Neutral Citation Number: [2020] EWCA Civ 1295

Case No: B3/2018/2189

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
THE HIGH COURT OF JUSTICE, QUEEN'S BENCH DIVISION
Mrs Justice Lambert
[2018] EWHC 2060 (QB)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 09/10/2020

Before:

LORD JUSTICE UNDERHILL
Vice-President of the Court of Appeal (Civil Division)
LORD JUSTICE IRWIN
and
LADY JUSTICE NICOLA DAVIES DBE

- -

Between:

Charlotte Swift	**Appellant**
- and -	
Malcolm Carpenter	**Respondent**
- and -	
Personal Injuries Bar Association	**Intervener**

- -
- -

Derek Sweeting QC and James Arney (instructed by **Leigh Day & Co**) for the **Appellant**
William Audland QC and Richard Viney (instructed by **Weightmans LLP**) for the **Respondent**
Darryl Allen QC and Richard Whitehall (instructed by **Simpson Millar LLP**) for the **Intervener**

Hearing dates: 23, 24, 25 June 2020

- -

Approved Judgment

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and publication on the Courts and Tribunals Judiciary website. The date and time for hand-down is deemed to be 10:30am on 9 October 2020.

Lord Justice Irwin:

Introduction

1. This is an appeal against the decision of Mrs Justice Lambert DBE of 2 August 2018. The appeal turns on a narrow issue, namely the decision by the judge to make no award in respect of the additional capital cost which she found to be required by the Appellant/Claimant so as to fund the purchase of a more expensive house than she would have required uninjured. The judge did so, concluding that she was bound by the approach set down in *Roberts v Johnstone* [1989] QB 878. A significant cause of that outcome was the current negative discount rate. The approach in *Roberts v Johnstone* is to award a claimant lost return on capital which must, perforce, be invested in attributable additional house purchase. Where the stipulated assumed rate of return on damages invested by such a claimant is negative, then there can be no loss of investment. The appeal proceeds on this issue by the permission of the judge herself.

The facts

2. On 31 October 2013 the Appellant was a front seat passenger in a motor car driven by the Respondent. She was injured in a collision for which the Respondent was responsible. At the time of the accident the Appellant and Respondent were partners. They have since married and have a child.

3. The Appellant sustained serious injuries in the collision. She had to undergo an amputation of her left lower leg and had significant disruption of the right foot. She was a very active and sports-oriented individual and has made sustained efforts at rehabilitation. She has had continuing difficulties which it is not necessary to set out in detail, but they include severe continuing "phantom pain" in the amputated foot and continuing complications from the disruption of the structure of the right foot.

4. At the time of the trial, the appellant was 43 years of age, having been injured at the age of 39 years. She was expected to live to the age of 89.1 years. The lifetime multiplier for future loss was agreed to be 55.02, using the then current discount rate of -0.75%. It was agreed that the damages should be in the form of a capitalised lump sum award.

5. The judge made a lump sum order in the sum of £4,098,051. She found that the additional capital cost of the required special accommodation would be £900,000 more than the value of the Appellant's existing home. However, because she concluded that she was bound by the approach approved in *Roberts v Johnstone*, she declined to make any award in respect of the additional capital cost which she found would arise.

The Judge's Reasoning

6. The Appellant's submissions to the judge began with the argument that she was not bound by the decision in *Roberts v Johnstone* since, under current conditions (and in particular the negative discount rate) such an approach was inconsistent with the fundamental principle of fair and reasonable compensation for those injured by another's negligence: see *Livingstone v Rawyards Coal Company* (1880) 5 App Cas 25.

7. The Appellant's schedule of loss advanced four alternative formulae by which fair and reasonable compensation under this head of claim, it was said, could effectively be achieved. None of the suggested approaches linked the calculation of the multiplicand to the current discount rate.

8. The first submission was that the Appellant should be awarded the cost of an interest-only mortgage to bridge the difference between the value of the property currently held by the Appellant, which would be sold to fund part of the purchase of the special accommodation required, and the full purchase price of that accommodation. The Appellant had not adduced any expert evidence to support that proposition. Before the judge, it was argued by Mr Arney that a basic search of the internet could demonstrate that the current annual interest rate on an interest-only mortgage was 3.8%. If that were accepted, it was a matter of straightforward mathematics to apply that base percentage to the additional capital required of £900,000 and then to apply the current negative discount rate of 0.75%. The outcome would be an award in the region of £1.89m. As the judge observed, that was "more than double the sum which the notional mortgage is intended to fund".

9. The second approach, advanced in the alternative by the Appellant, was that the annual cost of an interest-only mortgage with borrowing of £900,000 should be defrayed by a matching Periodical Payment Order. That would limit the annual costs to the Appellant's lifespan, thus matching the need. However, the judge observed that the Appellant had a normal predicted expectation of life. If she fulfilled her predicted life expectation to 89.1 years, then the result of a Periodical Payments Order in the required annual amount would "well exceed the difference in capital cost between the Claimant's injured and uninjured accommodation needs".

10. The third approach advanced, Mr Arney's most favoured, was that the judge should adopt the *Roberts v Johnstone* approach but substitute a different rate of return when calculating the multiplicand. The schedule of loss was calculated on the suggested appropriate rate of 2%, on the basis that that figure was "in line with the interest award on general damages". To this the judge observed that:

> "No explanation is advanced in the Schedule or in submissions for using 2% as the notional rate of return. The total damages to be paid if this formula were to be adopted would again be in excess of the difference in value between the capital cost of the uninjured and special accommodation, but only marginally so."

11. The fourth alternative which was advanced was that there should be an award for damages reflecting the cost of renting special accommodation. In the course of the argument, it seems clear that was accepted as not really being a serious contention. This option has not been pursued before us and I need say no more about it.

12. In considering the options advanced by the Appellant, the judge began by noting the decision of William Davis J in *JR (A protected party by his mother and litigation friend) v Sheffield Teaching Hospitals NHS Foundation Trust* [2017] EWHC 1245 (QB). She observed that in that case the court was invited to depart from the *Roberts v Johnstone* approach. Two alternative approaches had been advanced in that case: firstly, an award of a lump sum reflecting the full difference in value between the property which the claimant would have owned and the accommodation needed as a result of the injuries;

secondly, an award reflecting that full difference, but subject to the deduction of the award to be made in the case by way of general damages. Mrs Justice Lambert observed that the judge in *JR v Sheffield* had expressed no view on the merits of either of those approaches. Noting that he had no expert evidence as to current or projected mortgage interest rates, or evidence of future trends in the net returns from low risk investments, he concluded that he was bound by *Roberts v Johnstone*. By reference to the negative rate of return on money, he made no award in respect of additional accommodation cost. In that case too, the judge granted leave to appeal on the point, but the matter never came before this court, since the appeal was compromised shortly before the hearing.

13. Mrs Justice Lambert further noted that the Personal Injuries Bar Association had intervened in the appeal in *JR v Sheffield*, and the written submissions lodged in that intervention were made available to her. One of the authors of those submissions was the then Chairman of the Association, Robert Weir QC. The judge was also provided with a copy of an article written by Mr Weir appearing in the Journal of Personal Injury Law, with significantly similar content. The judge noted that the principal submission advanced by Mr Arney before her in this case (that is to say the traditional *Roberts v Johnstone* methodology but with the substitute discount rate of 2%) was not an approach canvassed by Mr Weir, either in his submissions on behalf of the intervener or in his JPIL article. Nor had Mr Weir supported the approach advanced by the claimant in *JR* of the payment of the lump sum for the full amount of the differential, but with a deduction of the full amount of general damages, an approach which Mr Weir submitted was "unprincipled and arbitrary in the extreme".

14. Mrs Justice Lambert began her reasoning by eliciting the underlying rationale for the approach in *Roberts v Johnstone*. It was wrong as a matter of principle to award a claimant the full, incremental, capital cost of special accommodation, since that would not lead to full restitution but would result in over-compensation. The over-compensation arose because, at the claimant's death, his or her estate would benefit from an asset which had enhanced, not diminished, in value. The problem could not be solved, at the time of *Roberts v Johnstone*, by an award of the predicted cost of a mortgage necessary to meet the additional sum required since, in the circumstances of that day, the result would be a sum exceeding the net total difference between the "otherwise" property and the property now required. At the time of *Roberts v Johnstone* in the late 1980s, as the judge noted, mortgage interest rates were running at between 9-10% per annum. For that reason, not only would there be an additional capital asset as windfall on the death of the claimant, but an immediate cash surplus constituting an "even larger windfall" would be produced.

15. The judge then summarised the approach adopted in *Roberts v Johnstone* and its application over the period since, in a concise and elegant fashion:

> "134. The Court of Appeal found the answer to the conundrum in the notional cost, or "going rate" of temporarily foregoing the use of the money required to fund the purchase of special accommodation. Stocker LJ found the "going rate" to be 2% per annum on the basis of the analysis of Lord Diplock in *Wright v British Railways Board* [1983] 2AC 773 of the appropriate interest rate to be applied for non-economic loss. Expert evidence available to the House in *Wright* had demonstrated that

> the real return from investments which conferred a risk element were, in times of inflation, "no better than 2%". Stocker LJ recognised that the interest rate to be applied for non-economic loss may not be thought to be appropriate to economic loss, such as the notional cost of mortgage interest on acquired property; however he reasoned that, where the capital asset in respect of which the cost is incurred consists of house property, the inflation and risk element were secured by the rising value of such a property as bricks and mortar will maintain their value. Lord Lloyd in *Wells v Wells*, saw no reason to regard the figure of 2% as sacrosanct and, in the light of the expert evidence on the average net return on low risk Index-Linked Government Stock in the conjoined appeals before him increased the figure to 3%, thus bringing it in line with the discount rate to be applied for the calculation of multipliers for future loss. The figure has been subsequently "kept up to date" by the Lord Chancellor when exercising powers under s 1 of the Damages Act 1996 decreasing to 2.5% in 2001 and still further to -0.75% in March 2017."

16. Lambert J went on to consider the submissions then advanced by Mr Arney. She began by noting that she had, in her view, received neither in writing nor in oral submissions, a reasoned justification for the departure. She noted that Mr Arney submitted she was not bound by *Roberts v Johnstone* on the basis that case could be distinguished, because there the claimant had already purchased the special accommodation: no practical funding problem arose and there was a legitimate basis for valuing this part of the claim by reference to the notional loss of the use of the capital.

17. The judge accepted that in *Roberts v Johnstone* this court recognised the purchase had been financed by a capital sum paid on account by the defendants through the mechanism of interim payments. The court there observed that those facts had "reinforced" their approach. However, the judge went on to note that it was not argued in *Roberts v Johnstone* that that factual matrix was essential to the Court's reasoning. Nor has it been suggested in the cases where the approach has been applied since, that a different method, or even a different discount rate, was appropriate, where the property had not already been bought by the date of trial. The judge found in this aspect no sufficient basis for distinguishing *Roberts v Johnstone*.

18. The judge went on to record her key conclusions on the issue in two paragraphs, which it is helpful to quote in full:

> "136. The real point which Mr Arney was making to me, both in the Schedule and in his oral submissions, is that the *Roberts v Johnstone* formula is no longer fit for purpose in the modern context of a negative discount rate. It leads to unfairness and a result which is not consistent with the principle of full restitution. He submits that it could never have been the intention of the Court of Appeal to have devised a formula which resulted in a nil award. However, I note that the problems, or anomalies, which the application of the formula can produce have been present since 1989: the need to fund the property purchase by

> scavenging from damages allocated to other losses is intrinsic to the *Roberts* formula itself. As Tomlinson LJ observed in *Manna v Central University Hospitals NHS Foundation Trust* [2017] EWCA Civ 12, the "robbing Peter to pay Paul" effect of the formula leads to particularly anomalous (and problematic) results in a number of different contexts: in catastrophic injury/short life cases; in cases in which there has been a discount for contributory negligence or a compromise has been reached; in cases in which damages for care needs are to be met by a Periodical Payments Order thus drastically reducing "surplus" income which might be used to fund a property purchase. In these situations, as the Court of Appeal observed in *Manna*, the extent of the shortfall between the sum needed to fund the property and that recovered may be so great that the property cannot be purchased. The effect of the negative discount rate is to create a further (albeit larger and more extreme) category of anomaly.
>
> 137. But, as the Court observed in *Manna* the formula is the product of "*imperfect principles which have held sway since George v Pinnock.*" and I have no doubt that I am bound by *Roberts v Johnstone*. It cannot be sensibly argued otherwise. Each alternative formulation advanced by the Claimant in this case would produce, if capitalised, a final figure greater than the loss which the formula is intended to address. Each formulation would produce the "windfall" which the Court in *Roberts* considered to amount to over-compensation. As I have said, so far as I am concerned, that must be the end of the matter. In the circumstances, I make no award in respect of the additional costs associated with the purchase of special accommodation. I note, only in passing, that the basis in principle for Mr Arney's selection of a 2% discount rate remains unexplained. Further I, for my part, doubt that, if it were to be contended that mortgage interest rates were to be the basis for the loss calculation, it would be sufficient to rely upon the current interest-only mortgage rate: expert evidence on the trajectory of such rates in the future would be required. Such evidence is not currently deployed by the Claimant. Further, although Mr Arney's alternative formulations included a Periodical Payment Order in respect of the annual costs of an interest only mortgage, this was not the course which he advanced as his primary case. In any event, however, as I have already said, if capitalised even this approach would produce a figure higher than the loss which the Claimant seeks to recover."

19. On that basis the judge declined to make any award on this head.

20. It is of interest to note part of the judge's reasons when giving permission to appeal to this court against this part of her judgment. She said:

> "I granted permission as there exists an, in my view, important point of principle which the CA needs to resolve; that is, whether the *Roberts v Johnstone* formula remains consistent with the principle of full restitution. Even though the current discount rate may increase such as to produce some relatively modest damages in respect of the additional capital costs of accommodation in this case, the application of the formula produced anomalous results even when the discount rate was 2.5%. Tomlinson LJ in *Manna v Central Manchester University Hospitals NHS Trust* [2017] EWCA Civ 12 noted the various scenarios in which the shortfall between the damages awarded and the sum needed to fund the property may be so great that the property could not be purchased. Although therefore whilst historically *Roberts v Johnstone* has been regarded as a practical, if imperfect, solution to the difficult problem of reasonable (but not over) compensation when a claimant is intended to purchase an appreciating asset, there is a real issue now as to whether the formula remains fair and fit for purpose in the current economic climate of high housing prices, low interest rates and the use of PPOs for the delivery of damages for care."

Intervention by the Personal Injuries Bar Association (PIBA) in this Appeal

21. On 9 May 2019, PIBA applied to intervene in the appeal. By direction of Underhill LJ, that application was ordered to come before the full court. Written submissions from the PIBA were filed and served on 4 July 2019, subject to the outcome of that application. At the opening of the hearing before this court, Underhill and Nicola Davies LJJ ruled that PIBA should be permitted to intervene.

The Further Procedural History - The Appellant's Application to Adjourn and to Admit Further Evidence

22. This appeal has followed an unusual course.

23. When the appeal was listed on 23 and 24 July 2019, the Appellant repeated the submission made below that there was no requirement for expert evidence as to generic longer-term interest rates, given that she is "prepared to limit her claim to a figure which is lower than an unadjusted interest-rate-based lump sum award". However, the Appellant did apply to introduce evidence of a particular mortgage package backed by a periodical payment order, so as to assist in consideration of that alternative submission. The application to introduce this evidence was on the basis that since the court below had not yet made its findings as to the appropriate incremental costs of the Appellant's special accommodation, or as a consequence the difference in value between her existing property and that accommodation, calculation of the mortgage package designed to bridge the gap could not be advanced below.

24. The evidence was said to be credible since it might assist this court in considering whether a PPO-based award is appropriate as an alternative to the *Roberts v Johnstone* approach. This evidence was also said to be capable of informing the court "as to the willingness of a lender to make a PPO-backed mortgage offer at all, the same never having been ordered by the courts". The evidence would be of informative value as to

the interest rate which might be available for such a package, given that the amount of the loan (£900,000) and the "loan to value" proportion (£900,000 - £2.35m) are now known.

25. In oral submissions Mr Sweeting QC emphasised that there was a very difficult problem for this Appellant (and others in a similar position) in seeking permission to call extensive expert and other factual evidence at trial. The likely response of a trial judge was to decline to admit such evidence, because the court below was bound to follow *Roberts v Johnstone*, and the evidence was unnecessary for that purpose. For this reason, it was highly problematic to introduce a proper evidential platform at first instance, so that other approaches to the problem could be considered on appeal.

26. On that basis, following some discussion before the Court, the Appellant sought an adjournment of the appeal.

27. The Respondent opposed the admission of further evidence. The Appellant's first attempt to obtain any such evidence began only after the trial in the court below in August 2018, although the relevant attendance note disclosed indicated that earlier attempts had been made to obtain such evidence from a different financial institution. The Respondent also noted that the Appellant had placed the sum of £1m into an investment account so as "to comply with the stipulation of the [prospective] mortgage lender that £900,000 be ring fenced and held … as a repayment strategy in respect to the capital sum loan". The Respondent further noted that the only step taken by the Appellant prior to trial was to obtain evidence as to mortgage products and rates by means of a basic internet search, the results of which were not disclosed or sought to be introduced at trial. The Appellant therefore took no steps to obtain evidence as to the availability of a PPO-mortgage-backed product prior to trial. The Appellant had agreed in December 2018 to obtain and disclose evidence of research from a broker leading to the offer of mortgage on which it is now sought to rely. However, no documentary evidence became available or was served and filed, nor had any statement from such a broker been served and filed, and no explanation has been given.

28. The Respondent noted the principles laid down in the well-known case of *Ladd v Marshall* [1954] 1 WLR 1489 and the provisions of CPR 52.21(2)(b), stipulating that this court will not receive evidence which was not before the lower court "unless it orders otherwise". The Respondent relied on the decision of this court in *Sharab v Al-Saud* [2009] EWCA Civ 353, where the court observed that pre-CPR cases, including *Ladd v Marshall* "remain of relevance and indeed of powerful persuasive authorities". The Respondent also relied on the observation of Mummery LJ in *Transview Properties Ltd v City Site Properties Ltd* [2009] EWCA Civ 1255 at paragraph 23, where he observed that if the reception of fresh evidence by the Court of Appeal would lead to a retrial then its admission should only be allowed "if imperative in the interests of justice".

