.

149. However, to accept this view would contradict the normal principle (reflected in the compensatory aim of damages being to put *the claimant* into as good a position as if the tort had not been committed: *Livingston v Rawyards Coal Co* (1880) 5 App Cas 25) that a claimant recovers for his or her own loss and not for the loss of a third party. There would also be some potential consequential difficulties. If the lost years award is to compensate the dependants' loss, would the award have to be held on trust for the dependants and how would this work where there were no dependants at the time of the award but there is a real prospect that there will be in the future? If this were to be the correct approach, it would also require a change to the way in which the living expenses would be assessed so as to bring the calculation precisely into line with the approach under the 1976 Act. Given the stance taken by Mr Rees, there were no submissions by the respondent as to how, if at all, these potential problems might be overcome. But it is noteworthy that, in respect of damages for cost of care, there have been similar questions raised as to whether, where the care is gratuitously carried out by a third party, the loss is really the third party's rather than the claimant's. In that context it was accepted by the House of Lords in *Hunt v Severs* [1994] 2 AC 350 that the loss is the carer's and not the claimant's so that those damages must be held on trust for the third party.

12. Conclusion

150. To summarise, it is my view that:

(i) The decision of the Court of Appeal in *Croke* that lost years damages cannot be awarded to a young child was inconsistent with the decisions of the House of Lords in *Pickett* and *Gammell* and should be overruled.

(ii) Whether lost years damages will be awarded to a young child, and the quantum of such an award, should depend on the normal principles and practice of proving loss. I anticipate that, usually, the multiplier approach will be applied, based on the Ogden Tables, but with a high percentage deduction for the claimant's living expenses.

(iii) Following this decision, it is to be hoped that there is an opportunity in a future case to consider *Pickett* afresh with a seven-person court and full submissions on its merits and demerits.

151. For all the above reasons, the appeal should be allowed and the case should be remitted to the trial judge to decide, in the light of the judgments on this appeal whether there should be a lost years award on the facts (I anticipate that there will be) and what the quantum of that award should be.

LORD STEPHENS (concurring, with whom Lord Briggs agrees)

152. I have read in draft, with admiration, the judgment of Lord Reed, with which I agree. I add a few words primarily to emphasise the duty on judges to assess damages in circumstances where a cause of action has been established and a loss has been sustained. The principle is that a claimant is entitled, as a matter of right and of justice, to have the court quantify their full loss notwithstanding forensic difficulty: see *Mastercard v Merricks* [2020] UKSC 51; [2021] Bus LR 25, at paras 45-51, and Lord Reed's judgment in this appeal at paras 56-57. The principle of full compensation applies to pecuniary and non-pecuniary damage alike. In the case of pecuniary loss, the courts have progressively been prepared to rely on ever more sophisticated evidence and calculations to establish the extent of a claimant's loss.

153. Amongst other heads of damages, the claimant sought damages for loss of earnings during the survival period and lost years damages, that is damages for loss of earnings and loss of pension minus living expenses during the period of her shortened life expectancy.

154. In relation to children there are greater difficulties in assessing damages for future loss of earnings during the survival period than occur in relation to adults. The earning capacity of a young child may be distant in time from the date of injury and from the date of trial. The difficulties will be compounded if, for instance, the young child has sustained a brain injury at birth and is unable to demonstrate prior to sustaining the injury intellectual ability or character traits upon which some assessment can be made as to what his or her individual earning capacity would have been if uninjured. However, if the injuries sustained by a young child are such that he or she will not be able to work or will only have a reduced wage-earning ability, then the young child has probably sustained a loss. The difficulties in assessment do not detract from the simple proposition that a probable loss has been sustained and must be assessed. The assessment of the loss calls for moderation with due regard to the vicissitudes of life, but the obligation remains to assess the loss and to award compensation for the undoubted loss which has been sustained. Indeed, claims for loss of earnings made by young children who have sustained personal injuries affecting their ability to work are routinely assessed by the courts despite

acknowledged difficulties in carrying out that assessment. Such assessments are standard and commonplace.

155. Despite the difficulties of assessment in this case, the respondents agreed in the statement of facts that CCC was likely to have gained GCSEs and higher qualifications from college or university leading to paid employment and, if uninjured, was likely to have worked to the statutory retirement age and would have received some sort of pension for the remainder of her life. The respondents also agreed the claimant's award for future loss of earnings at £160,000 during her anticipated life span up to the age of 29. The assessment of that loss was not too speculative.

