**[APPEAL NO.]**

**CLAIM NO. HQ13X03449**

**ON APPEAL FROM THE HIGH COURT OF JUSTICE**

**QUEEN'S BENCH DIVISION**

**MR JUSTICE WILLIAM DAVIS**

**BETWEEN:**

**JR**

**(A PROTECTED PARTY BY HIS MOTHER AND LITIGATION FRIEND JR)**

**Claimant**

**Appellant**

**-and-**

**SHEFFIELD TEACHING HOSPITALS NHS FOUNDATION TRUST**

**Defendant**

**Respondent**

---

**APPELLANT'S SKELETON ARGUMENT**

---

**Introduction**

1. This is the Appellant's skeleton argument. The appeal raises an important issue as to how, following the recent change in the discount rate, seriously injured claimants are to be compensated for the necessary cost of acquiring accommodation which can be adapted for their needs. In particular, it involves reconsideration of the principles and approach set out in *Roberts v. Johnstone* [1989] QB 878.

2. Permission to appeal was granted by the trial judge. The appellant has lodged a separate skeleton argument seeking permission to appeal on another matter. The appellant seeks an expedited hearing given the general importance of the issues raised and the likelihood that the outcome of the appeal will affect many other cases.

3. Paragraph references in brackets are to paragraphs within the judgment. The appellant is referred to as 'the claimant' and the respondent as 'the defendant'.

4. The hearing below proceeded solely in relation to the assessment of damages, liability having been admitted during the course of the litigation. At the time of trial, the claimant was a 24-year-old man, who suffered from cerebral palsy with severe physical and significant cognitive impairments. As the trial judge identified **(paragraph 8)**, he is a "delightful young man with an outgoing personality and many interests". Despite this, he will never be able to engage in remunerative employment; he requires a high level of care; the provision of specialist equipment, including assistive technology and wheelchairs; he lacks capacity to manage his financial affairs and his damages are administered on his behalf by a Professional Deputy.

5. The loss to a Claimant caused by the need to purchase alternative accommodation is calculated by reference to a formula. It is usually referred to as a "*Roberts v Johnstone*" calculation after the case in which it was advanced and approved by the Court of Appeal. The formula is based upon the premise that what is compensatable is the cost to the Claimant of devoting more capital to accommodation, not the cost of the accommodation itself because that is an asset which retains its value. The *Roberts v Johnstone* solution is to multiply the increased capital required to buy the alternative accommodation by a percentage discount rate (until recently 2.5%). This produces an annual multiplicand which is then multiplied by the Claimant's life multiplier. The multiplier is in turn derived from a table based upon on the same discount rate. The effect of a minus discount rate is to increase the multiplier. However, as with any equation containing a negative figure, the multiplicand becomes a negative.

6. The trial judge considered himself bound by *Roberts v. Johnstone* to calculate the multiplicand by reference to the discount rate in force at the time of trial (-0.75%). This resulted in a nil award for accommodation. The appellant contends that the judge was wrong to regard himself as compelled to reach a result that produced no compensation for a loss that arose directly from the injury. Whilst it is acknowledged that both he and the parties were in a difficult position as a result of the discount rate change the

appropriate course would have been to identify the loss and award damages for that loss. The approach set out in *Roberts v Johnstone* does not have the force of statute or set out a binding statement of the law. It was a pragmatic solution which has now ceased to be any solution at all.

7. In the alternative, if the judge was bound to reach a nil award for accommodation, the appellant contends that the method of calculating damages for future accommodation set out within *Roberts v. Johnstone* has finally become unworkable having already produced the outcome in many cases (even where calculated on a 2.5% basis) that claimants have been left without sufficient funds to purchase property. In these circumstances, the mechanism by which a claimant is compensated for future accommodation needs should be reconsidered and a different methodology applied to the material facts found in this case or it should be remitted to the trial judge for that methodology to be applied.

**Factual Background**

8. The appellant was born on 14 November 1992 at the Jessop's Hospital in Sheffield. He was catastrophically injured during the course of his birth, when he was delivered by a negligent breech extraction.

9. The relevant factual background, insofar as the appellant's development and condition are concerned, is set out at paragraphs 3 – 9 of the judgment[1].

**The Accommodation Claim**

10. It was not in dispute that the property that the claimant lived in with his parents prior to trial was wholly unsuited to his needs and that a new property needed to be purchased and adapted **(paragraph 40)**. There was a dispute as to the costs of purchasing suitable accommodation, the costs of adapting that property and the additional expenses arising at the time of purchasing the accommodation and on an annual basis thereafter. The trial judge resolved those issues as set out within the table below **(paragraphs 80 – 87)**.