29. Against that background, the Respondent opposed an adjournment. The relevant evidence could have been obtained before trial. The skeleton argument on behalf of PIBA admitted to the appeal in *JR v Sheffield* envisaged a test case in which evidence could be adduced of mortgage interest rates before a rate of return was set in the light of such evidence. Evidence of this kind was always in contemplation. The second principle in *Ladd v Marshall* was not satisfied. Evidence as to one possible mortgage illustration was not likely to have "an important impact on the outcome of the case".

The illustration was not a firm offer, was now significantly out of date, did not represent an offer of a mortgage for life but was limited to 40 years. Moreover, the offer assumed (see the passage entitled "Rationale") that when the mortgage reverted to the standard variable rate after a period of five years, subsequent fluctuations in the interest rate could be mirrored by a variable PPO. That model was flawed in principle since the legislation does not allow for such a PPO.

30. We considered these arguments on the first day on which this appeal was listed. The court concluded that it was a proper course in this case, in the interests of the parties, and in the wider public interest, to adjourn the case, and to exercise the Court's powers under CPR 52.21(2) to admit evidence which was not before the lower court, including oral evidence. It was made plain to the parties that, whilst of course it was for them to decide what evidence should be adduced, the court desired to reach a properly informed conclusion as to the underlying problem and the solution, in contemporary conditions. On that basis, the appeal was adjourned to be re-listed.

31. Case management directions were given by me on 24 July 2019, the second day of the original appeal listing. Further directions were given before the matter was due to be heard in March 2020. Unfortunately, because of the timing of the advent of Covid-19, that hearing had to be adjourned. Hence the matter came before us only in late June 2020.

32. The parties agreed three 'paradigm cases', that is to say hypothetical cases, intended to be realistic, which might be useful in giving some comparative indications of the outcome of the approach in *Roberts v Johnstone*, or of alternative approaches to valuing the claim. These 'paradigm cases' are appended to this judgment as Annex 1.

Narrowing the Issues

33. In preparing for the adjourned appeal, the parties consulted a number of experts. As a result, a number of the options previously advanced were abandoned. In the report from the Civil Justice Council of 2010 the authors favoured the solution of an interest-only mortgage advance of the additional sum needed for purchase, backed by a periodical payments order ["PPO"]. The mortgage experts instructed for both sides reached agreement that this was not a practical solution. It was unlikely that a mainstream lender would accept income based on a PPO. Moreover, interest only mortgages were generally not widely available in the current market and lifetime mortgages were not generally available to younger borrowers. The developing market in "equity release" lending later in life was noted, but the experts could not predict what later life products would be available in 35 years' time. No suitable relevant product existed at the present time, and the experts felt it was unlikely that commercial lenders would be prepared to provide one in cases of long life expectancy. As the defendant would not retain any interest in the claimant's property under such an arrangement, it would be for the claimant's estate to bear the costs of restoring the property for sale at the conclusion of the claimant's life. It would also follow that if there was any change in the real value of the incremental property purchased over the claimant's lifetime, the estate would still acquire the windfall (or bear the burden of any decrease). For those reasons, this proposal was abandoned.

34. The parties explored whether an adjustment to the multiplier/multiplicand applicable to the claimant's life, whether based on mortgage repayments, interest on mortgage

repayments or on rental costs, might be an apt solution. However, in the appellant's case (and in other cases of long future life) the lifetime multiplier was such that any mortgage-interest-based calculation would lead to an award which exceeded the capital sum of £900,000. For example, at a typical rate of 3.8%, the interest-only payments on £900,000 equates to annual payments of £34,200. Applying the established multiplier of 55.02 would give an award £1,881,684. For the award to be less than £900,000 the multiplicand would need to be around £16,300 and would require a mortgage rate of 1.817%. Such a rate was unachievable. Hence, this potential solution was abandoned.

35. The possibility of a loan from the Defendant to the claimant with a charge on the property was unworkable, because the Respondent was not in a position to offer such a loan and the difficulties arising from shared ownership again were insuperable.

The Narrowed Issues

36. The issues remaining live in the appeal can be summarised as follows. The first is a legal issue: is this court bound by the decision in *Roberts v Johnstone*? That issue subdivides into three questions: 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*? If the answers to those questions permit the court to re-examine the approach in *Roberts v Johnstone*, then the questions arise, should the court award the full capital value of the incremental sum required? Alternatively, should the court award that sum but reduced to reflect the value of the notional reversionary interest, in other words the value of the "windfall"? If the latter approach is correct, how should the court reach a conclusion as to the value of the reversionary interest?

Is this Court Bound by *Roberts v Johnstone*?

37. The Respondent argues that the court is bound by *Roberts v Johnstone*. The Appellant submits not so: firstly, the approach enunciated in *Roberts v Johnstone* represents guidance rather than the legal principle; secondly, conditions have changed so as to render that approach unjust in its effect. In order to understand the arguments, it is necessary to look at the background to the decision, the terms of the decision, and how it has been addressed in subsequent authority.

38. The first relevant case is *George v Pinnock* [1973] 1 WLR 118. In that case the claimant was a young woman badly injured in a traffic accident. She was living in rented council accommodation with her mother and grandmother. But for the accident, it was assumed she would not purchase any accommodation. Out of a significant interim payment she did buy a bungalow for the capital outlay of £12,000. She had a life expectancy which the judge set at 13 years and she needed intensive personal care. She appealed against a number of the aspects of her damages award. As becomes clear from the judgment of Orr LJ, the judge had awarded no discrete element of damages in respect of her accommodation cost. As summarised by Orr LJ, after dealing with a number of identified elements in the award, the damages included "For the remaining elements of general damages, including loss of amenities and pain and suffering, £19,000". The respondent argued this must have included an award for the accommodation purchase cost, albeit in an undifferentiated way. The court rejected that submission. Rather than remit the matter, this court addressed this head of claim in the appeal, in the following terms:

> "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.
>
> I am not prepared to assume that the plaintiff, if the accident had not happened, would have been able to continue for more than a very short time living in accommodation rented at 17s 9d a week. If she had remained unmarried, I would have expected that she would contribute to a realistic rent, and might well in a year or two have found accommodation of her own. If she had married, it is in my judgment more likely than not that she would have continued to work, not necessarily continuously, and would have made substantial contributions to the matrimonial home. Taking into account, on the one side, the loss of income arising from the purchase of the bungalow, and, on the other, the expenses she would have been likely to incur apart from the accident, and allowing for tax in the calculation, I would assess the damages under this heading at £3,000, and I would award that sum as additional damages."

39. Aside from the very simple, not to say approximate, approach to personal injury damages, redolent of the time, it is to be noted that the Court did not apparently differentiate between the lost return by reason of the investment in the property and

other additional costs associated with the bungalow. The Respondent relies on the decision to decline a lump sum award because the claimant "still has the capital".

40. In *Roberts v Johnstone* itself, the plaintiff sustained serious brain injury at birth through medical negligence. In awarding damages, Alliott J expressed himself as following *George v Pinnock* when awarding damages for the incremental property acquired. The difference between the proceeds of the family home which had been sold and the purchase price of the required bungalow was £68,500. As analysed by Stocker LJ in his leading judgment, the judge at first instance had "clearly lumped together the cost of the bungalow plus the cost of its conversion before deducting the value of Hill cottage…" [Page 890F]. The judge had then discounted the sum of £10,000, representing an increase in value brought about by the cost of improvements and then deducted a further element because the property purchased was "much pleasanter than it needed to have been in order to provide adequately for the plaintiff". He then expressed himself as "arbitrarily" taking off one third of the product of his computation as representing an element of increased charges.

41. The plaintiff appellant criticised the trial judge on the ground that he had not followed *George v Pinnock.* The plaintiff argued that a proper application of the principles in *George v Pinnock* would have been to apply the relevant multiplier –

> "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 7%…. 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" [Page 881 F].

42. The respondent argued that the decision in *George v Pinnock* –

> "...must be approached with caution…. 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…. In those circumstances the judges "arbitrary" or rough and ready approach was inevitable….".

The respondent went on to argue, based on the decision in *Wright v British Railways Board* [1983] 2 AC 773, that the appropriate interest rate for "temporarily foregoing the use of money without risk to the integrity of the capital (other than inflation)" was 2%.

43. The respondent went on to say that –

> "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% of the capital cost. That provides a way through the thicket of

> difficulties caused by a literal application of *George v Pinnock*”. [Page 883 A].

44. In reply, the appellant argued that since the applicable multipliers –

> “are discounted at 4 to 5%, and not 2%… and in view of the current level of mortgage rates, 7% is the appropriate figure. If the court is faced with the 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.” [Page 884 E/F].

45. Stocker LJ summarised the plaintiff’s submissions and their consequences in the following terms:

> “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 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 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.”

46. The court went on to consider the appropriate rate to be used in evaluating the annual cost, but concluded that the answer was to be found in the reasoning of Lord Diplock in his speech in *Wright v British Railways Board* where he concluded in favour of the rate of interest obtainable on money invested in government stocks, a parallel to the assumptions behind the discount stipulated by the Lord Chancellor since the commencement of the Damages Act 1996. Stocker LJ went on:

> “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 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 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."

47. In completing his computation, Stocker LJ awarded the mathematical sum representing the cost of the difference between the two buildings, calculated at 2% with a multiplier of 16.

48. First instance judges have followed the approach laid down in *Roberts v Johnstone* in the ensuing years. Collins J did so at first instance in *Thomas v Brighton Health Authority* (1995) PIQR Q 44. That too concerned a brain injury at birth with very serious consequences. The issue in the case was not directly concerned with the approach in *Roberts v Johnstone*, the methodology of which was accepted by both sides. The issue was the appropriate interest rate to apply. For our purposes it is not necessary to go into that. It is of interest to note the remarks by Collins J in relation to the approach laid down in *Roberts v Johnstone*, as follows:

> "The difference in price between the houses was £62,000. Mr and Mrs Thomas paid off their existing mortgage of £30,000 by using their savings and took out an endowment mortgage in the sum of £60,000 to cover the extra costs. The mortgage interest is claimed by the plaintiff.
>
> It is convenient at this stage to consider the proper basis of compensation for the extra house costs. No part of the plaintiff's money was used in this case. Accordingly, on one view no damage has been suffered by the plaintiff since his parents chose to fund the purchase themselves. The opposing view is that the plaintiff should, following *Housecroft v. Burnett*, be enabled to make reasonable recompense for the additional payment. But the whole matter is complicated by *Roberts v. Johnstone [1989] 1 Q.B. 878*, since both counsel accepted that the means of assessing the costs of purchasing special accommodation approved in that case should be applied for the future. I confess I do not see the logic of that, since the plaintiff's parents and not he himself will continue to incur the cost and they, not he, will receive the benefit when he leaves home. However, logic

> frequently flies out of the window in the exercise of assessing damages and trying to be fair to both sides. The reason given for accepting the *Roberts v. Johnstone* approach for the future was that otherwise the plaintiff would be over-compensated. I think that applies both before and after trial and I bear in mind that all parents will be prepared to make and most will have actually to make financial sacrifices for the sake of their children."

49. The judge noted there was agreed evidence in the case between the two experts (see page Q56) "that in the long run property prices would rise to keep pace with inflation, and so I see no reason to vary the return on that ground". The debate as to the appropriate interest rate proceeded from there.

50. In the House of Lords, *Thomas* was heard in a conjoined appeal and is reported as *Wells v Wells, Thomas v Brighton Health Authority and Page v Sheerness Steel Co* [1999] 1 AC 345. The issue arising in all these cases was what should be the assumed approach to investment by a seriously injured claimant, and as a consequence, what should be the assumed rate of return on their investments, and thus in turn the appropriate multiplier. This issue affected many of the heads of damage arising in all three cases. There was no argument before the House of Lords as to the underlying approach in *Roberts v Johnstone*. The case was decided in the House of Lords after the passage of the Damages Act 1996, but before the Lord Chancellor had prescribed a rate of return to be expected from the investment of the sum awarded as damages, pursuant to his power under section 1(1) of the Act. I will return below to some of the provisions of the statute said to be significant in this appeal by the Respondent. However, the approach taken in the House of Lords is important when considering the issue of *stare decisis.*

51. The leading speech in the case was given by Lord Lloyd of Berwick, with whom the others agreed. Early in his speech he reiterated the principles by which lump-sum awards of damages should be governed:

> "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."

52. In the course of his speech, Lord Lloyd distinguished between the position of the "ordinary investor" and such plaintiffs as those party to the appeal. The former could address fluctuations in the value of their investments because they could "wait for long term recovery". Injured plaintiffs could not do so because they needed "the income, and a portion of their capital, every year to meet their current cost of care." Lord Lloyd therefore concluded that "it does not follow that a prudent investment for the ordinary investor is a prudent investment for the plaintiffs" (page 366H). It was on that basis that Lord Lloyd altered the previous practice as to the assumption of the rate of return on investments and thus the multiplier which is to be applied. Essentially, this was a response to changed conditions in the form of the availability of Index Linked Government Securities ["ILGS"]. Lord Lloyd explicitly approved of the decisions below whereby the judges in the three cases, he said, "were right to assume for the purpose of their calculations that the plaintiffs would invest their damages in ILGS" [page 373 C].

53. Turning to the application of that conclusion, Lord Lloyd made reference to the Damages Act 1996, noting that the Lord Chancellor had not as yet prescribed a rate. He observed that:

> "It goes without saying that the sooner the Lord Chancellor sets the rate the better. The present uncertainty does not make a settling of claims any easier. In the meantime, it is for your Lordships to set guidelines to replace the old 4 to 5 per cent bracket." [Page 375 E].

In his speech, Lord Lloyd repeatedly refers to what "guidelines" should be set by reference to the current average returns on those investments. Noting that "it is undesirable that the guidelines should be changed too often, it may be better that the average gross return should be ascertained over a period of months rather than on the particular day", he proposed a guideline of 2.5% "for general use until the Lord Chancellor has specified a new rate" [page 375H/376A].

54. Later in his speech, Lord Lloyd addressed specific aspects of the three cases under appeal, and in relation to *Thomas* addressed the question of incremental expenditure on house purchase, as follows:

> "In October 1990, 15 months after the plaintiff's birth, and five years before the trial, the plaintiff's parents moved into a larger house. They needed more space, because of his disability. The additional cost was some £60,000 which they raised by way of a mortgage. The question is how the additional cost should be reflected in the award of damages.
>
> 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?

> The answer to this question, described in Kemp & Kemp, The Quantum of Damages, vol. 1, para. 5-044 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.
>
> …
>
> 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.
>
> 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 forgoing the use of capital. At that time the net return on 15-year and 25-year index-linked stocks was 2 per cent. 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 Act of 1996. On this point I would restore the order of Collins J."

55. In the course of argument, both parties referred to further passages from the additional speeches in *Wells v Wells*, and it is convenient to refer to some of those passages now. The Appellant emphasises that the decision in *Wells v Wells* provided guidelines and should not be understood as establishing any legal principle. The Respondent argues that the approval of the methodology in *Roberts v Johnstone*, means that the approach in that case carries the authority of the House of Lords. The Appellant's reply is to the effect that the parties agreed to the approach, which was not the subject of argument in the course of the appeal and did not form part of the *ratio decidendi*.

56. The Respondent has a subsidiary argument based on the structure and wording of the Damages Act as amended. In essence, the proposition is that, where the Lord Chancellor has the power to set "different rates of return for different classes of case", the court has no power to do so where the Lord Chancellor has declined to exercise his power.

57. Germane to some of those arguments are the following short references. Lord Steyn, in giving his view on the appropriate guideline, remarked that –

> "while this figure of about 3 per cent should not be regarded as immutable I would suggest that only a marked change in economic circumstances should entitle any party to reopen the debate in advance of a decision by the Lord Chancellor." [Page 388E]

Lord Hope emphasised that –

> "the assessment of damages is not an exact science – that all the law can do is to work out as best it can, in a rough and ready way, the sum to be paid to the plaintiff as compensation…. Nevertheless, the object of the award of damages for future expenditure is to place the injured party as nearly as possible in the same financial position as he or she would have been in the accident. The aim is to award such a sum of money as will amount to no more, and at the same time no less than the net loss…." [Page 389F/390B]

Lord Clyde restated that the –

> "purpose of the award for an injured plaintiff is, in so far as the sum of money can do so, to put him as nearly as possible in the same position as he was in before he was injured…. The accumulation of precedent and experience in the careful analysis of the nature and effects of particular injuries can go a long way towards establishing levels of award which may be generally recognised and accepted as reasonable in particular circumstances. If necessary those levels may be open to adjustment or even correction from time to time by those courts which are best qualified to review what must in essence be a factual assessment of the kind sometimes referred to as a jury question. In relation to future pecuniary losses and expenses the uncertainties in the calculation are at their most severe. Here particularly means have been devised to minimise the imprecision. But despite the development of detailed tables and actuarial calculations there will always remain an element of uncertainty in prediction which may only in a rough and ready way satisfy the desire that justice should be done between both parties. The problem of sufficiently providing for the future care of the very severely disabled plaintiff gives rise to particular concern, since any inadequacy of the award in that respect could be particularly serious." [Page 394D/G]

58. Later in his speech, Lord Clyde indicated that he too favoured an assumed rate of return on investment of 3%, but emphasised that –

> "such a formula should not be seen as set in stone. It can serve as a general guide, open to modification and adjustment to meet the demands of particular cases." [Page 397H]

59. Finally, Lord Hutton addressed the approach to changes in the assumed rate of return in the future as follows:

> "I further consider that in order to promote and facilitate settlements and to simplify the assessment of damages in actions which come on for trial the rate of 3 per cent. taken by this House in the present appeals should be applied in other cases notwithstanding fluctuations in the return on I.L.G.S. until the Lord Chancellor prescribes a different rate pursuant to his power under section 1 of the Damages Act 1996 or unless there is a very considerable change in economic circumstances." [Page 404 H]

60. Neither party submitted to us that there was any subsequent authority directly on the point of the *Roberts v Johnstone* approach, or bearing on the question whether this court is constrained to follow that approach by the doctrine of *stare decisis*.

The Parties' Submissions

61. The Appellant's starting point is that the fundamental principle of law is that of full and fair compensation for injury. A claimant is entitled to damages which place her as closely as possible in the position that she would have been, absent her injury. The Appellant acknowledges that should not mean overcompensation, where that can be achieved.