156. Whilst the claim for loss of earnings to the age of 29 was not too speculative the respondents then asserted that upon her anticipated death, at the age of 29, the assessment of loss of earnings, loss of pension and the assessment of her living expenses during the period of her lost years was suddenly too speculative. It is informative to juxtapose the acknowledged ability to assess loss of earnings during the survival period to age 29 with assertion that upon her anticipated death the assessment becomes all too speculative. The juxtaposition exposes the inherent contradiction.

157. The question for the respondent was: why is it any more difficult to assess the claimant's lost years claim than the claim for loss of earnings during the survival period? Self-evidently the answer could not lie in relation to the claimant's likely earnings. These had already been agreed up to the age of 29. Mr Rees, on behalf of the respondent, attempted to answer this question by reference to the difference between a claim for loss of earnings and a claim for the lost years. Living expenses fall to be deducted in a lost years claim but play no part in the assessment of damages for future loss of earnings. Mr Rees submitted that the additional difficulty in assessing a lost years' claim is in assessing the amount of living expenses which are required to be deducted over the whole period of the claim. He submitted that the deduction of living expenses would only commence at the anticipated date of the claimant's death and thereafter living expenses would be deducted during the whole of claimant's normal life expectancy. So, in this case, the task of the trial judge would have been to assess the amount of living expenses after the anticipated date of death when the claimant was 29, which was 21 years after the date of trial, and then to assess the amount of those living expenses for each year of the claimant's normal life expectancy. Mr Rees posed the question of how, in such circumstances, can a court sensibly assess the amount of living expenses which fall to be deducted? Mr Rees submitted that by virtue of this additional difficulty in assessing the amount of living expenses, the whole exercise of assessing the claim for lost years in this case involving a young child is entirely speculative.

158. I reject this submission on the basis that deductions for living expenses can be based on a rough-and-ready (or broad brush) percentage discount. The question then arises as to what is the rough-and-ready percentage discount? There is a spectrum in

respect of the amount spent by an individual on his or her own living expenses. The spectrum ranges from miserliness through frugality and moderation to profligacy. A rough-and-ready discount should not be arbitrary or artificial so caution must be applied to simply always using a standard or conventional percentage discount. The basic rule of the common law is that a claimant is entitled to have the court assess the discount even if it is on a rough-and-ready basis. So, the task of the trial judge is to decide on the facts of the case on a rough-and-ready basis whereabouts in that spectrum the claimant will fall and then to apply the appropriate percentage discount. The assessment of the discount feeds into the assessment of lost years damages. The overall assessment calls for suitable moderation. In this case it will be a matter for the trial judge to determine the appropriate rough-and-ready percentage deduction for living expenses.

159. So, the first point I make is that the assessment of lost years damages in this case is not too speculative.

160. The second point I make is that the respondent's assertion in relation to lost years damages being too speculative leads to incoherence. The point can be illustrated by imagining a pair of identical one-year-old twin sisters being gravely injured in the same car accident. Both are rendered incapable of ever earning. But one's life expectancy is until 30 and the other's until 40. The forensic difficulties of assessing what each might have earned between 30 and 40, or what their expenses might be, are exactly the same and are not at all affected by their different actual life expectancies resulting from their injuries. Their life expectancies if the injuries had not been sustained are the same. Yet merely because one has a shorter actual life expectancy after sustaining her injuries (and therefore presumably a graver injury) she would obtain less compensation than her sister: i.e. nothing for the period between 30 and 40. That is incoherent.

161. The third point I make is that Comyn J in *Connolly* incorrectly failed to make an award for lost years damages. In that case Comyn J arrived at a figure of £7,500 for loss of earnings up to the anticipated date of the claimant's death. The claimant was a child who had sustained catastrophic injuries when 17 days old, who at trial was four years old, and who had a reduced life expectancy to the age of 27 ½ years. The judge arrived at the figure of £7,500 by applying the yardstick that the child would have followed in his father's footsteps obtaining employment in the plastering trade earning £60 per week or thereabouts. The details of the calculation are not clear, but this was then said to produce a figure for future loss of earnings of £15,000 which, without explanation, Comyn J then discounted by 50% to produce an award for loss of earnings of £7,500. Having assessed loss of earnings up to the anticipated date of the claimant's death, Comyn J then proceeded to assess the claim for the lost years at nil as the loss had not been proved. Comyn J proffered no explanation as to why the claim for loss of future earnings had been proved but the claim for the lost years had not been proved. I agree with Comyn J's analysis that *Pickett* and *Gammell* did not lay down a rule that as a matter of law young children cannot be awarded lost years damages. I consider that Comyn J was correct to grapple with and to award an amount in relation to loss of earnings during the claimant's life span up to the

age of 27 ½. The claim for loss of earnings was not too speculative and, as he was required to do, he made an award for future loss of earnings, though the present methods of assessing the loss are different from the methods employed by Comyn J. Reading the judgment as a whole, whilst Comyn J faithfully and conscientiously strove to do justice to both the claimant and the defendant, I consider that there was inconsistency between Comyn J's award of future loss of earnings and his finding that the claim for lost years had not been proved. Given this inconsistency and the evidence which the judge accepted in relation to the claim for loss of future earnings, I consider that an award ought to have been made in respect of the claim for lost years damages.

