[COURT OF APPEAL]

ROBERTS v. JOHNSTONE AND ANOTHER

1988 Jan. 21, 22; March 17

May, Balcombe and Stocker L.JJ.

Damages—Personal injuries—Accommodation—New accommodation necessitated by plaintiff's injuries—Cost of converting premises to meet plaintiff's needs—Measure of damages—Calculation of annual cost of accommodation

Damages—Personal injuries—Nursing—Pre-trial care and attendance of plaintiff provided by adoptive mother—Damages awarded for notional cost of employing persons to provide care and attendance—Whether general or special damages—Appropriate rate of interest on award

The plaintiff claimed damages for personal injuries caused by the negligence of the defendants, a consultant obstetrician and gynæcologist and his employer, a regional health authority, in consequence of which she had been born suffering from hæmolytic disease of the new-born and had thereby suffered grievous permanent disabilities including brain damage and would require constant care and attention for the rest of her life. Liability having been admitted, Alliott J. awarded the plaintiff damages and interest totalling £334,769·88.

On the plaintiff's appeal against the judge's assessment under nine heads, and in particular against his award of £28,800 damages in respect of the cost of purchasing and converting a bungalow suitable for the plaintiff's needs, and against his award of £9,152 general damages in respect of pre-trial full-time care and attendance of the plaintiff by her adoptive mother and his award of interest on the damages for pre-trial care and attendance on the basis that they were general damages:—

Held, allowing the appeal, (1) that the damages to be awarded in respect of the purchase of special accommodation necessitated by a plaintiff's injuries should not be the net capital cost of the purchase but the additional annual cost over the plaintiff's lifetime of providing that accommodation; that such annual cost was to be taken as 2 per cent. of the net capital cost which, if necessarily expended, was not to be reduced by reason of any element of betterment not required to meet the plaintiff's needs; that in addition damages amounting to the full capital cost of any conversion works necessary to adapt a property for the plaintiff's needs were to be awarded, save in so far as they enhanced the value of the property; and that, applying a multiplier of 16 to the annual cost of the bungalow so calculated, the plaintiff was entitled to £21,920 in respect of the purchase of the bungalow plus £28,284 in respect of that part of the cost of converting it which had not enhanced its value (post, pp. 892F—893G, 895F—896B).

George v. Pinnock [1973] 1 W.L.R. 118, C.A. and dicta of Lord Diplock in *Wright v. British Railways Board* [1983] 2 A.C. 773, 781, 783–784, H.L.(E.) applied.

(2) That where a plaintiff required care and attendance as a result of her injuries, the cost of employing persons to provide that care up to the date of trial was recoverable as special and

A not general damages, even if no one had in fact been employed; that the award in respect of the care and attendance provided by the plaintiff's adoptive mother up to the date of trial should be increased by £20 per week; and that the interest on the damages awarded in respect of pre-trial care and attendance should accordingly be awarded on the basis that they were special damages (post, pp. 895B—896B).

Daly v. General Steam Navigation Co. Ltd. [1981] 1 W.L.R. B 120, C.A. distinguished.

Housecroft v. Burnett [1986] 1 All E.R. 332, C.A. applied.

Decision of Alliott J. varied.

The following cases are referred to in the judgment of Stocker L.J.:

Chapman v. Lidstone (unreported), 3 December 1982; but see *Kemp and Kemp, The Quantum of Damages*, vol. 2, para. 1–403, p. 1409, C Forbes J.

Daly v. General Steam Navigation Co. Ltd. [1981] 1 W.L.R. 120; [1980] 3 All E.R. 696, C.A.

George v. Pinnock [1973] 1 W.L.R. 118; [1973] 1 All E.R. 926, C.A.

Housecroft v. Burnett [1986] 1 All E.R. 332, C.A.

Mehmet v. Perry [1977] 2 All E.R. 529

Wright v. British Railways Board [1983] 2 A.C. 773; [1983] 3 W.L.R. 211; D [1983] 2 All E.R. 698, H.L.(E.)

The following additional cases were cited in argument:

Auty v. National Coal Board [1985] 1 W.L.R. 784; [1985] 1 All E.R. 930, C.A.

Chambers v. Karia [1979] C.L.Y. 669

Charalambous v. Islington Health Authority [1987] C.L.Y. 1171

E *Cunningham v. Harrison* [1973] Q.B. 942; [1973] 3 W.L.R. 97; [1973] 3 All E.R. 463, C.A.

Lim Poh Choo v. Camden and Islington Area Health Authority [1980] A.C. 174; [1979] 3 W.L.R. 44; [1979] 2 All E.R. 910, H.L.(E.)

Moser v. Enfield and Haringey Area Health Authority (1983) 133 N.L.J. 105; *Kemp and Kemp, The Quantum of Damages*, vol. 2, para. 1–721, p. 1781, Michael Davies J.

F *Pritchard v. J. H. Cobden Ltd.* [1988] Fam. 22; [1987] 2 W.L.R. 627; [1987] 1 All E.R. 300, C.A.

Saunders v. Edwards [1987] 1 W.L.R. 1116; [1987] 2 All E.R. 651, C.A.

APPEAL from Alliott J.