[1] Also within section 1 of the claimant's written closing at trial.

The appellant does not seek to disturb those conclusions:

| | |
|---|---|
| Capital Cost of Accommodation | £900,000.00 |
| Adaptation Costs | £400,000.00 |
| Betterment | £60,000.00 |
| Increased Running Costs | £7,000.00 per annum |
| Additional Costs (legal fees, stamp duty, moving costs, furnishing and renewal) | Not set out in terms within the judgment but agreed before judgment was handed down at £55,000.00 |

11. The appellant contended at trial that the court should adopt a multiplicand based upon 2.5% of the total sum for accommodation multiplied by the appellant's life multiplier. This resulted in an award that exceeded the capital purchase price of the property, so the appellant capped his claim at the purchase price of the accommodation. The claimant submitted that the rate of 2% adopted in ***Roberts v. Johnstone*** was essentially arbitrary, not based on any evidence and not set by reference to the discount rate (which was 4.5% at the time). The appellant submitted that it was open to the court to conclude that the multiplicand should continue to be calculated by reference to 2.5% of the capital sum or if the court considered that it would be unjust to adopt a mechanism that led to an award to the appellant of the full capital value of the property, the court should instead set the multiplicand by a different (but nonetheless positive) percentage.

12. The defendant argued that the claimant should receive a nil award for accommodation. It contended that in view of the poor rate of return on low risk investment, the claimant would be well advised to invest his damages in property and this would likely appreciate in value. The claimant would still have enough funds available from other heads of damage to fund the purchase of property; the familiar "robbing Peter to pay Paul" argument.

**The Judgment at First Instance**

13. The relevant passages of the judgment appear between paragraphs 40 and 50, and in

particular from paragraph 45 onwards.

14. The judge concluded that *Roberts v. Johnstone* was a pragmatic solution to the problem of providing accommodation to those who needed it but rejected the contention that the choice of a 2% multiplicand was arbitrary: *"The judgment of Stocker LJ is clear. 2% represented what was then the rate of return on risk-free investment. That is confirmed by the speech of Lord Lloyd of Beswick in Wells v. Wells [1999] AC 345 at 380/381. The difficulty facing JR is that applying the rationale of Roberts v. Johnstone in the current climate results in a nil award for the capital cost of accommodation…"* **(paragraph 46)**. He went on to conclude that he was bound by *Roberts v. Johnstone* and consequently bound to make a nil award for the capital cost of accommodation **(paragraph 49)**.

15. He considered that the observations of Harvey McGregor in McGregor on Damages at 38.204 were apposite and that in circumstances where the discount rate was negative the: *"the method becomes unworkable; it would produce a nil award*". He added that he was also: *"…quite correct when he opined that a fair and proper solution should be found to the conundrum of providing a claimant with the means to purchase special accommodation*" **(paragraph 48)**. He went on to say:

*"…I am not in a position to find 'the fair and proper solution' to the problem as a whole. I am faced simply with the case of this Claimant. In his case maintaining the conventional approach would provide him with the full capital cost of the accommodation, something which clearly would be wrong. I have no evidence which would enable me to consider some other approach. For instance, given the current cost of borrowing, it might have been possible to say that the interest element on an appropriate mortgage (say £600,000 as the cost of a property less the amount of general damages) over a 25 year term would provide a reasonable figure, the cost of annual mortgage interest being the alternative method of assessment suggested in George v. Pinnock. It was rejected in Roberts v. Johnstone because the rate of mortgage interest at that time was so high that an award on that basis would result in full recovery of the capital cost of the accommodation. That is no longer the case. However, I have no evidential basis for using such a calculation and none was put forward. In other cases prior to the change in the*

*discount rate it has been suggested that a defendant could take a reversionary interest in the property purchased in which event providing the full capital cost would not involve any windfall benefit; rather it would simply provide the claimant with the accommodation he needs for his lifetime. This solution (so it is said) would remove the imperfection inherent in Roberts v. Johnstone. It certainly is superficially attractive. But no such solution was proposed here and again I have no evidence which allows me to adopt it".*

