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The 1COR Quarterly Medical Law Review

Updates and analysis of the latest legal developments

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Welcome to this special issue of the Quarterly Medical Law Review, brought to you by the barristers at 1 Crown Office Row.

In this special issue **Lizanne Gumbel QC** explains the Court of Appeal's much awaited judgment in ***Swift v Carpenter*** concerning accommodation claims. She explains the judgment and provides a worked example.

Furthermore, **at 3.30pm** on **Monday, 12 October 2020,** barristers from 1 Crown Office Row, including Lizanne Gumbel QC and John Whitting QC, will be **hosting a Q&A webinar** where all your questions about the judgment will be answered. For further details, please email Olivia Kaplan at events@1cor.com.

Send us your questions, queries or concerns - at medlaw@1cor.com, or on Twitter at @1corQMLR.

Previous issues can be found on our website.

ACCOMMODATION CLAIMS – SWIFT V CARPENTER

Lizanne Gumbel QC

Swift v Carpenter [2020] EWCA Civ 1295

The Issue on the Appeal

Whether an award should be made to the Claimant to fund the additional capital cost required by the Claimant to purchase suitable accommodation for her disabled needs.

The trial Judge (Mrs Justice Lambert) found that the Court was bound by the decision in *Roberts v Johnstone [1989] QB 878* to make no award when there was a negative discount rate.

The Judge had heard no expert evidence on possible methods of compensating the Claimant for the capital cost if *Roberts v Johnstone* could be departed from.

The Court of Appeal considered expert evidence on alternative methods of calculating compensation for the increased capital cost of purchasing suitable accommodation including evidence introduced by the Intervenor – The Personal Injury Bar Association – from an actuary Mr Watson who conducts a business in auctioning and valuing reversionary interests. The Appellant adopted his evidence and the Respondent called Mr Robinson in response.

The Appellant and the Respondent called evidence from actuaries, the Appellant from Mr Daykin and the Respondent from Ms Angell.

The Appellant called evidence from Mr Cropper, financial adviser.

The background to the Swift case that was subject to the Appeal

On 31 October 2013 the Appellant was a front seat passenger in a motor car driven by the Respondent. She was badly injured in a collision for which the Respondent was responsible. At the time of the accident the Appellant and Respondent were partners and they have since married and have a child.

The Appellant sustained serious injuries in the collision. She had to undergo an amputation of her left lower leg and had significant disruption of the right foot. She was a very active and sports-oriented individual and has made sustained efforts at rehabilitation. She has had continuing difficulties which it is not necessary to set out in detail, but they include severe continuing "phantom pain" in the amputated foot and continuing complications from the disruption of the structure of the right foot.

The Judge made a lump sum order in the sum of £4,098,051. She found that the additional capital cost of the required special accommodation would be £900,000 more than the value of the Appellant's existing home.

The Judge awarded nothing for the capital cost but £260,000 for adaptations.

The Court of Appeal's Decision

The Court of Appeal allowed the Appellant's appeal and awarded the Appellant the capital sum of £801,913 taking the Judge's assessment of £900,000 and reducing this by the value of the reversionary interest which the Court assessed as £98,087 using a 5% discount rate and life expectation based on Table 28 (now Table 36).

The Court of Appeal's Reasoning in Not Following the Decision in Roberts v Johnstone

All 3 Judges in the Court of Appeal recognised that the reasoning in *Roberts v Johnstone* no longer provided a fair way of calculating compensation in modern economic circumstances.

Lord Justice Irwin stated at [203]:

In my view, for the reasons given [69, 71-80], this court is not bound to follow the approach to compensation for the incremental cost of property purchase attributable to the injury, formulated in Roberts v Johnstone.

Again, for the reasons given above [100-101, 140-148], ***that approach is no longer capable in modern conditions of delivering fair and reasonable compensation to a claimant****. The 'cash-flow' analysis said to justify that approach itself comprises such a level of conjecture, such complexity and such uncertainty of outcome that in my view it cannot be demonstrated to achieve fair and reasonable compensation.*

Lady Justice Nicola Davies stated at [212]:

"At the core of the determination of this court is the principle of law that a claimant is entitled to full and fair compensation for injury sustained as a result of the defendant's tort. The principle provides the legal basis for an individual's right to claim and to be awarded damages, the purpose of which is to place that claimant, as far as is reasonably possible, in the position he or she would have been absent the injury. It does not entitle the claimant to be compensated for more than the loss which has been sustained as a result of the defendant's tort.

Roberts v Johnstone represents guidance as to how compensation should be quantified in respect of the purchase of appropriate accommodation, so as to avoid a windfall to the claimant. ***It is guidance which reflected economic***

conditions at the time it was determined, conditions which have since materially changed. *As a result, the challenges now faced by claimants resulting from low or negative discount rates render the Roberts v Johnstone guidance ineffective in achieving its desired aim.*

Lord Justice Underhill stated at [220]:

"My starting-point is that I do not believe that the approach taken in Roberts v Johnstone produces fair compensation in the circumstances of this case.