By a writ and statement of claim dated 26 April 1984, the plaintiff, Sandra Roberts, by her parents and next friends, Julie Dawn Roberts G and Frederick Edward Karl Roberts, claimed against the defendants, R. Douglas Johnstone, a consultant obstetrician and gynæcologist, and his employer, the East Anglian Regional Health Authority, damages for personal injuries and consequential loss caused by the negligence of the first defendant in and about his treatment of the plaintiff and her mother prior to her birth, for which negligence the second defendant was vicariously liable. On 27 August 1985 the Official Solicitor was substituted H as next friend. Liability having been admitted, on 25 July 1986 Alliott J. awarded the plaintiff £334,769·88 damages and interest.

By an amended notice of appeal dated 14 August 1986 the plaintiff appealed for an order that the damages be increased, or awarded, in

respect of (i) night-time care and attendance of the plaintiff; (ii) the loss of income sustained by the plaintiff's adoptive father, Mr. Woodward; (iii) accommodation and conversion costs; (iv) an electric wheelchair; (v) additional building insurance premiums and rates; (vi) additional heating and contents insurance; (vii) Court of Protection costs; (viii) interest; and (ix) Mrs. Woodward's pre-trial full-time care and attendance of the plaintiff. The grounds of appeal in respect of head (iii) were that the judge had (a) erred in law in failing to provide damages for the actual loss sustained by the plaintiff, (b) wrongly rejected the plaintiff's evidence as to the actual loss sustained, (c) wrongly ignored the plaintiff's alternative calculations based on loss of income which would be incurred by investing her fund in the necessary accommodation, (d) erred in law by discounting 10 per cent. of the cost of the new bungalow on the basis that it was in a good location, (e) wrongly rejected the estate agent's evidence that there had been no other cheaper location in the Ipswich area for accommodation suitable for the plaintiff, and (f) ignored and/or failed to give due weight to the loss to be caused by the cost of conversion of the new bungalow. The ground of appeal in respect of head (viii) was that the judge had erred in law in refusing to grant interest on his award for the care and attendance at the same rate as the other special damages. The grounds of appeal in respect of head (ix) were that the judge had (a) wrongly based his award of only £80 per week, which on the evidence constituted compensation for only 10 hours per day six days per week, whereas Mrs. Woodward had been caring for the plaintiff 24 hours per day seven days per week, (b) misunderstood the evidence on which the £80 per week was based, in that the permanent care attendant to whom it would have been paid was part only of a four person team comprising the permanent care attendant, 10 hours per day six days per week, a day-time relief, three hours per day, a night-time sitter from 10 p.m. to 7 a.m. seven nights per week, and a weekend relief one day per week, and (c) been inconsistent in making an award for future care which included weekend and day-time reliefs, whilst ignoring such relief in his award for past care.

By a respondent's notice dated 24 November 1987 the defendants gave notice of their intention to contend that the judgment of Alliott J. should be affirmed on the additional grounds, in relation to head (iii), (a) that the judge had been entitled to award the sum awarded by taking into account six factors in assessing the loss of the chance of investing the sum represented by the new bungalow, viz. the fact that (1) the new bungalow was of a quality and size, and in a location, of a far higher standard than that which was actually and reasonably required for the plaintiff's needs or which the Woodwards or the plaintiff could reasonably have expected to enjoy had she not suffered the injuries complained of, (2) no deduction had been made from the award for pain, suffering and loss of amenity (which award was agreed) or from the award for care and attendance to reflect that increase in the standard of living, (3) the plaintiff had adduced no evidence as to the quantum of the loss of investment opportunity or as to the cost of a mortgage, (4) the alternative basis of calculation suggested in *George v. Pinnock* [1973] 1

A W.L.R. 118 when applied to interest rates current at the date of trial produced inconsistent results, (5) the value of the new bungalow was increasing and expected to continue to increase at a rate significantly in excess of inflation and was therefore a good investment, and (6) in the circumstances it was not unjust or unreasonable to award a figure approximating to 3 per cent. per annum of the capital value of the new bungalow after appropriate deductions for the high standard of the B property, its investment value, and the cost which would in any event have been incurred by the Woodwards; (b) alternatively, that by reason of the facts referred to at (a)(1) the judge's award was within the appropriate range; and (c) in any event that the award was reasonable given that an agreement had been made as to the quantum of rates over the plaintiff's lifetime and it was now proposed to replace the rating C system with a community charge.

The facts are stated in the judgment of Stocker L.J.

Harvey McGregor Q.C. and *John Holt* for the plaintiff. [Submissions were made on heads of appeal (i) and (ii) and reference was made to D *Lim Poh Choo v. Camden and Islington Area Health Authority* [1980] A.C. 174 and to *Mehmet v. Perry* [1977] 2 All E.R. 529.]

In assessing damages in respect of the cost of accommodation suitable for the plaintiff, the judge purported to apply the method of computation in *George v. Pinnock* [1973] 1 W.L.R. 118. It is clear from his judgment, however, that he did not in fact do so. His reasoning appears to have been purely arbitrary: there can be no rational E justification for reducing the figure claimed by two-thirds. On the *George v. Pinnock* approach, the judge should have arrived at the figure for damages by applying the multiplier of 16 to the annual cost of the mortgage required to fund the difference between the sale proceeds of the old property and the cost of purchasing the new one, taking a mortgage rate of 7 per cent.: see *Chapman v. Lidstone* (unreported), 3 F December 1982; *Kemp & Kemp, The Quantum of Damages*, vol. 2, para. 1–403, p. 1409, at pp. 1414–1416. Where the total figure produced by that calculation exceeds the full difference between the value of the properties, the court should adopt that full difference as the measure of damages. The sum to be awarded should not have been further discounted by reference to any element of betterment: it was perfectly reasonable for the Woodwards to purchase the particular property which G they in fact bought, as the judge found, and in those circumstances the full extra cost to them of that purchase should be awarded. [Submissions were made on heads of appeal (iv), (v) and (vi).]

