APPEAL NO. B3/2018/2189

ON APPEAL FROM THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
MRS JUSTICE LAMBERT DBE
BETWEEN:

CHARLOTTE SWIFT ("APP")

Appellant/Claimant

-and-

MALCOLM CARPENTER ("RESP")

Respondent/Defendant

APPELLANT'S REPLACEMENT SKELETON ARGUMENT

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1. Summary

1.1. The Appellant's argument in summary is as follows:

1.2. The Court has the power to revisit R v J and should do so.

1.3. The primary objectives must be to compensate claimants and enable them to acquire the special accommodation that the Court has determined they reasonably need;

1.4. The parties to this action are not beneficiaries under a trust or parties to a contract; they do not each have interests in property which must be treated equitably. The Respondent is a tortfeasor; the Appellant is the victim of negligently inflicted personal injury. She did not choose to be in that position; the purpose of the assessment hearing was to quantify and award tortious damages as compensation for her injuries.

1.5. Whilst a windfall may be undesirable, it should not be paramount. It should be ranked below: -

1.5.1. The principle of achieving full compensation;

1.5.2. Enabling injured claimants to purchase the special accommodation they are found to need;

1.5.3. Establishing a workable system that will provide clarity and certainty to future courts and parties as to how accommodation claims are to be assessed.

1.5.4. The solution in the Appellant's case should do justice to the particular facts of her case;

1.6. Insofar as possible, it would be desirable to lay down guidance that will produce a satisfactory solution in other cases, including the paradigms.

1.7. If not, it may be possible to indicate potential solutions and/or identify the type of evidence that other cases will require.

1.8. Plainly solutions that would be unworkable; involve disproportionate costs or enquiries on a case by case basis; involve speculative future assessments; spawn satellite litigation; and/or prevent parties negotiating with clarity should not be adopted.

1.9. Viable solutions, having regard to the objectives set out above, appear to be as follows in order of preference : -

1.9.1. Full capital value;

1.9.2. Full capital value, less market value of the reversion, as per Mr. Watson's valuation;

1.9.3. Full capital value, less market value of the reversion, provided defendants are prepared to buy the RI at the market value, if a claimant elects for them to do so. (see §§17.5-17.6 below)

2. Permission to Appeal

2.1. Permission to appeal was granted by the judge: -

2.2. As to Ground 1 of the Appellant's appeal, the judge acknowledged **[AB/Tab7/102-104]** that she *"expressed no view on the merits of the various approaches which were put forward…" having found that she was "…bound by the Court of Appeal's judgment in Roberts v Johnstone and awarded no damages".*

2.3. As to Ground 2 of the appeal, the judge recorded that **[AB/Tab7/104]**: -

"There exists an important point of principle which the Court of Appeal needs to resolve as to "whether the Roberts v Johnstone formula remains consistent with the principle of full restitution";

ii) Even if the current discount rate were to increase, "…the application of the formula produced anomalous results even when the discount rate was 2.5%", to include "scenarios in which the shortfall between the damages awarded and the sum needed to fund the property may be so great that the property could not be purchased"; and

iii) "…there is a real issue now as to whether the formula remains fair and fit for purpose in the current economic climate of high housing prices, low interest rates and the use of PPOs for the delivery of damages for care."

3. Introduction to Special Accommodation Claims and Roberts v Johnstone

3.1. Claimants who are severely injured often find that the properties in which they are living or had planned to live are no longer suitable for them. Catastrophically injured claimants nearly always have substantial accommodation needs as do those whose injuries have left them with a disability affecting their mobility.

3.2. This Appellant, Charlotte Swift, is no exception having suffered crushing injuries to both feet and lower legs requiring a left sided below knee amputation. The Defendant was the driver of the vehicle, now her husband but, of course, the litigation was conducted by his insurers who are in effect institutional litigants.

3.3. The Claimant was aged 44 and has average life expectancy. A lifetime multiplier of 55.02, based on a minus 0.75% discount rate, was considered appropriate at trial. This is the appropriate multiplier for an average female aged 43.58 years.

3.4. The trial related to the assessment of damages alone.

3.5. The need for accommodation to be purchased at a cost beyond that which the Appellant would otherwise have acquired for herself and her family was accepted.

3.6. The loss to a Claimant caused by the need to purchase alternative (or special) accommodation is calculated by reference to a formula. It is usually referred to as a "Roberts v Johnstone" calculation after the case in which it was advanced and then approved by the Court of Appeal; *Roberts v Johnstone [1996] PIQR 30* ("RvJ" or "Roberts v Johnstone") **[Authorities1/Tab12]**

3.7. In fact, the principles by which accommodation claims are determined derive from the earlier case of *George v. Pinnock [1973] 1 WLR 118* (per Orr LJ at p.124) **[Authorities1/Tab7/124]** which denied a claimant the full additional capital cost.

3.8. The RvJ formula is based upon the premise that what is to be compensated is the cost to the Claimant of devoting more capital to accommodation not the cost of the accommodation itself because that is an asset which retains its value.

3.9. The RvJ solution is to multiply the increased capital required to buy the alternative accommodation by a percentage discount rate (until quite recently and therefore for most of the period during which the formula has been applied the rate was 2.5%). This produces an annual multiplicand which is then multiplied by the Claimant's life multiplier. The multiplier is in turn derived from a table based upon the same discount rate. The effect of a minus discount rate is to increase the multiplier. However, as with any equation containing a negative figure, the overall result becomes a negative.

3.10. The trial judge considered herself bound by RvJ to calculate the multiplicand by reference to the discount rate in force at the time of trial (-0.75%). This resulted in a nil award for special accommodation. The discount rate is now -0.25%. This makes no difference to the real world outcome unless defendants were to take the position that claimants are

required to repay money.

3.11. The Appellant contends that the judge was wrong to regard herself as compelled to reach a result that produced no compensation for a loss that arose directly from the injury. In any event she submits that this court is not in that position.

3.12. The appropriate course would have been to identify the loss and award damages for that loss. It was illogical to say that the Appellant had no loss when the judge had found as a fact that she would have to pay £900,000 more than would otherwise have been the case for her accommodation.

3.13. The approach set out in RvJ does not have the force of statute or set out a binding statement of the law.

3.14. In the alternative, if the judge was bound to reach a nil award for accommodation, the Appellant contends that the method of calculating damages for future accommodation set out within RvJ has finally become unworkable having already produced the outcome in many cases (even where calculated on a 2.5% basis) that claimants have been left without sufficient funds to purchase property. In these circumstances, the mechanism by which a claimant is compensated for future accommodation needs should be reconsidered and a different methodology applied.

3.15. At the time of the decision in RvJ the prospect that it would produce nothing at all or even a sum which could not be found from unallocated damages was not in prospect. It was not a solution for all seasons and times. It was a pragmatic solution which has now ceased to be any solution at all.

4. The Court's Powers

4.1. The Court may award damages as a lump sum or in the form of a Periodical Payments (since the coming into force of the Damages Act 1996 **[Authorities3/Tab36/863]**).