In my view the nature of the issue in Roberts v Johnstone, and the rationale for the proposed solution, are such that the court must be taken to have understood that that solution was dependent on the broad economic conditions on the basis of which it made its decision continuing to obtain.

Although we are holding that we are free to depart from Roberts v Johnstone, ***that is because of the changes in economic conditions since it was decided, which mean that a claimant would now receive no award whatsoever in respect of their accommodation needs****: it is debatable whether that justifies us in going behind the Court's assumption, which was necessary to its reasoning, that it was acceptable for the plaintiff to have to fund the capital cost of the accommodation out of other elements in the damages."*

The Decision for Long Life Expectation Cases

In long life expectation cases the position is that the Claimant is entitled to the full capital cost of the additional cost of purchasing the property that is needed and working out the reversionary interest.

In this case the cost of the new property required was £2,350,000 and the value of the Claimant's uninjured property was £1,450,000. The Judge found the additional cost that the Claimant required was £900,000.

The Court of Appeal found that this sum of £900,000 should be recovered in full, subject to a reduction for the reversionary interest at the date of her death.

Calculating the reversionary interest: There are two suggested methods for calculating the reversionary interest. In the author's view, the first method is much simpler than the latter, but both are set out below.

Method 1: The reversionary interest can be calculated by using Table 36 life expectation in Ogden 8 (previously Table 28) and a discount rate of 5%. The 5% calculation is not included in the current tables but was included in earlier editions of the Ogden tables in Table 38. We have appended the 5% column to assist readers.

The Claimant in this case had a life expectation of 45.43 years – using the 5% discount rate from Table 35[1] multiplier for accelerated receipt is 0.1090.[2]

In the present case, therefore, the calculation is:

£,2,350,000 - £1,450,000 = £900,000

£900,000 x 0.1090 = £98,100.

This is slightly different from the figure calculated in the judgment, but is close.

Method 2: The other way is to use the formula: Capital sum x 1.05 to the power of -45.43.

In the present case, therefore, the calculation is:

£2,350,000 - £1,450,000 = £900,000

£900,000 x $1.05^{-45.43}$ = £98,087.

[1] Previously Table 27, or more previously Table 37.

[2] Between the multipliers for ages 45 and 46.

For those wondering how to calculate 'powers of' – the **^** symbol can be used in formulas in Microsoft Excel. For example inside a cell, one can insert "=900000*1.05^-45.43." On calculators the symbol x^y and **^** is common.

Lord Justice Underhill pointed out that in most cases the date at which the reversionary interest should be calculated was the date of death, but that there would be rare cases where it would be an earlier date if the Claimant had a formulated plan to move into residential care at a future time. He stated in this respect at [229]:

"*There must always be a possibility that the claimant's need for the additional element in their accommodation will come to an end, or the cost of it be reduced, at a date significantly earlier than their death – for example, if they move to a cheaper property later in life or live their last years in a nursing home or with a relative. It is true that some additional costs attributable to the injury may continue under the new arrangement, but not always and certainly not necessarily to the same degree. In such a case there would be a release of capital at that point, and a valuation on the basis that the notional reversion falls in only at the date of death will result in over-compensation. Irwin LJ acknowledges that possibility, but says that it will occur only rarely. I am not sure that I agree about that. However, I would still agree with him that the reversion should be valued at the predicted date of death (except perhaps in unusual circumstances where the probability of a substantially earlier release of capital was high). The scenarios in which a pre-death release of capital may occur are simply too variable and too uncertain for an appropriate adjustment to be quantified in any way that was not mere guesswork; and the adjustment would not in any event be substantial in the context of the overall valuation given that it would be intended to reflect events at the distant end of the relevant period. In those circumstances the modest degree of over-compensation which a valuation based on life-expectancy would entail is in my view justifiable by the needs of practical justice. In this connection I note what Irwin LJ says at para. 205 of his judgment. The difference between, on the one hand, acknowledging a degree of over-compensation because of the impossibility of devising a workable way of avoiding it and, on the other, pragmatically treating uncertainties of this kind as part of an overall fair and reasonable assessment seems to me rather elusive; but I think the former description is better because more transparent."*

The Decision for Short Life Expectation Cases

It was pointed out by Lord Justice Underhill at [228] that:

"Having said all that, I must emphasise that I am concerned only with a case of the present kind, where the claimant has a long life expectancy. In such a case the application of a discount rate of 5% (which, to anticipate, I agree is the correct rate) will mean that the shortfall between the cost of the additional element and the amount awarded will typically be comparatively small and, as Irwin LJ puts it at para. 185, the gap between the need and the damages following deduction of the present value of reversionary interest should be capable of being bridged without creating substantial difficulties for the claimant. ***The position will be different in short life-expectancy cases, of the kind illustrated by paradigm 3. As Irwin LJ says at paras. 170 and 209,[3] these may require a different approach.***

Lord Justice Irwin stated at [210]:

"*I accept the submission of the Intervener that this guidance should not be regarded as a straitjacket to be applied universally and rigidly.* ***There may be cases where this guidance is inappropriate****. However, for longer lives, during conditions of negative or low positive discount rates, and subject to particular circumstances, this guidance should be regarded as enduring."*

Comment

This judgment is good news for Claimants with a reasonable residual life expectation but disappointing in failing to provide a solution for short life expectation cases.