In calculating the award for the full time care and attendance afforded to the plaintiff by Mrs. Woodward up to the date of trial, the judge appears to have misunderstood the evidence, and has awarded damages only in respect of care six days per week, excluding the cost of H night-time care. The amount of the damages under this head can be specifically calculated, since it is in the nature of special and not, as the judge thought, general damages: see the discussion of the distinction between general and special damages in *McGregor on Damages*, 15th

ed. (1988), pp. 14–17. *Daly v. General Steam Navigation Co. Ltd.* [1981] 1 W.L.R. 120 is distinguishable because the court was there dealing with the pre-trial compensation for a plaintiff who had been incapacitated from doing housework which she would otherwise have done, but had not in fact employed anyone to do that work: in those circumstances, damages for that loss formed part of general damages for loss of amenity. In this case the claim is for the cost of caring for the plaintiff, the cost of which is readily quantifiable and is by its nature special damages: see *Charalambous v. Islington Health Authority* [1987] C.L.Y. 1171. The judge was therefore wrong to calculate the award under this head on a general damages basis. The mere fact that that care was provided by the Woodwards free of charge and that therefore no one was in fact employed is no bar to recovery of such sums as special damages: see *Housecroft v. Burnett* [1986] 1 All E.R. 332, 342–343. [Reference was made to *Lim Poh Choo v. Camden and Islington Area Health Authority* [1980] A.C. 174, 183, 194.] Since the damages under that head are special damages, the interest on them should be at half the short-term investment rate, not at the general damages rate awarded by the judge: see *Charalambous'* case.

Adrian Whitfield Q.C. and *Robert Francis* for the defendants. [Submissions were made on heads of appeal (i) and (ii) and reference was made to *Housecroft v. Burnett* [1986] 1 All E.R. 332, 339, 343.]

There is no formula for calculating damages in respect of the cost of accommodation which works justice in every case. *George v. Pinnock* [1973] 1 W.L.R. 118 must be approached with caution. In that case the multiplier was only 10, and thus it did not produce an anomalous result. The formulae there proposed are inconsistent (mortgage interest is not necessarily the same as income from invested capital), and the case is difficult to understand in its application. A large number of contingencies have to be considered, and so a strictly arithmetical approach will not work (and was not used even in *George v. Pinnock* itself.) In those circumstances the judge's "arbitrary" or rough and ready approach was inevitable, and was in line with the approach adopted by O'Connor J. in *Chambers v. Karia* [1979] C.L.Y. 669 and by Michael Davies J. in *Moser v. Enfield and Haringey Area Health Authority* (1983) 133 N.L.J. 105; *Kemp & Kemp, The Quantum of Damages*, vol. 2, para. 1–721, pp. 1781, 1796. In this case no figures were put in evidence on a capital cost basis, and the judge therefore had either to make no award, following Lord Denning M.R. in *Cunningham v. Harrison* [1973] Q.B. 942, 953, or do his best. The *George v. Pinnock* approach requires the court to ascertain three figures: the difference between the capital cost of the new property and the net sale proceeds of the old, the notional interest rate to be applied in order to ascertain the annual cost of that sum, and the multiplier. Guidance on the appropriate interest rate, and the problems thrown up by the other cases, can be derived from *Wright v. British Railways Board* [1983] 2 A.C. 773, 781, 783–784, where the House of Lords expressed the view that 2 per cent. was the true rate of interest (above inflation) for temporarily foregoing the use of money without risk to the integrity of the capital (other than inflation), and was therefore the rate to be awarded on damages for non-economic loss.

A Where an economic loss claim relates to the cost of providing housing, inflation and risk elements are secured by the rising value of the property, and so the true annual loss resulting from the need to provide housing can legitimately be taken as 2 per cent. of the capital cost. That provides a way through the thicket of difficulties caused by a literal application of *George v. Pinnock.* Applying a rate of 3 per cent. to the difference between the capital cost of the new property (less the 10 per B cent. "Rolls Royce" element) and the net value to the family of the old property (viz. £59,850), would produce an award of £28,728, assuming a multiplier of 16, which is almost exactly the judge's award in respect of acquisition and conversion. It would be reasonable therefore to infer that the judge's calculation was based on a 3 per cent. notional interest figure. The 10 per cent. "Rolls Royce" reduction was extremely moderate C bearing in mind the quality, location and size of the new property and the fact that its amenities could have been, but were not, taken into account in reduction of the plaintiff's claim for loss of amenities and/or the Woodwards' claim for care. On the special facts of this case (not overlooking the alleged agreements to pay increased domestic rates over 16 years, made at a time when the community charge was about to be discussed) the judge's award in respect of accommodation was within the D appropriate limits, and the Court of Appeal should not interfere with it. [Submissions were made on heads of appeal (iv), (v) and (vi) and reference was made to *Housecroft v. Burnett* [1986] 1 All E.R. 332, 337.]