4.2. Whilst these might be regarded as fairly blunt powers if complex solutions are required they are allied to the ability of the court under the common law to provide a more finely tuned remedy by means of its characterisation of the nature of the loss. The case of *George v Pinnock* and those which follow are examples of the court both characterising the loss and then adjusting the mechanism for achieving a remedy in the face of changing circumstances.

4.3. The claimant also has a duty to mitigate loss. In many cases, for example, claimants will have needed to rent a property while awaiting the final assessment of damages. Whilst discount rates were positive, proposals that claimants should continue to rent over long periods were generally met by the argument that this amounted to a failure to mitigate where the overall cost of rental would exceed the cost of purchase.

4.4. Mitigation proposals might have proved a fertile source of alternative solutions to the problems posed by RvJ particularly if they had led to offers of loans by defendants; a solution favoured by the Civil Justice Civil Justice Council in its report "Accommodation Claims: Roberts v Johnstone" dated 29th October 2010 **[Authorities3/Tab43]**. Whilst there may be regulatory requirements to be met it would not be beyond large institutional litigants to put themselves in a position where they could offer loans on appropriate terms. In practice there has been no incentive for them to do so whilst the operation of RvJ moved increasingly in their favour.

5. Tortious Damages - The Starting Point

5.1. The Court's task in assessing damages for personal injuries is to arrive at a figure, whether by lump sum or PPO, which represents as nearly as possible full compensation for the injury which the claimant has suffered; the purpose of the award is to put the claimant in the same position, financially, as if she had not been injured[1].

[1] (see cases from Livingstone v Rawyards Coal Co. (1880) 5 App. Cas. 25 per Lord Blackburn at 39 **[Authorities1/Tab2/19]**, to Wells v Wells [1999] 1 AC 345 per Lord Lloyd at 364 **[Authorities1/Tab16/315]**)

5.2. In *Wells v. Wells [1999] 1 AC 345*, Lord Lloyd observed **[Authorities1/Tab16/314-5]**:

"It was common ground between all parties that the task of the court in assessing damages for personal injuries is to arrive at a lump sum which represents as nearly as possible full compensation for the injury which the plaintiff has suffered…

It is of the nature of a lump sum payment that it may, in respect of future pecuniary loss, prove to be either too little or too much. So far as the multiplier is concerned, the plaintiff may die the next day, or he may live beyond his normal expectation of life. So far as the multiplicand is concerned, the cost of future care may exceed everyone's best estimate. Or a new cure or less expensive form of treatment may be discovered. But these uncertainties do not affect the basic principle. The purpose of the award is to put the plaintiff in the same position, financially, as if he had not been injured. The sum should be calculated as accurately as possible, making just allowance, where this is appropriate, for contingencies. But once the calculation is done, there is no justification for imposing an artificial cap on the multiplier. There is no room for a judicial scaling down. Current awards in the most serious cases may seem high. The present appeals may be taken as examples. But there is no more reason to reduce the awards, if properly calculated, because they seem high than there is to increase the awards because the injuries are very severe.

5.3. And more recently in the Supreme *Court in Knauer v. Ministry of Justice [2016] AC 908* **[Authorities2/Tab29/736]**:

"It is the aim of an award of damages in the law of tort, so far as possible, to place the person who has been harmed by the wrongful acts of another in a position in which he or she would have been had the harm not been done; full compensation, no more but certainly no less. Of course, there are some harms which no amount of money can properly redress… There are also harms which it is difficult to assess, especially for those which will be suffered in the future, but the principle of full

compensation is clear."

5.4. That case, albeit when considering the approach to calculation of damages in cases under the Fatal Accidents Act 1976, recognised that the quantification of damages in personal injury claims in the 1970's and 1980's was intuitive and unsophisticated **[Authorities2/Tab29/739]**:

"…The short answer is that both cases were decided in a different era, when the calculation of damages for personal injury and death was nothing like as sophisticated as it now is. In particular, the courts discouraged the use of actuarial tables or actuarial evidence as the basis of assessment, on the ground that they would give 'a false appearance of accuracy and precision in a sphere where conjectural estimates have to place a large part'. Hence '[t]he experience of practitioners and judges in applying the normal method is the best primary basis for making assessments'. Lord Pearson in Taylor v. O'Connor [1971] AC 115,140. Rather like the assessment of the 'tariff' in criminal cases, the answer lay in the intuition of the barristers and judges who appeared in these cases. This was wholly unscientific. Counsel in the current case were agreed that, when they started at the Bar, the conventional approach to deciding upon the multiplier was to halve the victim's life expectancy and add one year, with a maximum of 16 to 18 years. This is an approach which depends on 'being in the know' rather than reality"

5.5. In the context of a claim for damages, as here, to meet a need arising from the claimant's injury, the appropriate question for the court is "what is required to meet the claimant's reasonable needs?" [2]

5.6. The Appellant has established that she requires special accommodation to meet her reasonable needs. This has been quantified by the judge's findings as an additional £900,000, being the difference between the value of her current home (£1.45m) and the reasonable purchase price of special accommodation (£2.35m).

[2] (See Sowden v Lodge [2005] 1 WLR 2129 per Longmore LJ at [94] **[Authorities2/Tab21/508]** and Pill LJ at [11]ff **[Authorities2/Tab21/489]**).

5.7. The Appellant's damages under this head should be sufficient to enable her to be provided, at no extra cost to herself, with that special accommodation. Otherwise, she will not have been provided with enough damages to meet her reasonable needs; the purpose of tortious damages will not have been achieved.

5.8. The principle of restitution means that the court should strive not to provide any element of betterment for a claimant. Sometimes this cannot be avoided.[3]

5.9. If a claimant obtains an incidental benefit in respect of unavoidable betterment, it should be ignored in the assessment of damages (See the summary of the law given by *Lord Hope in Lagden v O'Connor [2004] 1 AC 1067 at [34]*) **[Authorities2/Tab20/460]**.

5.10. This is because the court must address the issue from the point of view of the claimant, rather than that of the tortfeasor. As Lord Hope observed in *Longden v British Coal Corpn. [1998] AC 653 at 670* **[Authorities1/Tab15/293]**:

> *"The principle is that the plaintiff must be compensated, but no more than compensated for his loss. As Dixon CJ indicated in the High Court of Australia in National Insurance Co. of New Zealand Ltd v Espagne (1961) 105 CLR 569, 572 not much assistance is to be found in contemplating the supposed injustice to the wrongdoer. The concern of the court is to see that the victim is properly compensated. There must, of course, be no element of double recovery for the same tort."*

5.11. The comment in R v J that *"…the object of the calculation is to avoid leaving in the hands of the plaintiff's estate a capital asset not eroded by the passage of time"* (Per Stocker LJ at 893 **[Authorities1/Tab12/225]**) is, at best, an incomplete statement of the law. The object is, more

[3] (See, for instance, Harbutt's Plasticine v Wayne Tank and Plump Co. [1970] 1 QB 447 **[Authorities1/Tab6]** and the other cases referred to at fn 15 to 4.11 of the Law Commission's Report "Damages for Personal Injury: Medical, Nursing and Other Expenses; Collateral Benefits" **[Authorities3/Tab38/894]** and McGregor on Damages (19th ed.) at 2-007 **[**20th Edition at 2-008 **Authorities3/Tab48/1101, 1103]**).

accurately, to provide such damages as enable the claimant to meet her reasonable needs.