162. The fourth point I make is that the practice on proof of loss has developed. It is now much more sophisticated than it was at the time of *Pickett*, *Gammell,* and *Croke*. To my mind in relation to a claim for loss of earnings brought by a young child, it would be entirely extraordinary and most likely perverse not to make any award of damages on the basis that the claim was "entirely speculative." It would also be extraordinary not to make any award for the lost years' damages on the basis that the claim was speculative. I also consider that uncertainty should not lead a court to making inappropriately parsimonious awards.

163. In conclusion the present appeal should be allowed and the case remitted to the trial judge in order for damages for the claimant's lost years to be assessed.

LADY ROSE (dissenting)

164. I am grateful to Lord Reed, Lord Burrows and Lord Stephens for setting out with such clarity the dilemma which faces this court in this sad case. Having carefully considered the previous case law, I have, however, concluded that there is a principled distinction between the position of Mr Pickett, Mr Gammell and Mr Furness on the one hand and the young children in *Croke v Wiseman*, *Iqbal v Whipps Cross* and *Oliver v Ashman* on the other. The difference is that for an adult claimant, the court has before it some evidence of the individual characteristics and abilities of the person whose loss is being compensated. Based on that evidence, the court can make findings about what that person would have achieved in their working life if their life had not been irrevocably changed by the defendant's negligence. The court can then assess the value of what the person has lost. Where the claimant is a child and there is no evidence about how that individual would have grown and developed, the court is required instead to calculate damages on the basis of assumptions about the child's future abilities, opportunities and earning power, based on factors such as their gender and their family background, including their social class.

165. Not only does that push the court into uncomfortable territory, as I discuss below, but it contradicts a fundamental principle of tort law which is that the loss to be

compensated is the loss suffered by this individual claimant. As Lord Parker CJ said in the seminal case of *Smith v Leech Brain & Co Ltd* [1962] 2 QB 405, 414:

> "It has always been the law of this country that a tortfeasor takes his victim as he finds him. It is unnecessary to do more than refer to the short passage in the decision of Kennedy J in *Dulieu v White & Sons* [1901] 2 KB 669, 679 where he said: 'If a man is negligently run over or otherwise negligently injured in his body, it is no answer to the sufferer's claim for damages that he would have suffered less injury, or no injury at all, if he had not had an unusually thin skull or an unusually weak heart.'"

166. Lord Parker held in that case that what mattered was whether Mr Smith's employers could reasonably foresee the type of injury he suffered as a result of their negligence, in that case a burn to his lip: "What, in the particular case, is the amount of damage which he suffers as a result of that burn, depends upon the characteristics and constitution of the victim."

167. The loss for which the claimant is entitled to be compensated may be more or less than the loss that would have been caused by the defendant's negligence to another victim, whether the other victim was a member of the claimant's family or a hypothetical average person. An individual who suffers a head injury in a road accident caused by the defendant's negligence is compensated for the full extent of their injury even if they had an "egg shell skull" making them more vulnerable than other members of their family or the average person. Conversely if the claimant has an unusually thick skull and so suffers a less serious injury than might have been expected, the defendant is fortunate because his liability is reduced.

168. There are many circumstances in many areas of the law in which the court must speculate either about what will happen in the future or about what would have happened in the past if things had been different. There is no doubt that even with an adult claimant like Mr Pickett, there is a great deal of speculation involved in quantifying the likely course of his working life. But the "speculation" involved in assessing loss of future earnings for a child will in many cases be different in kind and not just in degree from the speculation involved in quantifying future lost years earnings for a working adult. That is because there may be no evidence as to the child's abilities which can form a proper starting point for that speculation.

169. I recognise the force of the point made by the other members of the court that the court does regularly assess and award lost earnings for the survival period even for the youngest claimants. No one (except Lord Denning) has argued that there should be no

award of lost earnings for the survival period. That involves the same kind of speculation about the child's future as I have just described – albeit that the degree of speculation is increased the further into the future the court has to look as from the date of assessment.