Compensation for pre-trial care and attendance, where no one was in fact and employed and therefore no expense was incurred, is for non-E economic loss and is therefore in the nature of general damages: see *Daly v. General Steam Navigation Co. Ltd.* [1981] 1 W.L.R. 120, where the decisive factor was the fact that no expenses had been incurred, not the identity of the person who would otherwise have done the work. There is no case for giving inflation-proofing twice over, which would be the effect of awarding interest at half the short-term investment rate in addition to the inflationary uplift inherent in assessing general damages F as at the date of trial. The point did not arise in *Lim Poh Choo v. Camden and Islington Area Health Authority* [1980] A.C. 174; the pre-trial care costs awarded there had in fact been incurred, and they *were* therefore special damages and *did* attract interest based on the short-term investment rate. In *Saunders v. Edwards* [1987] 1 W.L.R. 1116, 1129, 1134–1135, the Court of Appeal held that no interest should be G awarded on damages for inconvenience and disappointment, being damages for non-economic loss; but that a global figure including interest should be awarded as damages. That decision may not be directly applicable to personal injuries actions, but it does make it abundantly clear that if interest is to be awarded on damages for non-economic loss, it is to be on the basis that they are general damages, and the appropriate rate is therefore 2 per cent.: see *Wright v. British Railways* H *Board* [1983] 2 A.C. 773. The award of £80 per week for pre-trial full-time care and attendance can be equated with agency rates of a live-in helper available 24 hours a day, and is comparable with the rates awarded in *Housecroft v. Burnett* [1986] 1 All E.R. 332; there is no basis

on which the judge's assessment of general damages under that head can be criticised.

McGregor Q.C. in reply. *Chapman v. Lidstone*, 3 December 1982, is good authority for using the actual net annual cost of financing the new property: the 7 per cent. figure there was the mortgage rate less tax relief. In *Pritchard v. J. H. Cobden Ltd.* [1988] Fam. 22, 41–43, a rate of 4½ per cent. was used for *George v. Pinnock* calculations, on the basis of true interest on capital foregone. No percentage figure is stated in *George v. Pinnock* [1973] 1 W.L.R. 118 or in *Chambers v. Karia* [1979] C.L.Y. 669. The inference which the defendant seeks to draw, that the judge was applying a 3 per cent. interest rate, is ingenious, but there is no evidence for it in his judgment, and it is impossible to say with confidence that that was the basis of his reasoning. The only cases where an interest rate is specified are *Chapman* and *Pritchard*; in other cases where mortgate interest was actually incurred by or on behalf of the plaintiff, the mortgage rate seems to have been taken as the appropriate rate. The defendant's suggestion of 2 per cent. is wholly misguided: it is clear from *Wright v. British Railways Board* [1983] 2 A.C. 773 that the House of Lords was there dealing only with damages for non-pecuniary loss, and the principle there enunciated cannot be applied to compensation for expense actually incurred or to be incurred. *Wright* was considered in *Auty v. National Coal Board* [1985] 1 W.L.R. 784, 797, 802–803, 809–810, where the Court of Appeal held that the 2 per cent. figure applied only to damages for pre-trial non-pecuniary loss. The award here in respect of accommodation is substantially for future loss, since it represents the costs of the accommodation over the plaintiff's lifetime. If the rate were taken as 2 per cent. the multiplier would have to be revised upwards, since the conventional multipliers are discounted at 4 to 5 per cent., and not 2 per cent. On all the evidence, and in view of the current level of mortgage rates, 7 per cent. is the appropriate figure. If the court is faced with a choice between providing insufficient damages to fund the accommodation or leaving a capital asset intact at the end of the plaintiff's life, it should choose the latter.

Lim Poh Choo v. Camden and Islington Area Health Authority [1980] A.C. 174 clearly favours the plaintiff's contention that interest on damages for pre-trial care and attendance should be at half the short-term investment rate appropriate to special damages. *Daly v. General Steam Navigation Co. Ltd.* [1981] 1 W.L.R. 120 has nothing to do with this case: see the reasoning of Bridge L.J. at p. 128, where he based his decision on the plaintiff's reduced ability to do housework being part of her loss of amenity. *Charalambous v. Islington Health Authority* [1987] C.L.Y. 1171 further supports the *Lim* approach.

Whitfield Q.C. in rejoinder *Auty v. National Coal Board* [1985] 1 W.L.R. 784 is not relevant. A house is different from a pension: it increases in value over the years, and can be charged in order to generate funds during the plaintiff's lifetime.

Cur. adv. vult.

17 March. The following judgment of the court was handed down.

A STOCKER L.J. This is an appeal by the plaintiff against the judgment of Alliott J., given on 25 July 1986, so far as it related to certain heads of damage forming part of his total award of £334,769·88 damages in respect of personal injuries and consequential loss sustained by the infant plaintiff.

The plaintiff was born on 3 November 1981, her natural parents being Mr. and Mrs. Roberts, who as next friends commenced an action B by writ dated 26 April 1984. The Official Solicitor was substituted as next friend on 27 August 1985.

Although put in issue on the pleadings, liability was admitted at trial, which accordingly proceeded solely on the question of quantum. It is therefore unnecessary to recite at any length the circumstances attendant upon the plaintiff's birth or details of the negligence and breach of duty C alleged against the defendants, who are respectively the consultant obstetrician and gynaecologist and the regional health authority which was his employer. It is sufficient to say that since the blood-group of the mother was rhesus negative, and she had erroneously in 1975 received a blood transfusion of rhesus-positive blood, and the father's blood-group was rhesus positive—all matters known to the defendants—there was a severe risk that unless the appropriate treatment was given to the D mother, after conception and before birth, any child born to the mother would suffer from haemolytic disease of the new-born. The treatment was not given, and the plaintiff was born with a severe form of this disease. This and other associated conditions have resulted in the plaintiff suffering from very severe disabilities. She is deaf and it is doubtful whether a hearing aid does, or ever will, assist her. She is E mentally retarded and exhibits autistic behaviour. The whole of the brain has been affected and she suffers from cerebral palsy. The brain is not growing as it should, and the plaintiff will never achieve a mental age, as the judge found, beyond that of a four-year old. She will therefore throughout her life expectation of about 30 years be severely disabled and require attention. She cannot yet walk, and medical opinion was divided as to whether or not she ever would walk. The judge has F found:

> "she probably would walk in some way at some stage, but her lack of understanding will always present the risk of accident. She will never be able to speak or acquire any verbal skills, though she may acquire a few simple and basic methods of communication. She is hyper-active. She is doubly incontinent and unlikely ever to achieve G toilet control. It is unlikely that she will ever be able to feed herself completely and will never work or marry."