5.12. There is, however, room for a defendant to contend that the claimant has failed to mitigate her loss; just such an argument was run in *Wells* in the context of the discount rate (The House of Lords rejected the defendant's contention that the claimant failed to mitigate her loss by not investing in equities: see 366-7 **[Authorities1/Tab16/317]**). So if the defendant proves that the claimant should have taken steps to reduce the cost associated with meeting the need for special accommodation, she will not be entitled to recover the amount claimed but the lesser amount that would equally have met her reasonable need.

6. The Legal Framework in relation to Accommodation Claims

6.1. The relevant line of authorities begins with *George v. Pinnock [1973] 1 WLR 118* (per Orr LJ at p.124 **[Authorities1/Tab7/124]**):

> *"For the plaintiff it has been contended, in the first place, that she should receive as additional damages either the whole or some part of the capital cost of acquiring the bungalow, since it was acquired to meet the particular needs arising from the accident. But this argument, in my judgment, has no foundation. The plaintiff still has the capital in question in the form of the bungalow.*
>
> *An alternative argument advanced was, however, that as a result of the particular needs arising from her injuries, the plaintiff has been involved in greater annual expenses of accommodation than she would have incurred if the accident had not happened. In my judgment this argument is well founded, and I do not think it makes any difference for this purpose whether the matter is considered in terms of a loss of income from the capital expended on the bungalow or in the terms of annual mortgage interest which would have been payable if capital to buy the bungalow had not been available. The plaintiff is, in my judgment, entitled to be compensated to the extent that this loss of income or notional outlay by way of mortgage interest exceeds what the cost of her*

accommodation would have been but for the accident. She would also, in my judgment, have been entitled to claim the expenses of any new items of furniture required because of that condition, but there was no evidence before the judge under either of those headings. As to the increased cost of accommodation, if any, it was, as I have said, agreed that we should make the best estimate that we could on the available material, and the matter can only be approached on a broad basis".

6.2. The ratio was accordingly that the Claimant has not incurred a loss in purchasing property. The Claimant has been forced to convert one form of capital (cash) into another form of capital (property).

6.3. This re-allocation of capital theory is predicated on the basis that the Claimant has capital to re-allocate. This necessarily assumes that the injured party will utilise free capital (general damages) or raise capital through loans to purchase accommodation.

6.4. In *Chapman v. Lidston* (unreported but referred to within Roberts v. Johnstone [1989] 1 QB 878 **[Authorities1/Tab12/223]**) Mr Justice Forbes adjusted the mortgage rates in force at the time to allow for tax relief.

"The mortgage interest on that is at present running, as I am told, at 10 per cent, but, of course, one gets tax relief on that, which at the present rate would reduce it, in effect, to 7 per cent so that the actual extra mortgage cost would be £1,400. That again, it seems to me, having regard to the lifespan we have been talking about and the multipliers I have been using is one to which the full multiplier should be applied"

6.5. In *Roberts v Johnstone*, Lord Justice Stocker considered an appeal relating to a claim on behalf of a young girl suffering from profound physical and cognitive disabilities. Part of her claim related to the purchase of a suitable bungalow; the cost of the purchasing the bungalow was £76,500, from which the claimant offset £18,000 representing the property that the claimant would have purchased in any event. The claimant received general damages of £78,300 (including interest). The

claimant could, accordingly, comfortably pay for her property out of her award of general damages.

6.6. After describing *Chapman v. Lidston*, Lord Justice Stocker said **[Authorities1/Tab12/223-5]**:

"…The figures to which he was applying the calculation did not produce any anomaly; but, applying his reason to the present case, a higher rate than 7 per cent would seem appropriate, since the tax relief is under present legislation granted only in respect of the first £30,000; the rest would not qualify. The appropriate rate would therefore be 9.1 per cent, which would produce an even larger windfall and would leave the capital asset intact.

In our view, the answer to this problem is to be found in the reasoning of Lord Diplock in his speech in Wright v. British Railway Board [1983] 2 AC 773, where he said, at p.781G

> *'In times of stable currency the rate of interest obtainable on money invested in Government stocks includes very little risk element. In such times it is, accordingly, a fair indication of the 'going rate' of the reward for temporarily foregoing the use of money. Inflation, however, when it occurs, exposes all capital sums of money that are invested temporarily in securities of any kind instead of being spent at once on tangibles to one form of risk, amounting to a certainty, that upon realising the security there will be some reduction in the 'real' value of the money received for it, whatever kind of risk the security selected for investment may attract.*

He went on to consider the rates of interest in times of inflation, and observed at p.783:

> *'The experts' examination of the rate of return obtained upon a range of investments that were not inflation-proof but in which the risk element, apart from inflation, was small led him to the conclusion that no better return than 2 per cent in excess of the*

> *rate of inflation could be expected during that period of recession and inflation as the real reward for foregoing the use of money… I see no grounds for rejecting for the tie being the 2 per cent rate adopted by the Court of Appeal in Birkett v. Hayes as the rate to be used for calculating the conventional interest on an award of damages for non-economic loss that the statute requires the courts to include in the sum for which judgment is given"*

Lord Diplock was in these passages concerned with the appropriate interest rates for non-economic loss, and the reasoning may therefore be said to be inappropriate to economic loss such as the notional cost of mortgage interest on acquired property. It seems to us, however, that where the capital asset in respect of which the cost is incurred consists of house property, inflation and risk element are secured by the rising value of such property particularly in desirable residential areas, and thus the rate of 2 per cent would appear to be more appropriate than that of 7 per cent or 9.1 percent, which represents the actual cost of a mortgage loan for such a property.

We are reinforced in this view by the fact that in reality in this case the purchase was financed by a capital sum paid on account on behalf of the defendants by way of interim payments, and thus it may be appropriate to consider the annual cost in terms of lost income and investment, since the sum expended on the house would not be available to produce income. A tax-free yield of 2 per cent in risk-free investment would not be a wholly unacceptable one. Mr McGregor, for the defendants, objects that if a rate of 2 per cent is adopted then the multiplier of 16 would be far too low and a substantially higher multiplier should be adopted resulting much the same anomaly. For our part we would reject this argument, since the object of the calculation is to avoid leaving in the hands of the plaintiff's estate a capital asset not eroded by the passage of time; damages in such cases are notionally intended to be such as will exhaust the fund contemporaneously with the termination of the plaintiff's life expectancy"

6.7. In summary the Claimant could easily purchase property from PSLA. The Claimant was not incurring a loss but re-allocating capital. Mortgage interest rates applying a multiplier/multiplicand approach resulted in an award of more than the capital value. The Claimant's loss was the loss of a return on her investment of PSLA.

