Byrom Street Chambers

Accommodation Claims: Life after *Swift v Carpenter*

Darryl Allen QC

APIL Brain Injury SIG – 9th December 2020

Swift v Carpenter

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- Claimant aged 39, RTA October 2013
- Below-knee amputation, severe phantom limb pains
- Serious injury to right foot, ongoing pain and stiffness
- Not disputed that current property unsuitable
- Lambert J held that:
  - Capital cost of suitable accommodation: £2,350,000
  - Value of C's existing accommodation: £1,450,000
  - Therefore additional capital cost: £900,000
  - But bound by *Roberts v Johnstone* to award £Nil

The Old Law

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- *George v Pinnock* [1973] 1 WLR 118
- *Roberts v Johnstone* [1989] QB 878

  - C not entitled to the additional capital cost of the property, because he would be left with an asset which would probably increase in value and which would be left to his estate on his death.
  - Instead, C expected to purchase the property from his own capital.
  - Property expected to retain its value over time.
  - Appropriate measure of loss is the income which the capital would have earned over the period had it been invested instead.

The Old Law

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- *Thomas v Brighton HA*, heard with *Wells v Wells*
  - HoL brought the rate in line with the discount rate
  - when DR became negative, this resulted in there being no loss to C
- But *Roberts v Johnstone* binding on first instance judges:
  - *JR v Sheffield Teaching Hospitals* [2017] EWHC 1245 (QB), William Davis J
  - *Swift v Carpenter* [2018] EWHC 2060 (QB), Lambert J

Court of Appeal

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- Was the court bound by the decision in *Roberts v Johnstone*?
  - Does *Roberts v Johnstone* apply?
  - If yes, is the court prevented from revisiting *Roberts v Johnstone*?
  - If no, should the court revisit *Roberts v Johnstone*?

Was *R v J* unjust?

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- D argued:
  - C could not show that the *R v J* approach actually resulted in injustice
  - Adduced evidence to illustrate that if C committed £900k of her award to the purchase of a property:
    - she would not run out of money for her ongoing needs until late in life;
    - on a cash flow model, she would be able to release equity from her property in her later years to fund the shortfall

A Workable Alternative?

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- Parties agreed that some alternative options were unviable:
  - Interest-only mortgage backed by a PPO;
  - Life multiplier x (a) mortgage payments, (b) mortgage interest payments, (c) rental costs;
  - Loan from D to C with a charge on the property.

- Parties also agreed that if the CoA concluded that they could depart from *RvJ*, the best approach was to value the "reversionary interest" in the property and deduct it from the additional capital cost.

Reversionary Interest

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- Brian Watson

- Life Interest/Reversionary Interest

- Valuing the Reversionary Interest:
  - Market Value
  - Fair and Reasonable based on rental yield
  - Fair and Reasonable based on investment returns

Market Value

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- Court of Appeal held that the rate should be based on market value:
  - "the market value of a reversionary interest in this case, and the majority of personal injury cases, represents the current value of a long-term, and uncertain-term, investment"
  - "it seems to me rather obvious that, since the central problem is the current value of a future interest in property, the best measure of the value is what people will pay to acquire it." (Irwin LJ, para. 197)

Market Value

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- Evidence showed that the typical rate in the market was 6.2-7%

- Court of Appeal held that the appropriate rate should be 5%:
  - Size of the market
  - Comparable with the Fair and Reasonable approaches
  - Additional uncertainties where the life tenancy is longer

Scope of the Guidance

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- Court of Appeal did not suggest that *Swift* offers a 'one size fits all' approach.

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

Scope of the Guidance

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- Short Life Expectancy Cases:
  - The shorter the term, the more valuable the reversionary interest and the greater the deduction to the capital cost
  - "It may be that different considerations and arguments could be applied to that category of case. I make no further comment on that and should not be understood to express a view on it." (Irwin LJ, para. 171)

To the Supreme Court?