62. Mr Sweeting QCemphasises that since *Roberts v Johnstone* and *Wells v Wells*, there are judicial dicta at the highest level making it clear that fair and reasonable compensation must be "full" compensation for a claimant. He cites in particular Lord Hope in *Longden v British Coal Corporation* [1997] AC 653, himself quoting Dixon CJ:

> "The principle is that the plaintiff must be compensated but no more than compensated, for his loss. As Dixon CJ indicated in the High Court of Australia in *National Insurance Co of New Zealand Ltd v Espagne* (1961) 105 CLR 569, 572 not much assistance is to be found in contemplating the supposed injustice to the wrongdoer. The concern of the court is to see that the victim is properly compensated. There must, of course, be no element of double recovery for the same tort." [p670D/E].

63. He also cites Baroness Hale in *Simon v Helmot* [2012] UKPC 5, at paragraph 60 where she said: "the only principle of law is that the claimant should receive full compensation for the loss which he has suffered as a result of the defendants tort, not a penny more but not a penny less."

64. Those are the principles, says the Appellant: the approach laid down in *Roberts v Johnstone* merely represents guidance as to the appropriate means, in the conditions of that day, towards achieving full and fair compensation, without overcompensation. As many cases have demonstrated, notably *Wells v Wells* itself, changing circumstances can require a change to such guidance.

65. The House of Lords in *Wells v Wells* was not considering the material change in circumstances faced by claimants in recent times, derived from very low or negative discount rates. The approach in *Roberts v Johnstone* was agreed by the parties before argument in the House of Lords and although the approach was restated by Lord Lloyd, the relevant changes in conditions had not come about, the approach was never the subject of argument or analysis by the parties. It did not form part of the *ratio decidendi* of the House of Lords in reaching their decision in those appeals, and thus the decision is not authority on the point. Properly understood, this court is not bound by *Roberts v Johnstone.*

66. The Respondent argues to the contrary. The decision of this court was fully reasoned, was intended to be authoritative, carries the *imprimatur* of the House of Lords, has for decades been treated as precedent and is binding on this court. The case cannot be brought to fall into any of the categories identified in *Young v Bristol Aeroplane Company Ltd* [1946] AC 163 which permit this court to depart from earlier decisions of the court. Indeed, the Appellant had not sought to argue that it did so.

The Subsidiary Argument

67. The Respondent developed a subsidiary argument, as I have noted above, derived from the Damages Act 1996. Section 1 of the Act in its original form and its relevant parts reads as follows:

> "**1 Assumed rate of return on investment of damages**
>
> (1) In determining the return to be expected from the investment of a sum awarded as damages for future pecuniary loss in an action for personal injury the court shall, subject to and in accordance with rules of court made for the purposes of this section, take into account such rate of return (if any) as may from time to time be prescribed by an order made by the Lord Chancellor.
>
> (2) Subsection (1) above shall not however prevent the court taking a different rate of return into account if any party to the proceedings shows that it is more appropriate in the case in question.
>
> (3) An order under subsection (1) above may prescribe different rates of return for different classes of case."

68. In 2018 that section was amended by the Civil Liability Act 2018 which replaced section 1 by substituting section A1. The significant difference from our point of view was the addition of section A1(4) which reads:

> "(4) An order under subsection (1) may in particular distinguish between classes of case by reference to –
>
> > (a) the description of future pecuniary loss involved;
> >
> > (b) the length of the period during which future pecuniary loss is expected to occur;
> >
> > (c) the time when future pecuniary loss is expected to occur."

69. Mr Audland QC argued that the terms of section A1(4), setting out particular circumstances where the Lord Chancellor might exercise his power under section A1(3), represented a change in the meaning of the statute and should constitute a further inhibition. With great respect to him, I conclude that this argument was misconceived. The power in the hands of the Lord Chancellor is established by sections 1/A1(3). In my view, section A1(4) does no more than identify particular grounds upon which the power may be exercised. In a sense the subsection adds nothing. Any exercise of the power on any of the bases set out in subsection (4), which predated the amendment of the statute, would have been obviously *intra-vires* and almost certainly uncontroversial. In *Wells v Wells* itself, the House of Lords gave guidance, even though the Lord Chancellor of the day had not exercised any of his powers in this respect. Of course, it is the case that where the power has been exercised to set a rate of return, whether generally or for a particular class of case, the court must take that into account. It has been established in *Warriner v Warriner* [2002] 1 WLR 1703 that where the Lord Chancellor has exercised his power under section 1 (1) the court should only reach a conclusion under section 1 (2) if the case in question –

> "falls into a category which the Lord Chancellor did not take into account and/or there are special features of the case which (a) are material to the choice of rate of return and (B) are shown from an examination of the Lord Chancellor's reasons not have been taken into account…"

In my view the alteration of the statute adds nothing to this question. Moreover, we are not here concerned with the change in the discount rate.

70. It was of some interest that during the course of argument we were informed by one of the expert witnesses, Mr Cropper, that he had sat on the relevant panel advising the Lord Chancellor on the discount rate in 2015. He provided to the court an addendum to the instructions to the panel from the Ministry of Justice which made it explicit that:

> "the use of the discount rate by the courts in calculating accommodation cost losses is **irrelevant** to the Lord Chancellor's exercise of setting the discount rate and therefore **should not be taken into account by the panel** in advising the Lord Chancellor on that exercise."

It was confirmed to us there has been no subsequent guidance or instruction.

Conclusions on *stare decisis*

71. I accept the Appellant's argument that *Wells v Wells* is not binding authority on this court as to the application of *Roberts v Johnstone*. The case was not the subject of argument before the House of Lords and did not form part of the *ratio decidendi* of that decision.

72. An illuminating authority on this issue is the decision of the Supreme Court in *Knauer v Ministry of Justice* [2016] UKSC9. In that case, the claimant appellant sought to avoid the outcome of the decision of the House of Lords in *Cookson v Knowles* [1979] AC 556 as reaffirmed in *Graham v Dodds* [1983] 1 WLR 808, namely that the multiplier for the value of income and services lost in a fatal accident claim should be applied from the date of death, rather than from the date of trial. The appellant's argument was that the decision in *Cookson v Knowles* was guidance rather than a declaration of the law. Whilst the respondent acknowledged that there was merit in the appellant's complaint as to the impact of the earlier decision, the respondent asserted that the decision was in relation to principle, and a matter of law, and thus constituted precedent.

73. The judgment was given by Lord Neuberger and Baroness Hale, with whom the other five justices agreed. They began with another restatement of the fundamental principle that:

> "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 the position in which he or she would have been had the harm not been done: full compensation, no more but certainly no less."

The court accepted that the effect of the decision in *Cookson v Knowles* did not do so, since the multiplier to be applied had as an important function to give a discount for early receipt of damages which, in the instant and paradigms cases, would not be received before trial. Thus, if the multiplier was applied from the date of death, the result would be under compensation. The consequence in *Knauer* was agreed to be a difference in damages of £52,808.

74. The court asked itself why the House of Lords had reached the conclusion it did in *Cookson v Knowles* and *Graham v Dodds.* The justices concluded that:

> "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…." [Page 918H/919A]

However, the justices concluded that the earlier authority was a decision in principle as to the law, and they did so in the following terms:

> "20. For the appellant, Mr Frank Burton QC contended that a determination that the appropriate date is the trial date would not involve a departure from those previous decisions, and therefore did not require the appellant to rely on the *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234, whereby the House of Lords declared that it could depart from its previous decisions. This contention rested on the basis that we are merely being asked by the appellant to change a judicial guideline, rather than to depart from any earlier decision. We do not accept that contention, which appears to fly in the face of the reasons given by Lord Bridge for reaching the conclusion which he did in *Graham v Dodds*. He stated that the selection of the date of trial date would be "clearly contrary to principle" and would give rise to a "highly undesirable anomaly" (p 815). However much we may doubt those observations for the reasons already given, they demonstrate that he was deciding the issue as a matter of legal principle, and not merely giving non-binding guidance.
>
> 21. Furthermore, it is important not to undermine the role of precedent in the common law. Even though it appears clear that both the reasoning and conclusion on the point at issue in *Cookson v Knowles* and *Graham v Dodds* were flawed, at least in the light of current practice, it is important that litigants and their advisers know, as surely as possible, what the law is. Particularly at a time when the cost of litigating can be very substantial, certainty and consistency are very precious commodities in the law. If it is too easy for lower courts to depart from the reasoning of more senior courts, then certainty of outcome and consistency of treatment will be diminished, which would be detrimental to the rule of law."

75. The Supreme Court then proceeded to correct the injustice they had identified by the application of the *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234.

76. The question for this court is whether or not the instant case falls into the same category. I have not found this an easy question to decide, but in the end I have concluded that this case is distinguishable from the position which arose in *Knauer*. I have done so for two principal reasons.

77. The first is that, as the judgment in *Knauer* made clear through the quotation from *Cookson v Knowles* set out above, the decision in the latter case was explicitly based on "principle". That appears to have been the determining point for the Supreme Court in *Knauer*. The approach adumbrated in *Cookson v Knowles* was not guidance to achieve an end consistent with principle, but a statement of principle itself.

78. My second reason turns on the nature of the development of practice and guidance in personal injury litigation. Perhaps more than in any other field of litigation, disputes are resolved by negotiation and settlement. There is the strongest possible need for clear guidance from the courts as to how fairly to approach such negotiations. Both claimants and insurers have a strong interest in predictability, which brings resolution and some containment of costs. Yet the nature of adjudication of compensation, perhaps most

critically future losses, if it is to amount to anything more accurate than the frankly crude approach adopted many years ago, requires close attention to many changing circumstances: changing life expectancy, changing security of and return on investments, changing medical care and modes of personal care, perhaps being only the most obvious. In my view, there is undoubtedly some tension between desirable certainty and predictability on the one hand, and response to changing conditions on the other.

79. Many of the decisions at an appellate level bearing on the approach to calculating damages are explicitly based on the conditions of the day. The decision in *Wells v Wells* was so. Guidance is given often with an express indication that the guidance is based on changed conditions, and might be altered by future changes, albeit implicitly significant rather than trivial changes. Where such guidance is given by an appellate court as to how best, in the currently prevailing circumstances, to comply with legal principle (in this instance fair and reasonable compensation but not overcompensation) then it seems to me conceptually correct to recognise that it is guidance, and not an enunciation of legal principle. The practical consequences for litigation will be little different. Litigants and judges at first instance will not depart lightly from such guidance: the costs risks in personal injury litigation represent a formidable discipline. But there would be a diminished risk that guidance as to practice will long outlive the conditions which gave rise to it.

80. I wish to emphasise that without reference to both aspects of my reasoning, I would not have reached the conclusion that I have. It appears to me that the reasoning in *Roberts v Johnstone* was a means to an end rather than a principle, or end in itself. If there is a justified call to alter the means by which that end (fair compensation but not overcompensation) is reached, and another means is available, it appears to me this court should be ready to contemplate a change in the guidance to be given.

81. I would therefore answer the first two questions arising in this case as follows: *Roberts v Johnstone* does apply to this case, but in the form of authoritative guidance from this court, given in the specific conditions prevailing at the time of the decision. If that guidance is demonstrated now to be ineffective in achieving the object of the relevant principles of law, namely full compensation without over-compensation, then this court can revisit and alter such guidance. I now turn to the question whether we should do so.

Should the Court Alter the Approach Laid Down in *Roberts v Johnstone*?

82. The central proposition of the Respondent on this issue is that the Appellant cannot show that the application of *Roberts v Johnstone* results in any injustice, because the Appellant cannot show that she is likely to suffer a net loss from buying the more expensive house. The award of any sum in damages would amount to overcompensation, and hence injustice to the Respondent. Central to this proposition is some of the evidence before the court.

The Economists

83. Each side instructed an expert economist. The Appellant instructed Dr John Llewellyn. After an academic career, he spent 17 years working for the Organisation for Economic Cooperation and Development (OECD) in which capacity he was the head of

international forecasting and policy analysis, and later chief of staff to the secretary general. He then became Global Chief Economist and Senior Economic Policy Adviser at Lehman Bros. Since 2009 he has acted through his own consultancy specialising in macroeconomics. He sits on the board of the Office for Budgetary Responsibility ["OBR"]. The Respondent instructed Mr Alan Wilson, director of consulting services at Oxford Economics. Following postgraduate qualification, he spent 12 years in the government economic service, including two years at the Treasury forecasting inflation and coordinating macro-economic forecasts. He joined Oxford Economics in 1996. He has since worked extensively on forecasting economic developments around the world. In his report of December 2019, Mr Wilson makes it clear that the views he presented are based on the analysis developed by his consultancy.

84. Both these experts agree that there is an intrinsic problem in compensating for a more expensive house purchase than would otherwise arise. As Mr Wilson put it, this is fundamentally because "housing does not just provide the owner with somewhere to live. It also represents a capital asset which can be sold…". Mr Wilson points out that what has become termed "the windfall problem" is not confined to an award of lump sum damages to cover such additional capital cost. He says: "it would be no different if the defendant provided a periodical payment of a more expensive property, or indeed if the defendant provided an interest-free loan…. In all these cases the claimant, as the beneficial owner of the property, would benefit from any additional capital gain that accrued as a result of owning a more expensive house…. The only circumstances where this windfall problem does not arise is when the claimant does not own property."

85. There is an irony about the last observation. It is clear that if the claimant were to rent property throughout a long life, the windfall problem would not arise, but the damages would be very much greater. Avoiding the detriment to a defendant's insurer of a windfall in that way, even if it was practical, would be much more expensive.

86. It is possible to distinguish two elements to the potential windfall: firstly the additional capital supplied to the claimant which is invested in property, and which, provided property retains its value, represents additional capital in the hands of the claimant or his/her estate. The second element is any incremental gain in the value of the additional capital invested in property arising from a real increase in property value. In both cases a windfall only arises when the injured claimant no longer needs to occupy either the property purchased, or a substitute property purchased following a move. Although there will be cases where an injured claimant eventually moves from their own property into hospital or other residential care, it appears to be accepted by the parties that in the great majority of cases of serious injury any windfall will arise only at the claimant's death.

87. The Respondent's approach relies essentially on three bases. The first is that property will at least hold its real value through the lifetime of the Appellant. The second is to suggest that it is consistent with fair and reasonable compensation in effect to compel the claimant to generate the necessary additional capital for house purchase by investing damages awarded to her, not merely in respect of such heads of claim as damages for pain and suffering and loss of amenity, but also as capitalised and discounted future losses such as lost earnings, and future care costs. The third basis of the Respondent's approach springs from the second. The Respondent recognises that, even on the predictions or projections upon which he relies, this Appellant (and many others in a

similar situation) will require to release some of that capital late in life to deal with continuing costs, such as the cost of care.

88. The economists agreed on a number of points recorded in a note of their prehearing discussion. They agreed that, in order to accommodate the "dual nature of owner-occupied housing" representing both need and asset, economists have developed the concept of the "user cost of housing". The full "user cost" model consists of: mortgage interest paid, plus interest foregone on capital used (opportunity cost), plus depreciation and running costs (repairs and maintenance, taxes, insurance, et cetera), minus capital gain (difference between price at beginning and end of period). Where running costs are covered separately, the user cost of housing reduces to the cost of capital minus the expected capital gain.

89. The economists further agree that the *Roberts v Johnstone* approach "goes some way towards dealing with the capital gains/losses issue by allowing only for the real, not the nominal, opportunity cost of capital. They agreed, however, it does not allow for the possibility that house prices might rise, or fall, relative to general inflation". They also agree that the model does not allow for differences between claimants who can meet their additional capital needs out of savings or a lump sum award, and those who need to borrow to finance their additional accommodation needs. As we shall see, the need to borrow may arise at very different points, depending upon the particular circumstances of the case. In the case of this Appellant, even on the figures as presented by the Respondent, the need to borrow will arise late in life but well within her life expectancy, and at a time of likely vulnerability.

90. The economists further agree that statistical analysis shows that the "user cost of housing" has on average been negative, even for those who need to borrow additional capital. This result comes about by factoring in the historic pattern of rising house prices and by taking into account the consequential capital value of the relevant property at point of sale (usually death). As the economists phrase it:

> "the real increase in house prices has on average exceeded the real cost of mortgage borrowing. Over the past 45 years, house prices have increased by an average of 2.6-2.7% relative to the Consumer Prices Index (CPI) and around 1.9% a year relative to the Retail Price Index (RPI)."

91. The economists then addressed the difficulties of forecasting. They agree that forecasting inevitably involves errors. In addressing forecasting over long periods, they agree that there is a distinction to be made between "real variables" such as GDP or productivity and "nominal variables" such as the aggregate price level of the exchange rate. Errors are likely to be smaller, they say, when forecasting the difference between two nominal variables than when forecasting them individually, "for example, forecasting changes in real house prices, rather than individually forecasting nominal house prices and the general level of prices in the economy".

92. At that point the economists diverge. In his original written evidence of December 2019, Mr Wilson for the Respondent suggests that the user cost of housing will be positive at an average of 0.6% over the next 30 years, for a claimant who needs to borrow. For a claimant who can use capital that would otherwise be saved or invested, his forecasts show that the user cost of housing over the next 30 years will be on average

negative at -0.9%, provided the opportunity cost of capital (i.e. the lost investment return) is based on the discount rate applicable in this case, namely -0.75%. Mr Wilson goes on to say that the relevant rates can be averaged "for the claimant who can meet some of the cost in one way and some in the other, and this is the most appropriate way to apply my recommended approach". He goes on to add that in his view "it is much more likely that house prices will increase in real terms over the next 40 years than that they will fall or stay the same".

93. In a footnote to his report, Mr Wilson promised an update if there were significant changes in the economic outlook before the hearing. Commendably, he provided a supplementary report dated 8 June 2020. In the introduction he stated that: "the revisions that have been made to Oxford Economics' forecasts for 2020 since the start of the year are <u>the largest forecast revisions I have ever seen</u>" [emphasis added], and required a supplementary report. As a consequence of Covid-19, and the financial consequences thereof, Mr Wilson gave a forecast that "UK GDP [will] be 8% lower in 2020 and 2019, compared with a forecast at the start of the year of 1% growth". The likely level of interest rates was lower than previously thought. The forecast annual user cost of housing for a borrower projected over 30 years was altered from 0.65% to 0.37%. The forecast annual user cost of housing for a saver where the opportunity cost of capital was based on RPI -0.75% was altered from -0.86% to -0.60%.