6.8. The Claimant was in effect expected to invest PSLA damages to meet the shortfall but acquired an appreciating asset in the form of property.

6.9. The approach has been the subject of much professional and academic criticism (see McGregor on Damages paragraph 40-204 **[Authorities3/Tab48/1106]**):

"Unfortunately, the Court of Appeal [in Roberts v. Johnstone) went to the other extreme and awarded only the 2 per cent contended for by the defendant. This percentage was derived from that adopted by the House of Lords in Wright v. British Railways Board for interest on non-pecuniary loss in personal injury claims. But it is thought that the analogy from Wright v. British Railways Board is a poor one, especially when that decision can be interpreted as reflecting a policy to cut back on interest for non-pecuniary loss which, it is strongly arguable should never have been allowed in personal injury claims at all. The practical result of this move to a 2 per cent rate at a time when multipliers were still worked out on a 4.5 per cent discount rate was that claimants would at best obtain by way of damages in the region of a third only of the capital cost of their new accommodation – 30 per cent on a multiplier of 15, 36 per cent on one of 18 – and were forced to resort to the monies awarded for general damages for non-pecuniary loss and, to the extent that they could afford to, to the award for loss of earning capacity, for the remaining funding of the special accommodation to which they were entitled."

6.10. R v J also produces anomalies in cases where claimants have short life-expectancies, or where damages are reduced for contributory negligence or following an agreement on liability (See McGregor on Damages 40-206 **[Authorities3/Tab48/1106]**: *"Yet the inequity of not allowing the*

claimant sufficient money with which to acquire the needed accommodation, which the Roberts v. Johnstone method, however applied does not give, remains to a degree and in very many cases to a very substantial degree"). Moreover it does not in fact avoid a windfall to the estate for those with a longer life-expectancy.

6.11. Thus the calculation, as it was originally performed, disjointed the calculation of the multiplier from the multiplicand. This aspect of the calculation was ameliorated in *Wells* by tying the multiplicand to discount rate which at 2.5% until 2017 produced approximately 75% of the capital sum. However the real world value of the shortfall has grown so that the in modern age claimants cannot purchase accommodation with 'unallocated damages'.

6.12. Lord Justice Tomlinson in *Manna v. Central Manchester University Hospitals NHS Foundation Trust [2017] EWCA Civ 12* (from paragraph 16) observed **[Authorities2/Tab31/789]**:

"The exercise in which the court is thus engaged is in modern conditions increasingly artificial. The assumption underlying the approach is that the claimant will be able to fund the capital acquisition out of the sums awarded under rubrics other than accommodation. But in modern times residential property prices have increased rapidly while general awards for pain, suffering and loss of amenity have remained at their traditional levels. Whilst Peter is no doubt robbed to pay Paul, it must often be the case that the accommodation assessed by the court as suitable is simply not purchased. A further problem confronts the claimant with immediate and pressing needs but a relatively short life expectancy. A similar problem confronts the claimant who establishes less than 100% liability in the defendant, as here, where the award is only for 50% of the sums regarded as necessary to meet the Claimant's reasonable needs. Thus the award here for the 'second home' is only in fact 50% of the cost of acquiring and adapting suitable accommodation. It seems very unlikely that such a property will in fact be purchased…

Lord Faulks QC, for the Defendant helpfully reminded us of the

observations of Lord Woolf MR in Heil v. Rankin [2001] 2 QB 872 that awards of damages in cases of this field must be at a level which neither results in an injustice to the Defendant nor is 'out of accord with what society as a whole would perceive as being reasonable'. This is salutary, but society as a whole would not perhaps understand that an award elaborately structured in a manner which will ostensibly permit the attainment of a number of objectives desirable in the interests of the disabled claimant might not in fact succeed in enabling the claimant even to acquire the accommodation deemed appropriate for his care… No one suggests that we should on this appeal revisit the imperfect principles which have held sway since the decision of this court in George v. Pinnock [1973] 1 WLR 118.

6.13. *Heil v Rankin* **[Authorities1/Tab17]** should however be approached with caution; see the analysis of Warby J on this point in *A v University Hospitals of Morecambe Bay NHS Foundation Trust [2015] EWHC 366 (QB)* at [9]-[16] **[Authorities2/Tab27/671]**). *"The court's task, in the case of pecuniary damage, is to determine the amount of damages that meet the claimant's reasonable needs; once that calculation is done, there is, as Lord Lloyd put it in Wells (at 364) "…no room for judicial scaling down…".*

6.14. The problems which would be caused by negative discount rates were, presciently, discussed in McGregor on Damages 19th Edition (38.204) **[Authorities3/Tab48/1107]**

"It is high time that the Roberts v. Johnstone problem was tackled and a fair and proper solution found and adopted. The Law Commission looked into the matter some time ago but found it too difficult to formulate an acceptable solution and so recommended that the Roberts v. Johnstone method be retained. The Ogden Working Party is fully aware that the law needs to be righted and has it in mind to investigate the issue in the near future. What could trigger action on this front is a further reduction in the discount rate, the possibility of which, as we have seen, is very much in the air. It is true that, as the discount rate

lowers, the multipliers increase, but an examination of the figures in the tables in Ogden shows that the increases in the multipliers do not come anywhere near to balancing, or off-setting the effect of, the fall in the discount rate. Ironically the injured party will get more for care but less for special accommodation. Indeed should the discount rate move into the negative, which is highly unlikely but did happen in the Guernsey case in the Privy Council of Helmot v. Simon the Roberts v. Johnstone method becomes unworkable; it would produce a nil award".

7. Mortgages

7.1. Another solution favoured by the Civil Justice Council in its 2010 report was a PPO backed mortgage **[Authorities3/Tab43/976]**:

"Under the periodical payments order approach, the claimant would take out an interest only mortgage which would be funded by the order. The defendant would be financing, as it should, the exact cost of the additional accommodation reasonably required as a result of the tortfeasor's negligence."

7.2. A structure whereby the Defendant agreed to meet the interest payments on a commercial mortgage on a PPO basis could provide a solution to the risk of fluctuating mortgage rates but it relies upon such a product being available on a full-life basis.

7.3. The mortgage experts Mr. Smith and Mr. Baxter have reached agreement **[EB2/Tab15/529-532]** that:

(a) It is unlikely that a mainstream lender will accept income based on a PPO in the current market;

(b) Interest only mortgages are generally not widely available in the current market;

(c) Lifetime mortgages are not generally available to younger borrowers;

(d) Whilst lending in later life is an area of growth/development: -

i) They cannot predict what later life products will be available in 35 years' time;

ii) At present, the most suitable product in 35 years' time would be a lifetime mortgage.