At present one of the most distressing features of her condition is that she indulges frequently, and for protracted periods of time, in uncontrolled fits of screaming. This causes soreness to the plaintiff's throat and is a source of both anxiety and exhaustion to those responsible H for her care and welfare.

It is therefore perfectly clear and not in dispute that the plaintiff suffers from grievous permanent disabilities and will require care and attention for her daily needs and safety for the rest of her life.

Before turning to the issues which arise on this appeal it should be stated that the plaintiff remained in the care and control of her natural parents from the date of her birth until April 1983. They were unable to sustain the strain or provide the necessary attention, and from April 1982 until May 1984 she was in the care of foster parents, Mr. and Mrs. Jolly. They also were unable to continue to look after her. From May 1984 her care was entrusted to Mr. and Mrs. Woodward. The plaintiff remains in their custody and she has now been legally adopted by them. Mr. Woodward is aged in the middle fifties and himself to some extent disabled by the loss of an arm. At the date of the trial, Mrs. Woodward was aged 31. There is also resident in the household another adopted child, Peter, aged 13 at the date of the trial, who also suffers from cerebral palsy, but who is less disabled than the plaintiff. The present arrangements seem admirable. All the doctors and those who have knowledge of the family are agreed that the plaintiff receives all the loving care and assistance that could possibly be provided, and the judge said:

> "It is agreed on all sides that Mr. and Mrs. Woodward are doing a superb job caring for the plaintiff and that they should continue to do so indefinitely."

That they will do so indefinitely seems established by the fact of legal adoption.

Part of the claim put forward on behalf of the plaintiff relates to the expenses or notional expenses of the natural parents, of Mr. and Mrs. Jolly, and of Mr. and Mrs. Woodward. Most were agreed figures, but issues arise in respect of part of the special damage claimed in respect of the Woodwards. We will therefore leave further description of the position of the Woodwards until a later stage in this judgment.

The plaintiff's contention on the damage issue was put before the court in the form of an itemised schedule. Many of the items were agreed and no issue arises upon them. Some items claimed were disallowed by the judge, who accordingly made no award upon them. Some were awarded, but in a reduced amount. At this stage it may be convenient to set out in tabulated form by reference to the schedule an analysis of the award made by the judge, omitting rejected items:

1. *General damages* for pain, suffering and loss of amenity	£75,000	
Interest	£ 3,330	£78,300
2. *Care and Attendance*		
(A) Natural parents special damage		
Nursing care	£500	
Travelling expenses	£498·12	£998·12
(B) Mr. & Mrs. Jolly special damage		
Nursing care	£3,840	
Other expenses	£590·73	£4,430·73
(C) Mr. & Mrs. Woodward special damage		

(a) Mrs. Woodward for care and attention	£9,152	
(b) Travel and other expenses	£2,033·60	£11,185·60
(D) Interest	£2,113·33	£2,113·33
(E) Future loss claim:		
(a) Mrs. Woodward daytime services; (b) Mrs. Woodward night time services	£66,560	
(d) Domestic attendance relief	£21,200	
(f) Holiday residential help	£25,520	
(g) Domestic help	£9,514·90	£122,794·90
3. *Additional nursing services after the plaintiff leaves school*		
(a) Morning assistance; (b) Evening assistance; (c) Additional domestic assistance	£35,000	£35,000
4. *Accommodation*		
(a) Cost of suitable bungalow (less value of property sold); (d) Cost of conversion less value of improvements	£28,800	
(c) Removal costs, legal and survey fees	£2,115	
(f) Special equipment (i–xvi)	£4,924.20	
(xviii) Aural aids	£1,500	£37,339·20
5. *Transport*		
Nissan Prairie	£6,728	
Depreciation	£7,136	£13,864
6. *Additional daily care expenses*		
(c) Clothing	£3,744	£3,744
7. *Court of Protection administration costs*	£25,000	£25,000
Total		£334,769·88

A sum was received by way of interim payment.

We have not set out in this analysis of the judge's award any indication of those items under various heads upon which he made no award, or, where an issue is raised, those in respect of which the award made was less than that for which the plaintiff contended. The issues which fall to be decided upon this appeal arise under the following heads: (a) future care and attendance for Mrs. Woodward at night, a matter which arises under the claim for post trial future losses, and under the special damage claimed in respect of those matters; (b) Mrs. Woodward's earnings: this item was put forward in respect of future loss, and was claimed as an item under the general claim for care and

attendance; (c) accommodation and conversion costs; (d) special items, including additional rates and insurance premiums. A

We now turn to consider the matters raised on this appeal in the order in which they were put forward in the notice of appeal and argued before this court. [His Lordship considered the appeal on grounds (i) and (ii) (in respect of the cost of future night-time care for the plaintiff and Mr. Woodward's loss of earnings) and concluded:] It seems to us that there was evidence upon which the judge could properly reach B the conclusion that Mr. Woodward's motivation in relinquishing part of his earning capacity and not wishing to restore it, even if circumstances permitted, was his preference to remain available to assist in running the house and doing the gardening. The judge rejected his evidence that the change of location of the house caused him to give up his job.

