

Association of Personal Injury Lawyers

GROUPS

Minutes of Clinical Negligence special interest group 27 September 2017

Holiday Inn – Bloomsbury, London

- **Secondary victims and aggravated damages, Lizanne Gumbel QC & Shaheen Rahman QC**
- **Accommodation claims and the discount rate, Richard Cropper**

Chair	Suzanne White Jerard Knott	APIL SIG/REG Coordinator (Leigh Day) APIL SIG/REG Secretary (Curtis Law)
Speakers	Suzanne Trask Lizanne Gumbel QC Shaheen Rahman QC Richard Cropper	Bolt Burdon Kemp (on behalf of APIL Exec. Committee) One Crown Office Row One Crown Office Row Personal Financial Planning
Attendees	Name	Firm
	Suleikha Ali	Leigh Day
	Kriya Amin	Leigh Day
	Alison Appelboam-Meadows	Penningtons Manches LLP
	Grainne Barton	Hugh James
	Isabel Bathurst	Hart Brown
	Heather Beckett	Goldsmith Chambers
	Graham Brierton	Powell Spencer & Partners
	Joanna Chapman	Bolt Burdon Kemp
	Nick Garrish	Mayo Wynne Baxter solicitors
	Sophie Jones	Hugh James
	Nandi Jordan	Leigh Day
	Despina Kavadas	Leigh Day
	Emma Kendall	Leigh Day
	Caroline Kerr	Sheridanlaw LLP
	Rhian Lowe	Fisher Jones Greenwood LLP
	Fran Moore	Hugh James
	Lynda Reynolds	Hugh James
	Jane Rogers	JMD Law Ltd
	Julie-Ann Say	
	Rushmi Sethi	
	Kate Rohde	Kingsley Napier LLP
	Sanja Strkljevic	Leigh Day
	Jane Weakley	Fieldfisher
	Tracey Dao	Boyes Turner
	Sophie Wills	Leigh Day

Preliminary

Introduction from Suzanne White of SW and JK as new coordinator and secretary. Explained the aims and hopes of the group and then introduced Suzanne Trask to provide the EC update.

SW subsequently introduced Richard Cropper and then Lizanne Gumbel QC and Shaheen Rahman for their respective talks.

The presentations of the speakers are kindly reproduced and kept with the minutes with permission of the authors.

APIL EC update

The details of the EC updates are intentionally omitted from the Clinical Negligence minutes at a time of fast moving development. The APIL office can be contacted for details of all current EC activity and initiatives.

Secondary victims and aggravated damages, Lizanne Gumbel QC & Shaheen Rahman QC

A copy of slides and paper are available and filed with these minutes.

The paper provided a detailed review of the current state of play in secondary victims cases and the relevant control mechanisms in use.

As the content is detailed the paper is not rehearsed here.

Accommodation claims and the discount rate, Richard Cropper

No presentation notes were provided.

In summary RC explained that:

- *ILGS guarantee a return on final redemption, but due to limited supply the Claimant will end up with a negative real yield.*
- *MoJ argument is that Claimants do not buy ILGS*
- *Why not ILGS? If 100% compensation is realistic the pinch for Roberts v Johnstone leaves a hole in compensation to start with. ILGS also do not have redemptions in each calendar year. Yields have been falling but Government adopted a 3 year average. At 20/03/2017, the actual return rate was -1.69%. This means that actually the current picture leaves a Claimant about 30% short on their needs.*
- *The Cookson v Knowles argument is an assumption that the Claimant's needs do not change.*
- *In Thompstone the approach adopted was that an RPI linked periodical payment order was short of cost inflation and ASHE 6115 was the correct measure. This was approved by the Court of Appeal.*

- *If ILGS are purchased day one that would result in an outcome of about 30% than need. Over a lifetime ILGS will undercompensate by about 50%. Therefore the Claimant accepts they must invest in some riskier models.*
- *A good example is prosthetics which now cost about 15 times more than they would have done not that long ago.*
- *The advice provided to the Government from Cox on the setting of the rate adopted 20/20 hindsight and he took 4 months to argue with himself.*
- *The indication is that the market is currently towards a peak. This means that currently there is the least money for accommodation and higher risk. Post Brexit we are likely to be in a trough with more money for accommodation and lower risk. The range may well be -5% to +8% which on the Cox measure gives a mean calculation of +2.5%.*
- *PFPP agreed some risk should be adopted and recommended using ILGS on a 1 year rate, not the 3 year average, which would have resulted in a current discount rate of -1%. Government did not like this advice and went to the City which produced an imbalanced investment portfolio (A and B pot) which placed 71% in pot B.*
- *Gadd's advice was adopt a £10,000 annual spend so you can ignore tax. Seemingly he suggested a 0.5% tax allowance. PFPP have requested disclosure from the Government of the methodology but this remains outstanding.*
- *Current position is that the amendment of the discount rate requires legislation. Once the legislation is passed the legislation panel must provide their report within 90 days.*
- *Anticipated that we may have the -0.75% discount rate for another 24 months.*

Roberts v Johnstone

- *JR is to be heard on paper appeal by the Court of Appeal. PIBA have intervened.*
- *Only RvJ deals with capital need, all other heads of loss deal with loss of income. A special situation.*
- *Assumes capital secure and RPI linked. RvJ makes an assumption of forever growth, yet the 1990's saw a fall of 22%.*
- *RvJ was considered in JR, but J Davis did not consider whether RPI and out of pocket assumptions made were correct. J Davis therefore adopted the -0.75% figure. As a consequence JR had to use all his PSLA and £700K from his pot for his accommodation needs.*
- *RvJ does not work, but what are the solutions.*
- *Mortgages – these do not normally work – often the needs would be between 35 and 40 years. If you get a mortgage approaching 40 years you will always make money. There is very good reason why most mortgages are 25 years as otherwise they are not financially viable for the lender. For that reason beyond 25 years the rate currently will be over 6% to deal with the loss of interest.*
- *Rentals – only work occasionally – but ONS accept a measure that meets the necessary test – PFPP can advise on this if necessary.*
- *Loans – this is the best solution as it is upsets both Claimant and Defendant. Claimant is provided with a loan to purchase the property which is charges against the property, redeemable only on sale of the property, but this binds Claimant and Defendant together for ever.*
- *Court therefore has to either overcompensate, undercompensate or bind together for ever.*
- *JR is important and may solve the conundrum.*

Closing remarks

SW provided her thanks to the speakers.

Author: Jerard Knott
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