(e) Of the various options for indexing mortgage interest rates, the most appropriate benchmark is currently Bank Base Rate.

(f) The paradigms would be "extremely challenging" from a current mortgage acceptability and criteria position

7.4. It would appear that no relevant product exists and whilst it is not impossible that they will be created in the future it is unlikely that commercial lenders will be prepared to provide it in cases of long-life-expectancy where they might not expect repayment of their capital for 40 or 50 years.

7.5. As the Defendant would not retain any interest in the Claimant's property under such a structure, it would be for the Claimant's estate to bear the costs of restoring the property for sale at the conclusion of the Claimant's life. The Claimant's estate would obtain the windfall of any increase in the value of the property over the Claimant's life-time, or bear the burden of any decrease.

7.6. The prospect of mitigating such a windfall of course underpins the ratio in RvJ.

8. Multiplier/Multiplicand Solutions

8.1. Alternative approaches might involve using mortgage or housing sector data as a way of producing a capital sum. This would essentially be an analogue of the RvJ approach with all of its inherent problems. Thus a multiplier/multiplicand approach for life, whether based on mortgage repayments, interest on mortgage repayments or on rental costs, would with the present discount rate result in the Claimant recovering more than the value of the accommodation in the case of longer life-expectancy or a significant short-fall in cases of shorter life-expectancy.

8.2. In the Appellant's case, the lifetime multiplier is such that any mortgage-interest based calculation will lead to an award which exceeds the £900,000. At a 3.8% internet-research based figure **[SP1/Tab8/136-8]**, interest-only payments on £900,000pa equate to annual payments of £34,200. Applying the multiplier of 55.02 gives an award of £1,881,684. For the award to be less than the £900,000, the multiplicand would need to be less than £900,000/55.02 = £16,358, commensurate with a mortgage rate of 1.8175'%. Such a rate would be unachievable.

9. Solutions which are not considered viable

9.1. The parties have prepared a schedule of "Potential Solutions Agreed to be Unworkable" **[SB2/Tab9/39-40]**. For the purpose of this appeal at least and based on the evidence gathered the solutions which are not viable include : -

i) A PPO to fund an interest-only mortgage for life, for the reasons set out above;

ii) A loan (with charge on the property), principally because the Respondent is not in a position to offer such a loan;

iii) Shared ownership; again because of difficulties in the Respondent being able to offer such a solution.

9.2. Both i) and ii) above are solutions which, if offered, would in principle engage a claimant's obligation to mitigate loss if the position was that the full additional capital sum was the starting point.

9.3. From the Appellant's perspective (see further below) the suggestion of some form of equity release in many years' time is also an unworkable solution.

10. Potentially Viable Solutions

10.1. The remaining potential solutions that require consideration are: -

i) R v J (that is to say no change to the present position coupled with the argument that the Appellant has suffered no loss);

ii) Full capital value;

iii) Borrowing from other heads of damages;

iv) Reversionary interests based upon one or both of;

a. Market value

b. 'Fair and reasonable'

11. The Respondent's Position

11.1. The Respondent's starting position is that the Court cannot interfere as it is bound by RvJ.

11.2. It also appears to be suggested that Appellant has suffered no loss because her other heads of loss are greater as a result of the discount rate change. There is also more than a hint of the suggestion that claimants have somehow been overcompensated as a result of that change.

11.3. Finally it is argued that the Court should not interfere because the Appellant can make up any shortfall by borrowing against her home when she runs out of capital.

12. Roberts v Johnstone

12.1. Whilst the House of Lords held in *Wells* that the annual multiplicand should be calculated by reference to the discount rate, both sides accepted that the correct approach was that adopted by this court in R v J (See 380F in the judgment of Lord Lloyd **[Authorities1/Tab16**/331). So the House of Lords did not itself determine that R v J formed the correct (or only) basis for assessing damages relating to the purchase of special accommodation.

12.2. This court has in fact already altered the approach to the calculation of

loss on an entirely pragmatic basis to reflect changes to mortgage rates and reliefs (see the background analysis above).

12.3. The Court (at first instance and/or on appeal) can distinguish R v J as a result of:

12.3.1. The different social conditions that now apply: the cost of a mortgage has changed, the investment potential of money (as determined by the discount rate) has changed over time from the assumed position in *Wells* and so has the relative cost of property and a claimant's ability to purchase one out of damages.

12.3.2. The formula is incapable of working to produce a just result when the discount rate is negative.

12.3.3. Periodical Payment Orders ("PPOs") are now available. Firstly, PPOs limit the scope for obtaining a substantial lump sum interim payment with which to purchase special accommodation and deplete the future loss damages available as a lump sum.

12.3.4. The balance between the capital cost of special accommodation and PSLA awards is now markedly different. In many cases the cost of special accommodation can significantly exceed even the highest PSLA awards.

12.3.5. Impecuniosity is a factor that the court can now take into account when assessing damages.

12.3.6. It is respectfully submitted that the court should distinguish R v J given that it fails to provide the Appellant with such damages as meet her reasonable needs.

13. No Loss because other heads of damage are greater following the discount rate change.

13.1. The cases which preceded the discount rate change involved the claimant recovering a substantial portion of the capital cost where it might be argued that, if the claimant could overcome the initial funding hurdle, the

shortfall could be recovered by an increase in the value of the property over time.

13.2. This is quite different from the contention that the claimant will be fully compensated for her loss if she is given nothing with which to purchase a property. It is trite to then say that a claimant will have to use other damages to cover a shortfall.

13.3. In principle the claimant's unallocated damages (general damages for pain, suffering and loss of amenity) may provide a reserve from which to do so (although it is equally arguable that it is wrong in principle to require claimants to use awards for PSLA for this purpose; it certainly produces very odd results depending on the severity of the injury). But, the failure of the RvJ approach as time has gone by (as identified in *Mana* **[Authorities2/Tab31]**) is that these damages are no longer sufficient for that purpose in most cases and claimants have to raid damages awarded to them to allow them to live (loss of earnings) or for future therapies and other needs.

13.4. This was compounded by the fact that the multipliers for damages were calculated on an increasingly artificial basis and resulted in under-compensation.

13.5. Prior to March 2017 the Discount Rate was set at 2.5% (since 2001). The 2.5% figure reflected the economic position in 2001. In short, a relatively healthy economy with a Bank of England base rate of 4%. A lump sum invested in 2001 would earn a significant rate of interest, justifying a large discount rate. In essence the assumption was that an investment would, over its lifetime, earn around 2.5% above inflation.

13.6. By 2017 interest rates had fallen sharply so that claimants investing lump sum awards were earning minimal interest. It could no longer be assumed that investments would grow. Indeed the risk was that the value of investments would fall over time. Awards which had been discounted by 2.5% were held in accounts paying minimal interest and often shrinking in value. Claimants were often grossly undercompensated and

had been for some time.