16. There are a number of observations that might be made about the judge's suggestions as to possible alternative approaches:

    a. If the judge was, as he concluded, bound to use the *Roberts v Johnstone* approach then no other approach was open to him irrespective of whether there was evidence or not.
    b. What the judge appears to contemplate in his first suggestion is that the claimant should invest his general damages for pain, suffering and loss of amenity in the property and then receive as a lump sum the interest payments on a mortgage (for the balance) over the the mortgage term; presumably on the basis that it would allow him to fund the required borrowing. However, that presupposes a fixed rate, interest only loan on a capital sum which would fall to be repaid within the claimant's lifetime. The claimant would have no means of repaying the loan, short of selling his home (having already invested his only unallocated damages in the property). *Roberts v Johnstone* at least acknowledges that if the claimant is to be regarded as tying up his capital it is over his lifetime then his loss should be calculated by reference to a life-multiplier. Alternative approaches proposed around a loan can only feasibly be based on an interest free loan to the claimant for life.
    c. The suggestion that mortgage interest rates have reduced so that there would no longer be full recovery of the capital cost (notwithstanding the judge's observation that there was no evidence) is also incorrect since it ignores the effect of the discount rate change on the multiplier. Thus in this case the use of even a 2.5% per annum notional mortgage interest rate (i.e. the old discount

rate) resulted in a recovery in excess of the capital cost. In other words simply using a commercial mortgage rate within the *Roberts v Johnstone* formula will now, in any case of substantial life expectancy, result in the same outcome as was considered unpalatable in that case.

d. The second suggestion, that the defendant could take a reversionary interest, of course relies upon a defendant being prepared to fund the full capital cost on this basis[2]. It is not on the face of it a solution which it is open to the court to impose unless it were to make the award of the full capital amount dependent upon an undertaking to grant such an interest[3]. Equally it leaves unanswered questions as to what the precise nature of the interest would be and whether the the defendant or the estate would receive the "windfall" generated by a rise in the value of the property or bear the risk of a fall in value.

17. The judge went on to say **(paragraph 50)**:

*"On behalf of JR it was submitted that the Defendant's argument required him to use capitalised sums in respect of loss of earnings when to do so would deprive him of monies intended to recompense him for a quite different loss. The Defendant's argument meant that JR would not recover his full loss as per Wells v. Wells. This submission ignores the long accepted consequence of the Roberts v. Johnstone approach as described by Tomlinson LJ in Manna. JR in the long run will recover his full loss because his estate will have the benefit of the full value of the accommodation. JR also argued that a nil award under Roberts v. Johnstone would leave some claimants with no prospect at all of obtaining special accommodation which they ought to have. An example was given of a double amputee living in an upstairs flat whose earning capacity remained intact and whose care and other needs were limited. Such a claimant would have only modest capitalised sums against which to borrow (to use the Whiten terminology) and would be unable to purchase something which was vital to him and*

[2] Which was never a possibility in this case and unlikely to be so where the Roberts v Johnstone formula required the defendant to pay less than the capital cost (and now none of it at all).

[3] It seems doubtful whether it would be right to put the claimant or his deputy to such an election between receiving the full amount or nothing at all simply as a way of avoiding grappling with the issue of what his loss is in terms of damages.

*which was a loss resulting from the breach of duty. This example only serves to emphasise the need to find a proper solution to the accommodation conundrum. It does not provide a basis for allowing JR's claim for the capital cost of special accommodation".*

18. The suggestion that *JR in the long run will recover his full loss because his estate will have the benefit of the full value of the accommodation* is a non-sequitur:

    a. First, it presupposes, correctly, that the claimant does have a loss and that the full value of that loss is the additional capital cost of accommodation but it then asserts that the claimant will recover the full value of that loss even if no award is made in respect of it at all.
    b. Secondly, the reference to this being a long accepted consequence is wholly inapposite. The cases which preceded the discount rate change involved the claimant recovering a substantial portion of the capital cost[4] where it might be argued that, if the claimant could overcome the initial funding hurdle, the *shortfall* could be recovered by an increase in the value of the property over time. This is quite different from the contention that the claimant will be fully compensated for his loss if he is given nothing with which to purchase a property. It is trite to then say that a claimant will have to use other damages to cover a *shortfall*. In principle the claimants unallocated damages (general damages for pain, suffering and loss of amenity) may provide a reserve from which to do so[5]. But, the failure of the ***Roberts v Johnstone***[6] approach as time has gone by (as identified in ***Manna***) is that these damages are no longer sufficient for that purpose in most cases and claimants have to raid damages awarded to them to allow them to live (loss of earnings) or for future therapies and other needs.[7]
    c. Thirdly, the example, given in argument on behalf of the claimant, of the double

[4] Save in short life expectancy and liability reduction cases.

[5] Although there are cogent arguments of principle as to why they should not.