170. My answer to that point, as I develop later, is that logic has always been an unreliable guide when applied to determining the proper boundaries of tortious compensation, particular for economic loss which is what lost years earnings are. There are good policy reasons for continuing to award damages which in effect substitute for the earnings that the child would have received to cover their daily living expenses for the period when the child will in fact still incur those expenses. That may justify making an exception to the principle I have described above that it is incumbent on the claimant to prove his or her particular loss as an individual. But logic is not a sound basis for extending the liability of the defendant to cover the lost years earnings. There are important decisions of this court and the House of Lords in which lines have been drawn based on policy grounds and the reasons expressed for drawing those lines are very similar to the reasons which pertain in the current case.

171. It is necessary first to consider what the House of Lords decided in *Pickett*. Their Lordships certainly did not think they were deciding that a young child should receive an award for lost years earnings. The claimant in *Pickett* was exposed to asbestos dust whilst working for the defendant. In 1974 he contracted mesothelioma. In July he brought an action against the defendant claiming damages for personal injuries. The evidence at trial showed that if he had not contracted the disease his life expectancy was 65 but this had been reduced to one year. He died shortly after judgment and his wife continued the appeal as the administratrix of his estate. The Court of Appeal held that he was not entitled to be compensated for any loss of earnings during the lost years.

172. Lord Wilberforce first described the deceased as very fit "with an excellent physical record" such that there could be no doubt that he could have looked forward to a normal period of continued employment up to retiring age: page 146. The issue before the House was whether to overrule *Oliver v Ashman* which decided that no damages could be awarded for lost years earnings. He referred to the unsatisfactory nature of the then current state of the law which threw up from time to time cases which did "not appeal to a sense of justice". Lord Wilberforce referred to *Benham v Gambling* [1941] AC 157 which was a case of a young child killed almost instantly. In that case, there was no claim made for loss of future earnings. The issue was rather as to the appropriate conventional sum to award for loss of expectation of life. That case was not dealing with a claim by a living person for lost years earnings.

173. Lord Wilberforce's conclusion in *Pickett* was expressed at p 150:

> "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. In that of a young child (cf *Benham* v *Gambling* [1941] AC 157) neither present nor future earnings could enter into the matter: in the more difficult case of adolescents just embarking upon the process of earning (cf *Skelton v Collins* (1966) 115 CLR 94) the value of 'lost' earnings might be real but would probably be assessable as small."

174. Lord Salmon also distinguished the case before him from that of a young child (p 153G):

> "The amount awarded will depend upon the facts of each particular case. They may vary greatly from case to case. At one end of the scale, the claim may be made on behalf of a young child or his estate. In such a case, the lost earnings are so unpredictable and speculative that only a minimal sum could properly be awarded. At the other end of the scale, the claim may be made by a man in the prime of life or, if he dies, on behalf of his estate; if he has been in good employment for years with every prospect of continuing to earn a good living until he reaches the age of retirement, after all the relevant factors have been taken into account, the damages recoverable from the defendant are likely to be substantial. The amount will, of course, vary, sometimes greatly, according to the particular facts of the case under consideration."

175. Lord Salmon held that *Oliver v Ashman* had been correctly decided because "in the case of a child of such tender years, the amount of the earnings which he might have lost was so speculative and unpredictable that the sum in the award attributable to that element must have been minimal and could therefore be disregarded" (p 156A). The question, Lord Salmon said, was whether that case decided lost years could never be taken into account in assessing damages. He held that it did not but in so far as it did, it should be overruled.

176. Lord Edmund-Davies' speech in *Pickett* focused on the question whether there was any loss suffered by the claimant in the period beyond the anticipated date of his premature death: p 162D. He regarded *Oliver v Ashman* has having decided that lost years earnings can never be recovered and therefore as being wrong. Lord Scarman agreed with Lords Wilberforce, Salmon and Edmund-Davies. In the list of objections put forward to the recovery of lost years earnings, Lord Scarman included the objection that the plaintiff may be so young "that it is absurd that he should be compensated for future loss of earnings". He dismissed this on the basis that "it will be taken care of in the ordinary course of litigation: a measurable and not too remote loss has to be proved before it can enter into the assessment of damages." Again, Lord Scarman seems to have assumed that the absence of the proof that is required in ordinary litigation would likely preclude any award of lost years earnings for a child.