13.7. In 2017 the Discount Rate was lowered to -0.75% and a review was announced.

13.8. The government, in reducing the Discount Rate from 2.5% recognised that claimants are risk averse investors who may well, if their injuries are severe, have to rely on a compensation payment for the rest of their lives and rejected the argument put forward by defendants that the average claimant should be expected to invest their money in higher risk, high return investments.

13.9. The later setting of the rate at -0.25% continued to acknowledge both the nature of the risk which claimants should be expected to run and the costs of investment. In other words the adjustment to the rate corrected underpayment. In any event the Appellant has suffered a loss.

13.10. Where a claimant is living in rented accommodation and requires special, more expensive accommodation as a result of her injury, it is self-evident that she will incur a loss (being the difference between the rental cost of the special accommodation and of the pre-accident rental accommodation). The position is the same where the claimant is, prior to the accident, living in her own home and needs special accommodation at an increased capital cost as a result of the accident.

13.11. Even where the claimant is wealthy and has ready access to her own funds so as to purchase the special accommodation, there remains a loss. If, as in RvJ, the court assumes that the new property will increase in line with RPI, it nevertheless remains the position that the claimant has put her own monies into a larger property to meet her own accident-related needs. But for the accident, had the claimant been so minded as to invest this private capital in property, she would have been in a position to rent out the property. In that way, the claimant's capital would be taken to increase in line with RPI and the claimant would benefit from rental income. A similar loss (of capital increase and income) would arise if the claimant had to withdraw funds from investment other than property.

Whether viewed as a loss of investment return or loss of use of her capital, the claimant suffers a loss.

13.12. The vast majority of claimants are not in a position to afford, by independent means, to purchase special accommodation. They are, relative to the costs of special accommodation, impecunious. In *Lagden v O'Connor [2004] 1 AC 1067* **[Authorities2/Tab20]**, the House of Lords elected not to follow the rule laid down in *The Liesbosch [1933] AC 449* **[Authorities1/Tab3]** and held that the claimant's impecuniosity should be taken into account when assessing damages. At para 61, Lord Hope held that **[Authorities2/Tab20/468]**:

"The wrongdoer must take his victim as he finds him…This rule applies to the economic state of the victim as it applies to his physical and mental vulnerability. It requires the wrongdoer to bear the consequences if it was reasonably foreseeable that the injured party would have to borrow money or incur some other kind of expenditure to mitigate his damages."

13.13. An impecunious claimant, who needs to borrow funds in order to fund the purchase of the special accommodation, clearly suffers a loss. The loss is not extinguished if the claimant, in fact, borrows from other damages awarded in respect of different heads of loss; that would impermissibly involve setting off one head of loss against another.

13.14. The loss cannot be ignored by the court because, by virtue of the change in the discount rate, a claimant will recover more than she would have done under a previous (or indeed a future) rate. The rate is a reflection of the accurate cost or loss to a claimant at the material date of trial, upon which she is entitled to have her damages assessed.

14. Borrowing from other heads of damage/Equity Release

14.1. This a species of no loss argument to which there are at least two objections of principle.

14.2. First, it is simply not the way in which damages are calculated. Damages

are arrived at by considering each loss as a head of damage. That has become increasingly more sophisticated in recent times; the exercise produces a more precise and calibrated assessment of what the claimant's loss is in monetary terms. The fact that there is an overall sum is a by-product of the quantification of separate heads. There is no next step or scaling up or down which involves the court in deciding whether and how any of that money should be invested. The Courts are ill-equipped to conduct any such exercise and it is not for the court to tell a claimant with capacity how damages are to be spent. There is in any event no need. The claimant has been fully compensated under each head of loss. If not there can be an appeal in relation to separate heads which does not involve any recasting of the adequacy or otherwise of the total sum awarded (this appeal is an example).

14.3. Secondly, the discount rate which produces the capital is not (and certainly not after the most recent change to the way in which it is arrived at) based upon an assumption that the Claimant invests 25% of her damages in her property (as would be the position in the present case). The assumptions made as to investment are set out in the Government Actuary's advice **[Authorities3/Tab46/1052]** in relation to setting the discount rate as part of the consultation and review which led to a change to a -0.25% rate.

14.4. As Mr Daykin observed **[EB2/Tab14/522]**, it *"...would fundamentally undermine the basis on which the original compensation award for other heads of damages was made, since the claimant would not have the whole of the award available to invest in a risk-free manner in accordance with the assumptions underlying the PIDR, but would instead be required to invest approximately 25% of the award into a single non-interest-bearing asset which is not risk-free, namely their own house." (see p10 (para (A) of the actuarial JR).*

14.5. There are also good pragmatic reasons why this is not a viable approach; not least because it is speculative and uncertain.

14.6. The mortgage experts are *"unable to predict what later life lending*

products will be available in 35 years' time" **[EB2/Tab15/531]** to enable the Appellant to meet her needs in the later years of life. This ought to be an end to the matter.

14.7. It would also be unworkable in practice: -

i) Parties could not assess overall value until the recovery in respect of other heads of loss was known. At trial, this would require an additional step/hearing, where findings were first made on all other variables, and then expert evidence would be required as to the implications of these findings on the actuarial valuation, before a court could consider and determine the award.

ii) In negotiation, often conducted by reference to a global sum rather than individual heads of loss, accurate assessment would be impossible. The same would hold true in relation to interim payment applications.

iii) In every case, complex actuarial evidence would be required, giving rise to significant (and potentially disproportionate) cost.

(e) Use of this approach would require the Court to make assumptions which are vulnerable to the dangers and difficulties of forecasting identified by Mr Llewellyn **[EB2/Tab13/510** joint report**] [EB1/Tab3/77** sole report**]**.

(f) Ms Angell's use of this approach is grossly distorted by flawed methodology as identified by Mr Daykin in the JR (p6) **[EB2/Tab14/518]**. For example:

(i) Ms Angell has the reversionary interest accruing from the date of trial despite the date from which Respondent would be financing the appellant being many years hence; and

(ii) Ms Angell applies the reversionary interest calculation to the full extent of the additional cost, rather than the lesser amount explicitly being financed by the Respondent under their approach.

(g) Ms Angell's approach produces an obviously unreal result, with the

value of the reversion exceeding the full capital value.

(h) This approach would also fail the key criteria of allowing claimants to purchase the special accommodation.

(i) It also fails a benchmark comparison against either the market value or the 'fair and reasonable' valuation of the reversionary interest

15. Full capital value

15.1. The advantages of this approach are many: -

(a) It fully compensates the victims of negligence;

(b) It enables special accommodation to be purchased in all cases;

(c) It is a straightforward solution – easy to understand and apply, whether at trial or in negotiations;

(d) It is proportionate: it avoids expensive enquiry into reversionary interests, rental yields and/or other variables, including expert and legal fees. On a practical level, these will go some way to offset any disadvantage to defendants.

(e) It will encourage a resourceful insurance industry to explore alternative solutions that will mitigate claimants' losses.

