

Accommodation Claims

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Introduction

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- A review of Swift v. Carpenter
- How the new test will apply in practice
 - The calculation
 - The evidence you will need
 - In any event costs
 - Claimants with short life-expectancies
 - Second Homes
 - Adaptations and betterment
- Where the law goes from here

Was the Court bound by *Roberts v. Johnstone*?

(Spoiler alert, no)

George v. Pinnock [1973] 1 WLR 118

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- The Claimant who requires special accommodation suffers a loss of:
 - Return of investment on capital sum;
 - Mortgage interest payments;
 - Is not entitled to claim the capital cost of accommodation.

Roberts v. Johnstone [1989] QB 878

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- Claimant born with cerebral palsy
- Life expectancy to age 30 (multiplier of 16)

- PSLA: £78,300
- Special accommodation cost: £76,500
- Credit for own property: £18,000

Roberts v. Johnstone [1989] QB 878

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Adopting the mortgage interest approach

Mortgage interest rates 9.1% annually

$\text{£}76,500 - \text{£}18,000 \times 9.1\% \times 16 = \text{£}85,176$

Roberts v. Johnstone [1989] QB 878

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Adopting a multiplicand of 2% per annum

$\text{£}76,500 - \text{£}18,000 \times 2\% \times 16 = \text{£}18,720$

Shortfall = $\text{£}39,780$

PSLA = $\text{£}78,300$

Roberts v. Johnstone [1989] QB 878

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“...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”

Problems with Roberts v Johstone

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- In all cases provides too little to purchase accommodation
- Creates a very large shortfall in short life-expectancy cases
- In all cases requires the claimant to economise or use allocated damages to make up the shortfall
- Unfavourable if discount rate less than 2.5%
- Fails entirely with a negative discount rate.

Is Roberts v. Johnstone binding?

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- Principle or Guideline? (Knauer v. Ministry of Justice [2016] UKSC 9)
- The overarching principle is that an award of damages for tort should amount to full compensation: no more, no less.
- “It appears to me that the reasoning in Roberts v. Johnstone was a means to an end rather than a principle of an end in itself...” (Irwin LJ paragraph 80)

Does the Claimant suffer a loss?

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“The central proposition of the Respondent on this issue is that the Appellant cannot show that the application of Roberts v. Johnstone results in any injustice, because the Appellant cannot show that she is likely to suffer a net loss from buying the more expensive house. The award of any sum in damages would amount to overcompensation, and hence injustice to the Respondent”

Does the Claimant suffer a loss?

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- The respondent's 'cash flow' approach imposes: "conjecture, the complexity and uncertainty of outcome preclude the view that this approach can be regarded as full and fair compensation" (Irwin LJ paragraph 141)
- "What is envisaged by the Respondent is that when the Appellant is approaching the age of 80, she will undertake a form of equity release on the property...In my judgment this proposed course undermines the principle of full and fair compensation" (Nicola Davies LJ paragraph 214)

Reversionary Interest

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- Absence of real evidence about the market:
 - Four - five sales per annum since 2000.
 - Slowing over the last few years
 - Unpredictable.
 - Speculative
- The court should approach the issue with caution and assume a discount rate of 5% (below 6.6% identified by C's expert but above 1.1% identified by D's expert)

The Calculation

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Property Purchase price £900,000.00

Less reversionary interest - calculated by reference to a 5% discount rate

Use Table 28 life expectancy.

Until table available

$1.05 \times^{-45.43}$ (life multiplier, don't forget the minus) = 0.1089

$£900,000 \times 0.1089 = £98,087.00$

$£900,000 - £98,087.00 = £801,913.00$

Evidence

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- Cost of reversionary interest?
- Cost of accommodation,
- Cost of adaptations,
- Cost of running costs,
- Valuation of existing/ in any event property

Credit for Existing Property

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- Swift v. Carpenter First instance
 - Claimant's previous property valued at £1.45 million
 - Special accommodation £2.35
 - Claimant gives credit for previous property

Credit for Notional Property

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- The Claimant must give credit for accommodation that he would have purchased or rented in any event Thomas v. Brighton Health Authority [1996] PIQR 30; Evans v. Pontypridd Roofing Ltd [2001] EWCA Civ 1657.
- Assume 50% of purchase price for unmarried claimant

Claimants with Short Life Expectancies

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If Mrs Swift aged 75

$$1.05^{-14.01} = 0.5048$$

$$£900,000 \times 0.5048 = £454,339.43$$

$$\text{Award of damages} = £445,660.57$$

Claimants with Short Life Expectancies

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"...this guidance should not be regarded as a straightjacket 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... this guidance should be regarded as enduring."

Irwin LJ paragraph 210

Claimants with Short Life Expectancies

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“On the face of it the most straightforward approach would be simply to award the claimant the full amount of the cost of the additional accommodation attributable to the injury... But of course that fails to take into account the fact that at the point where the claimant ceases to need the additional element... they or their estate will continue to benefit from its capital value and that extent will be over-compensated... If there is a fair and workable means of avoiding that windfall it should be adopted... The only workable candidate now in place... is the value of the reversion approach”

Underhill LJ (paragraph 224)

Claimants with Short Life Expectancies

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“...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%... will mean that the shortfall between the cost of the additional element and the amount awarded will typically be comparatively small and... 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... these may require a different approach”

Underhill LJ paragraph 228

Claimants with Short Life Expectancies

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- Will these claimants be able to argue for the full capital value?
- Yes if no better solutions are available:
- *“There are well established examples in the field of tort where a degree of overcompensation has proved unavoidable... If it were to prove impossible here to award a claimant full compensation without a degree of over-compensation, then it seems to me likely that the principle of fair and reasonable compensation for injury would be thought to take precedence”.* (Irwin LJ paragraph 206)

Second Homes

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- Separated parents. Second home recoverable if both parents have played an active role in the claimant's life and it is reasonably proportionate to meet that need by purchasing a second home (*Manna v. Central Manchester*)
- Holiday homes unlikely to be recovered as need can be met more proportionally with increased holiday costs.

Adaptations and Betterment

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- The claim for adaptations is unaffected by Swift v. Carpenter
- If adaptations are likely to bring about and increase in the value of the property the element of betterment should be deducted from the claim.
- Adaptations may also bring about a need for revision at the end of the claimant's time in the property. Restoration costs may therefore be recoverable.

The Future

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- Swift v. Carpenter identifies a mechanism by which outdated guidelines for the assessment of damages may be altered (Principle or guidelines: Smith v. Manchester? Croke v. Wiseman?)
- Likely battles surrounding short life expectancy cases and full capital value.
- Will a reversionary interest market develop and lead to a correction of the 5% discount rate approach?
- Will Roberts v. Johnstone reanimate if discount rate increases?
- Swift v Carpenter in the Supreme Court



Our thanks to Richard Baker for his presentation.

If you have any questions on Richard's presentation please email your questions to Norika@avma.org.uk by Monday 2nd November.

AvMA will be recording a Q&A session on this topic with Richard in early November and we will make this available to all LSG members soon afterwards.