177. What *Pickett* therefore decided was: first that there is in principle a claim for lost years earnings and that *Oliver v Ashman* was wrong in so far as it decided that there could be no such claim. Secondly, that the claim is in respect of loss suffered by the claimant and not by his dependants. That means that the claim can be made whether or not he has dependants and whether or not he is likely to have given them the benefit of any savings he made during his life or after his death. Thirdly, when making an award, the court should deduct an amount to reflect the living expenses "saved" by the fact that the claimant will no longer be alive incurring those expenses. I agree with those three principles.

178. What the House did not decide was that in a case where there is no evidence before the court about the claimant's past earnings or about this particular claimant's earning potential, the court can and should rely instead on evidence about other people in order to guess what the claimant's life would have been like had he or she not been injured. On the contrary, their reasons for rejecting the possibility of an award for a young child were, in my view, based on the likely absence of any evidence on which to assess the child's future earning potential. That was why the case of a young child would be very different from the case before them where there was ample evidence of Mr Pickett's previous work record and physical health and aptitude.

179. This was also discussed perhaps more clearly in the House of Lords' judgment in the two cases *Gammell v Wilson* and *Furness v B & S Massey*. In those two joined cases the victim had been killed instantly. The victim's cause of action continued for the benefit of his estate under the Law Reform (Miscellaneous Provisions) Act 1934. This was subject to a proviso in section 1(2)(c) that where the death of that person gives rise to a cause of action, the compensation "shall be calculated without reference to any *loss or gain to his estate consequent on his death*, except that a sum in respect of funeral expenses may be included." (my emphasis) The question was whether the lost years earnings fell within that proviso as being a gain "consequent on the victim's death" and so not recoverable by his estate. Their Lordships held that the lost years earnings were not so "consequent" and so were recoverable by the estate.

180. Both the victims in those cases were young men who had already embarked on their working lives. But their Lordships were very unhappy with upholding the award that they considered the court was bound by *Pickett* to make. Lord Diplock said at p 62 that "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." He went on: (p 65)

> "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."

181. Lord Edmund-Davies described the House in *Pickett* as having been ineluctably driven to hold that the injured plaintiff could recover lost years earnings. He said at 70G-H that "the assessment of compensation for the 'lost years' rests upon no special basis of its own and it proceeds on no peculiar principle. It may present unusual difficulties, but the task itself is the ordinary one of arriving at a fair figure to compensate the estate of the deceased for a loss of a particular kind sustained by him in his lifetime at the hands of the defendant." He held that although the evidence before the trial judge "was admittedly meagre", it was there to be weighed up.

182. Lord Fraser of Tullybelton also found that the result compelled by a combination of the legislation and *Pickett* led to a result which was neither sensible nor just. He said: (pp 71-72)

> "It is particularly difficult to justify the law in cases such as the present, in each of which the deceased was a young man with no established earning capacity or settled pattern of life. In such cases it is hardly possible to make a reasonable estimate of his probable earnings during the 'lost years' and it is, I think, quite impossible to take the further step of making a reasonable estimate of the free balance that would have been available

> above the cost of maintaining himself throughout the 'lost years.' … The process of assessing damages in such cases is so extremely uncertain that it can hardly be dignified with the name of calculation; it is little more than speculation. Yet that is the process which the courts are obliged to carry out at present."

183. Lord Russell, no doubt feeling that his dissent in *Pickett* had been fully vindicated by the cases then before the House, said that the law had "gone astray by excessive refinements of theory" leading "to almost grotesque embodiment of estimates or rather guesses".

184. With a child claimant the difficulty facing the court is not merely that there is "no established earning capacity or settled pattern of life". The problem is that there in many cases may not be even the "meagre" evidence that there was in relation to Mr Gammell as to how he or she is likely to turn out. So the "evidence" purporting to prove the quantum of their loss must derive not from any known characteristic of theirs but from the characteristics of their family members, or of members of some cohort with which they are said to share some particular characteristic so that the successes and failures of their family or of that segment of society are used as a proxy for what is likely to have happened to them.

185. The point – and the mischief it engenders – can be illustrated most clearly in the speech of Lord Scarman in *Gammell.* At p 78 he said:

> "In civil litigation it is the balance of probabilities which matters. In the case of a young child, the lost years of earning capacity will ordinarily be so distant that assessment is mere speculation. No estimate being possible, no award – not even a 'conventional' award – should ordinarily be made. Even so, there will be exceptions: a child television star, cut short in her prime at the age of five, might have a claim: it would depend on the evidence. A teenage boy or girl, however, as in *Gammell's* case may well be able to show either actual employment or real prospects, in either of which situations there will be an assessable claim. In the case of a young man, already in employment (as was young Mr Furness), one would expect to find evidence upon which a fair estimate of loss can be made. A man, well established in life, like Mr Pickett, will have no difficulty. But in all cases it is a matter of evidence and a reasonable estimate based upon it."