[6] In which the shortfall was entirely covered by damages for PSLA

[7] A problem exacerbated by the introduction of periodical payments effectively reducing the overall capital pot.

amputee does indeed suggest, as the judge observed, that a proper solution is required but it also illustrates why, in this claimant's case, the accommodation loss cannot be regarded as one which the claimant will recover. The claimant here is no more receiving compensation for his accommodation loss than is the claimant whose claim is very largely for adapted accommodation but will receive nothing because of the negative result of any *Roberts v Johnstone* calculation.

d. Fourthly the claimant can hardly be regarded as obtaining compensation if it is only realised after his death and as the result of other damages being diverted during his life for a purpose for which they were not intended.

**The Legal Framework**

19. The relevant line of authorities begins with *George v. Pinnock* [1973] 1 WLR 118 (per Orr LJ at p.124):

*"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 the 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 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 that we could on the available material, and the matter can only be approached on a broad basis".*

20. In *Chapman v. Lidston* (unreported but referred to within *Roberts v. Johnstone* [1989] 1

QB 878) Mr Justice Forbes adjusted the mortgage rates in force at the time to allow for tax relief.

*"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"*

21. In *Roberts v. Johnstone*, Lord Justice Stocker considered an appeal relating to a claim on behalf of a young girl suffering from profound physical and cognitive disabilities. Part of her claim related to the purchase of a suitable bungalow. The cost of purchasing the bungalow was £76,500, from which the claimant offset £18,000 representing the property that the claimant would have purchased in any event. The claimant had already acquired the property using a substantial interim payment from the defendant. The court was accordingly considering a case in which the claimant had already 'tied up' her capital in the purchase. She received general damages of £78,300 (including interest). The claimant could, accordingly, comfortably pay for her property out of her award of general damages.[8]

22. After referring to *Chapman v. Lidston*, Lord Justice Stocker said:

*"…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 Railway Board [1983] 2 AC 773, where he said, at p.781G*

> *'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*

[8] The capital shortfall was around half of the general damages. Although general damages awards have increased they have not matched rises in the value of property. As a result, the capital shortfall is now more often two to three times the general damages award for PSLA.

*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 p.783:*

*'The experts' 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 grounds for rejecting for the time being the 2 per cent rate adopted by the Court of Appeal in Birkett v. Hayes 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 courts 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 on 9.1 percent, 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 would not be a wholly unacceptable one. Mr McGregor, for the defendants, 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 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"*

23. The approach has been the subject of much academic criticism (see for example

*McGregor on Damages* 19th Edition paragraph 38-201):

*Unfortunately, the Court of Appeal* [in Roberts v. Johnstone) *went to the other extreme and awarded only the 2 per cent contended for by the defendant. This percentage was derived from that adopted by the House of Lords in Wright v. British Railways Board for interest on non-pecuniary loss in personal injury claims. But it is thought that the analogy from Wright v. British Railways Board is a poor one, especially when that decision can be interpreted as reflecting a policy to cut back on interest for non-pecuniary loss which, it is strongly arguable should never have been allowed in personal injury claims at all. The practical result of this move to a 2 per cent rate at a time when multipliers were still worked out on a 4.5 per cent discount rate was that claimants would at best obtain by way of damages in the region of a third only of the capital cost of their new accommodation – 30 per cent on a multiplier of 15, 36 per cent on one of 18 – and were forced to resort to the monies awarded for general damages for non-pecuniary loss and, to the extent that they could afford to, to the award for loss of earning capacity, for the remaining funding of the special accommodation to which they were entitled.*

24. The Civil Justice Council report "Accommodation Claims: Roberts v Johnstone" concluded in its report dated 29th October 2010:

*As to the solution, the majority recommended 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 RvJ award*

*Under the 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 dissenter's 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.*

*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). 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.*

*It is agreed that it should remain open to the Court to order the parties to agree that the accommodation claim be funded (in whole or in part) on the RvJ 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 RvJ approach.*

25. In recent years the courts have also identified anomalies arising from the approach adopted in *Roberts v. Johnstone*, in particular in cases where claimants have short life-expectancies, or where damages are reduced for contributory negligence or following an agreement on liability.[9]

26. Mr Justice Tugendhat considered such a problem in *Oxborrow v. West Suffolk Hospitals NHS Trust* [2012] EWHC 1010 (QB) in which the claimant applied for an interim payment of £740,000 to provide suitable accommodation for a five-year-old claimant who suffered from cerebral palsy and whose life-expectancy was limited to age 21. The claimant's short life-expectancy would have an obvious impact upon his ability to raise sufficient funds to purchase property, relying upon a multiplier/multiplicand approach. At paragraph 31 of the judgment, Tugendhat J identified the shortfall based on the *Roberts v. Johnstone* calculation as being between £110,052 and £168,286. Per Tugendhat J from paragraph 43:

*Mr Spencer submits that Roberts v. Johnstone simply does not apply to this case. The issue that the Court of Appeal was addressing in that case was on facts where, applying the appropriate interest rate to the appropriate multiplier, there resulted a sum which exceeded the net total difference between the old and new premises, with the result that*

[9] See McGregor on Damages 38.203: "Yet the inequity of not allowing the claimant sufficient money with which to acquire the needed accommodation, which the *Roberts v. Johnstone* method, however applied does not give, remains to a degree and in very many cases to a very substantial degree".

*the damages if awarded on that basis, would represent more than the full value of the assets (pages 891 C-B). The court in that case was simply not concerned with facts where the appropriate interest rate and multiplier resulted in a substantial shortfall from the cost of reasonable accommodation.*

*Mr Spencer accepted that the reasoning behind George v. Pinnock is binding on this court, namely that the damages awarded for accommodation costs should not result in the award of a figure of a capital sum which would remain intact at the Claimant's death and therefore represent a windfall to his estate. He submitted that this problem could be addressed in the manner discussed in McGregor at para 35-211, namely by the deputy giving an undertaking to the Defendant to pay any such surplus to the Defendant on the Claimant's death, such undertaking to be secured, if the Defendant should so wish, by a charge on the property.*

*Mr Spencer recognised, as submitted by Mr Hopkins, that the Law Commission in its report 'Damages for Personal Injury: Medical, Nursing and Other Expenses' (1999) report number 262 at paras 4.11 to 4.16 had considered the criticisms of Roberts v. Johnstone, had recognised that it was 'admittedly imperfect' (para 4.15) but did not recommend legislation to implement a different solution to the problems in question. However, speaking from his very great experience, Mr Spencer submitted that it was not easy to understand why the Law Commission considered that Claimants would be unlikely to choose damages on a different basis, or why if they did the complexity would render any drafting virtually unworkable in practice. He remarked on the complexity of PPO's as they are now commonly made.*

*Mr Hopkins submits that Roberts v. Johnstone remains good law unless a higher authority says otherwise.*

*In light of the conclusions I have already reached I do not need to express a view on this point. However, it seems to me that there is considerable force in Mr Spencer's submissions. Roberts v. Johnstone does not address the issue that arises in the present case. However, I recognise that that approach to the issue of accommodation is now so well established that a court, at least in the first instance, and especially on an interim application such as the present, should not depart from it, or more precisely, should not proceed on the footing that the trial judge is likely to depart from it. In the circumstances I prefer to express no view"*

27. More recently still, Lord Justice Tomlinson in *Manna v. Central Manchester University Hospitals NHS Foundation Trust* [2017] EWCA Civ 12 (from paragraph 16) observed:

*"The exercise in which the court is thus engaged is in modern conditions increasingly artificial. The assumption underlying the approach is that the claimant will be able to fund the capital acquisition out of the sums awarded under rubrics other than accommodation. But in modern times residential property prices have increased rapidly while general awards for pain, suffering and loss of amenity have remained at their traditional levels. Whilst Peter is no doubt robbed to pay Paul, it must often be the case that the accommodation assessed by the court as suitable is simply not purchased. A further problem confronts the claimant with immediate and pressing needs but a relatively short life expectancy. A similar problem confronts the claimant who establishes less than 100% liability in the defendant, as here, where the award is only for 50% of the sums regarded as necessary to meet the Claimant's reasonable needs. Thus the award here for the 'second home' is only in fact 50% of the cost of acquiring and adapting suitable accommodation. It seems very unlikely that such a property will in fact be purchased…*

*Lord Faulks QC, for the Defendant helpfully reminded us of the observations of Lord Woolf MR in Heil v. Rankin [2001] 2 QB 872 that awards of damages in cases of this field must be at a level which neither results in an injustice to the Defendant nor is 'out of accord with what society as a whole would perceive as being reasonable'. This is salutary, but society as a whole would not perhaps understand that an award elaborately structured in a manner which will ostensibly permit the attainment of a number of objectives desirable in the interests of the disabled claimant might not in fact succeed in enabling the claimant even to acquire the accommodation deemed appropriate for his care… No one suggests that we should on this appeal revisit the imperfect principles which have held sway since the decision of this court in George v. Pinnock [1973] 1 WLR 118.*