Regarded in isolation, we do not consider that the court should C interfere with this finding, and accordingly reject the contention that Mr. Woodward should be reimbursed for his future loss of earnings or reduced earning capacity. In our view, however, the matter cannot be regarded in isolation. The fact remains that one person cannot provide all the services, both night and day, needed for the plaintiff's care and protection. Mr. Woodward is needed as a relief for his wife, particularly at night, even if the relief takes, as on most occasions it will, the form of D availability rather than actual attendance. The total sum claimed under this head, £55,504, is based on the proposition that two people are notionally employed for 24 hours each day. In our view, the evidence supports the judge's finding that such a provision would be unnecessary; there is no need for two people all the time. None the less Mr. Woodward is, in our view, entitled to some recompense for the services E which he inevitably has to provide if Mrs. Woodward is not to be engaged or on call for 24 hours a day. Having rejected the claim that these services should be valued on the basis of his loss of earnings—the logical and appropriate basis if the factual ground for his giving up those earnings had been proved (see *Mehmet v. Perry* [1977] 2 All E.R. 529)—then he is entitled to recover an appropriate sum to recompense him for his services in assisting his wife and relieving her of what would F otherwise be an intolerable burden. The sum claimed is too high, since it is based on day and night services provided by two people all the time. Though the calculation is open to the criticism that it is arbitrary, we feel a fair measure of compensation would be to allow him 25 per cent. of the net cost of the services at £80 per week, viz., £20 per week for 46.5 weeks, to which a multiplier of 16 would be applied. This G results in a figure of £14,880, and we would allow this sum in respect of night-time services (item 2E(b)).

We are also of the view that on the basis that Mr. and Mrs. Woodward were "a team," and as such shared the duties over 24 hours a day, some relief one night a week should be allowed to enable both to be absent from the home together if they so wished, and we would allow them 2E(e) for night-sitting relief once a week in the sum claimed, H £10,592.

Accordingly, we would allow the appeal under this head to the extent of allowing £14,880 in respect of the night services provided by

A Mr. Woodward under head 2E(b) and £10,592 for night relief for one night under 2E(e).

Ground (iii): Accommodation

The Woodwards, when the plaintiff came to live with them and became the subject of their whole-time care, lived at Hill Cottage, B Holbrook, Suffolk. They already had Peter, who suffers from cerebral palsy, living with them. The cottage had three inter-connected bedrooms. The evidence was that it had narrow door openings, steep-turning staircases and uneven floor surfaces. The rooms were small, and there were inadequate bathroom and toilet facilities and inadequate passages and approach paths. It had no garage. It was in poor structural condition. It is not disputed that this cottage was inadequate and C inappropriate for the plaintiff if her care was to be properly carried out. Mr. Spencely, an architect who gave evidence and whose report was before the court, stated in his report:

> "Hill Cottage is wholly unsuitable for a disabled person and it is amazing that the family has managed so well so far. . . . I can see no way in which the property could be altered and adapted D economically."

In his report Mr. Spencely set out the criteria for a suitable property. It is unnecessary to recite all the criteria, but if the new premises were a house it would require a stairlift to the upper floor and sufficient space for a wheelchair to be manoeuvred. Corridors and doors would be required to be of specified minimum widths, and a garage and level E access was required.

A suitable bungalow was found at Purdis Avenue, Purdis Heath, Ipswich. A valuer, Mr. Hall, had sought suitable accommodation on the criteria provided by Mr. Spencely. He did not succeed in the Holbrook area, where the Woodwards were living, and eventually the bungalow at Purdis Avenue was found, apparently by Mr. Woodward. It is situated in a favoured residential area of Ipswich, and has some other amenities F which the defendants contended were not necessary for the proper care of the plaintiff. The difference in the capital costs were: (1) the Woodwards' house, Hill Cottage, realised £18,000; (2) the cost of the Purdis Avenue bungalow taken as £86,500, after a reduction of £10,000 conceded on behalf of the plaintiff; (3) the conversion cost of the bungalow, £38,284.

G The full difference between the sale price of Hill Cottage and the purchase price of the new bungalow is therefore £68,500, and the plaintiff claimed this sum. The judge awarded the sum of £28,800, including the cost of conversion. The judge's reasoning appears in his judgment. He cited an extensive passage from the judgment of Orr L.J. in *George v. Pinnock* [1973] 1 W.L.R. 118, 124–125. It is sufficient for the purposes of this appeal to cite only part of the judgment more H extensively cited by the judge:

> "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 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 a move to a new home imposed by her condition and the expense 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 we could on the available material, and the matter can only be approached on a broad basis."

The judge accepted that *George v. Pinnock* was an authority binding upon him, and in form applied its directions, for he said:

"It is plain that the capital cost of a new house cannot be awarded as damages, but that the additional cost of providing a new home can. . . . I consider that *George v. Pinnock* remains good law, approved by the Court of Appeal and binding on me."

