Your Place or Mine?

The Future of Accommodation Claims

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PFP

Roberts -v- Johnstone

- Court of Appeal
- 17th March 1988
- Purchase price of £86,500 (actually £96,500)
  - £10,000 'betterment' accepted by the Plaintiff
- Adaptations of £38,284
- Existing property of £18,000
- Capital need of £68,500

Roberts -v- Johnstone

- Damages awarded:
  - £68,500 multiplied by 2% = £1,370 per annum
  - Multiplier of 16
  - Total of £21,920
  - Capital hole created of £46,580

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Roberts -v- Johnstone

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 on 9.1 per cent, which represents the actual cost of a mortgage loan for such a property.

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Roberts -v- Johnstone

- Therefore, in order for 'house property' to be considered risk free and 'real' (i.e. growth above inflation, the capital appreciation on the property is ignored.
- The Claimant is able to recover 2% per annum, above the rise in the value of the property.
- Reference to 7% on 9.1% is due to Mortgage Interest Relief.

Your Place or Mine!

Roberts -v- Johnstone

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 payment, 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.

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Roberts -v- Johnstone

- This approach seems to forget that the Claimant lives of both capital and income to meet his future needs, with the capital being exhausted upon death.
- If the capital is tied up in the property and the Claimant cannot free that capital during his lifetime, how can he apply the capital to meet his future needs?
- A Claimant cannot live on income alone.

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Roberts -v- Johnstone

... 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.

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Roberts -v- Johnstone

- The reality is that if the Claimant cannot free the capital during his lifetime, he will leave the capital asset in his estate on death.
- However, he will have had to go without the future needs during his lifetime that would have been provided by the capital tied up.
- Any over-compensation would be reduced by Inheritance Tax ("IHT").
- However, this is less of a problem as the capital hole of £46,580 is just 59.5% of the General Damages (including interest), which was £78,300.

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Thomas -v- Brighton Health Authority

- House of Lords.
- 16th July 1998.

Your Place or Mine?

Thomas -v- Brighton Health Authority

Obviously the plaintiff is not entitled to the additional capital cost, since the larger house is a permanent addition to the family's assets. It will be there, and could be realised, at the end of the period covered by the award. How then should this head of damages be calculated? Should it be the interest on the mortgage? or interest calculated in some other way?

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Thomas -v- Brighton Health Authority

The answer to this question, described in Kemp and Kemp as "a satisfactory and elegant solution," was provided by the Court of Appeal in Roberts v. Johnstone [1989] Q.B. 878. It is to be assumed that the plaintiff will pay for the additional accommodation out of his own capital. It is further to be assumed that the capital input will be risk-free over the period of the award, and protected against inflation, by a corresponding increase in the value of the house. What the plaintiff has therefore lost is the income which the capital would have earned over the period of the award after deduction of tax.

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Thomas -v- Brighton Health Authority

- The loss is not just the interest on the capital, but the ability to apply the capital during life that is tied up in the property.

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Thomas -v- Brighton Health Authority

Both sides accept that the correct approach is that adopted by the Court of Appeal in Roberts v. Johnstone. The only question is how that approach should be applied. Collins J. arrived at the "going rate" by taking the average return on I.L.G.S. as the best possible indicator of the real return on a risk-free investment over the period of the award. In other words, he took the same discount of 3 per cent. net of tax as he had taken for the calculation of future loss. The Court of Appeal disagreed. They took the "conventional rate" of 2 per cent., pointing out that Stocker L.J. had not tied his 2 per cent. to the return on any particular form of investment.

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Thomas -v- Brighton Health Authority

It is true that there is no reference to I.L.G.S. in Roberts v. Johnstone. But in Wright v. British Railways Board Lord Diplock chose the return on I.L.G.S. as the first (and in my view simpler) of the two routes by which courts can arrive at the appropriate or "conventional" rate of interest for foregoing the use of capital. At that time the net return on 15-year and 25-year index-linked stocks was 2 per cent.

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Thomas -v- Brighton Health Authority

I can see no reason for regarding 2 per cent. as sacrosanct now that the average net return on I.L.G.S. has changed. The current rate is 3 per cent. This therefore is the rate which should now be taken for calculating the cost of additional accommodation. It has two advantages. In the first place it is the same as the rate for calculating future loss. Secondly it will be kept up to date by the Lord Chancellor when exercising his powers under section 1 of the Damages Act.

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Thomas -v- Brighton Health Authority

- Therefore, the current rate applied is 2.5% per annum
- If the Discount Rate is reduced following the current review, there will be an impact on the accommodation claim.
- I will consider this in greater detail later.