94. The addendum report notes that the overall user cost of housing was generally about 0.25% higher as a result of lower forecast average rate of house price inflation. Mr Wilson fleshed out this point as follows:

> "our expectation that house prices will fall this year and next, and only partly recover this fall over the following years means that we no longer expect house price inflation to exceed RPI inflation over the 30 years shown in the table. But we do expect house price inflation to exceed RPI inflation once these short-term falls are out of the way, and in the very long run this effect is likely to dominate.… I still regard it as much more likely that house prices will increase over a 40-year period in real terms rather than fall or stay the same if this is measured relative to the CPI, but relative to the RPI our central forecast is for little change in real house prices."

95. Dr Llewellyn restated that forecasting the user cost of housing requires forecasting of each of the main components, that is to say the (opportunity) cost of capital minus the expected capital gain. Dr Llewellyn's conclusion is that both forecasts are problematic, even before considering the impact of Covid 19:

> "Interest rates in the UK are the lowest that they have been for over 300 years and the likely evolution of property prices is particularly problematic. The determinants of property prices are… Interest rates, the number of households, inflation, (real) income, …Taxation of various forms, including mortgage interest relief, inheritance tax, capital gains taxes, and wealth taxes, and crucially, the supply of housing."

In the course of his oral evidence to us Dr Llewellyn emphasised that the ratio between house prices and earnings was now at its highest for a hundred years. This was no doubt connected with the historically low interest rates. It was very hard to believe that such a ratio could go on indefinitely. In Dr Llewellyn's view "it is not possible to forecast these determinants for more than just a few years ahead with a sufficient degree of certainty". It was important to recognise that the high degree of uncertainty led to a large potential for error, particularly in predictions stretching 30 to 40 years into the future.

96. In cross-examination, Dr Llewellyn emphasised the difficulty of accurate forecasting of property prices just now. He made clear that he could now imagine property prices might well not rise. In the course of the 1950s, British house prices halved in relation to earnings. He was asked about his own approach as a serving member of the board of the Office for Budgetary Responsibility (OBR) and as former head of forecasting at the OECD. It was important to have in mind the distinction between forecasts and projections. Projections were valid as a means of examining the implications of a specific set of assumptions. At the OECD he would generate and engage with projections over perhaps 30 years. Valid forecasting was done over periods of only one or two years. Dr Llewellyn agreed with the proposition that the prediction that house prices would hold their value was the "safest" prediction, but it was "not safe". Given the extraordinarily low interest rates, currently at an historic extreme, it was very likely that interest rates will rise, increasing the cost of mortgage borrowing, and thus holding back property prices.

97. In the course of his cross-examination, Mr Wilson accepted that the changes in expectation captured by his supplementary report were very considerable. Every forecast assumes that there may be some unknown events or contingencies during the relevant period. He accepted that in relation to the user cost of housing there could be big variations over five-year periods. Although such fluctuations could be averaged out if taken over a long-term view, liquidity mattered more for owner occupiers, and such fluctuations represented a bigger risk at a given particular point in time. He accepted that forecasts did not always follow the past. Even the Office of National Statistics [ONS] accepted that there was a great debate about forecasting inflation: everyone recognised this was a difficult area. When he was asked why the user cost approach was not adopted for official statistical purposes, Mr Wilson's answer was "ask the ONS".

98. Focusing on house prices, in his original report Mr Wilson noted that Oxford Economics' prediction in January 2009 was for a rise in house prices at an annual average of 2.8% over the ensuing 10 years. Looking back the actual increase on average over that decade was 2.6% a year. His prediction for future house price change in December 2019 had been for average house price inflation of 3.18% a year over the next 30 years. The revised prediction of June 2020 was 2.89%, a figure which (as I have already indicated) his consultancy has concluded will likely not exceed RPI over the next 30 years.

99. Mr Wilson did emphasise that similar degrees of uncertainty afflict the prediction of other heads of claim such as future earnings and future costs of care.

Conclusions on the Economists' Evidence

100. Standing back from the economic evidence, in my judgment some conclusions arise. Although it may be the safest prediction, I accept from Dr Llewellyn's evidence that it is no longer a "safe prediction" that property prices will rise or even hold their value over the ensuing decades. We are not in the same era as the court in *Thomas,* where the experts agreed that property prices would rise to keep pace with inflation. I accept that the "user cost of housing" is a valid economic tool for historical analysis, taking into account as it does the gain in capital value normally only realised on death. It is a separate question whether the user cost of housing is an appropriate yardstick for full, fair and reasonable compensation to an injured claimant during life. Even as an academic approach, the user cost of housing as a predictive tool in relation to an individual appears to me to have a high degree of uncertainty, perhaps particularly starting from such a turbulent economic and financial climate as obtains in mid-2020.

101. I pause to note that, even accepting Mr Wilson's predictions at face value, the difference of 0.29% in his two successive sets of predictions, compounded over 30 or indeed more than 40 years of future life, would produce a very considerable margin, and this even before one comes to consider the degree of uncertainty about each individual prediction, the cyclical fluctuations in prices potentially critical for the claimant who must realise assets at a particular point in time, or the relative changes in inflation (however measured) which will determine how the mathematical change in house prices converts to the real value of capital.

The Actuarial Evidence

102. I turn to the actuarial evidence called by both sides.

103. Although other witnesses are qualified actuaries, the formal actuarial evidence came from Mr Chris Daykin for the Appellant and Ms Kate Angell for the Respondent. They took widely different approaches to the case, in large measure because they received widely different instructions as to how to approach it. Mr Daykin is highly critical of the effects of *Roberts v Johnstone*, and I analyse his approach later in this judgment. The Respondent relies on Ms Angell's evidence as demonstrating, on the basis of particular assumptions derived from the economists' evidence, that the outcome of the application of *Roberts v Johnstone* in this case will represent fair and reasonable compensation. The Respondent says this evidence is supportive of what I have identified as the second and third bases of the Respondent's case: namely that it is consistent with fair and reasonable compensation that the claimant should be compelled to generate the necessary additional capital for house purchase by the investment of lump sum damages awarded pursuant to other heads, because the Appellant will be able to, and should be required to, release some of the capital investment in the property later in life to deal with continuing costs.

104. Both these witnesses also gave some evidence relevant to the valuation of the reversionary interest in such cases.

105. Mr Daykin was employed by the Government Actuary's Department from 1970 to 2007. From 1989 to 2007 he was head of the department, and the Government Actuary. He was a member of the Ogden Working Party from the early 1990s until the end of his service with the Department and was responsible for the preparation of the 2nd to 6th

editions inclusive of the official *Actuarial Tables with explanatory notes for use in Personal Injury and Fatal Accident Cases.* He has a number of distinguished professional medals and awards. He is now an independent consultant. Ms Angell qualified as an actuary in 1998. She joined Willis Towers Watson in 2009 and is currently a senior director in the Insurance Consulting and Technology practice.

106. As with the other pairs of experts, Mr Daykin and Ms Angell engaged in pre-hearing discussion. They reached agreement on certain relatively restricted matters. They agreed that the calculations provided in their respective reports "are correct, subject to the assumptions on which they are based". They agreed that the "differences between their respective reports arise to a large extent from the instructions which they were each given, and reflect significant underlying differences of principle". They also agreed as follows:

> "If capital is awarded to the claimant for additional accommodation costs, or even if it is loaned to them for their lifetime (or any shorter period), then the defendant will in principle have a reversionary interest in the house (or part of the house) that the capital is used to purchase. This would crystallise on the death of the claimant or possibly earlier when they vacate the property if, for example, they move into a care home or hospital in later life.
>
> The practicality of implementing some of the borrowing approaches considered (in particular cost of borrowing and equity release) will depend on the availability of suitable loan products either at the time of trial or, on some approaches, at a future date. Some methods could still be regarded as a theoretical basis for calculating an amount of compensation, even if they could not be implemented in practice, leaving the claimant to apply that sum as they choose to alternative routes available to them.
>
> The practicality of taking into account the defendant's reversionary interest will depend on whether suitable assumptions can be determined to calculate the value in a way which is fair to both claimant and defendant, which could be by way of the Court setting the assumptions or by simulating a market value, to the extent that a robust set of underlying assumptions can be inferred from the market in such interests."

107. Their other areas of agreement are either uncontroversial, unnecessary to state, or no longer relevant, given the narrowed issues in the appeal.

108. Ms Angell has approached the Appellant's case using an analysis termed "cash flow modelling". It is helpful first to consider her evidence, and the critique of her evidence, given its close connection with the economic predictions relied on by the Respondent.

109. Ms Angell was asked to consider three alternative approaches to the case: firstly, to give an "estimation of the expected reversionary interest of the additional accommodation cost, such that the possible compensation amount is the capital value

of the accommodation cost in current terms less the current value of the conditional interest in the additional property value following the claimant's death". The second "approach" was a "calculation of the cost of borrowing the additional accommodation cost, on an interest only basis, based on some alternative starting ages and annual costs of borrowing". This approach has ceased to be relevant. The third approach was an "estimation of the additional compensation payable to cover the costs of borrowing under an equity release type arrangement to cover the expected shortfall in compensation that would arise due to the claimant using part of their initial compensation payment to purchase the property".

110. In assessing all of these, Ms Angell made a number of explicit assumptions. Firstly, she assumed that house price inflation would be constant at 3.2%. Secondly, appropriately, she began her calculations when valuing the reversionary interest at the age of the Appellant at trial. The most important of her calculations relates to the question of equity release by the Appellant later in life. Here she was asked to assume that the claimant uses part of her compensation award to purchase the property, thereby reducing the compensation amount available for investment. She approached the calculation on two alternative bases, the first being what she described as:

> "A theoretical interest only basis, whether borrowing costs reflect the amount borrowed … and assume that interest is paid annually … Such that no interest accrues on interest from previous years".

The second basis, conversely, is:

> "A theoretical accumulation of interest basis where I have assumed that interest payments due on any borrowed amounts are not paid by the claimant, and hence additional borrowing is required to fund the interest payments. Interest is therefore accrued on interest from previous years."

111. In each case, Ms Angell has had to make assumptions about the cost of borrowing which will arise very many years from now, and about the age of the Appellant when her damages run out, so that she is compelled to borrow against the equity in the house to fund her care and other needs. The assumptions are respectively, cost of borrowing at 4%, 5% or 6%, and age 78.58 or 79.58. Ms Angell herself emphasised that this method does require the input of a significant number of assumptions which are uncertain and rely on expert judgment. These include house price inflation and the future cost of borrowing under an equity release type arrangement. The approach also implicitly assumes that "such an equity release type arrangement, on borrowing rates consistent with those assumed, will be available when the claimant's funds are exhausted…".

112. I now reproduce the critical table from Ms Angell's report.

Table 7.2: Equity release approach

Basis	Assumed equity release borrowing costs	Age at which claimant is expected to require additional funds	Initial compensation amount assumed	Additional cost to fund equity release interest payments	Additional compensation payment due to insufficient equity in property	Reversionary interest in the property
Interest Only	4% per annum	78.58	£3,321,801	£269,384	£0	£721,674
Interest Only	5% per annum	78.58	£3,321,801	£332,980	£0	£721,674
Interest Only	6% per annum	78.58	£3,321,801	£399,576	£0	£721,674
Interest Only	4% per annum	79.58	£3,451,801	£217,808	£0	£796,351
Interest Only	5% per annum	79.58	£3,451,801	£272,260	£0	£796,351
Interest Only	6% per annum	79.58	£3,451,801	£326,712	£0	£796,351
Accumulation of Interest	4% per annum	78.58	£3,321,801	-	£51,255	£480,692
Accumulation of Interest	5% per annum	78.58	£3,321,801	-	£116,887	£452,157
Accumulation of Interest	6% per annum	78.58	£3,321,801	-	£197,272	£434,010
Accumulation of Interest	4% per annum	79.58	£3,451,801	-	£19,115	£577,350
Accumulation of Interest	5% per annum	79.58	£3,451,801	-	£58,390	£538,326
Accumulation of Interest	6% per annum	79.58	£3,451,801	-	£144,323	£510,678

113. In respect of the results of her calculations, Ms Angell highlights a number of features. As will perhaps be obvious, the age at which the Appellant is expected to require additional funds is affected by the degree to which there is a need to invest compensation awarded under other heads in the initial property purchase. Secondly, again based on the assumptions identified, where borrowing late in life is obtained on an "interest only" basis, Ms Angell predicts "no scenarios where the additional value of the property is insufficient to allow the claimant to borrow enough funds to meet the claimant's expenses. As a result, the "additional compensation payment" in the table… is always zero for the interest only basis." By contrast, if it proved to be the case that an equity release product was indeed available to the appellant at the age contemplated, but not on an "interest only" basis, or alternatively that she was unable to afford to defray any interest annually rather than to allow interest to roll up, then Ms Angell's evidence is that there would need to be a further compensatory award, as she terms it "due to insufficient equity in property". Ms Angell also comments that this approach is the "most complicated of the methods I have been asked to consider."

114. It will also be clear (and is conceded by Mr Audland QC) that if parties and the courts were to follow such an approach, either as an examination of the effect of *Roberts v Johnstone,* or as an alternative approach to assessing what should be the award to a claimant, detailed actuarial analysis would be required in every case. The analysis would be based upon explicit assumptions, which themselves would require detailed preliminary consideration by the parties if agreed, or resolution by the court if not agreed. In the latter eventuality, quantifying the claim would require a two-stage process.

115. In the course of prehearing preparation, a number of questions were put to Ms Angell. She confirmed that the reversionary interest values set out in her report were:

> "calculated from a theoretical actuarial perspective and I have not attempted to determine a market value, nor have I considered whether a market for such reversionary interests exists."

She clarified that her estimation of the value of the reversionary interest was "based on a <u>nominal</u> discount rate of 4.9%". She gave an explanation as to why her calculations differed from the approach taken by the Respondent's expert on the reversionary interest Mr Clark who provided written evidence to the court, and who calculated his figures based on a "revised <u>real</u> discount rate of 1.75%".

116. There were significant areas of disagreement between Mr Daykin and Ms Angell on this approach. Apart from the disagreement as to the appropriate nominal discount rate, Mr Daykin emphasised that he regarded "the assumption of a fixed rate of growth of house prices at 3.2% a year for 75 years regardless of market yields as being entirely speculative". Mr Daykin agreed with Dr Llewellyn on that point, stating his preference for a market valuation of the reversionary interest, or if need be a simulation of a market valuation. He also considered it "inappropriate to assume that the reversionary interest of the defendant builds up in full, from the time of the trial".

117. Following their discussion in January 2020 Ms Angell provided a supplementary report in June. Like Mr Wilson, she introduced alternative economic assumptions. She now took the predicted house price inflation at 2.96% per annum, and assumed a future inflation rate for all heads of loss at the same rate, 2.96% per annum. She took the Ogden discount rate at -0.75% per annum and the "risk-free investment return/nominal discount rate" at 2.1878% per annum. On that basis, she revised her table calculating the effects of an equity release approach as follows:

Table 7.2-E1: Equity release approach

Basis	Assumed equity release borrowing costs	Age at which claimant is expected to require additional funds	Initial compensation amount assumed	Additional cost to fund equity release interest payments	Additional compensation payment due to insufficient equity in property	Reversionary interest in the property
Interest Only	4% per annum	78.58	£3,321,801	£269,023	£0	£653,374
Interest Only	5% per annum	78.58	£3,321,801	£336,279	£0	£653,374
Interest Only	6% per annum	78.58	£3,321,801	£219,864	£0	£653,374
Interest Only	4% per annum	79.58	£3,451,801	£274,830	£0	£729,491
Interest Only	5% per annum	79.58	£3,451,801	£329,796	£0	£729,491
Interest Only	6% per annum	79.58	£3,451,801	-	£0	£729,491
Accumulation of Interest	4% per annum	78.58	£3,321,801	-	£80,726	£437,565
Accumulation of Interest	5% per annum	78.58	£3,321,801	-	£153,488	£417,729
Accumulation of Interest	6% per annum	78.58	£3,321,801	-	£236,380	£404,559
Accumulation of Interest	4% per annum	79.58	£3,451,801	-	£36,077	£523,297
Accumulation of Interest	5% per annum	79.58	£3,451,801	-	£83,868	£493,221
Accumulation of Interest	6% per annum	79.58	£3,451,801	-	£144,946	£472,165

118. Ms Angell explained the changes and the reasoning behind the changes in a short paragraph which it is worth reproducing, rather than attempting a paraphrase:

> "2.5 Given the reduction in the assumed rate of general price inflation, the assumed nominal discount rate has reduced compared with that used for the figures in Table 7.2 of my Expert Report. As a result, the figures for the "additional cost to fund the equity release interest payments" and "additional compensation payment due to insufficient equity in property" shown in the table above have both increased compared with the figures set out in Table 7.2 of my Expert Report. <u>The "additional compensation payment due to insufficient equity in property" figures have increased to a more significant extent given the additional impact of the reduction in house price inflation. This results in an increase in the compensation payment required to fund the borrowing requirements which are more likely to exceed the value of the property at some point in the future</u>." [Emphasis added]

119. The effect of Ms Angell's calculations was that the whole of the award would be used up, depending on the detailed scenarios employed when and if the Appellant reached an age around 92 to 93.

120. When cross-examined, Ms Angell was frank in acknowledging the degree to which her calculations were based upon assumptions. Her response was that there were in any event very many uncertainties in calculating any compensation award. Looking at future investment returns, she accepted that the method involved projecting very many years into the future. There were real uncertainties about the assumptions she had made. She accepted in particular that if there was any doubt or variation in the expected or assumed growth in house prices, then her calculations as to the value of the reversionary interest or what price it might fetch in any existing market fell away. She also accepted, as was obvious, that on her model the requirement for the instigation of some form of equity release, driven by exhausted available funds, arose at a time when the Appellant would be very much older and likely to be at a vulnerable stage in her life.

121. Mr Daykin began his report with a review of the background leading up to the setting of the new discount rate by the Lord Chancellor in February 2017 at the level of -0.75%. He noted the revision to -0.25% on 15 July, following the commencement of the Civil Liability Act 2018. The altered basis of approach in that legislation was a move from the assumption of risk-free investment in a portfolio of index linked gilts to an assumption of investment in a lower risk portfolio. Mr Daykin then noted the consequential effect on the application of *Roberts v Johnstone*:

> "With the formula in *Roberts v Johnstone* being interpreted post *Wells v Wells* as involving the statutory discount rate both for the multiplicand and the calculation of the life multiplier, this implied that the compensation for the capital costs of accommodation became negative with the setting of a negative statutory discount rate from 2017, in other words the claimant should pay the defendant for the costs of improving the property. As this would be an absurd result, the courts at first instance have since then determined that there should be zero compensation for this head of damage…"

122. Mr Daykin summarised some of the mounting criticism of the *Roberts v Johnstone* formula prior to 2017:

> "since in practice in many cases it did not provide sufficient funds for the claimant to be able to upgrade their accommodation, unless they have spare capital within their existing resources or use the compensation from other heads of damage for the purpose. The amount of compensation awarded was directly dependent on the value of the life multiplier, and hence on the claimant's expectation of life. Where the expectation of life was short the compensation was low and *vice versa* in cases with a long expectation of life."