15.2. The only drawback is the windfall, not to claimants, but to their estates.

16. Reversionary Interests

16.1. The valuation or grant of reversionary interest ("RI") may potentially offer an alternative solution to full capital value, perhaps in all cases, provided: -

(a) It is capable of practical and proportionate application, both at trial (whether or not a specific property has been identified) and in negotiations during the lifetime of claims;

(b) It is capable of consistent application to all types of claims/claimants;

(c) It enables claimants to acquire the special accommodation that they are held to need.

16.2. If it fails these requirements, then full capital value should be preferred.

17. Market Value of a Reversionary Interest

17.1. This is the only tangible evidence before the Court as to the value of the reversionary interest in the Appellant's case, and in the paradigms. Mr Watson is the only expert with expertise on this issue.

17.2. Whilst it is true that the evidence is based on a small market with few sales and few buyers, it remains the only evidence as to real-world valuation of reversionary interests. The significance of this is twofold: -

(a) On the evidence before this Court, this is the best evidence as to valuation of the RI in APP's case;

(b) In cases where a claimant cannot afford to fund the shortfall deduction of the RI valuation, they will retain the option of seeking to sell the RI on the open market to bridge the funding gap to enable them to purchase the property they require.

17.3. As Mr Watson observes at §10.24 of his report **[EB2/Tab16/547]**, *"If the intention is that a claimant will sell the reversionary interest (or that the reversionary interest will be held by a defendant) then the market value (i.e. what an independent 3rd party would pay) offers an objective assessment of the value of the reversionary interest".*

17.4. This of course contrasts with Mr Watson's view where a claimant is to retain the reversionary interest. The epithet "fair and reasonable" may be descriptive in the business context in which it is used by Mr Watson but it is questionable whether it is apposite in relation to a claimant and a tortfeasor defendant. The following points flow from this: -

(a) There may be some cases in which a claimant will very likely be able to, and will choose to, pay the deduction to the full capital value to avoid the need for any third party to retain the reversionary interest (e.g. long

life cases, independent financial means, etc). In other cases claimants will obviously not have that luxury (e.g. short life, no independent means, etc), such that they can only acquire the needed special accommodation if the RI value is not deducted or if they sell the RI. A third group will be closer to the tipping point between these two, such that the capacity/choice to apply a deduction to avoid a RI may be more a matter of personal choice/priorities and/or more sensitive to the basis of the valuation. All three groups ought to have their damages assessed in the same way, rather than those who can/do acquire the RI being penalized / receiving a lesser award as a result.

(b) If the 'fair and reasonable' approach is used, a claimant who cannot bridge the gap will either (i) not be able to purchase the special accommodation due to the shortfall caused by the deduction (even if they sell the RI on the open market); or (ii) suffer under-compensation because the amount achievable by selling the RI on the open market will be less than the 'fair and reasonable' figure which defendants are entitled to deduct, leaving them both a shortfall and subject to a third party RI.

17.5. A hybrid solution using "full capital value" and "market valuation of RI's", whilst overcoming the Court's inability to force an unwilling defendant to acquire a RI or an unwilling claimant to sell a RI might be as follows: -

(1) The Court awards the full capital sum as the default order;

(2) In mitigation of a claimants' loss, and to prevent a windfall, defendants would be able to apply a reduction to the full capital value equal to the market value of the RI calculated by reference to Mr Watson's 6.6% yield.

(3) A condition of a defendants' right to apply a deduction would be that if the claimant elects to sell the RI (within a defined period), the claimant may require the defendant to purchase the RI at the level of the reduction under (2) above.

17.6. The benefits of this approach are as follows: -

(a) All claimants (even impecunious claimants with short life expectancies) will be placed in the position of being able to purchase the special accommodation they need:-

i) Some can and will choose to accept the deduction, and will not sell the RI.

ii) Those who must or choose to sell the RI will be guaranteed to recover the deduction, at the cost of being subject to a reversion.

iii) The mechanism also safeguards against the shrinking of the RI market, as no auction is actually required - the defendant will step in to acquire the RI.

iv) No defendant will be required to take a RI against their wishes (or where there are regulatory or other obstructions to them doing so). These defendants will simply not exercise the option to apply the deduction.

(v) Insofar as such impediments do presently exist, the mechanism will incentivise the insurance industry to make such changes as are required to facilitate the exercise of this option.

(b) Windfall will be minimised: -

i) Any claimant who needs or chooses to sell the RI will gain no windfall at all. They will be left with a life interest, subject to a reversion,

ii) Any windfall to claimants who do not sell the RI will be reduced by the extent of the market value deduction, leaving just the marriage value.

iii) The remaining windfall in those cases is preferable to claimants not being enabled to purchase the special accommodation they have been held to need.

(c) The mechanism would be capable of being applied during the lifetime of litigation for negotiation purposes, and at trial, even when a specific

property has yet to be identified. The value of the deduction will be a function of life expectation and the size of the additional funding required in each case (a factor which would already be the subject of consideration by the accommodation experts).

(d) The mechanism will be proportionate to implement. No additional expertise will be required. The additional step of the RI sale will only be required in some cases. Fees will be minimized, as no actual auction will be required.

18. 'Fair and Reasonable' ("F&R") Valuation

18.1. The Appellant makes the following observations: -

(a) There is no evidence of a valuation of the F&R in the Appellant's case. Both Mr Watson and Mr Robinson provide illustrations, rather than figures which they contend do or should apply to her case;

(b) Any valuation appears likely to be based upon rental yields, in the absence of expert evidence on that issue.

(c) The approach also requires long term assumptions contrary to the Economists' caveats.

(d) There would be an increased likelihood that many claimants, faced with a greater deduction to the full capital value, will be left with an insurmountable shortfall that will prevent them from purchasing the special accommodation they are found to need.

18.2. In relation Mr Robinson: -

(a) He does not attempt to provide a market valuation, and gives no more than illustrations in respect of F&R value.

(b) His approach is littered with recognition that he is not an expert. At the very least, conceding that he is not expert in "markets", rental yields, expenses and taxes of lenders, equity release products.

(c) His illustrations of F&R value incorporate multiple assumptions on

variables, including those identified by other experts as unachievable and/or speculative/unreliable.

(d) Insofar as he adopts the Respondent's approach to borrowing from other heads of damage, this falls foul of the same objections as raised above.

18.3. His characterisation of the approach to and theory of damages in a PI case is simply wrong (see section 7) **[EB2/Tab18/593]** he also seems to ignore the evidence about the unavailability of any equity release product which would allow the mechanism he is positing to operate in practice.

18.4. His comments about the setting of the discount rate fail to deal with the assumptions made as to the portfolio spread in which the damages are invested and which in turn lead to the rate. As Mr Daykin has commented that does not involve an investment of some 25% of the damages in the single property **[EB2/Tab14/522]**.

19. Submissions

19.1. The Appellant will contend that the starting point for assessing an accommodation claim is that the claimant should be entitled to full-compensation. A mechanism that leads to claimants being undercompensated, either because they are unable to purchase or acquire the accommodation that they need, or because they have to re-allocate funds that had been properly awarded in respect of other losses is plainly undesirable.