[3] These paragraph references appear to be incorrect, and likely ought to be paragraphs 171 and 210.

DISCOUNTING FACTORS FOR TERM CERTAIN

Factor to discount value of multiplier for a period of deferment

Currently Table 35 in Ogden 8, previously Table 27 and prior to that, Table 37

Term 5.0%

Term	Discount rate of 5.0%	Term	Discount rate of 5.0%
1	0.9524	41	0.1353
2	0.9070	42	0.1288
3	0.8636	43	0.1227
4	0.8227	44	0.1169
5	0.7835	45	0.1113
6	0.7462	46	0.1060
7	0.7107	47	0.1009
8	0.6768	48	0.0961
9	0.6446	49	0.0916
10	0.6139	50	0.0872
11	0.5847	51	0.0831
12	0.5568	52	0.0791
13	0.5303	53	0.0753
14	0.5051	54	0.0717
15	0.4810	55	0.0683
16	0.4581	56	0.0651
17	0.4363	57	0.0620
18	0.4155	58	0.0590
19	0.3957	59	0.0562
20	0.3769	60	0.0535
21	0.3589	61	0.0510
22	0.3418	62	0.0486
23	0.3256	63	0.0462
24	0.3101	64	0.0440
25	0.2953	65	0.0419
26	0.2812	66	0.0399
27	0.2678	67	0.0380
28	0.2551	68	0.0362
29	0.2429	69	0.0345
30	0.2314	70	0.0329
31	0.2204	71	0.0313
32	0.2099	72	0.0298
33	0.1999	73	0.0284
34	0.1904	74	0.0270
35	0.1813	75	0.0258
36	0.1727	76	0.0245
37	0.1644	77	0.0234
38	0.1566	78	0.0222
39	0.1491	79	0.0212
40	0.1420	80	0.0202

EDITORIAL TEAM

Rajkiran Barhey (Call: 2017) – Editor-in-Chief

Rajkiran accepts instructions in all areas of Chambers' work and is developing a broad practice, particularly in clinical negligence, personal injury, inquests and public law and human rights. Kiran joined Chambers as a tenant in September 2018 following successful completion of a 12-month pupillage. She is currently instructed by the Grenfell Tower Inquiry and has recently undertaken a secondment at a leading clinical negligence law firm.

Jeremy Hyam QC (Call: 1995, QC: 2016) – Editorial Team

Jeremy is a specialist in clinical negligence, administrative and public law, inquests, public inquiries, and professional regulatory work. He has particular experience in all aspects of health law and has appeared in a number of leading cases in the field at all levels including in the Supreme Court and Privy Council.

Shaheen Rahman QC (Call 1996, QC: 2017) – Editorial Team

Shaheen Rahman QC specialises in public law, clinical negligence and professional discipline. Recognised by the legal directories as a leading practitioner in multiple areas, she is instructed in complex and high value clinical negligence matters including catastrophic brain injury cases, has particular expertise in judicial review challenges to healthcare funding decisions, appears at inquests involving detained or otherwise vulnerable patients and acts for healthcare professionals in regulatory and MHPS proceedings.

Suzanne Lambert (Call: 2002) – Editorial Team

Suzanne has a broad practice, with a particular focus on healthcare/medical law. She has experience mainly in clinical negligence and inquests, but also in disciplinary law and judicial review. Suzanne is instructed by claimants and defendants in a wide variety of cases involving serious and catastrophic injuries e.g. cerebral palsy, spinal injuries, loss of fertility, and delayed diagnosis of cancer. She has experience with complex legal issues such as contributory negligence, apportionment between defendants, and consent.

Matthew Flinn (Call: 2010) – Editorial Team

Matt's practice spans all areas of Chambers' work, including clinical negligence, personal injury, public law and human rights. He is developing particular expertise in inquests, and clinical and dental negligence claims, acting for both claimants and defendants. He undertakes a wide range of advisory and court work. He also has experience in information law and has advised in private litigation stemming from the Data Protection Act 1998.

Dominic Ruck Keene (Call: 2012) – Editorial Team

Dominic has considerable experience of acting in clinical negligence claims for both claimants and defendants: drafting pleadings, advising on merits, quantum and settlement; successfully representing parties at RTMs and at mediation; as well as appearing in case management hearings, application hearings, and at trial in both the county and High Courts. As a result of his background in the Army, Dominic has a particular interest and expertise in all nature of cases involving service personnel and National Security. He is on the Attorney General's C Panel.

CONTRIBUTORS

Elizabeth-Anne Gumbel QC (Call: 1974, QC: 1999) – Contributor

Elizabeth-Anne Gumbel QC is a leading practitioner in Clinical Negligence and Personal Injury claims. Lizanne has a distinguished reputation for representing Claimants with highly complex claims for catastrophic injury. In clinical negligence she has particular expertise and experience in birth damage and neo-natal claims but acts in claims arising in a wide range of circumstances. In personal injury she acts for Claimants with head injuries, spinal injuries and other complex multiple injuries.