123. Mr Daykin then set out principles by which he approached his conclusions. I do not intend to repeat them all. These are principles which in Mr Daykin's view should be observed by courts when awarding compensation, since in his view "not to do so will lead to explicit under-compensation". The principles include the proposition that the capital cost of "upgrading accommodation should actually ensure that the claimant has the funds to purchase the more valuable property which the court has determined will meet his needs". Mr Daykin's third principle he expresses as follows: "the third principle which should in my view be considered as fundamental is that the claimant should <u>not</u> be required to use compensation received for other heads of damage in order to finance necessary improvements to their property". Mr Daykin's fourth principle is that the method and implementation of compensation "should not depend on the financial position of the claimant before or after the accident or and whether they already own a property with or without a mortgage".

124. With great respect to Mr Daykin, who is undoubtedly a deeply knowledgeable and experienced expert, some of the principles formulated represent a personal view of what the law should be, rather than a statement of the law as it exists.

125. Mr Daykin's fifth, sixth and seventh principles bear repetition:

> "3.5 A fifth principle is that the method of compensation should, as far as possible, be robust in respect of the uncertainty about how long the claimant will survive.
>
> 3.6 A sixth and significant principle is that, where the method adopted involves a third party, such as mortgage lender, purchaser of reversionary interest or life insurer, the relevant market should be sufficiently deep and liquid to avoid excessive frictional costs and the possibility that the market could operate in a biased fashion against either the claimant or the defendant.
>
> 3.7 Where it is possible to avoid it, and it does not conflict with the principles above, a seventh principle of compensation for such capital expenditure on upgrading accommodation should be that the claimant's estate after their death should not benefit unduly from a windfall in respect of any increase in value of the property which has been financed by the compensation award."

126. Mr Daykin's fourth and fifth principles are probably uncontroversial as a matter of law, certainly as it applies to these circumstances. A claimant cannot be penalised in the measure of damages because they happen to have other personal resources. The approach laid down in *Roberts v Johnstone* would not do so and I do not understand the Respondent to argue to the contrary. The sixth principle requires a little more consideration. It certainly is an apt observation that, if one is using a market model to value an interest, such as a reversionary interest in property many years hence, if that market is not deep or liquid to a sufficient degree then it may indeed operate in an inefficient way, producing effects which may be regarded as "biased". Jumping ahead somewhat, this stricture is relevant when we come to consider the restricted market in actual sales of reversionary interests. It must equally be relevant to an approach to compensation which relies on third parties to advance monies 30 or 40 years hence, and where there can be no evidence today of what market will obtain then.

127. The seventh principle too is of interest. The essence of this proposition is that the avoidance of overcompensation is not of equal importance to what Mr Daykin identifies as the primary aim of affording an injured claimant fair and reasonable compensation. The implication is that the avoidance of a potential windfall to the estate of the claimant, representing as it must a potential detriment to a defendant (in reality to an insurer) is of secondary importance. So far as I am aware, such a ranking of objectives as a matter of the policy of the law has never been articulated in authority in quite those terms, although that implication may be drawn from some of the authorities. Rather it has been assumed that both objectives may be achieved.

128. The principal points to be derived from Mr Daykin's original report can be summarised as follows. Acknowledging the existence now of equity release products for those above the age of 55, and the newer product described as a "retirement income only mortgage", Mr Daykin comments that it is highly uncertain what the market may provide very many years hence, when the Respondent's model anticipates the Appellant's need to release funds from equity will arise. This echoes the agreed position of the mortgage experts instructed, but not called to give live evidence. In the course of his cross-examination, Mr Daykin summarised his view of the cash flow model: he described it as a hypothetical calculation, based on a very large number of assumptions and modelling hypotheses.

129. He had two further specific points bearing on the cash flow model: in his view the forced investment of a large proportion of the damages "in a single property which has no return from rental income would be unacceptable as a component of a low risk investment portfolio because of the concentration of risk and lack of diversification". In other words, any forced investment of a large proportion of damages, in the view of Mr Daykin, conflicts with the low risk investment approach underpinning the 2018 legislation, and by implication even more so, conflicts with the "no risk" approach which underpinned the -0.75% discount rate obtaining at the time of the trial in this case. As Mr Daykin put it in cross-examination, one cannot constrain the value of the portfolio without affecting the discount rate. The obligation to make such an investment "would…require the discount rate assumption to be revisited to allow for very low effective return on that part of the compensation for 35 years or more, which would significantly increase the calculated amount of compensation required."

130. Mr Daykin applies the point to the facts of this case. The Respondent's proposal requires about one quarter of the lump sum compensation awarded to the Appellant to

be invested in a single house. Even on the "low risk", as opposed to the "no risk", basis, Mr Daykin observes:

> "taking the investment portfolio assumed by the Government Actuary in the June 2019 report… I estimate that this forced change to the underlying investment portfolio would reduce the discount rate by about 0.85% a year to -1.10% a year, which would broadly increase the calculated compensation by close to £1 million. This would likely be more expensive for the defendant than meeting the whole of the £0.9 million capital cost."

Mr Daykin provided calculations to support those conclusions.

The Evidence of Richard Cropper

131. Some relevant evidence on this issue was given by the Appellant's expert Richard Cropper. Mr Cropper is a financial adviser, specialising predominantly in advice to personal injury claimants since 1993. As I have already mentioned, he has served on the advisory panel to the Lord Chancellor in recent years.

132. Mr Cropper points out that the Government Actuary's report entitled "*Setting the Personal Injury Discount Rate: Government Actuary's advice to the Lord Chancellor*" was based on a call for evidence. The responses suggested that the average duration for personal injury awards is between 40 and 45 years. The Lord Chancellor's statement placed in the libraries of the Houses of Parliament on 15 July 2019 took a "baseline assumption of a representative claimant investing over a period of 43 years to be a reasonable one." It follows that the period in this claim is by no means unusual. It also follows that consideration of such a long future period in major awards is commonplace.

133. It is Mr Cropper's view that the *Roberts v Johnstone* approach does not do justice to claimants, particularly in the context of a negative return on investment, and particularly with regard to the large sums often required, given current property prices, forming a major drain on capital awarded for other purposes. Mr Cropper considered the impact of the traditional approach and the paradigm cases. He noted that paradigms 1 and 2 involve changing additional capital need arising during the future. Some of the capital needs would be discounted for early receipt. In his report, he accepted that even a capital award without deductions in such circumstances might well mean that the claimant had to draw on damages awarded under other heads than the future cost of house purchase. If a capital award of damages is reduced to reflect the future value of a reversionary interest in the incremental cost of housing, then that would apply in every case. But, in essence, Mr Cropper emphasises that such reduction would be much more likely to be affordable.

134. Mr Cropper expressed particular concern about the approach advanced by the Respondent, requiring a claimant such as this Appellant, late in life to seek to raise finance on the house so as to fund continuing care or other needs. He was concerned that if the full capital is not available to a claimant and they were advised of the future prospect of having to raise finance, they might often be driven to compromise on the proper level of purchase in the first place. There might also be pressure, as the point of

exhaustion of funds approached, to sell and downsize quickly, particularly in the face of an unknown market in equity release type arrangements. The "cash flow model" was dependent on the ability to release capital. In the case under appeal there was simply no evidence of a mechanism to release such capital when this appellant was nearly 80 years of age.

Expressions of Concern

135. It is not without interest that there has long been widespread concern as to the effect of the *Roberts v Johnstone* approach. The Respondent concedes this, and indeed has summarised some of the expressions of such concern. Key examples are (1) Law Commission Paper 262 of 1999; (2) the DCA consultation paper on the law of damages of 2007; and (3) the report on Accommodation Claims by the Civil Justice Council of October 2010. I will touch on only one of these, by way of illustration.

136. The Injury Committee of the Civil Justice Council consisted of representatives from both sides of this branch of litigation. The committee was "unanimously agreed that *Roberts v Johnstone* does result in injustice and that reform is both necessary and achievable." The committee divided as to the better alternative approach to be adopted. The majority took the view that it was "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 question the majority consider that the present state of the law is wrong in principle, fails to provide proper compensation and can create significant hardship." The dissenting group consisted of two members of the committee, both of whom represented the defence litigation community. They acknowledged that there were "problem cases" where there were present one or more of: a short life expectancy, the majority of future expected life not in working age and/or a lack of other available capital. They distinguished between awards under different heads of claim when considering the justification for the *Roberts v Johnstone* approach. In their view it was acceptable that general damages for pain and suffering and loss of amenity, for handicap on the labour market and/or for special damages for loss of future earnings should be drawn upon to make up any shortfall in the purchase price. They suggested that the proposition that there were many cases in which the awards under such heads of damage would be insufficient to cover the shortfall was unsubstantiated.

137. It should be noted that these expressions of concern all pre-dated the advent of a negative discount rate. None of those concerned had in contemplation the situation affecting claimants now, including this Appellant, whereby no damages at all fall to be awarded.

138. In *Manna (A Child) v Central Manchester University Hospitals NHS Trust* [2017] EWCA Civ 12, Tomlinson LJ was addressing a case of catastrophic birth injury. The parents had separated following the birth of the child and were intending to share the care of the child. There therefore arose the need for two separate houses capable of catering for the needs of the severely injured claimant. As to the effect of the *Roberts v Johnstone* computation, Tomlinson LJ expressed concern as follows:

> "17. 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. The adoption of the appropriate multiplier in his case, when allied to the 2.5% notional return upon investment, will lead to a relatively modest award and a large shortfall between it and the cost of acquiring the property which is acknowledged to be required to meet the claimant's needs during his admittedly short life expectancy….
>
> 18. Whilst the *Roberts v Johnstone* approach is designed to avoid conferring a windfall upon a claimant's estate, it gives rise to other anomalies. Thus in many instances of adapted accommodation in cases of this sort there is potentially a windfall for the claimant in the event of the death of his parent carers, since he is likely to be left with a home which is larger than necessary for his own requirements….
>
> 19. 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 restructured 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."

139. Finally, in this context it is worth noting the views expressed by the editors of McGregor on Damages, 20th edition (30 November 2019). At paragraph 40-206 the editors address what they describe as "the inequity of not allowing the claimant sufficient money with which to acquire the needed accommodation…. remains to a degree and in very many cases to a very substantial degree." They cite the case of *Oxborrow v Western Sussex hospitals NHS Trust* [2012] EWHC 1010 (QB). In that case the younger claimant was so catastrophically injured at birth that he was expected to live only to age 21. He would therefore need more expensive accommodation for a fairly short time. Those circumstances led to a multiplier of around 13 which, when applied to the discount rate then obtaining of 2.5%, provided the claimant with only a little over 30% of the value of the property envisaged. The editors noted the decision in *Manna*. They continued as follows:

> "40-208 it is high time that the *Roberts v Johnstone* problem was tackled and a fair and proper solution found and adopted.….It is true that, as the discount rate lowers, 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 offsetting the effect of, the fall in the discount rate.….Indeed since February 2017 the discount rate has moved into the negative (-0.75%), the *Roberts v Johnstone* method becomes unworkable; it would produce a nil award…"

The editors thus predicted what has now come about.

Conclusions on *Roberts v Johnstone*

140. I can state my conclusions on this issue quite briefly. It is my view that, in the context of modern property prices and a negative discount rate, the formula in *Roberts v Johnstone* no longer achieves fair and reasonable compensation for an injured claimant. In my view, it cannot be regarded as full, fair or reasonable compensation to award nil damages in respect of a large established need, on the basis that, if all the relevant predictions hold good over many decades to come, there will arise a windfall to a claimant's estate. Nor is it fair or reasonable compensation to follow the *Roberts v Johnstone* approach on the basis that if all the same predictions hold good, there will in addition be in existence a suitable market to enable a claimant, by then elderly or aged, to release equity at a reasonable cost and without unacceptable disruption.

141. The "cash flow" approach advanced by the Respondent as a justification for *Roberts v Johnstone* reveals the difficulties attendant upon that approach. The degree of conjecture, the complexity and uncertainty of outcome preclude the view that this approach can be regarded as providing full and fair compensation. In an era of negative, or very low positive, return on investments, forced investment of such a significant proportion of a claimant's damages award in property purchase has identifiable negative effects.

142. The 'cash-flow' model runs directly counter to the multiplier/multiplicand approach the court must take in calculating an award under discrete heads of claim. It was possible to take a pragmatic view of that contradiction when it could be assumed in the great number of cases that the necessary investment would be from heads of claim which were not based on particular and finely calculated future needs. That is no longer the case. In my view this does damage to the integrity and coherence of the court's overall approach to compensation.

143. I accept the point advanced by Mr Daykin that a forced investment of a significant sum of damages in purchasing a more expensive house constrains the assumed portfolio of investment of a claimant. In most cases this will prevent any return on the investment being realised during the claimant's lifetime, and therefore would logically call for a consequential revision of the presumed return on the remainder of the award. As we have seen from the evidence of Ms Angell, even on her assumed figures, there may well arise a need for additional compensation. As her figures in tables 7.3 and 7.2-E1 demonstrate, at least where the claimant is unable to defray interest payments along the way, these figures are considerable. [112,117].

144. For the avoidance of doubt, there is in my view no proper general basis for requiring a claimant to invest damages awarded under a discrete head (such as future loss of earnings) in the purchase of property, whether the additional cost of property derived from the injury or the property likely to have been acquired otherwise. Once that is accepted, then there is no basis for a deduction from the overall award to reflect mortgage costs which are avoided if a claimant chooses to invest damages in property. Damages under other heads, such as lost earnings, are fully discounted for early receipt, reflecting the assumed rate of return on investment applying at the time. There is no case for further deduction. It should also be noted that the suggestion of such deduction is logically unconnected with the principal question arising in this case. If that suggestion were correct, it would arise even in cases where no additional property derived from the injury needed to be acquired. That has never been argued, and in my view it is an unsustainable proposition

145. Thirdly, the *Roberts v Johnstone* approach significantly constrains the capacity of the claimant to protect herself from future contingencies. The principle that it is for the claimant to decide how to invest damages is important not merely as a general matter of the autonomy of the individual. The prudent claimant will wish to build and maintain a reserve of capital against the uncontrollable risks and eventualities of the future. Such a cautious, one might say sagacious, approach is rendered very much more difficult under these circumstances. As the Respondent's own "cash flow" analysis demonstrates in the instant case, the *Roberts v Johnstone* award (or non-award) means that the Appellant may well exhaust the funds awarded to provide for her needs well within her expected life, setting aside any question of provision for living longer, as of course she very well may do.

146. I recognise the need to avoid a windfall to the claimant's estate, if that can be achieved without prejudice to the cardinal principle of fair and reasonable compensation. But to withhold all damages for the purpose of avoiding an eventual windfall seems to me to put a secondary principle before a primary principle: to put the cart before the horse. It is a valid comment that the Respondent's approach taken to its logical conclusion, would result in not merely no award but a demand for a deduction from the claimant's damages awarded under other heads, to reflect the full value of the windfall to the estate which they predict. Of course, the Respondent (no doubt wisely) has not argued to that end, but that does not alter the end point of the logic which they have advanced to support a nil award.

147. It is relevant that it will be rare for the windfall to arise other than at a claimant's death. The Respondent has submitted that a windfall might arise on the sale of the property, and the variety of circumstances which arise in such cases means that there will be some occasions when that is so. But as I have said, in the great majority of cases, the claimant's needs for accommodation derived from the injury will remain. If they do move, there will normally be little reason to think that subsequently purchased property will lack the requirements which led to the incremental purchase cost in the first place. For example, if for family reasons they 'downsize' a property, there is likely to remain an incremental requirement above that which would otherwise persist, and where that is so, capital released may properly be regarded as capital released from the "otherwise" house, which had or would have been acquired if the claimant were uninjured. For the most part, therefore, any windfall should be regarded as likely to arise only after a claimant's death.

148. There is also an asymmetry arising from the current approach. The Claimant's needs are assessed now, and assessed for a property purchase which will arise presently or in the near future. In this case it has of course already arisen. There is a currency to the valuation or quantification of that need. Following the current dispensation, the windfall is not assessed now. The whole of the lump sum award which would otherwise be awarded is withheld, to avoid the risk or chance of a windfall. That would be logical if an alternative way could be devised of funding a claimant's need on a continuing basis, rather than by a lump sum award. Many of those who have been critical of *Roberts v Johnstone* have advocated such a solution in one form or another: by funding the payment of rent, by periodical payments funding a loan or a mortgage, by continuing shared ownership. As I have said, at an earlier stage of this litigation, such solutions were thought to be the answer. All have fallen by the wayside. Therefore, the question is simplified. This Appellant showed at trial she has a need for £900,000 which can only be awarded as a lump sum. Is that to be withheld in total because of a potential capital windfall, very probably to her estate after her death, which will not be valued until then? My answer is no. Such an outcome does not represent fair or reasonable compensation.

149. I fully accept that a windfall should be avoided if at all possible, even if it means a not insignificant reduction in the award. Here the parties have a measure of agreement. Depending on the answer to two questions, they agree that the proper approach is now to establish as best as possible the value of the reversionary interest in the incremental part of the property to be purchased. The first question is whether the *Roberts v Johnstone* approach should no longer apply. I have given my answer to that. The second question is whether the Appellant's argument that there should be no reduction to reflect the windfall should be rejected. My answer to that will depend on whether a valid and reasonably workable approach can be reached to establishing the current value of such a windfall.

The Reversionary Interest

150. Before examining the evidence on this issue, it is worth emphasising a preliminary point. The Respondent agrees that if the *Roberts v Johnstone* approach is set aside, then the 'cash-flow' analysis which they advance as an approach to valuing the reversionary interest is not a practical means of determining the proper level of compensation in individual cases. Such an approach would require detailed expert actuarial evidence on each side. That evidence could only be crystallised once the capital cost difference between the "un-injured" house and the "injured" house had been agreed or established by the court. The "cash-flow" model is advanced as relevant to the level of discount to be applied generally. It is agreed that the proper approach is to establish as a capital sum what award is required to fund the purchase of the house required, and then to establish a practicable approach to the calculation of a single sum to be deducted, representing the value of a reversionary interest in the windfall. In reality, this comes down to the question of what discount rate should be used for the calculation.