186. Lord Scarman described the evidence about the claimant in *Gammell* in the following terms: (p 79)

> "The boy was 15. His father is of the Romany blood, uneducated and illiterate. His mother is a well-educated woman who, as a witness, impressed the judge. She knew her boy and was confident he would make his way in the world. He never went to school, but his mother taught him his three 'Rs' At 14 (the year before he died) he began work. When he died, he was earning £20 a week from the sort of work he, with his Romany background, was well placed to find (fruit picking, scrap dealing and road surfacing). He was saving up for a van in order to follow the career of an antique dealer (in the footsteps of an uncle). When he died, his future was not merely matter for speculation: he had made a start, was in work, and had won the confidence of his sensible mother, who had herself educated him."

187. Lord Scarman therefore rejected the criticism of the £8 per week multiplicand for the lost years as being "a figure picked out of the sky". He said it was not; it was based on the circumstances known to the judge: p 79D. One might ask if Mr Gammell had been killed or seriously disabled at birth, would the court have been required or entitled to assume that because of his "Romany blood" he would have spent his working life fruit picking and road surfacing?

188. It is true that relying on such outdated and unacceptable assumptions at least resulted in the Gammell family receiving some recompense for their son's lost years earnings rather than none. But that is not, in my view, the point. As Lord Edmund-Davies said in *Gammell* at p 70G-H: "the assessment of compensation for the 'lost years' rests upon no special basis of its own and it proceeds on no peculiar principle." One of the principles for assessing compensation is that it must be based on evidence about the claimant him or herself. There is such evidence where the claimant has started work, whether they are a fruit picker or a child television star. I would not limit the cases in which an award is possible to those where the claimant has already started work. A young claimant may be able to adduce evidence about his or her abilities at a much younger age than the age at which they are ready to join the workforce.

189. Further, the problem is not, as Lord Scarman suggested, that the lost years are too far distant. It does not matter, therefore, whether the claimant brings his claim soon after the injury or waits until adulthood before bringing the claim as happened in *JR v Sheffield Teaching Hospitals NHS Foundation Trust* [2017] EWHC 1245 (QB); [2017] 1 WLR 4847. The fact that by the time the case comes before the court, the severely disabled claimant is closer in age to the start of the lost years period may assist in showing that

they have indeed survived the perils of the earlier years. But it does not help in establishing what they would have become had they not been injured.

190. I therefore consider that Comyn J was broadly right in how he approached the task in *Connolly*. The plaintiff was severely injured by a negligently performed operation shortly after his birth. His father was in the plastering trade though had been out of work for some time before the hearing. On the question of future earnings for the survival period, given a life expectancy to age 27.5 years, he said (p 255) that "[t]he only yardstick, if it can even be dignified with that word, that could be taken was in the plastering trade, following in father's footsteps". He recorded that both counsel had arrived at a figure of £60 a week or thereabouts giving a total of £15,000. He reduced this by half noting that "It is all very problematical, all very artificial, all very hypothetical, all very difficult". Turning to the lost years earning, he said he had read and reread the House of Lords' decisions in *Pickett* and *Gammell* and concluded that "running as an undercurrent" in some of the speeches was that a child was in a different position to a young man.

191. Applying the principles to the case before him, Comyn J said that there was no hard and fast rule as to whether lost years earnings can be recovered: "a child qualifies as such under this head of damage dependent on the ability to prove". I agree with that proposition. Where I would disagree with him is when he goes on to refer to cases in which damages can be "proved". He refers to "the Shirley Temple case or that of a television star" and I agree that where a child has an established earning record then there is evidence on which a judge may decide, given *Pickett*, to award earnings for both the survival period and the lost years. I would disagree with his other examples in so far as they apply to a child injured at or shortly after birth, in particular that of "the son of a father who owns a prosperous business". That immediately begs the question – in my mind at least – whether the daughter of such a father should also be assumed to be likely to step into his shoes. In neither case is there any evidence at all about whether the child has inherited its father's business acumen or work ethic.

192. There is a risk of unfairness to defendants in that their liability is likely to be increased where the family of the claimant is successful but the court may prefer to fall back on published average earnings figures where the family is unsuccessful. A court may therefore be invited to assume that a child will follow in its family members' footsteps if its parents and siblings are gainfully employed. But if the claimant's father has spent most of his adult life in prison and his brother has lived on social security benefits, it would be difficult for the court to dismiss the claim for loss of earnings on the assumption that the claimant would have followed a similar path.