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Example

- Two Claimants, both aged 20;
- Both have annual care needs of £121,000 per annum;
- Both have capital claims (excluding accommodation) of £850,000;
- Both need a house at the cost of £750,000;
- Both have loss of earnings claims of £15,000 per annum;
- Both have other annual losses of £29,865 per annum;
- The only difference is that one Claimant has a 15-year life expectancy, whilst the other has a 50-year life expectancy.

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Example

- Claimant 1:
  - *R-v-J* calculation:
    - Capital need of £750,000 (assuming no 'betterment' or credit for 'otherwise' house)
    - £750,000 x 2.5% = £18,750
    - £18,750 x 12.54 = £235,125
    - Capital hole of £514,875
    - General Damages – not enough.
    - Loss of Earnings – might want PPs but will have to capitalise this element of the claim.

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Example

- Claimant 2:
  - *R-v-J* calculation:
    - Capital need of £750,000 (assuming no 'betterment' or credit for 'otherwise' house)
    - £750,000 x 2.5% = £18,750
    - £18,750 x 28.72= £538,500
    - Capital hole of £211,500
    - General Damages – might be enough.
    - Loss of Earnings – much bigger claim to offset.

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Example

- Where credit is given for 'otherwise' house it is worth noting that *R-v-J* asks for no credit for the fact that a Claimant capitalises that part of his future loss of earnings and can apply that to property.
- This saves 25 years of mortgage interest on 'otherwise' mortgage.
- For example, 25 year mortgage on £150,000 property at 6% interest is:
  - £150,000 x 6% x 18.65 = £167,850

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CJC Injury Committee

- 29th October 2010.
- Headed by Judge Jones -

In 1999 the Law Commission concluded that the R v J approach is, in most cases, "inappropriate" and "leads to under compensation". However, the Commission perceived resolution of the injustice to be too complex and declined to recommend legislation. In 2007 the Ministry of Justice sought to obtain a consensus as to the appropriate approach through its Consultation Paper on the Law of Damages. Having failed, the Ministry subsequently asked the Council's Injury Committee to review, reappraise and provide recommendations for any

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CJC Injury Committee

The Injury Committee is unanimously agreed that Roberts v Johnstone does result in injustice and that reform is both necessary and achievable.

In the view of the majority, it is wrong in principle that a claimant is deprived, wholly or in part, of the use of funds for the purposes for which they were awarded as damages. It is no answer to say that the claimant still has the general damages because they are invested. He no longer has the use of them. He is entitled to be awarded and to have available for use compensation for pain, suffering and loss of amenity and for the additional accommodation costs resulting from the tortious act.

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CJC Injury Committee

General damages are awarded, in part, to be available to make the suffering and loss of amenity more bearable and comfortable by, for example, the purchase of extra facilities or comforts for which there has not been specific compensation. In cases (which occur more frequently than the minority contend) where there is a shortfall making it necessary for the claimant to have recourse not only to general damages but also to damages awarded for other needs (such as income or care), there is obvious injustice, as the minority recognise, of a serious kind requiring reform. It is also desirable to move away from the need, present in the R V J approach, to make artificial and uncertain estimates of life expectancy; and the use of the discount rate is open to

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CJC Injury Committee

The majority consider that the present state of the law is wrong in principle, fails to provide proper compensation and can create significant hardship.

As to the solution, the majority recommend that the law be changed so that the Court in its discretion can award damages on the basis (separately or jointly) of (i) a periodical payments order; (ii) an interest free loan; (iii) an R v J award.

Your Place or Mine?

CJC Injury Committee

Under a 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. The claimant would thereby be placed in the position in which he would have been if he had not sustained the wrong for which he is receiving compensation. The dissenters' view is not disagreement as a matter of principle. They raise the issue of practical problems, to which they refer, which would need to be explored carefully before any change is implemented. The majority view is that the problems identified are limited and present no real obstacle.

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- Provider?
- 100% mortgage – who provides the deposit?
- If the Claimant, then *R-v-J*?
- This mitigates the problem but does not solve it.
- Term of the mortgage – lifetime.
- Unlawful Variable PPO if had to move lender and terms changed.
- Fixed rate for life, rather than variable, to give certainty
- Linked to what?
- LIBOR.

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- Indexation - annual LIBOR otherwise could have to apply indexation a number of times in one year.
- Must have found the house as the loan would be secured on the property.
- May have to adjourn accommodation until property found.
- What happens on death?
- PPO payable for 12 months following death
- Taxable PPs.
- May still leave asset in the estate of growth on the value of the asset.