151. On this issue, expert evidence was advanced by the Intervener and by the Respondent. The Appellant is supportive of the position of the Intervener.

152. The expert witness instructed by the Intervener is Mr Brian Watson. He qualified as an actuary in 1977, and he too is a Fellow of the Institute of Actuaries. He worked in life insurance until he formed his own actuarial consultancy in 1992. Since 1999 he has

acted as a consultant and then a director of a company now known as H E Foster and Cranfield, a practice of auctioneers and valuers of financial rights and interests. His work includes advising clients on the apportionment of trust interests between beneficiaries, and advising clients who are considering selling a financial interest, such as an interest in a trust, on sale price. That has been the business of Foster and Cranfield since before Mr Watson's involvement in the firm. It appears to be common ground that at the moment, Foster and Cranfield represent the only public forum in the United Kingdom in which financial interests such as reversionary interests in property, held under a trust for sale, are themselves for sale. There are a number of other actuarial consultancies which provide similar advice to that which Mr Watson gives, on what is termed the "fair and reasonable" valuation of trust interests.

153. Daniel Robinson, called by the Respondent, is a principal of Barnett Waddingham LLP, an actuarial consultancy. He too is a Fellow of the Institute and Faculty of Actuaries and has for 19 years given actuarial advice to trustees, companies and individuals. He has a specialist side to this practice in advising on life interest trusts in other legal cases. He also advises more generally smaller pension schemes on funding, gives legal advice in relation to pension valuation for the purpose of litigation, advises divorcing couples on pension valuation and division of such assets, and has other aspects to his practice. For present purposes it is his expertise in providing "a fair apportionment of life interest trusts" which is most pertinent. Mr Robinson makes it clear that he has "no professional experience of the market for reversionary interests or life interests to be bought and sold".

154. In his evidence, Mr Watson makes clear that the market in buying reversionary interests is small. The reversionary interests which arise for sale at auction through Foster and Cranfield typically represent the assets left in trust by a testator to provide his widow with an income for life, or a right to occupy that part of the matrimonial home. Otherwise, trust assets may consist of income generating assets such as stocks, shares and residential and commercial property. Typically, it will be a widow who is the life tenant and typically the children of the family hold the reversionary interests and are the "remaindermen".

155. In Mr Watson's experience, the typical investor buying a reversionary interest at auction is an individual, as opposed to a corporation. Often the investor already has investments in less common assets, such as commercial property or buy-to-let properties. Mr Watson comments that as a group such investors "are also attracted to buying assets at a discount (i.e. at less than their face value), albeit that they have to wait until they have access to that asset." Mr Watson's understanding is that a vendor selling a reversionary interest in a trust is not liable for any tax on the proceeds of the sale, nor is the investor purchasing a reversionary interest liable to tax on the profit made on the investment.

156. Mr Watson states that historically there was a bigger market in such interests, including a number of companies set up to acquire them. A number of factors are likely to have contributed to the contraction of the market: high rates of income tax used have in the past formed an incentive for life tenants to transfer over an income stream; a lack of understanding by the younger generation of legal and financial advisers that such a market exists; more flexible trust provisions which often permit discretionary distribution of trust capital, have meant that a beneficiary's interest is less well defined and therefore less marketable.

157. Mr Watson emphasised that this was a small market. There had been roughly four to five such sales each year from the year 2000. Over the last five years or so the market had been smaller than previously. It was unpredictable. Over the period of this century he had never sold more than four or five. In answer to written questions, the sales of reversionary or life interests offered by Foster and Cranfield between 2015 and 2019 had varied between one and four. He rejected the proposition that it was a dead market. He had two proposals for sale under investigation at the time of giving evidence, which may or may not come to market.

158. Of the last ten cases handled by his firm, eight out of ten had produced sales of the interests on the basis of a projected return between 6.2% and 7% per annum. One sale was based on a projected return of 5% and one was somewhat higher than the range he had quoted. These figures founded his opinion that a 6.6% projected return was the correct basis for calculating the discount.

159. In cross-examination Mr Watson was asked about the scale of the market, the examples he had given in his written report and the lack of detail about the trusts and assets in question. He made the point that a great deal of trust documentation was confidential. He agreed that potential clients might often not proceed because they were not attracted by the terms of the trust. He agreed that none of the examples he had given in his written report consisted of a single residential property in prime London, comparable to the Appellant's property. He accepted, and emphasised that he had pointed out in his report, that the sales reported tended to relate to life interests (and thus reversionary interests) at the older end of the age range. However, he also emphasised that he did not consider there was a correlation between the age of the life tenant and yield. The yield would be identical whatever ages were in question. The age affected the valuation but not the yield.

160. In the course of cross-examination, Mr Watson accepted that his practice was not regulated to sell a reversionary interest where a life tenant was already in residence. The relevant regulations are derived from the Financial Services Management Act 2000, section 63B. However, it is clear that such regulation is available. The equity release schemes currently available require such regulation.

161. Mr Watson told the court that, more frequently than organising sales, he was asked to advise on how to divide the trust assets between the beneficiaries so that the trust could be brought to an end. In that context he approaches the matter employing a "fair and reasonable" approach, comparable to the approach adopted by Mr Robinson.

162. It will almost always be the case, he said, that the sum of the separate market values of a life interest and the associated reversionary interest do not equal the value of the whole. If beneficiaries have a choice, they will mostly be best advised to bring a trust to an end rather than to sell their respective interests. This is because of the existence of the "marriage value", meaning in effect the market value of the property without the constraint of the lease. The two situations are different. As Mr Watson observes:

> "The market value is what an independent third party investor would pay for the individual reversionary interest.… In my experience investors are usually looking for an annual return of 6.2% to 7%, and the prices obtained at auction reflect that. This return is not taxed in the hands of the investor and allows for the

investor's assessment of the possible Inheritance Tax payable on the death of the life tenant."

163. Mr Watson suggests that the size of the marriage value depends on the difference between the yield sought and achieved by the investors buying trust interests, and the yield on trust assets. He estimates this would generally represent returns in the region of 6.6% per annum (the average of 6.2% and 7%) for the former, and 3% per annum for the latter.

164. Mr Watson's own approach to the "fair and reasonable" valuation is to base his calculations on the yield of the trust assets, net of basic rate tax. The logic can be expressed as follows: if the beneficiaries take their respective share of the trust assets and reinvest that share in assets with the same yield, then if the life tenant dies exactly at the end of their current life expectancy, the beneficiaries will replicate what they would otherwise have received from the trust. In the case of an income beneficiary (who would have received income from the trust assets) Mr Watson assesses that by combining the investment income with progressive disinvestment of capital, he is able to replicate the income which would have been received from the trust during the life of the trust.

165. Similarly, in the case of a reversionary beneficiary, they would have accumulated capital equal to that which they would have received from the trust. When a life tenant occupies the trust property, there is clearly no income from which to determine the yield. In such cases, Mr Watson's approach would be to use a yield based on the open market rent which the property could achieve on letting. In his view that most closely reflects the income which the property asset could generate, and is some objective measure of the benefit of the asset to the life tenant. Although there is no actual income, merely a notional income, he would use a yield net of basic rate tax. That means that the resultant split between the beneficiaries is the same as in the case of a trust which has the same actual net yield. He observed that this approach might be said to undervalue the life tenant's interest, since they are in effect benefiting from not paying the gross rent. However, the counterargument is that to do otherwise would be to disadvantage the remainderman: why should the remainderman receive less than they would if the trust was income producing? A key feature of the approach which he uses is that on the "fair and reasonable" basis of valuation, the sum of the different interests do add up to the value of the trust's assets: in other words, there is no marriage value to be discounted.

166. In the course of pre-hearing preparation Mr Watson was asked whether in this context, he made any allowance for the expenses of letting a property. He did not. He said that he regarded the rental yield approach as "an objective measure of the benefit to the life tenant or claimant. So the life tenant or claimant can be considered as a long-term tenant and not a landlord suffering the expenses" identified. The rental yield and his calculation reflect the saving to the life tenant or claimant of not having to pay rent.

167. It is clear therefore that there is a major difference between the two bases of valuation. The market value of a reversionary interest represents the current value of a long-term, and uncertain-term, investment, where the "marriage value" is postponed for the life of the trust (or in a case such as ours, the life of the injured claimant). The purchaser of the reversionary interest in part of a residential property will in the end benefit from the "marriage value" of the assets, or rather that part of the marriage value referable to the

investor's proportion of the overall value of the property. But it is an important point that the market value is the valuation now of the reversionary interest then.

168. The "fair and reasonable" approach is designed for the early dissolution of the trust and distribution of the assets, meaning that the "marriage value" can and will be obtained soon, when the trust is dissolved. The difference is reflected in the assumed rate of return to be ascribed over the term, and that difference which is the basis for Mr Watson's average 6.6% and 3% expected return on investment, real or notional, applied to the different approaches.

169. Mr Daykin gave evidence relevant to this issue. He agreed with the evidence of Dr Llewellyn that the assumption of a growth rate in house prices at 3.2% per annum for a very long period was "entirely speculative". He stated his preference for a market valuation of the reversionary interest, or if need be a simulation of a market valuation. He also considered it "inappropriate to assume that the reversionary interest of the defendant builds up in full, from the time of the trial". Mr Daykin has prepared a table illustrating the different outcomes as to value, responding to the different assumed discount rates derived from Mr Watson's evidence, and that of his counterpart Mr Robinson. The mathematics of this are not challenged. I have reproduced those figures as Annex 2 to this judgment. This table is a useful way of illustrating the scale and impact of the different approaches to valuation in this case, and by way of further illustration, in the three 'paradigm' cases.

170. The Respondent suggests, for technical reasons, that in substitution for table 28 of the Ogden tables which concern multipliers for term certain, Mr Daykin should have used Ogden table 2, which would produce approximately 10% difference in the figures. The Appellant and the Intervener disagree, arguing that questions of risk are already accommodated in the application of the relevant tables to produce the life expectancy for the appellant. In my view the Appellant and Intervener are correct on that point for the reasons given by Mr Daykin. The relevant risks and the future life expectancy have already been settled by the judge's findings.

171. It is instructive to look briefly at the rather different impact of these valuations in paradigm case 3, involving a much shorter life expectancy. It is not surprising that in such a case the reversionary interest is much greater, whichever discount rate is adopted. In such a case the economists' evidence would also suggest there is a greater risk of the asset being realised perforce during a downturn in property prices. However, normally the risk of investment in such a case would appear to be lower, because of the much earlier return. This illustration is not close to the facts of the instant appeal. As I have noted above, we know from the Government Actuary that the average span of a personal injury claim is around 43 years of future life, and so paradigm 3 represents a case far from the average. 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.

172. I turn to the evidence of Mr Robinson. As I have already observed he has no experience of the market in reversionary interests. He notes himself that he is:

> "not asked to place a market value on either the life interest or the reversionary interest. If there were a perfect market (in the economic sense) for these interests and other financial products,

> and no need for prudence, then I would expect to arrive at a market value through my calculations."

173. In Mr Robinson's approach a key point is that the sum of the values of the two parts of the trust must equal the current value of the assets in the trust, in this instance the house. That is derived from the context in which he works as he says: "this is because the house is about to be sold, or may already have been sold, and the payments to the parties is to be made out of this known sum." Mr Robinson values the life interest by reference to the income generated by the trust sum, or the notional rent which could be charged in respect of property. He illustrates his approach graphically by suggesting that "a life interest in a safe full of gold bars should be worthless, as no income is generated, and the remaindermen should receive the entire amount." His calculation proceeds through the following steps. He determines the assets held "for this life interest". He determines that the asset allocation should give a fair balance between income and capital growth. He calculates the assumed future return that the assets will provide, that is to say the discount rate in the calculation and he then divides the return into income, or notional rent, for the life tenant and capital growth for the remaindermen. The present value of the assets is made up of the present value of their future income up to any given date, plus the present value of the market price of the assets at that date. He then calculates the life interest by discounting the assumed income payments back to the present using the assumed discount rate, weighting each payment by the probability that the life tenant is alive at that date less this life interest. Then, as a check, Mr Robinson calculates the reversionary interest by discounting the assumed market value of the assets at each future year, weighting those amounts by the probability that the life tenant dies in that year. The value of the life interest is then produced by the market price less this reversionary interest.

174. Mr Robinson asserts it is not necessary for him to analyse the particular property subject to the trust in detail, so as to determine the notional rent and expected property price growth. As he says, that is because "by the time I am being asked to apportion the trust, the intention is to sell the house and spend the proceeds in other ways. In any case, the rental yield may not be known, <u>and it may be difficult to find a completely reliable estimate of future house price inflation</u> [emphasis added]. In addition, as the life tenant is not actually renting a property, nor wanting to live in the property, it is in my opinion unnecessary to consider the rental market, or the particular house in the case."

175. Mr Robinson thus has to make explicit assumptions about the notional future return on the assets. In his report he describes how, in his own calculations, he assumes a balanced portfolio of 50% "protection assets" and 50% "income-producing assets such as equities, as representing a fair approach to both sides." He then assumes that income in excess of inflation is allocated to the life tenant, with the rest of the income being used to ensure the capital value of the assets is preserved in real terms for the remaindermen. To make such assumptions good with figures, Mr Robinson takes the average of the Net Dividend Yield on the FTSE All-Share Index of UK equities, which for April 2018 was 3.85%. By contrast the yield on the FTSE Over 15-year Index-Linked Gilt index was -1.64%. Mr Robinson averages those two yields producing 1.1% per annum and suggests that would be appropriate to use in a traditional life interest case. As at February 2020, he suggests that the discount rate calculated in the same manner using up-to-date market factors would coincidentally be 1.1%. Applying that

approach to the £900,000 arising in this case he would value the reversionary interest at £552,000 and therefore the life interest at £348,000.

176. His report continues with an interesting short paragraph:

> "4.24 clearly, the choice of discount rate is very subjective, and it will be possible to argue that rates from a reasonably wide range were appropriate. Clearly, a zero or negative yield would result in a zero or negative apportionment to the life tenant, and so this would not be seen as fair. In practice, I believe yields from 0.5% to 3% per annum could be used without being seen as unreasonable, depending on the assumed investment returns."

177. As an alternative approach, Mr Robinson considered using a discount rate reflecting a rental yield. Accepting that he has no expertise in the rental yield on such a property as the one in question here, Mr Robinson performed Internet searches and has assumed a gross rental yield of 3/3.5% on "high-quality London property". In relation to costs, again sensibly disclaiming expertise, Mr Robinson has turned to the Government Actuary estimates and has assumed 0.75% per annum of cost is a prudent estimate. He has assumed basic rate tax of 20% payable on the income received. The result of his calculations produces a discount rate of 1.8 to 2.2% per annum. On this basis he calculates the life interest in this case would be worth between £491,000 and £553,000. As a consequence, the reversionary interest would be worth between £347,000 and £409,000.

178. Mr Robinson then considered alternative approaches. Firstly, he considered a valuation of the reversionary interest using a discount rate of 1% or 1.5% per annum, which gives approximately similar results to his preferred method.

179. He then considered a "fair compensation for all cash flows" approach. This approximates to the evidence of Ms Angell. In Mr Robinson's opinion there should be one cash pot. In his view:

> "there is no intrinsic difference between cash flows in respect of accommodation, and cash flows in respect of other needs. The actuarial method of placing a present value on the cash flows should be the same: to determine the amount of money that should be invested today in order to be sufficiently certain of meeting the future cash flows."

180. The outcome of this approach is expressed in his report [7.16] as follows:

> "It is possible that incorporating the value of the windfall into the cashflows in this way, even after allowing for the cost of borrowing (to access the windfall earlier) could result in the value of the "accommodation claim" being below zero, if it were artificially split out from the other costs being compensated for."

Mr Robinson did not calculate the results based on this approach, but he considered they would be likely to be similar to the answers given by Ms Angell.

181. As I have already noted, in the course of cross-examination, Mr Robinson freely accepted that in any event such an analysis in each case would have to be an actuarial exercise and could not be standardised.

182. In addition to the evidence of Mr Robinson, the Respondent relied upon the written evidence of the surveyor Mr Julian Clark. He is a consultant to Gerald Eve LLP in London. He qualified in 1990 and has specialised in valuation advice relating to leasehold enfranchisement since 1995. His clients include some of the very major estates with residential and commercial property in London. In the course of his practice he values freehold reversion.

183. In his view, "the valuation of a freehold reversion in the circumstances [of this case] would be a hypothetical exercise and not a valuation of real property." He explains how he would set about such a valuation, relying extensively on the guidance laid down in the leading decision of the Lands Tribunal in *Earl Cadogan and Another v Sportelli and Another* (Lands Tribunal 15/9/06). In that decision a predictable and stable approach to such valuations was laid down. It was determined that a "generic deferment rate of 4.75%…, comprising a risk-free rate of 2.25% less a real growth rate of 2%, plus a risk premium 4.5%" should be adopted. This has been the basis of awards since.

184. On that basis, Mr Clark produced two valuations derived from the facts in this case:

> "on the basis that the value of the freehold in possession is £900,000 I provide a valuation of the present value of the freehold reversion in the order of £104,400 assuming a deferment rate of 4.75%, or in the alternative a present value in the order of £402,200 assuming a deferment rate of 1.75%."

185. Brief reference only was made by any of the parties to Mr Clark's evidence.

186. I now turn to the submissions on this part of the case. Mr Sweeting QC for the Appellant emphasises that whether one considers the "cash flow" analysis of Ms Angell, or the "fair compensation for all cash flows" of Mr Robinson, neither reflects the way damages claims are calculated or awarded. Each head of claim is considered, a discrete award is made, and there is no "scaling up or down". If a valuation of reversionary interest is to be made, then the market model is much the best approach. It has survived contact with the evidence. It is practicable and proportionate as an approach in negotiation and at trial it is capable of consistent application and in most cases should enable claimants to acquire the property they need. The gap between the need and the damages following deduction of the reversionary interest will for the most part be capable of being bridged. This represents a pragmatic solution in today's conditions, as it was intended should be the approach in *Roberts v Johnstone* in its day.

187. The market value approach was a real valuation not a notional valuation. It was a genuine test of value rather than a compromise approach based on assumptions and projections, aiming to achieve consensus between parties. Mr Sweeting QC accepted that the market was a small market, but it was a viable market and represented the best available approach.