19.2. Assuming a positive multiplicand, the assessment of lump sum damages for the purchase of accommodation, however it is calculated, leads to the claimant being provided with the means of purchasing a capital asset that will remain undiminished at the date of his death. It therefore does not avoid an asset passing to the claimant's estate upon his death but rather discounts the lump sum provided to purchase that asset.

19.3. The formula adopted in RvJ assumed that the claimant would purchase property using damages awarded for pain, suffering and loss of amenity.

This was a realistic assumption in an age where general damages provided an adequate lump sum with which to purchase accommodation. In modern times it is increasingly unrealistic. The sum claimed for general damages in the present case came to £135,000, a sixth of the additional cost of purchase The future loss of earnings claim was £481,573 also leaving a significant shortfall even if added to PSLA (and notwithstanding that these damages are in no sense "unallocated")

19.4. In those circumstances, the claimant does not suffer a loss of return on investment over her lifetime but rather creates a hole in her overall capital fund, which cannot be realised before her death and which needs to be replaced in order to provide for those needs within her lifetime. That asset is still passed on to the claimant's estate, its value having been enhanced by capital that would otherwise have benefited the claimant in her life-time.

19.5. The difficulty created by the short-fall is enhanced in cases where the claimant has a short life-expectancy, or in cases where accommodation represents a disproportionately large part of the claimant's future capital needs and there is no significant available capital sum of any sort. An award for future loss of earnings is not always recovered in claims where a claimant has a need for adapted accommodation. An amputee, for example, may continue to work with little impact on their working capacity but nonetheless have a need for adapted accommodation.

19.6. In those cases a claimant will have little prospect of replacing the capital hole created by purchasing property, and will therefore be left with the stark choice between not purchasing the necessary property to meet her needs, or accepting that (s)he will be grossly undercompensated in respect of other future needs. In *JR v Sheffield Teaching Hospitals NHS Foundation Trust (2017) EWHC 1245 (QB)* William Davies J. observed **[Authorities2/Tab30/764§E]**:

"JR also argued that a nil award under Roberts v. Johnstone would leave some claimants with no prospect at all of obtaining special accommodation which they ought to have. An example was given of a

double amputee living in an upstairs flat whose earning capacity remained intact and whose care and other needs were limited. Such a claimant would have only modest capitalised sums against which to borrow (to use the Whiten terminology) and would be unable to purchase something which was vital to him and which was a loss resulting from the breach of duty. This example only serves to emphasise the need to find a proper solution to the accommodation conundrum"

19.7. The starting point for assessing an accommodation claim is that the claimant should be entitled to full-compensation. A mechanism that leads to claimants being undercompensated, either because they are unable to purchase or acquire the accommodation that they need, or because they have to re-allocate funds that have been properly awarded in respect of other losses is inherently undesirable. The compensation required to meet the accommodation need attributable to the injury is the additional cost of acquiring a property that can be adapted or land on which a property can be built.

19.8. It is suggested that the change in discount rate has had the effect of increasing other heads of damage, including loss of earnings, and that as a consequence the claimant is provided with a larger capital award overall, thereby minimising the impact of the entire loss of her claim for accommodation. This argument is fallacious. The change in discount rate was intended to ensure that damages for future loss were calculated in a way that adequately protected claimants' awards in the future. The fact that claimants have been undercompensated in the past is not a justification for regarding the re-calibration of future losses as providing a bonus award.

19.9. Borrowing from other heads of damage should also be ruled out. The Court cannot be confident that the necessary equity release product will be available in 35 years to facilitate the need to borrow at that time. There are in any event good reasons why this approach ought not to be adopted not least that it cuts across the principles by which damages are assessed under individual heads and would represent a judicial scaling

down of damages.

19.10. It is now unrealistic to apply the language of lost investment returns, when considering an award for accommodation. That term might reasonably have been used where the need for purchasing property could be met by drawing on an award of general damages but is artificial where the claimant must utilise capital that would otherwise have been allocated to provide for other needs in the future: equipment, therapies etc.

19.11. An outcome by which the claimant received nothing in relation to the capital cost of purchasing accommodation was wrong. The claimant did not receive compensation for a her loss in relation to the need to purchase a property capable of being adapted for her needs, The Grounds of Appeal are accordingly that:

19.11.1. The trial judge erred in concluding that she was bound to make a nil award for accommodation and should have awarded the claimant the capital cost of purchase in whole or part.

19.11.2. In the alternative, if the trial judge was bound by Roberts v. Johnstone to calculate a multiplicand by reference to the discount rate then the method of calculating accommodation cases set out in that case should be revisited.

19.12. The approach of the House of Lords and Supreme Court subsequent to RvJ being decided has demonstrated a move away from an intuitive form of calculation and towards a model that favours full-compensation. The principle in RvJ has become wedded to the discount rate, something not contemplated by the Court of Appeal when the principle was established. As a consequence claimants, who have accommodation needs, are grossly under-compensated. The Court of Appeal should depart from the principle in RvJ and set a new mechanism for determining accommodation claims.

19.13. A mechanism that results in the claimant recovering nothing towards the capital value of accommodation is unjust. The claimant will contend that

the claimant should recover an award representing all or part of the capital value of the property and one which provides a realistic prospect that it can be purchased or a method of financing a purchase.

19.14. There are a number of mechanisms that could be adopted. Some provide the claimant with the full capital value of the accommodation in any event. Others might provide a notional discount, mirroring the common effect of the Roberts v. Johnstone calculation prior to the discount rate change. The claimant will contend that in the absence of developed alternatives and against a background of much consideration and debate over many years without a conclusive outcome what is required is a revised, “pragmatic” solution which is plainly within the court’s powers and its role in awarding damages. An approach which is simple and certain is to be preferred.

19.15. The Appellant's primary contention is for full capital value. The only drawback of that approach is the windfall argument. If faced with a choice of this or less than full compensation and/or claimants not being enabled to purchase the special accommodation at all, it is the best “imperfect solution”.

19.16. If any deduction from the full capital value is to be made, it should be for the market value of the reversionary interest. This achieves all other objectives whilst minimising the windfall in the Appellant's case. This comes at the cost in some cases of preventing claimants from purchasing what they require.

19.17. An enhancement of this option would be the suggested mechanism for giving claimants the option of selling the reversionary interest to defendants. The default position if defendants are not prepared to acquire the reversionary interest at the market valuation would be the full capital value.

19.18. An alternative in the wider group of cases would be to allow the Court to consider whether a proposal advanced by the defendant ought to be accepted in mitigation of loss; where the starting position is that the

claimant receives the full additional capital cost. This would encourage development of a practical solution in a greater number of factual contexts.

Derek Sweeting QC
James Arney
Counsel for the Appellant/Claimant

~~**10th March 2020**~~
20th June 2020