28. The issue of negative discount rates is discussed in McGregor on Damages 19th Edition (38.204)

"*It is high time that the Roberts v. Johnstone problem was tackled and a fair and proper solution found and adopted. The Law Commission looked into the matter some time ago but found it too difficult to formulate an acceptable solution and so recommended that the Roberts v. Johnstone method be retained. The Ogden Working Party is fully aware that the law needs to be righted and has it in mind to investigate the issue in the near future. What could trigger action on this front is a further reduction in the discount rate,*

*the possibility of which, as we have seen, is very much in the air. It is true that, as the discount rate lowers, the multipliers increase, but an examination of the figures in the tables in Ogden shows that the increases in the multipliers do not come anywhere near to balancing, or off-setting the effect of, the fall in the discount rate. Ironically the injured party will get more for care but less for special accommodation. Indeed should the discount rate move into the negative, which is highly unlikely but did happen in the Guernsey case in the Privy Council of Helmot v. Simon the Roberts v. Johnstone method becomes unworkable; it would produce a nil award".*

29. The principle in *Roberts v. Johnstone*, which provided only part of the cost of accommodation in the case of a positive discount rate could be seen as at odds with the general approach to damages in tort claims but is plainly outside of any principle of compensation if it provides nothing at all:

30. In *Wells v. Wells* [1999] 1 AC 345, Lord Lloyd of Berwick identified the fundamental nature of the exercise in which the court is engaged as follows:

*"It was common ground between all parties that the task of the court in assessing damages for personal injuries is to arrive at a lump sum which represents as nearly as possible full compensation for the injury which the plaintiff has suffered…*

*It is of the nature of a lump sum payment that it may, in respect of future pecuniary loss, prove to be either too little or too much. So far as the multiplier is concerned, the plaintiff may die the next day, or he may live beyond his normal expectation of life. So far as the multiplicand is concerned, the cost of future care may exceed everyone's best estimate. Or a new cure or less expensive form of treatment may be discovered. But these uncertainties do not affect the basic principle. The purpose of the award is to put the plaintiff in the same position, financially, as if he had not been injured. The sum should be calculated as accurately as possible, making just allowance, where this is appropriate, for contingencies. But once the calculation is done, there is no justification for imposing an artificial cap on the multiplier. There is no room for a judicial scaling down. Current awards in the most serious cases may seem high. The present appeals may be taken as examples. But there is no more reason to reduce the awards, if properly calculated, because they seem high than there is to increase the awards because the injuries are very severe."*

31. It should of course be borne in mind that the purpose of awards relating to the capital cost of acquiring and adapting accommodation is not to replace a lost income stream or meet a projected future cost but to enable the claimant to live in an environment in which his care can delivered and which is suitable and safe having regard to his disability. He is plainly not being put into the same accommodation as he would have lived in but for the injury, but he is being enabled to live a life which is as close to his uninjured life as possible within the all too obvious constraints of what can be achieved by monetary compensation.

32. As the Supreme Court observed in *Knauer v. Ministry of Justice* [2016] AC 908.

*"It is the aim of an award of damages in the law of tort, so far as possible, to place the person who has been harmed by the wrongful acts of another in a position in which he or she would have been had the harm not been done; full compensation, no more but certainly no less. Of course, there are some harms which no amount of money can properly redress… There are also harms which it is difficult to assess, especially for those which will be suffered in the future, but the principle of full compensation is clear."*

33. That case, albeit when considering the approach to calculation of damages in cases under the Fatal Accidents Act 1976, recognised that the quantification of damages in personal injury claims in the 1970's and 1980's was intuitive and comparatively unsophisticated:

*"…The short answer is that both cases were decided in a different era, when the calculation of damages for personal injury and death was nothing like as sophisticated as it now is. In particular, the courts discouraged the use of actuarial tables or actuarial evidence as the basis of assessment, on the ground that they would give 'a false appearance of accuracy and precision in a sphere where conjectural estimates have to place a large part'. Hence '[t]he experience of practitioners and judges in applying the normal method is the best primary basis for making assessments'. Lord Pearson in Taylor v. O'Connor [1971] AC 115,140. Rather like the assessment of the 'tariff' in criminal cases, the answer lay in the intuition of the barristers and judges who appeared in these cases. This was wholly unscientific. Counsel in the current case were agreed that, when they started at the Bar, the conventional approach to deciding upon the multiplier was to halve the victim's life expectancy and add one year, with a maximum of 16 to 18 years.*

*This is an approach which depends on 'being in the know' rather than reality"*

**Submissions**

34. The starting point for assessing an accommodation claim is that the claimant should be entitled to full-compensation. A mechanism that leads to claimants being undercompensated, either because they are unable to purchase or acquire the accommodation that they need, or because they have to re-allocate funds that have been properly awarded in respect of other losses is inherently undesirable. The compensation required to meet the accommodation need attributable to the injury is the additional cost of acquiring a property that can adapted or land on which a property can be built.