In applying these principles in *George v. Pinnock* to the facts of this case the judge clearly lumped together the cost of the bungalow plus the cost of its conversion before deducting the value of Hill Cottage, as it seems he was invited to do by the plaintiff. This method of calculation produces a figure of £106,784 (£86,500 + £38,284 − £18,000). From this total it seems the plaintiff was prepared to concede a discount of £10,000, as representing an increase in value brought about by the cost of improvements to meet the plaintiff's needs, thus reducing their gross claim, including betterment, to £96,000. The judge then reached his award by way of the following reasoning:

"I must try to evaluate the increased charges incurred in accommodating the plaintiff with her special needs upon a rational basis. I start from the plaintiff's net figure claimed, £96,000, and discount it by 10 per cent. to reflect what was called during the hearing the Rolls Royce element. This bungalow is in a particularly favoured area of Ipswich, has a spacious garden and, making due allowance for estate agent's hyperbole, is much pleasanter than it need have been in order to provide adequately for the plaintiff. This reduces the claimed figure to £86,400 and I then arbitrarily

A take one-third of that as the increased charges element, arriving at the figure of £28,800 which I award under heads 4(a) and (d)."

This method of computation has been criticised by the plaintiff on a number of grounds. First, it is said that the judge did not apply the method of computation approved in *George v. Pinnock* [1973] 1 W.L.R. 118 whilst purporting to do so, since he reached his final figure by a B purely arbitrary process of reasoning. Secondly, the judge ought not to have discounted further the sum representing the difference between the sale of the old and purchase of the new by reference to a "betterment element." Counsel for the plaintiff submitted that the application of the *George v. Pinnock* principle would result in a figure of £68,500. This figure was derived by taking the net difference between £86,500 and the £18,000 (the proceeds of sale of Hill Cottage), viz. £68,500. Taking the C notional annual mortgage interest at 7 per cent. the annual cost would be £4,795. Applying the appropriate multiplier of 16 there resulted £76,720. It is apparent at once that this figure exceeds the net total difference between the old and the new premises, and thus does not comply with the reasoning behind *George v. Pinnock* that the damages awarded for accommodation costs should not represent the full capital D value of the asset, since this would remain intact at the date of the plaintiff's death and represent therefore a windfall to her estate. It is clear that this is the basis of the *George v. Pinnock* approach, and the figures claimed by the plaintiff's calculations not only preserve the net asset intact but produce an immediate surplus as well.

It is canvassed before the court that in these circumstances, where the computation based on *George v. Pinnock* principles produces a E figure in excess of the full difference between the value of the two properties, the latter should be adopted. This would seem to involve some reduction, an approach which the judge seems to have adopted, though not for this reason, since he does not appear to have attempted to evaluate the annual cost on *George v. Pinnock* lines. It seems to us that it is therefore necessary to consider what the appropriate rate F should be in making the *George v. Pinnock* calculation.

In *Chapman v. Lidstone* (unreported), 3 December 1982; *Kemp and Kemp, The Quantum of Damages*, vol. 2, para. 1–403, p. 1409, Forbes J. when applying this method of assessment to arrive at the annual cost of capital expenditure, took 7 per cent. as the appropriate rate. He said, at p. 1415:

G "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."

H We observe that the difference in cost between the two properties in that case was £20,000. The figures to which he was applying the calculation did not produce any anomaly; but, applying his reasoning 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 Railways Board* [1983] 2 A.C. 773, 781, where he said:

> "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 pp. 783–784:

> "The expert's 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 ground for rejecting, for the time being, the 2 per cent. rate adopted by the Court of Appeal in *Birkett v. Hayes* [1982] 1 W.L.R. 816 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 court 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 per cent., 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

A would not be a wholly unacceptable one. Mr. McGregor, for the plaintiff, 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 in 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 B 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.

Before applying this calculation to the figures we should say that, in our opinion, there was here no justification for reducing the full difference between the sale price of the old cottage and the acquisition of the new by reference to any element of betterment due to factors not C directly related to the plaintiff's need. It is true that in some ways this has occurred. The house is in a more attractive area, and thus more expensive than it might have been in other areas. The garden is larger than it needs to be for the plaintiff's purposes. However, the facts indicate, and the judge's findings confirm, that the purchase of this house was reasonable having regard to the need and the non-availability D of a suitable but cheaper building elsewhere. Once the purchase is found to have been reasonable in the circumstances we see no justification for further erosion of the differential sum involved, particularly having regard to the plaintiff's conceded reduction of £10,000 on the true capital outlay on the computation as put forward and accepted by the judge. It seems, however, that the judge, despite his phraseology, was in truth referring not to the "Rolls Royce" element but to that part of the E conversion costs which may themselves have enhanced the value of the property and were not related to the needs which a purchaser would be likely to require. On this basis we accept the reduction. We therefore calculate that, applying a rate of 2 per cent. to the full difference of £68,500, a figure of £1,370 is reached which, applying the multiplier of 16, equals £21,920. This calculation, however, does not take into account F the conversion costs. The net conversion costs after allowance for that part of the cost which adds to the recoverable value of the house on resale, put at £10,000, reduces the conversion costs from £38,284 to £28,284. In our view, this sum should be added to the £21,920 (the cost of the difference between the buildings, calculated at 2 per cent.) and accordingly we would assess the value of the new accommodation G regarded as damages for the plaintiff in the sum of £50,204. We would substitute this figure for the figure reached by the judge and award the difference, £21,404.

It may be said that such calculations are over-complicated, and that the judge's approach of an arbitrary figure is a better one. In our view, the computation is no more complicated than that to be derived from *George v. Pinnock* [1973] 1 W.L.R. 118, save that we have applied a H different interest rate. We have had some difficulty in ascertaining from the judgment precisely how the base figures were arrived at, particularly with regard to the discounts, but have done our best to reflect what we consider to be the base material for the award.