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- CoA refused permission to appeal to the SC

- Grounds:
  - Departure from *R v J*
  - Rejection of cash flow analysis
  - Selection of market value approach and 5%

- Defendant has confirmed it will **not** be appealing to the SC

The formula

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- Value of reversionary interest is:

$$\mathbf{R = (P - B) \times 1.05^{-L}}$$

R = reversionary interest
P = value of property now required
B = value of property owned but for the accident
L = predicted life expectancy [period of loss]

- Damages award:

$$\mathbf{D = (P - B) - R}$$

The calculation in *Swift*

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P = £2,350,000
B = £1,450,000
L = 45.43 (normal life expectancy derived from Table 2)

R = (£2,350,000 - £1,450,000) x $1.05^{-45.43}$ = £98,087
D = (£2,350,000 - £1,450,000) – £98,087 = £801,913

Note: "L" is the number of years; it is **not** a discounted multiplier.

Child brain injury

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- 10 at age of injury.
- 20 at date of trial.
- Life expectancy to age 50.
- Would have moved out of home at age 30 to buy a family home at age.
- Now needs a £750K property. Absent injuries would have purchased a £300K family home at age 30 – joint ownership - 50:50 share with partner. Her share would have been £150K.

Child brain injury

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P = £750,000
B = £150,000
L = 30

Single calculation

R = (£750,000 - £150,000) x 1.05^{-30} = £138,826
D = (£750,000 - £150,000) – £138,826 = **£461,174**

Child brain injury

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Split calculation

R1 = (£750,000 - £0) x 1.05^{-10} = £460,435
R2 = (£750,000 - £150,000) x 1.05^{-20} = £226,134

D = (£750,000 - £150,000) - £460,435 - £226,134 = **-£86,569**

D = (£750,000 - £0) – £460,435 + (£750,000 - £150,000) - £226,134 = **£663,431**

Child brain injury

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Weighted calculation

R1 = (£750,000 - £0) x 1.05^{-30} = £173,533
D1 = (£750,000 - £0) - £173,533 = £576,467

R2 = (£750,000 - £150,000) x 1.05^{-30} = £138,826
D2 = (£750,000 - £150,000) - £138,826 = £461,174

D = (£576,467 x 15/30) + (£461,174 x 15/30) = **£518,821**

Child brain injury

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Better calculation

P = £750,000
B = £0 @ Year 0 and £150,000 @ Year 10
L1 = 30
L2 = 15
R1 = (£750,000 – 0) x 1.05^{-30} = £173,533
Life interest in **P** [**LP**] = £750,000 - £173,533 = £576,467
R2 = (£150,000 – 0) x 1.05^{-15} = £72,153
Life interest in **B** [**LB**] = **1.0383** x (£150,000 – £72,153) = £80,829

Damages award [LP – LB] = £576,467 - £80,829 = £495,638

Betterment

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P = £750,000
B = £150,000
L = 30
I = £50,000

No credit
R = (£750,000 - £150,000) x 1.05^{-30} = £138,826
D = (£750,000 - £150,000) – £138,826 = **£461,174**

Credit
R = (£750,000 + £50,000 - £150,000) x 1.05^{-30} = £150,395
D = (£750,000 - £150,000) – £150,395 = **£449,605**

Renters

P = £350,000
B = £0
L = 30
Rental = 31.16 x £7,200 = £224,352

Substituting rental payments for 'B'

R = (£350,000 - £224,352) x 1.05^{-30} = £29,072
D = (£350,000 - £224,352) – £29,072 = **£96,576**

Deducting rental payments as a second step

R = (£350,000 - £0) x 1.05^{-30} = £80,982
D = (£350,000 - £0) – £80,982 = £269,018
Net D = £269,018 - £224,352 = **£44,666**

Short life expectancy

- How short is "*short*"?
- Full capital cost
- Who is the onus upon?
- Peppercorn rent
- Equity release: 55/60+
- Rental for *very* short life expectancy cases

The future

- Robbing from Peter to pay Paul
- Departing from *Swift v Carpenter*
- Interim payments
- Perspective
- The implications of finding that *R v J* was guidance not principle