35. The use of a multiplicand/multiplier in relation to the capital cost does not of itself avoid an asset passing to the claimant's estate upon his death but rather discounts the lump sum provided to purchase that asset.

36. The formula adopted in ***Roberts v. Johnstone*** implicitly assumed that the claimant would be able to purchase property using damages awarded for pain, suffering and loss of amenity to meet the immediate shortfall produced by the calculation. This was a realistic assumption in an age where general damages provided an adequate lump sum with which to top up to the full purchase price. In modern times it has become unrealistic. The award of general damages in the instant case came to £300,000, one-third of the reasonable cost of purchasing property.

37. It is now unrealistic to apply the language of lost investment returns, when considering an award for accommodation. That term might reasonably be used where the need for purchasing property can be met by drawing on an award of general damages but is artificial where the claimant must utilise capital that would otherwise have been allocated to provide for other needs in the future: equipment, therapies etc. In those circumstances, the claimant does not suffer a loss of return on investment over his lifetime but rather creates a hole in his overall capital fund, which cannot be realised before his death and which needs to be replaced in order to provide for those needs

within his lifetime. The asset is still passed on to the claimant's estate, its value having been enhanced by capital that would otherwise have benefited the claimant in his life-time.

38. The difficulty is compounded in cases where the claimant has a short life-expectancy, or in cases where accommodation represents a disproportionately large part of the claimant's future capital needs. In those cases, the claimant will have little prospect of replacing the capital hole created by purchasing property, and will therefore be left with the stark choice between not purchasing the necessary property to meets his needs, or accepting that he will be grossly undercompensated in respect of other future needs.

39. The same difficulty also arises in cases where the claimant's overall damages are reduced for contributory negligence or as a percentage by agreement as part of negotiations. It is unreasonable to give undue prominence to the hardship that this causes as it necessarily follows that all heads of loss will be reduced but the effect on the accommodation claim is disproportionately large by reference to the effect on other heads of loss as a result of the *Roberts v Johnstone* calculation.

40. It was suggested during the course of closing arguments that the change in discount rate has had the effect of increasing other heads of damage, including loss of earnings, and that as a consequence the claimant is provided with a larger capital award overall, thereby minimising the impact of the entire loss of his claim for accommodation. This argument is fallacious. The change in discount rate was intended to ensure that damages for future loss were calculated in a way that adequately protected claimants' awards in the future. The fact that claimants have been undercompensated in the past is not a justification for regarding the re-calibration of future losses as providing a bonus award. Nor can the claimant's claim for future loss of earnings be regarded as an unallocated sum; it is required to meet all the same expenses that the claimant would have incurred during his life-time in any event and which do not form part of the other recoverable heads of loss[10].

[10] Indeed, it is the basis on which defendants argue that some items which a claimant requires would have

41. Further, an award for future loss of earnings is not always recovered in claims where a claimant has a need for adapted accommodation. An amputee, for example, may continue to work with little impact on working capacity but nonetheless have a need for adapted accommodation.

42. The trial judge proposed using mortgage interest rates as a method of calculation, noting that if these were awarded over a period of 25-years then it might result in a similar outcome to an award under *Roberts v. Johnstone* prior to the discount rate change. This is in reality a hybrid of the approach adopted in *Roberts v. Johnstone* as it involves adopting an annual multiplicand, albeit based upon mortgage interest rates rather than the discount rate. Setting the figure for the multiplicand would be difficult and whilst interest rates remain low at present it is unlikely that they would result in an annual multiplicand of less than the 2.5% proposed by the claimant. The question also arises as to the term over which the claim should be calculated. There is no obvious justification for adopting a term of 25-years. The claimant would not be in a position to repay the capital balance of the mortgage and so would be left having to re-mortgage after that term had passed. If the multiplier were fixed over the claimant's life-time, as would realistically have to be the case unless some mechanism could be provided to ensure that the capital value of the mortgage was repaid, then the claimant would be left with the same result as he sought at trial – namely that his award would exceed the value of the property and should be capped.

43. Any suggestion that mortgage rates be used to define the multiplicand on a case-by-case basis is also artificial. It is unlikely that a claimant could obtain a fixed mortgage rate for life, even if he were able to find a lender who was willing to provide him with a mortgage. He would plainly be at risk in the event that mortgage rates increased.