The remaining matters relate to special items of claim which we will consider in the order in which they are raised in the notice of appeal. [His Lordship then considered the appeal on ground (iv) (in respect of the cost of providing an electrically assisted wheelchair for the plaintiff) and concluded:] In our view, it cannot be said that the judge misunderstood or misinterpreted the evidence, and his conclusion was one which he could properly reach on that evidence. Accordingly we would reject this head of appeal.

Grounds (v) and (vi): Additional insurance premium and rates

In rejecting these heads of claim the judge said:

> "Four heads of damage rather faded from the case as it progressed, with no evidence being led in respect of them and little argument addressed to them. These were 4(g)(i) additional building insurance premiums, (ii) additional general and water rates; 6(a) additional heating, 6(b) contents insurance. I make no awards under any of them."

The claim was 4(g)(i), additional building premiums, and 4(g)(ii), additional general and water rates. The figures put forward in respect of these items were agreed as figures in the respective sums of £2,880 and £11,840, giving a total of £14,720. Before this court the defendants put forward no arguments having regard to this agreement if the court felt these items were recoverable in principle. It seems to us that they clearly were, and we would allow the appeal in the sum of £14,720 in respect of these items of claim.

Claims were put foward in the schedule, items 6(a), for additional heating at £500 per annum, capitalised at £8,000, and 6(b), for contents insurance at £50 per annum, capitalised at £800. No evidence was tendered at the trial to substantiate these figures, and the judge was therefore in some difficulty. For our part it seems to us that, though in principle there must be extra heating cost for a larger house and no doubt the contents insurance might also be greater, in the absence of any evidence at all of any cogency it is not possible to quantify either. It is for the plaintiff to adduce at least some evidence in support of specific items claimed, and we do not see how this court could approach this task other than by guesswork. We would therefore reject the appeal in respect of these items.

The appeal in respect of Court of Protection costs (ground (vii)) was not pursued.

Ground (ix): Mrs. Woodward's pre-trial full-time care and attendance

We were referred to *Housecroft v. Burnett* [1986] 1 All E.R. 332, and *Daly v. General Steam Navigation Co. Ltd.* [1981] 1 W.L.R. 120, as representing the general principles to be applied.

This head of claim relates to Mrs. Woodward's special damages. The judge awarded £9,152 out of the claimed figure of £15,000. It was submitted on behalf of the plaintiff that the judge had misapprehended the effect of Mr. Barde Hellyer's report, in that £80 a week cost per day of notional help was calculated on a six-day basis. This seems to be

wrong; arithmetically the figure awarded for future care to Mrs. Woodward represents £80 a week over 52 weeks, and it was on this basis that the judge awarded £9,152, being 2·2 years at £80 a week annually. It is true that he made no award for night care on this basis. We therefore reject the plaintiff's appeal under this head in so far as it is derived from an arithmetical approach.

The plaintiff, however, further submits that the special damage claim at £15,000 relates to full-time care, there being no specific claim for night care. The defendants argue that, as no person was in fact employed, no costs have been incurred, and that in the light of *Daly v. General Steam Navigation Co. Ltd.* any such claim would be general and not special damages. We do not agree. In *Daly's* case the plaintiff herself carried out the household duties in respect of which she claimed to be compensated by a claim for special damages. Here the plaintiff's claim relates to the notional cost of services performed by someone else, and is therefore recoverable as special and not general damages, if recoverable at all. *Housecroft v. Burnett* [1986] 1 All E.R. 332 confirms that there is no requirement for services to have been engaged under contract; moral obligation will suffice. The question, to our mind, is therefore whether the sum awarded is adequate, having regard to the fact that night services were provided as well as daytime services. Logic suggests that the special damages for Mr. Woodward alone should be treated in the same was as the post-trial services. If therefore the figure of £20 be taken as the cost of Mr. Woodward's assistance for one day per week relief, the appropriate figure over 2·2 years is £2,288 in round figures, and we would increase the award of £9,152 by that amount.

Ground (viii): Interest

The judge decided to award interest on that part of the sums awarded for past care on the basis that these were general damages, in reliance on *Daly v. General Steam Navigation Co. Ltd.* [1981] 1 W.L.R. 120. For the reasons we have given we do not think the facts of *Daly's* case are relevant to this case, and accordingly we consider that the judge ought to have awarded interest at the rate appropriate to special rather than general damages.

Accordingly we would increase the award by the sums we have indicated, viz:

Grounds (i) and (ii)	
Mr. Woodward's night services	£14,880
Night relief	£10,592
	£25,472
Ground (iii)	£50,204
Less sum awarded by the judge	£28,800
	£21,404

Grounds (v) and (vi)

Building insurance premiums	£2,880
General and water rates	£11,840
	£14,720 (agreed figure)

Amended ground (ix)

Mrs. Woodward's special damages	£2,288

The interest figure will also need to be evaluated on the rate appropriate to special damage.

In these respects and to this extent we would allow this appeal by increasing the total award by a figure of £63,884, plus the increased interest under ground (viii).

Appeal allowed.
Legal aid taxation.
Leave to appeal refused.

Solicitors: Burton, Yeates and Hart for Greene & Greene, Bury St. Edmunds; Le Brasseur & Bury.

C. S.

END OF VOLUME AND OF QUEEN'S BENCH SERIES FOR 1989