193. I do not agree that the absence of any evidence on which to base predictions of future earnings is helped by reliance on the Ogden tables as described by Lord Burrows in paras 119 onwards of his judgment. The problem created by the lost years earnings is not the number of years to be used as the multiplier, but the earnings sum to be used as

the multiplicand. The Ogden tables may have brought a greater sophistication to the task of working out what the multiplier should be. The tables address the problem that arises because simply multiplying an annual figure for loss of earnings by the number of years for which the claimant is expected to survive post injury would overcompensate the claimant for two reasons. The first is that claimants receive a lump sum in their hands years before they would actually have received the earnings periodically over the course of their working life. Secondly, it assumes that the claimant would have been in employment for the entire duration of the period of their working life. This does not take into account the vicissitudes of life such as early death, ill-health, childcare and redundancy.

194. The Ogden tables therefore provide multipliers which can be used in different circumstances, for example depending on when the loss is assumed to begin and whether it will continue to retirement age, or beyond or for a fixed period after which the claimant is expected to recover their full pre-injury working capability. The multipliers provided by most of the tables account for the risk that the claimant would have died early, based on average male and female life expectancy. The discount rate reflects an assumed annual interest rate that the claimant will obtain on the lump sum, after tax and inflation. As to the vicissitudes of life, early versions of the tables only took into account the possibility that the claimant would die early. But since the second edition in 1994, the Ogden tables have also allowed for other contingencies.

195. What the Ogden tables do not help with at all is working out the multiplicand, that is the annual earnings figure to which the multipliers derived from Tables 1 – 36 and the Additional Tables should be applied to arrive at the correct figure for future loss. They do not therefore help with the problem that arises if there is no evidence before the court as to what the claimant would have earned if he or she had not been injured.

196. Even Tables A – D which enable adjustments to be made to the multiplicand by applying baseline and reduction multipliers to a pre-accident earning capacity figure assume that the court will first have come up with that pre-accident earnings figure. They assume that it is possible to know the claimant's level of disability before the accident, his or her level of educational attainment, working status at the time of the accident and likely retirement age. The explanatory notes to the Ogden tables address claimants of a young age at paras 37 to 39. They explain that some of the tables have been extended down to age 0 but that multipliers for loss of earnings (Tables 3 to 18) have not been extended below 16. They state that for claimants who have not yet started work, it is first necessary to determine an assumed age at which they would have started work and then find the appropriate multiplier before applying discount or deferment factors. The Ogden tables have, therefore, nothing useful to say about what CCC's earning capacity should be.

197. They also do not address the difficulty of arriving at a figure by which to reduce the lost years earnings to take account of the living expenses "saved" by the fact that the claimant will no longer be alive. Before the Ogden tables, judges used a rough and ready multiplier. The Ogden tables have brought some actuarial rigour to that part of the exercise but the rough and ready element in the calculation has been replaced by the need to pick a percentage by which the resulting earnings figure must be reduced to take account of such living expenses. In addition, the further one has to look into the future, the greater the uncertainties and the greater the degree of speculation. In the present case, for example, the survival period is to the age of 29: a period which will end in 2044. The lost years assessment involves the assumption that the claimant would have worked until 2083 and would then have received a pension until her death which would presumably have been around the end of this century or the beginning of the next century.

198. That brings me to the issue of the logical inconsistency between the principle I have set out above which would deny recovery for lost years earnings where there is no evidence available as to the likely career of the infant victim and the fact that courts regularly award lost earnings for the survival period when there is similarly no evidence on which to base that. A logical approach might suggest that an award of damages for loss of earnings should not be made in either case. However, awards have been made in respect of the survival period, but not, until the present case, in respect of the lost years for an infant claimant. The *Connolly* case exemplifies the difficulty of distinguishing between the lost earnings for the survival period and the lost earnings beyond that in the lost years. Comyn J was prepared to assume that the little boy would have grown up to be a plasterer like his father for the purpose of assessing lost earnings for the years up to age 27.5. But the judge did not carry forward that assumption for the lost decades between age 27.5 and whatever life expectancy was for a child born into that family at that time.