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- IHT issues.
- Could assign PPs to the lender with Court approval.
- This removes the Claimant/Deputy from the equation
- Defendant deals with lender.
- There are still risks for the lender if the property is not sold following death.
- Very limited providers will offer such terms.
- Uncompetitive.
- Expensive.
- LIBOR plus 2.5% to 3.5% - current annual LIBOR 0.98%.

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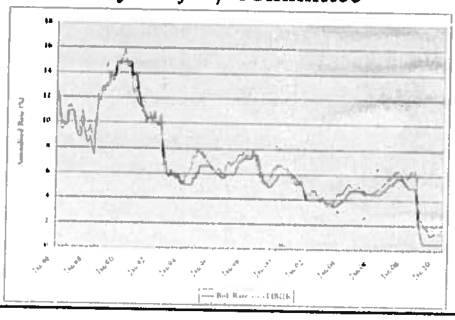

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There is agreement (in the majority view in all accommodation cases, in the minority view in the limited class identified) that it should be available to the parties to agree or the Court to order that there be an interest free loan by the defendant to fund the additional capital cost of the accommodation, the loan being secured by a charge (100% if the loan provides the full capital sum or a lower percentage if the claimant or his family invest some of their own funds in the accommodation).

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The only disagreement is as to the discrete issue whether any gain to the claimant or his estate as a result of any increase in the value of the property over the period of the loan, whether due to inflation, improvements, market movement or otherwise, should be considered (as the majority contend and the minority disagree) a collateral benefit which should not be brought into account.

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- This option simply inverts *R-v-J.*
- Defendant suffers loss of use of capital tied up, rather than compensating the Claimant.
- Proportionate charge would remove over-compensation.
- Given right to move.
- Given right to improve.
- If 'betterment' added by the Claimant/family out of own funds, then proportionate ownership could be adjusted.
- No mortgage.
- Issues of upkeep in non-CoP cases.

Your Place or Mine?

CJC Injury Committee

It is agreed that it should remain open to the Court to order or to the parties to agree that the accommodation claim be funded (in whole or in part) on the R v J approach. It is important that flexibility is retained in order to meet the needs of the claimant in particular situations; for example, where the claimant is contributorily negligent, he will not receive all the damages he requires to meet his accommodation needs and this may be a reason for preferring the R v J approach.

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- Probably preferable in longer life expectancy cases.
- Finality.
- Certainty.
- Flexibility.
- Legacy.
- Opportunity.
- Ability – Loss of earnings.

Your Place or Mine?

Other Alternatives

- Renting.
- *St George -v- The Home Office.*
- PPO for rent.
- Contingency fund for potential (but unlikely move).
- Very modest duration of loss.
- Indexed to RPI – imprecise but acceptable.
- Alternatives.
- But moving and associated costs thereof is a problem.
- Annual lease for legal reasons – occupancy rights.
- Issues with mortgage companies – buy to let.

My Issues

- In long duration of loss cases, where there is a loss of earnings claim and 'otherwise' property, *R-v-J* is likely to remain the preferred choice.
- Likely to mean that earnings would be a lump sum and not PPO, but this often the case anyway as no mortality benefits to such PPs.
- Short duration of loss cases are the problem.
- *Whiten* important – ignore parental home.
- Either the mortgage or charge route would allow the family to 'throw the keys in' following death and move back to original home.

My Issues

- The loan route does have a number of practical issues.
- Lender?
- Terms?
- Deposit?
- Payment after death?
- Negative equity?

My Issues

- What about the impact of a change in the discount rate?
- If the discount rate goes down then alternatives will be more attractive/imperative.
- If the discount rate goes up, then *R-v-J* will work more often.
- But not in the short life cases.
- But who is going to challenge it?
- Costs.
- Delay – we don't always have three years to wait for Supreme Court ruling.

My Issues

- What do we do in less than 100% cases?

My Approach

- In short duration cases it is important to illustrate to the Court that it cannot apply *R-v-J* and meet the full compensation principle.
- Elements of the future loss claim will have to be capitalised and locked into the property.
- This means that:

1. The least appropriate form of award is applied to these elements.
2. The Claimant must forego the elements for which she has recovered damages.
3. An asset is left in her estate which is subject to IHT.

My Approach

- There are alternatives.
- However, the Court cannot impose (some of) them (?).
- Need to cost them all out.
- Cost of the rental option and the mortgage option, in present value terms, is likely to be greater than actual purchase price of the property.
- Therefore, cheaper option would be for Defendant to hand over all of the capital.
- Over-compensation on death mitigated by IHT.
- Level of over-compensation less than under-compensation.