188. Mr Allen QC for the Intervener emphasised that the goal must be a model which produces efficient and effective compensation for the claimant's needs and, if possible, avoid a windfall. Predictability was necessary, since this head of claim will arise in a large number of personal injury cases. He too accepted that the market described by Mr Watson was small with a limited number of transfers. However, it was an established market with scope for expansion.

189. It was wrong to say that the marriage value was excluded from the market valuation. The marriage value only arises when the interests are combined. But the investor in the reversionary interest purchases entitlement to a share of the marriage value, which is not reserved to the claimant. The reversionary interest will be discounted for early receipt but not on that ground. The appropriate way forward was to support a clean break solution in the course of making a lump sum award. It was important to have a guideline rate to the discount so as to avoid extended argument. It would be desirable to leave some degree of flexibility so that judges can, if appropriate, respond to changes in the market or particular or striking circumstances in a given case. The guideline rate should not be a permanent straitjacket. What was needed was an endorsement of a methodology, a tool which could be adjusted for particular circumstances if need be. It was of high importance to avoid a model which called for complex evidence.

190. Mr Audland QC argued that the market approach was not fair to the Respondent because a sufficient market was unavailable. There were seven sales over a period of five to six years. There was no single sale reported by Mr Watson which is fully comparable in the sense that the asset was a single residential property in London. The assets were often mixed, including commercial property residential property and often equities or other interests.

191. The evidence of Mr Clark as to the London lease enfranchisement market was of some significance. The crux of his analysis was that investment in such products gave a risk-free yield of 2.25%. This was a closer parallel to the position in the present case.

192. The approach of Mr Robinson was the fairest way to come at a valuation. His assumption was that the asset held its value. His aim at balancing the interests of the life tenant and the remaindermen was a correct approach. The route by which he concluded the anticipated return of 1.1% "going forward" was accurate. It was fair also to assume a balance between gilts and equities and base a yield on such a mix was also correct. The model of Mr Robinson was the appropriate course to adopt when deciding where this court should settle on the appropriate discount rate.

Conclusions on the Valuation of the Reversionary Interest

193. In my view, the "fair and reasonable" approach to valuation is, perhaps necessarily, based on many fixed assumptions. The projections rely on an assumed future return from the assets concerned. When adopting the "fair and reasonable" approach to valuation, both experts considered rental yield as a means of valuing any continued occupation by the life tenant of the property. That is understandable in that context. However, given that the property here will be lived in for a long future period, neither rented out nor liquidated and invested, it seems to me problematic to base the relevant projections on either rental yields or a balanced investment portfolio. In this case the "return on the investment", if it exists, is the discounted future capital value of the incremental sum invested in the house. This brings the matter straight back to the

uncertainty of predicting future property values, and to how a prospective investor will view such an asset.

194. In addition, the presumed rental yields and costs are outwith the expertise of both actuaries. The valuations contained in the evidence of Mr Clark are acknowledged by him to be notional or standardised, and not real. Even if they were real, based on the particular property in question here, that would be no sound basis for setting a discount rate for general application. So far as Mr Robinson's projections are based on a balanced investment portfolio, there too the presumed return on investment is standardised. I imply no criticism of Mr Robinson in that.

195. As to Mr Robinson's "fair compensation for all cash flows" approach this too is based on even more detailed specific assumptions and predictions and in my view carries the same weaknesses already identified in the evidence advanced by Ms Angell. Moreover, as I have already observed, at least as this approach is currently presented, it does not appear to differentiate between awards of damages referable to future needs and other awards. Rather it appears to be the assumption that all awards would be applied to future needs.

196. Further, the application of the "fair compensation for all cash flows" approach would represent a wholesale revision of the established approach to calculating damages. If it is right here, it is hard to see why it is not applicable to all heads of claim for future loss. Adoption of such an approach would represent a radical departure from the multiplier/multiplicand method of calculating damages.

197. I fully recognise that the existing market in reversionary interests is very small. However, I have no doubt that a market approach must in principle be the correct way to value a reversionary interest. As I have already noted, 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. The "fair and reasonable" approach, whatever the methodology or detail incorporated by the actuary into the process, is designed to fulfil a different function: the advice is aimed at the early dissolution of the trust and the distribution of the assets. The process is designed to balance the interests of the parties and, as we have seen, all sorts of considerations, often distant from the circumstances of a personal injury claimant, are brought into play. Further, it is clear from the evidence of both Mr Watson and Mr Robinson that in the great number of cases they were unaware of what the parties in receipt of their advice as to fair and reasonable valuation actually did with their advice. By contrast, 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. If there was evidence of an ample market in such interests, then the conclusion could rest there.

198. However, the scale of the market being as it is, it seems to me right to take a cautious approach in relation to the discount rate suggested by the evidence of the expected return in that market. I would moderate my conclusion as to the appropriate discount rate, adopting the lowest individual return on investment which Mr Watson, the only expert with experience of the market, has indicated he has seen in practice. That is 5%.

199. That benchmark is cautious. Such a discount rate is 1.6% below the average rate identified by Mr Watson. As a check, I compare that rate to the outcome of the "fair

and reasonable" valuations of both experts. 5% is 2% above the fair and reasonable discount which Mr Watson considers to be usual and appropriate, and 2% above the top end of the range considered reasonable by Mr Robinson. It is very close to the rate identified in the *Earl Cadogan* decision.

200. It is also cautious in another way. It will be recalled that Mr Watson accepted that most of the existing sales of reversionary interests concerned life tenants who were older than this Appellant, and therefore shorter periods were anticipated before the reversionary interest matures. It was his view that the expected annual return on investment did not alter by reference to the length of the anticipated life tenancy, although of course he accepted that the valuation itself was critically affected by that. Intuitively, and contrary to Mr Watson's evidence, one would have thought that the increased uncertainties associated with a longer period before maturity, such as will arise in many of this category of case, might affect not merely the multiplier, but the expectation of return per annum, thus increasing the discount rate desired by investors. If the intuitive position proved to be correct, it would render yet more cautious my decision, doing the best that I can, that a discount rate of 5% is appropriate.

201. It is entirely possible following this decision (assuming that my Lord and my Lady agree with my conclusions), that an expanded market in the sale of such reversionary interests will develop. Claimants who have sustained a significant limitation of their damages by reference to the "windfall", may seek to recoup that shortfall by selling the reversion. That is perhaps more likely to arise in cases of shorter life expectancy, where the valuation of the reversion will, by definition, be larger, and the reduction in damages greater. It may well be that the development of an expanded market will over time give a better evidence base from which a revision of the discount rate may be considered.

Summary of Conclusions

202. I hope it will be helpful to draw together my conclusions on the case.

203. In my view, for the reasons given [69, 71-80], this court is not bound to follow the approach to compensation for the incremental cost of property purchase attributable to the injury, formulated in *Roberts v Johnstone*.

204. Again, for the reasons given above [100-101, 140-148], that approach is no longer capable in modern conditions of delivering fair and reasonable compensation to a claimant. The 'cash-flow' analysis said to justify that approach itself comprises such a level of conjecture, such complexity and such uncertainty of outcome that in my view it cannot be demonstrated to achieve fair and reasonable compensation.

205. The principles of law by which this court is bound can be summarised in two propositions: firstly, that a claimant injured by the fault of another is entitled to fair and reasonable, but not excessive, compensation. Secondly, as a corollary of that fundamental principle, in relation to the head of claim with which we are concerned, the award of damages should seek so far as possible to avoid a "windfall" to a claimant, or more realistically to his or her estate.

206. There are well established examples in the field of tort where a degree of overcompensation has proved unavoidable. They are helpfully digested in *McGregor on Damages* 20th Edition Paragraphs 2–005/8. If it were to prove impossible here to

award a claimant full compensation without a degree of over-compensation, then it seems to me likely that the principle of fair and reasonable compensation for injury would be thought to take precedence. I emphasise however that such an analysis is not necessary for my decision in this case. In my view it is possible, adopting the usual pragmatic approach to the law of compensation in tort, to make a fair and reasonable award in such cases while at the same time taking reasonable steps to avoid over-compensation.

207. If the *Roberts v Johnstone* approach is set aside, then the Respondent has conceded that the 'cash-flow' analysis is not a practical means of determining the proper level of compensation in individual cases. It is here advanced as evidence bearing on the general decision as to the proper discount rate. For the reasons given, I am sceptical of the fragility of the "cash-flow" analysis, however I have borne that approach, and the outcome advanced by Mr Robinson, in mind as a reference or check.

208. For the reasons I have given, [192-200] it appears to me that a market valuation is a more apt approach towards establishing the current value of a reversionary interest, which will not mature for many years. However, in response to the limited existing market and the other evidence given, I have reached a deliberately cautious view as to the appropriate discount at 5%.

209. I reject the suggestion [168] from the Respondent that it is inappropriate to apply the Ogden table 28 multiplier to life expectancy when calculating the amount to be deducted in respect of the windfall. The court has reached a decision on the Appellant's life expectancy. It seems to me appropriate to treat that decision as a term certain for the calculation.

210. 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.

211. For those reasons, I would quash the decision of the judge declining to make any award in respect of an identified need for £900,000 to purchase a more expensive house. In my view the appropriate award, applying a 5% discount rate, and therefore taking the value of the reversionary interest to be £98,087, would be damages of £801,913, and I would so order. To that extent and with that outcome I would allow the appeal.

Lady Justice Nicola Davies:

212. I agree with the reasoning and conclusions of Irwin LJ. Given the importance of this decision, I add some observations of my own. At the core of the determination of this court is the principle of law that a claimant is entitled to full and fair compensation for injury sustained as a result of the defendant's tort. The principle provides the legal basis for an individual's right to claim and to be awarded damages, the purpose of which is to place that claimant, as far as is reasonably possible, in the position he or she would have been absent the injury. It does not entitle the claimant to be compensated for more than the loss which has been sustained as a result of the defendant's tort.

213. *Roberts v Johnstone* represents guidance as to how compensation should be quantified in respect of the purchase of appropriate accommodation, so as to avoid a windfall to the claimant. It is guidance which reflected economic conditions at the time it was determined, conditions which have since materially changed. As a result, the challenges now faced by claimants resulting from low or negative discount rates render the *Roberts v Johnstone* guidance ineffective in achieving its desired aim.

214. The effect of the negative discount rate is such that even the Respondent acknowledges that the damages awarded to this appellant in the High Court proceedings will be insufficient to allow her to purchase, from existing funds, appropriate accommodation and thereafter meet all necessary costs resulting from her injury. What is envisaged by the Respondent is that when the Appellant is approaching the age of 80, she will undertake a form of equity release on the property, or by some other means release capital, in order to provide necessary funding. In my judgment, this proposed course undermines the principle of full and fair compensation. Further, it will do so at a time of particular vulnerability for this Appellant, by reason of her age and disability.

215. There is a real need for effective guidance by the courts in this area of personal injury law. As all who practise in this field are aware, many cases never reach trial. Negotiations leading to the narrowing of claims and settlement are an integral part of such litigation. What is required is clear and workable guidance by the court which should enable practitioners to provide legally sound and practical advice.

216. In my view, a fundamental difficulty with the models advanced by the Respondent, is the reliance upon assumptions and figures which, even in the course of this appellate process, have required amendment by reason of the Covid-19 pandemic. One of the Respondent's actuarial experts, Ms Angell, accepted that many of the calculations, for example as to the cost of borrowing many years hence, house price inflation and future borrowing pursuant to an equity release-type arrangement required the input of a significant number of assumptions which are uncertain and reliant upon expert judgement.

217. There is no certainty as to what the market will provide some 20 plus years hence, when the Respondent's model anticipates the Appellant's need to release funds will arise. Grateful as the court is for the professional care and skill which all have brought to this case, it has to be said that Respondent's proposed cash flow model is a hypothetical calculation based on a very large number of assumptions and modelling hypotheses.

218. The reliance by the Respondent upon assumptions and predictions is also to be found in their proposed approach to the calculation of the reversionary interest in the property. For the reasons given by Irwin LJ, the market rate model is the approach preferred by the court. Underlying the determination of the court is our belief that what is required is guidance which provides certainty and consistency.

Lord Justice Underhill:

219. I agree that this appeal should be allowed and the damages payable to the Appellant increased by the sum of £801,913 identified at para. 210 of Irwin LJ's judgment. The thoroughness and care of his exposition means that I can state my reasons in summary form.

220. My starting-point is that I do not believe that the approach taken in *Roberts v Johnstone* produces fair compensation in the circumstances of this case. That approach may have been vulnerable to criticism from the start, and criticisms have been made for many years, as Irwin LJ notes at paras. 135-137 of his judgment. It may be (though I am not sure) that those initial criticisms could have been answered by saying that no general approach can produce perfect justice in every case – that it was "practical, if imperfect", as Lambert J put it when granting permission to appeal (see para. 20 above). But I do not think that such an answer is sustainable in the circumstances now prevailing where the application of the negative discount rate leads to a nil award in respect of a real and immediate loss which the Appellant had suffered. I therefore entirely agree with Irwin LJ's conclusion at para. 140 of his judgment.

221. The next question is whether *Roberts v Johnstone* nevertheless constitutes binding authority so far as this Court is concerned. This is not entirely straightforward, but like Irwin LJ I have come to the conclusion that it does not. At para. 20 of their judgment in *Knauer v Ministry of Justice*, quoted at para. 74 above, Lord Neuberger and Lady Hale recognise a distinction – specifically in the field of the calculation of damages for personal injury – between "a matter of legal principle" and "judicial guidance". They do not elaborate on the nature of that distinction, but the essential question must be whether the court in question intended the relevant element in its decision to be applicable in all circumstances (the decision in *Cookson v Knowles* about the date as at which the multiplier should be applied, which is what *Knauer* was concerned with, is a good example) or to be capable of being revisited if circumstances changed. I regard the decision in *Roberts v Johnstone* as being of the latter kind. At the risk of simply repeating what Irwin LJ says at para. 79 of his judgment, it is particularly common in this field for the approach to important elements in the calculation of compensation to have to be reconsidered by the courts from time to time in the light of changing economic circumstances: the most obvious example is the way in which they responded, in a series of decisions, to the very high inflation of the 1970s. In my view the nature of the issue in *Roberts v Johnstone*, and the rationale for the proposed solution, are such that the court must be taken to have understood that that solution was dependent on the broad economic conditions on the basis of which it made its decision continuing to obtain.

222. I would add that I agree with Irwin LJ that guidance of this character should only be revisited in response to really significant changes, and in the case of appellate guidance (which it generally is) it will rarely if ever be right for that guidance to be departed from by a first-instance court. Lambert J, if I may say so, did exactly the right thing by following *Roberts v Johnstone* but drawing attention to the problems with it and giving permission to appeal to this Court.

223. That conclusion would equally apply to the application of *Roberts v Johnstone* by the House of Lords in *Thomas v Brighton Health Authority*. But in fact the position as regards *Thomas* is *a fortiori*, since, as appears from the fourth paragraph in the passage from Lord Lloyd's speech quoted at para. 54 of Irwin LJ's judgment, the correctness of the approach taken in *Roberts v Johnstone* was not in issue at all.

224. The question then is what different approach should be taken to assessing compensation for a loss of the kind with which we are here concerned. On the face of it the most straightforward approach would be simply to award the claimant the full amount of the cost of the additional accommodation attributable to the injury ("the additional

element”). But of course that fails to take into account the fact that at the point where the claimant ceases to need the additional element (typically, though not necessarily, when they die) they or their estate will continue to benefit from its capital value and to that extent will be over-compensated – or, to use a term which is convenient if not wholly apt, receive a windfall. If there is a fair and workable means of avoiding that windfall it should be adopted. As appears from paras. 8-11 and 33-35 of Irwin LJ’s judgment, various ways of addressing the problem which might seem superficially attractive have proved flawed or unworkable on closer examination. The only workable candidate now in play, at least in a case of the present kind where there is a long-term need for the additional element, is the “value of the reversion” approach, in which the award is reduced by the amount of the present value of a notional right to receive the windfall amount at the assumed date of the claimant’s death. I agree with Irwin LJ that this is in principle an appropriate way of avoiding over-compensation, at least in a case of the present kind where the claimant has a long life expectancy. There are, however, two aspects of it which I have not found straightforward.

225. The first is that the deduction of the value of the notional reversion means that the claimant does not receive the full cost of the additional element in their accommodation at the time when it is actually required. The cash is needed (typically) at the date of the assessment (or indeed may already have been spent, usually with the benefit of an interim payment); and the benefit of enjoying an absolute right to the property instead of merely a life interest is of no use since, as is now common ground, there is no workable means of realising that benefit. The only way that claimants will be able to fund the shortfall attributable to the deduction is thus either (untypically) from their own resources or (more likely) from the amount awarded in respect of other heads of damage. Is it not wrong in principle that a claimant should be compelled to invest such resources or damages in their property rather than being free to spend them as they choose, particularly if the pots that have to be raided for this purpose include awards intended to fund future expenditure? If it is, a claimant should be awarded the full amount needed to fund the additional element in their accommodation at the time when the payment has to be made, and if there is indeed no other means of avoiding over-compensation that will have to be accepted as a necessary consequence of the more important principle of avoiding under-compensation.

226. That point has given me some pause. But I have come to the conclusion that it represents too rigid an approach. The piecemeal development of law and practice in this field makes it very difficult to be a purist; a strong element of pragmatism and practical justice is required. An award of damages for personal injury contains a number of elements of different characters. The award for pain, suffering and loss of amenity does not represent pecuniary loss at all. The award for pecuniary loss comprises both loss of earnings and compensation for expenditure necessitated by the injury. As regards the latter, the modern process of assessing the elements in the award systematically and separately under each head of loss is a valuable discipline, but it should not mislead us into thinking that the end result is anything but a best estimate or that in the real world claimants will spend the sums awarded precisely in accordance with the assumptions on which they are assessed; and of course, as Lambert J points out at para. 136 of her judgment (quoted by Irwin LJ at para. 18), that is not even possible where there is a deduction for contributory negligence or the parties reach a compromise. In that context, I do not think that it is unacceptable in principle that, in order to avoid over-compensation, claimants should have to use part of the sum

assessed under other heads to fund (in cash-flow terms) the additional element in their accommodation needs. And in fact Mr Sweeting QC only advanced the contrary submission in a highly qualified form, describing it as "not quite a fallback". His position was that if there was no viable mechanism which provided the Appellant with some compensation for her accommodation loss while avoiding a windfall – so that the choice was between her receiving nothing and her receiving the full cost of the additional element – then the Court must take the latter option. He did indeed point out that the scope for "robbing Peter to pay Paul" (Tomlinson LJ's phrase from *Manna*) had become more limited in recent years as the level of awards in respect of accommodation had risen much faster (as a result of increases in property prices) than the level of awards for pain, suffering and loss of amenity, and many elements in future loss were covered by periodical payments; but that is a different kind of point.