199. In my judgment, the difference in approach which has been adopted in the previous authorities can be justified in principle and should not be abandoned for the sake of consistency. The members of the House of Lords in *Pickett* did not regard it as illogical that they awarded Mr Pickett lost years earnings but said that no such award should be made for a young child: see the passages I have set out earlier at paras 173, 174 and 176 above. I agree with the other members of the panel that the distinguishing feature cannot be that Mr Pickett had dependants whereas an infant has no dependants and no immediate prospect of dependants. But the references to dependants in *Pickett* are nonetheless important since they show how the decision in *Pickett* was driven by policy concerns, as Lord Burrows has explained at paras 86-88 above. Its rationale was to provide a fund for the claimant's dependants, on the assumption that no dependants' claim could follow upon the injured party's claim. According to Lord Wilberforce, that assumption – that the dependants' claim would be excluded – "provides a basis, in logic and justice, for allowing the victim to recover for earnings lost during his lost years" (p 146). Accordingly, as Lord Wilberforce said at p 151, "the basis, in principle, for recovery lies in the interest which [the claimant] has in making provision for dependants and others, and this he would do out of his surplus". Similarly, in the later case of *Gregg v Scott* [2005] 2 AC 176 Lord Phillips emphasised at para 180 that the rationale of the decision

in *Pickett* to allow damages for loss of earnings during the lost years was that "[o]nly in this way could provision be made for the loss to be suffered by the dependants".

200. *Pickett* is certainly not the only case in which an important element of policy has been introduced to temper the pursuit of logic and consistency in this area of the law. Limits have been placed on recovery for personal injury in, for example, the well-known case of *McLoughlin v O'Brian* [1983] 1 AC 410 ("*McLoughlin*") on recovery for psychiatric illness by a claimant who witnessed her close relatives in the aftermath of a road accident caused by the defendant's negligence. Lord Wilberforce's comment at p 419H of *McLoughlin* is, in my judgment, particularly pertinent to the issue of jumping from loss of earnings for the survival period to those for the lost years:

> "To argue from one factual situation to another and to decide by analogy is a natural tendency of the human and the legal mind. But the lawyer still has to inquire whether, in so doing, he has crossed some critical line behind which he ought to stop."

201. Lord Wilberforce eschewed reliance on the absence of a duty of care owed by the motorist to people other than those in the vicinity of the accident. He considered that the extent of liability should: (p 420D)

> "… rest upon a common principle, namely that, at the margin, the boundaries of a man's responsibility for acts of negligence have to be fixed as a matter of policy."

202. As to what policy reasons justify drawing the line between recoverable survival period earnings and lost years earnings, Lord Wilberforce referred in *McLoughlin* to the additional burden placed on insurers and ultimately upon the class of persons insured. That is an important consideration in the present case where it is the NHS Foundation Trust which is already liable for the £6,866,615 Ritchie J ordered, a sum which did not include any compensation for lost years earnings.

203. The discussion of this boundary by Griffiths LJ in *Croke v Wiseman* is also valuable. He upheld the award for lost earnings during the survival period for an infant victim and did not read *Pickett* as contradicting that. He agreed that there should be no award for lost years but justified the award for the survival period by reference to compelling social reasons: (pp 82-83)

> "However, when one is considering the case of a gravely injured child who is going to live for many years into adult life,

> very different considerations apply. There are compelling social reasons why a sum of money should be awarded for his future loss of earnings. The money will be required to care for him. Take the present case; the cost of future nursing care has been assessed upon the basis of nurses coming in to care for him for part of the day and night. It is not a case where damages have been awarded which will provide a sufficient sum for him to go into a residential home and be cared for at all times. Damages awarded for his future loss of earnings will in the future be available to provide a home for him and to feed him and provide for such extra comforts as he can appreciate. It cannot be assumed that his parents will remain able to house, feed and care for him throughout the rest of his life. If, of course, damages have been awarded upon the basis of the full cost of residential care so that they include the cost of roof and board, any award for future loss of earnings will be small because there will be a very large overlap between the two heads of damage. The plaintiff must not be awarded his future living expenses twice over; this would be unfair to the defendants.
>
> I would, therefore, award this child a sum to compensate him for his loss of earnings during the period that he will live but I would not award any additional sum to compensate him for the lost years."

204. In my judgment the line drawn by Griffiths and Shaw LJJ in *Croke v Wiseman* is the correct line; the claimant has a need for a sum of money to pay for their care during the survival period and that need is met by the award of lost earnings. That can be regarded as a justified exception to the general rule that loss must be proved on the basis of the characteristics of the individual claimant and not on the characteristics of some different person or of the average member of some cohort to which they may belong. But a claimant has no such need during the lost years.

205. I would therefore dismiss the appeal on the basis that damages for lost earnings at least where there is no evidence before the court as to the claimant's earning capacity or individual characteristics should be awarded up to the end of the survival period and should not extend to the lost years.