44. Whilst an indexed periodical payment might avoid the danger created by fluctuating interest rates this would create different problems for the claimant looking to purchase

---

been and will be purchased in any event irrespective of the injury.

property as it would remove the primary benefit of the capital lump sum. The claimant would instead receive an annual sum, which could service a mortgage in the event that the claimant was able to find a lender who was willing to provide him with a capital loan on an interest only basis for life. The claimant would have no prospect of repaying the capital portion of the mortgage during his life-time and his estate would be required to sell the property immediately upon his death. If there was a short-fall in the value of the property his estate would need to make up that short-fall, presumably by retaining a contingent capital sum. This would be a significant problem for claimants with shorter life-expectancies, where the risk of a shortfall would be greater. In the event that the property had become the claimant's family home, his family would in turn be forced to relocate upon his death.

45. The claimant's family would also face having to leave their family home upon the claimant's death if the claimant was granted a life-interest in the property. An additional problem with offering a reversionary interest to the defendant would be the question of who took the benefit of any increase in the value of the property over the claimant's lifetime. This approach might well lead to defendants not only being expected to manage a potentially very large trust portfolio but also in the fullness of time receiving a large capital windfall themselves. Both of these outcomes, the lack of any security for a claimant's family in their family home and a potential capital windfall to the tortfeasor upon the claimant's death, would be undesirable.

46. Renting property has on occasion been proposed as a potential solution but it seems highly improbable that properties of the type commonly required by claimants with severe disabilities would be available to rent at all, let alone with security of tenure for the claimant's lifetime. There would be additional sums to be paid and likely restrictions in the types of work that could be undertaken to adapt those properties if they were available. It also carries with it the prospect of the claimant's family having to leave the family home upon the claimant's death.

**Conclusion**

47. An outcome by which the claimant received nothing in relation to the capital cost of

purchasing accommodation was wrong. The claimant did not receive compensation for his loss in relation to the need to purchase a property capable of being adapted for his needs, The Grounds of Appeal are accordingly that:

a. The trial judge erred in concluding that he was bound to make a nil award for accommodation and should have awarded the claimant the capital cost of purchase in whole or part;
b. In the alternative, if the trial judge was bound by *Roberts v. Johnstone* to calculate a multiplicand by reference to the discount rate then the method of calculating accommodation cases set out in that case should be revisited.

48. The approach of the House of Lords and Supreme Court subsequent to *Roberts v. Johnstone* being decided has demonstrated a move away from an intuitive form of calculation and towards a model that favours full-compensation. The principle in *Roberts v. Johnstone* has become wedded to the discount rate, something not contemplated by the Court of Appeal when the principle was established. As a consequence, claimants who have accommodation needs are grossly under-compensated. The Court of Appeal should depart from the principle in *Roberts v Johnstone* and set a new mechanism for determining accommodation claims.

49. A mechanism that results in the claimant recovering nothing towards the capital value of accommodation is unjust. The claimant will contend that the claimant should recover an award representing all or part of the capital value of the property and one which provides a realistic prospect that it can be purchased. There are a number of mechanisms that could be adopted. Some provide the claimant with the full capital value of the accommodation in any event. Others might provide a notional discount, mirroring the common effect of the *Roberts v. Johnstone* calculation prior to the discount rate change. The claimant will contend that in the absence of developed alternatives and against a background of much consideration and debate over many years without a conclusive outcome what is required is a revised, “pragmatic” solution which is plainly within the court’s powers and its role in awarding damages. An approach which is simple and certain is to be preferred. The options which meet these criteria are:

a. Awarding the claimant the capital value of the property;
b. Awarding the claimant the capital value of the property less the value of his award for general damages[11]. This approach would not be inconsistent with the ratio in *Roberts v. Johnstone*. It would provide a discount on the global sum, more favourable to the defendant in many cases to that which would have been achieved by the *Roberts v. Johnstone* calculation when following a positive discount rate[12]. It would ensure that the claimant was in fact able to purchase the property that he needed in all cases without using funds allocated to other future losses.

**Derek Sweeting QC**
**Richard Baker**
7 Bedford Row
12 June 2017

[11] In these circumstances the claimant would still be entitled to claim the loss of investment return on his general damages. Whilst this would be nil at present, it could vary in accordance with the discount rate.
[12] In the instant case the claimant would recover £600,000 for accommodation, i.e. two thirds of the total. The conventional *Roberts v. Johnstone* calculation (on the basis of the 2.5% discount rate) provided the claimant with an award of slightly less than £700,000