227. I should add that I am not sure that it would even be open to us as a matter of authority to hold that robbing Peter to pay Paul (in that sense) is wrong in principle. As Lambert J points out in the passage already referred to, a degree of "scavenging from damages allocated to other losses" was inherent in *Roberts v Johnstone* from the start. (The same is true of *George v Pinnock*.) Although we are holding that we are free to depart from *Roberts v Johnstone*, that is because of the changes in economic conditions since it was decided, which mean that a claimant would now receive no award whatsoever in respect of their accommodation needs: it is debatable whether that justifies us in going behind the Court's assumption, which was necessary to its reasoning, that it was acceptable for the plaintiff to have to fund the capital cost of the accommodation out of other elements in the damages.

228. Having said all that, I must emphasise that I am concerned only with a case of the present kind, where the claimant has a long life expectancy. In such a case the application of a discount rate of 5% (which, to anticipate, I agree is the correct rate) will mean that the shortfall between the cost of the additional element and the amount awarded will typically be comparatively small and, as Irwin LJ puts it at para. 185, the gap between the need and the damages following deduction of the present value of reversionary interest should be capable of being bridged without creating substantial difficulties for the claimant. The position will be different in short life-expectancy cases, of the kind illustrated by paradigm 3. As Irwin LJ says at paras. 170 and 209, these may require a different approach.

229. The second point which I have not found entirely easy is that considered by Irwin LJ at para. 146. There must always be a possibility that the claimant's need for the additional element in their accommodation will come to an end, or the cost of it be reduced, at a date significantly earlier than their death – for example, if they move to a cheaper property later in life or live their last years in a nursing home or with a relative. It is true that some additional costs attributable to the injury may continue under the new arrangement, but not always and certainly not necessarily to the same degree. In such a case there would be a release of capital at that point, and a valuation on the basis that the notional reversion falls in only at the date of death will result in over-compensation. Irwin LJ acknowledges that possibility, but says that it will occur only rarely. I am not sure that I agree about that. However, I would still agree with him that the reversion should be valued at the predicted date of death (except perhaps in unusual circumstances where the probability of a substantially earlier release of capital was high). The scenarios in which a pre-death release of capital may occur are simply too

variable and too uncertain for an appropriate adjustment to be quantified in any way that was not mere guesswork; and the adjustment would not in any event be substantial in the context of the overall valuation given that it would be intended to reflect events at the distant end of the relevant period. In those circumstances the modest degree of over-compensation which a valuation based on life-expectancy would entail is in my view justifiable by the needs of practical justice. In this connection I note what Irwin LJ says at para. 205 of his judgment. The difference between, on the one hand, acknowledging a degree of over-compensation because of the impossibility of devising a workable way of avoiding it and, on the other, pragmatically treating uncertainties of this kind as part of an overall fair and reasonable assessment seems to me rather elusive; but I think the former description is better because more transparent.

230. The final question is how to assess the present value of the notional reversionary interest. Effectively what that means is identifying an annual rate by which the value should be discounted for the period between the assessment and the predicted date of death. I agree with Irwin LJ that a market rate approach is right in principle, and if there were an active market in such interests we could simply take the established rate. However, in my view Mr Watson's evidence does not establish that there is (at present) a sufficiently active market to yield such a rate. The rate must thus be chosen by the court (as the "deferment rate" was by the Lands Tribunal in the *Earl Cadogan* case), but an important element in its decision must be such evidence as there is about what investors are prepared to pay for broadly analogous interests. For that purpose Mr Watson's evidence about the limited number of transactions which he identifies does have real value. Having regard to that evidence and the other factors identified by Irwin LJ, I agree with him that the rate in this and similar cases should be 5%.

ANNEX 1

PARADIGM (1)

11 year old Claimant - maximum severity injury - no capacity – 30 year life expectancy - immediate need for accommodation

The Claimant suffered hypoxic brain injury at birth, leading to dyskinetic cerebral palsy. He suffers global developmental delay and is wheelchair dependent. Swallow function is intact and he has some mobility. He requires 24 hour care. He has an older brother [now age 13].

As at the date of injury the family lived in a two storey three bedroom semi-detached property. They subsequently purchased, extended and adapted a four bedroom bungalow. That property now provides:

- Bedroom with adapted en-suite bathroom for the Claimant;
- Bedroom for the Claimant's parents and his brother;
- Carer's suite [bedroom, kitchenette and small shower/toilet space].
- Family bathroom;
- Therapy room for the Claimant;
- Kitchen, lounge and dining room;
- Equipment store for the Claimant's wheelchair and other equipment.

The Judge found that the property purchased was appropriate and the purchase price was reasonable [£500,000]. Adaptation costs were £250,000. Absent his injuries, the Claimant would have lived with his parents to age 25 and would then have purchased a starter home with a partner at a cost of £150,000 [50% contribution each of £75,000]. The Judge also found that at age 35 the Claimant would have purchased a family home at a cost of £300,000. Again this would have been with a partner [50% contribution of each of £150,000].

The Judge's findings in relation to the other heads of loss were as follows:

- PSLA - £325,000
- Past gratuitous care - £200,000
- Past paid care - £1,000,000
- Past equipment - £100,000
- Past miscellaneous expenses - £50,000
- Life multiplier [30 years @ -0.25%]: 31.16
- "*But for*" life multiplier [11 year old male]: 85.53
- Earnings multiplier [23 years from age 18]: 24.10
- Future care and case management – 31.16 x £225,000[1] p.a. = £7,011,000
- Future loss of earnings: 24.10 x 0.90 x £25,000 = £542,250
- Future transport and travel - £300,000
- Future aids and equipment - £250,000
- Future therapies - £150,000
- Future deputyship - £600,000
- Future miscellaneous expenses - £50,000

1 Double up daytime care with night sleeper.

- **TOTAL AWARD [ex future accommodation claims] - £10,828,250**

The Claimant's preference, accepted by the Judge, is for future care and case management costs to be met by an annual periodical payment of £225,000 index linked to ASHE 6115 at the 80th centile. All other heads of loss are met by way of lump sum - £3,817,250. It is a reasonable working assumption that future transport and travel, aids and equipment, therapies, deputyship and miscellaneous expenses will be spread evenly over the remainder of the Claimant's lifetime.

The Claimant has received £1,750,000 by way of interim payment [house purchase, adaptation and past care/case management etc]. That has to deducted from the award and leaves a balance of £2,067,250. From that, £200,000 is to be paid to the Claimant's parents in respect of past care and £150,000 is required to reimburse them for past expenditure and miscellaneous expenses. There is therefore a remaining net balance of £1,717,250.

The Judge rejected the Claimant's "*lost years*" claim which was claimed on the following basis:

- "*Lost years*" multiplier [from age 41 to age 70]: (53.61 x 1.0177) – 24.10 = 30.46
- Lost years claim: 30.46 x £25,000 x 50% = £380,750

PARADIGM (2)

55 year old Claimant - earning capacity and life expectancy unimpaired - full capacity - need for accommodation in 7 years

The Claimant was injured in a road traffic accident. He suffered multiple severe orthopaedic injuries, including severe fractures to both legs. He is currently mobile indoors with the use of sticks/walking aids. The agreed expert evidence is that the Claimant's mobility will deteriorate in the next 5-10 years, such that he will have difficulty with stairs and will require single storey accommodation. The Judge finds that the Claimant will come to that point in 7 years' time. The Judge also finds that the Claimant will be a regular wheelchair user from age 80.

The Claimant works as a financial administrator earning £30,000 p.a. net. After six months off work, he returned to work earning at the same level as he had before. The Judge finds that his employment is secure and that his earning capacity is unimpaired.

He lives with his wife; their grown up children have moved out. The Claimant and his wife own their four bedroom two storey house subject to a mortgage, which has an outstanding balance of £100,000. The house is worth £400,000, therefore there is £300,000 equity in the property; it is owned in equal shares by the Claimant and his wife.

The agreed cost of a four bedroom bungalow in the Claimant's area is £600,000. The agreed cost of adaptations to a four bedroom bungalow is £100,000.

The Judge finds that absent his injuries, the Claimant and his wife would have "*downsized*" to a smaller three bedroom property at age 70 in any event. The cost of that property would have been £300,000. The agreed cost of a three bedroom bungalow in the Claimant's area is £450,000. The agreed cost of adaptations to a three bedroom bungalow is £90,000.

The Judge finds that from the date of trial to age 70 the Claimant will require ad hoc assistance of 5 hours per week which will be provided by his wife, from age 70 he will require 14 hours per week paid personal care and assistance from age 70 and 42 hours per week from age 80 [a further 5½ years].

The Judge's findings in relation to the other heads of loss were as follows:

- PSLA - £125,000
- Past loss of earnings - £15,000 [subrogated claim on behalf of the employer]
- Past gratuitous care - £20,000
- Past travel - £5,000
- Past miscellaneous expenses - £5,000
- Life multiplier: 31.98
- Multiplier to age 62: 7.06
- Multiplier from age 62: 24.92
- Multiplier to age 75: 18.82
- Multiplier to age 70: 14.45
- Multiplier age 70-80: 10.52
- Multiplier age 80+: 7.01

- Future care to age 70: 14.45 x £1,852.50[2] = £26,769
- Future care 70-80: 10.52 x £12,740[3] p.a. = £134,025
- Future care 80+: 7.01 x £38,220[4] p.a. = £267,922
- Future physiotherapy: 31.98 x £1,000 = £31,980
- Future aids and equipment: £150,000 [£50,000 to age 80 and £100,000 thereafter]
- Future transport and travel: £25,000
- Future DIY, decorating and gardening [to age 75]: 18.82 x £1,500 = £28,230
- Future miscellaneous expenses: £10,000
- **TOTAL AWARD [ex claim for purchase of property]: £943,926**

As set out above, the bulk of the Claimant's care needs will arise in later life, starting at age 70 with the greatest need for care from age 80 onwards. Similarly, the Claimant's aids and equipment needs will increase significantly at age 80. All other future losses will be spread evenly over the Claimant's lifetime.

2 5hr/wk x £9.50/hr x 52 weeks x 75% = £1,852.50 p.a.
3 14hr/wk x £17.50/hr x 52 weeks = £12,740 p.a.
4 42hr/wk x £17.50/hr x 52 weeks = £38,220 p.a.

PARADIGM (3)

75 year old Claimant – 7 year life expectancy - full capacity - immediate need for accommodation

The Claimant suffered an above knee amputation as a result of a road traffic accident. As at the date of the accident he was not working and was in receipt of a state pension. He lived alone in a rented one bedroom first floor flat. He was fully mobile and independent in all aspects of everyday living.

The Claimant requires prosthetics for life. However, as a result of his injuries he will be a regular wheelchair user and requires a wheelchair accessible adapted ground floor property. The Judge finds that the Claimant will be unable to adapt a rental property to meet his needs and will have to purchase a property in order to carry out the agreed adaptations [door widening, level access shower/wetroom, widened passageways for wheelchair access, adapted kitchen and so on].

The Judge finds that the Claimant will require 35 hours of care to age 80 and live in care in the final two years of life. Absent his injuries, the Claimant would not have required any paid care and assistance.

The Judge finds that the Claimant requires a three bedroom bungalow[5] which can be adapted to create a suitable bathroom, wheelchair accessible rooms and a bedroom/carer's suite for live in care.

The cost of a three bedroom bungalow in the Claimant's area is £250,000. The cost of adaptations is £150,000. The Claimant's annual rental charges were and would have remained, absent his injuries, £80 p.w. which would have been met in full by Housing Benefit.

The Judge finds that purchase and adaptation of a bungalow would be a reasonable solution to meet the Claimant's reasonable needs. The alternative is for the Claimant to rent a 3 bedroom bungalow and to adapt the property. Rental costs of a bungalow would be £1,000 pcm and adaptation costs would be the same as before [£150,000]. The Claimant would have to make good the adaptations and restore the property to its previous unadapted state. The Judge rejects this solution due to (i) uncertainty that Claimant will have a secure tenancy for the rest of his life, and (ii) the risk that further adaptations might have to be carried out in the event that the Claimant is forced to move.

The Claimant's expert evidence is that the Claimant's life expectancy is 10 years; the Defendant's expert evidence is that it is 5 years. The Judge finds that it is likely to be 7 years.

The Judge's findings in relation to the other heads of loss were as follows:

- PSLA - £100,000
- Past gratuitous care - £30,000
- Past travel - £5,000
- Past miscellaneous expenses - £5,000
- Life multiplier: 7.06
- Multiplier to age 80: 5.03

---

5 One of the bedrooms will be converted to create a level access en suite wetroom for the Claimant.

- Multiplier age 80+: 2.03
- Future prosthetics: £125,000
- Future aids and equipment: £35,000
- Future care to age 80: 5.03 x £31,850[6] p.a. = £160,205
- Future care age 80+: 2.03 x £75,000 p.a. = £152,250
- Future case management: 7.06 x £10,000 = £70,600
- Future treatments and therapies: £10,000
- Future transport and travel: £15,000
- **TOTAL AWARD [ex claim for purchase of property]: £858,055**

Given the range of opinion on the issue of life expectancy, the Claimant's preference is for a "*flat rate*" PPO for care and case management for life [£31,850 + £10,000] with the additional cost of live in care for the last two years included in the retained lump sum [2.03 x (£75,000 - £31,850) = £87,595]. If such a flat rate PPO was made, the retained lump sum [excluding future accommodation] would be £562,595. As set out above, the Claimant will have to fund a £250,000 purchase and pay £150,000 for adaptations.

6 35hr/wk x £17.50/hr x 52 weeks = £31,850

Annex 2

Tables corresponding to paragraphs 16 and 17 on pages 20/21 of Brian Watson's report of 31 January 2020 (pages 552/553 of EB2)

Swift v Carpenter **Property Value £900,000 Life Expectancy 45.43 years**

Discount Rate	**1%**	**2%**	**3%**	**4%**	**5%**	**6%**	**6.60%**	**7%**
Life Annuity at age 43.58 for female	35.99	29.21	24.24	20.51	17.66	15.43	14.33	13.67
Table 28 multiplier for life expectancy of 45.43	36.55	29.96	25.00	21.20	18.26	15.95	14.79	14.10
Assurance of 1 on death	0.6363	0.4067	0.2611	0.1683	0.1090	0.0709	0.0548	0.0462
Assurance using life annuity	**0.6419**	**0.4216**	**0.2835**	**0.1956**	**0.1384**	**0.1009**	**0.0839**	**0.0751**
Value of reversion of £900K (defendant's interest)	572,694	366,047	234,989	151,502	98,087	63,767	49,344	41,623
Rounded value of reversionary interest	573,000	366,000	235,000	152,000	98,000	64,000	**49,000**	42,000
Calculation Using Mr Daykin's Life Annuity	**577,686**	**379,409**	**255,145**	**176,025**	**124,529**	**90,820**	**75,480**	**67,596**
Value of life interest in £900K (claimant's interest)	327,306	533,953	665,011	748,498	801,913	836,233	850,656	858,377
Rounded value of life interest	327,000	534,000	**665,000**	748,000	802,000	**836,000**	**851,000**	858,000
Value of life interest allowing for mortality	**322,314**	**520,591**	**644,855**	**723,975**	**775,471**	**809,180**	**824,520**	**832,404**

Paradigm (1) **Property Value £500,000 Life Expectancy 30 years**

Discount Rate	**1%**	**2%**	**3%**	**4%**	**5%**	**6%**	**6.60%**	**7%**
Table 28 multiplier for 30 years	25.94	22.62	19.89	17.64	15.75	14.17	13.35	12.84
Assurance of 1 on death	0.7419	0.5521	0.4120	0.3083	0.2314	0.1741	0.1470	0.1314
Value of reversion of £500K (defendant's interest)	370,961	276,035	205,993	154,159	115,689	87,055	73,494	65,684
Rounded value of reversionary interest	371,000	276,000	206,000	154,000	116,000	87,000	**73,500**	66,000
Value of life interest in £500K (claimant's interest)	129,039	223,965	294,007	345,841	384,311	412,945	426,506	434,316
Rounded value of life interest	129,000	224,000	**294,000**	346,000	384,000	**413,000**	**426,500**	434,000

Paradigm (2) **Property Value £600,000 Life Expectancy 39.2 years**

Discount Rate	**1%**	**2%**	**3%**	**4%**	**5%**	**6%**	**6.60%**	**7%**
Table 28 multiplier for 29.2 years	25.34	22.17	19.56	17.39	15.56	14.03	13.23	12.73
Assurance of 1 on death	0.7479	0.5609	0.4218	0.3181	0.2406	0.1824	0.1547	0.1387
Value of reversion of £600K (defendant's interest)	448,711	336,532	253,107	190,888	144,352	109,451	92,820	83,204
Rounded value of reversionary interest	449,000	337,000	253,000	191,000	144,000	110,000	**93,000**	83,000
Value of life interest in £600K (claimant's interest)	151,289	263,468	346,893	409,112	455,648	490,549	507,180	516,796
Rounded value of life interest	151,000	263,000	**347,000**	409,000	456,000	**490,000**	**507,000**	517,000

Paradigm (3) **Property Value £250,000 Life Expectancy 7 years**

Discount Rate	**1%**	**2%**	**3%**	**4%**	**5%**	**6%**	**6.60%**	**7%**
Table 28 multiplier for 7 years	6.76	6.54	6.32	6.12	5.93	5.75	5.64	5.58
Assurance of 1 on death	0.9327	0.8706	0.8131	0.7599	0.7107	0.6651	0.6393	0.6227
Value of reversion of £250K (defendant's interest)	233,180	217,640	203,273	189,979	177,670	166,264	159,823	155,687
Rounded value of reversionary interest	233,000	218,000	203,000	190,000	178,000	166,000	**160,000**	156,000
Value of life interest in £250K (claimant's interest)	16,820	32,360	46,727	60,021	72,330	83,736	90,177	94,313
Rounded value of life interest	17,000	32,000	**47,000**	60,000	72,000	**84,000**	**90,000**	94,000