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Finally

- Revisit our 2 Claimants.
- Claimants are better off if the discount rate goes down!
- Claimant's are worse off if the discount rate goes up?
- Am I an idiot?
- If this was the case, then why would APIL bother pursuing the JR!

Your Place or Mine?

Claimant with 15 year life expectancy - 2.5% discount rate

	Multiplicand	Multiplier	Total
Care and case management	£121,000		
Loss of earnings	£15,000	10.03	£150,480
Capital elements			£895,000
Ongoing elements	£29,865	12.54	£374,507
Accommodation			
Roberts v Johnstone (£750,000)	£18,750	12.54	£235,125
TOTAL			£1,655,112

Claimant with 15 year life expectancy - 1.0% discount rate

	Multiplicand	Multiplier	Total
Care and case management	£121,000		
Loss of earnings	£15,000	11.14	£167,160
Capital elements			£895,000
Ongoing elements	£29,865	13.93	£416,019
Accommodation			
Roberts v Johnstone (£750,000)	£7,500	13.93	£104,475
TOTAL			£1,582,654

Your Place or Mine?

Claimant with 15 year life expectancy - 2.5% discount rate

	Multiplicand	Multiplier	Total
Care and case management	£121,000		
Loss of earnings	£15,000		
Capital elements			£895,000
Ongoing elements	£29,865	12.54	£374,507
Accommodation			
Roberts v Johnstone (£750,000)	£18,750	12.54	£235,125
TOTAL			£1,504,632

Claimant with 15 year life expectancy - 1.0% discount rate

	Multiplicand	Multiplier	Total
Care and case management	£121,000		
Loss of earnings	£15,000		
Capital elements			£895,000
Ongoing elements	£29,865	13.93	£416,019
Accommodation			
Roberts v Johnstone (£750,000)	£7,500	13.93	£104,475
TOTAL			£1,415,494

Your Place or Mine?

Claimant with 50 year life expectancy - 2.5% discount rate

	Multiplicand	Multiplier	Total
Care and case management	£121,000		
Loss of earnings	£15,000	22.98	£344,640
Capital elements			£895,000
Ongoing elements	£29,865	28.72	£857,723
Accommodation			
Roberts v Johnstone (£750,000)	£18,750	28.72	£538,500
TOTAL			£2,635,863

Claimant with 50 year life expectancy - 1.0% discount rate

	Multiplicand	Multiplier	Total
Care and case management	£121,000		
Loss of earnings	£15,000	31.51	£472,680
Capital elements			£895,000
Ongoing elements	£29,865	39.39	£1,170,382
Accommodation			
Roberts v Johnstone (£750,000)	£7,500	39.39	£295,425
TOTAL			£2,839,487

Your Place or Mine?

Claimant with 50 year life expectancy - 2.5% discount rate

	Multiplicand	Multiplier	Total
Care and case management	£121,000	28.72	£3,475,120
Loss of earnings	£15,000	22.98	£344,640
Capital elements			£895,000
Ongoing elements	£29,865	28.72	£857,723
Accommodation			
Roberts v Johnstone (£750,000)	£18,750	28.72	£538,500
TOTAL			£6,110,983

Claimant with 50 year life expectancy - 1.0% discount rate

	Multiplicand	Multiplier	Total
Care and case management	£121,000	39.40	£4,767,400
Loss of earnings	£15,000	31.52	£472,800
Capital elements			£895,000
Ongoing elements	£29,865	39.40	£1,176,681
Accommodation			
Roberts v Johnstone (£750,000)	£7,500	39.40	£295,500
TOTAL			£7,607,381

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	2.5% discount rate	1.0% discount rate	Percentage change
Claimant with 15 year life expectancy (periodical payments for care only)	£1,655,112.10	£1,582,654.45	-4.38%
Claimant with 15 year life expectancy (periodical payments for care and earnings)	£1,504,632.10	£1,415,494.45	-5.92%
Claimant with 50 year life expectancy	£2,635,862.80	£2,839,487.35	7.73%
Claimant with 50 year life expectancy (no periodical payments)	£6,110,982.80	£7,607,381.00	24.49%

	2.5% discount rate	1.5% discount rate	Percentage change
Claimant with 15 year life expectancy (periodical payments for care only)	£1,655,112.10	£1,608,865.60	-2.79%
Claimant with 15 year life expectancy (periodical payments for care and earnings)	£1,504,632.10	£1,447,585.60	-3.79%
Claimant with 50 year life expectancy	£2,635,862.80	£2,767,834.90	5.01%
Claimant with 50 year life expectancy (no periodical payments)	£6,110,982.80	£7,034,294.90	15.11%

Your Place or Mine?

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