

## Roberts v. Johnstone is dead

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1. This morning the Lord Chancellor announced that the discount rate would be revised from 2.5% to -0.75%. This clearly has major implications for the calculation of future losses and will lead to much higher awards and settlements than we have seen before. There are also major implications for the calculation of damages for accommodation where this is required as a result of negligently caused injury. Roberts v. Johnstone is dead.

### **The decision in Roberts v. Johnstone**

2. Since March 1988 and the decision in Roberts v Johnstone [1989] Q.B. 878; the cost of future accommodation has been calculated on the basis of compensation for the loss of use of capital required by the purchase of a more expensive property. In Roberts the Court of Appeal held that appropriate compensation would be calculated on the basis of an assumed rate of return of 2%. In 2001 the Lord Chancellor exercised his power under the Damages Act 1996 to set the discount rate at 2.5% and this figure has been used for R v. J calculations ever since.

### **R v. J doesn't work with a negative interest rate**

3. It is a statement of the obvious to say that R. v J. does not work with a negative interest rate. Claimants using an R v. J calculation would be paying money back to the defendant.

### **It was time for a change anyway**

4. For many years claimants have been arguing that the R v J calculation is outdated in an era when house prices are so much greater and where a low multiplier (e.g. in cases of limited life expectancy) would not produce a large enough capital sum to fund the purchase of a property. Today's announcement cuts through these arguments. R v. J was only ever intended as a pragmatic fudge, once it ceases to be pragmatic it simply disappears as an option.

### **So what are the alternatives?**

5. I suggest three:

- a. Damages to cover the cost of a mortgage.
- b. Damages to cover capital purchase with a charge on the property so that it reverts to the Defendant at the end of the Claimant's life.
- c. Actual or notional rental costs.

### **Cost of a mortgage**

6. It is worth going back to George v. Pinnock [1973] 1 W.L.R. 118 where Orr LJ held that the Claimant should not be entitled to the capital cost of the property, as this would leave a windfall on her death, but she was entitled either to the additional mortgage interest on the additional cost or to damages for loss of income from the capital:

*"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."*

7. So the first option for a claimant is to obtain expert evidence as to the cost of financing the difference in property price by way of a mortgage and claiming these mortgage costs.

### **Mortgage costs and PPOs**

8. There is no reason in principle why instead of claiming the notional cost of borrowing the funds to purchase a property the claimant should not recover the actual costs of borrowing with periodical payments order to cover those costs, or at least the interest (rather than capital repayment) element of the mortgage.

### **Capital purchase**

9. The objection to an award of the capital purchase costs was recognized in George v. Pinnock. It would give the Claimant's

estate a windfall on her death which meant that she would be overcompensated.

10. That objection could be met by the claimant giving a voluntary undertaking that the property will be restored to the defendant on his/ her death. This option was not considered in George but would be a similarly pragmatic solution to that adopted in respect of the cost of private care in Peters v. East Midlands SHA [2009] EWCA 945. Of course this ties the claimant and defendant together but no more than a PPO already does.

### **Rental cost**

11. A claimant can usefully advance an argument that he is entitled to the rental cost of a property for life if there is no other feasible option available. The rental costs, not least when multiplied by eye-wateringly high new multipliers, will in most cases give a much higher award than the capital purchase cost.

### **Conclusion**

12. None of the above is advice, nor is it novel. Similar suggestions have been made by others over the years. What has changed is that a new approach to R v. J is now definitely required. What was always a 'pragmatic fudge' will have to be replaced by a new one.

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