IN THE COURT OF APPEAL (CIVIL DIVISION) **Appeal Reference: B3/2017/1649/A**

ON APPEAL FROM THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

BETWEEN:

JR **Appellant/claimant**

(a protected party by his litigation friend and mother JAR)

- and –

SHEFFIELD TEACHING HOSPITALS NHS FOUNDATION TRUST

Respondent/defendant

-and-

PERSONAL INJURIES BAR ASSOCIATION **Intervener**

PIBA'S WRITTEN SUBMISSIONS

Introduction

1. By Order dated 25 July 2017, Hamblen LJ granted the Personal Injuries Bar Association ('PIBA') permission to intervene in JR's appeal against the decision to award nil damages for the capital cost of accommodation and to make these written submissions. By email dated 16 August 2017, Hamblen LJ confirmed that the question whether PIBA should be given permission to make short, oral submissions is best left to the Court hearing the appeal.[1]

Issues addressed by PIBA

2. PIBA addresses, in turn: (1) the correct legal test to apply; (2) whether a claimant, who requires special (and more expensive accommodation)[2], has incurred a loss and, if so, what is the status of *Roberts v Johnstone* [1989] QB 878; (3) routes by which the court can quantify or measure such loss.

[1] PIBA intends to attend the oral hearing and seek permission at the hearing to make submissions limited to 30 mins, as per its application notice of 29 June 2017.

[2] Invariably level access accommodation that is larger than would otherwise be required. A broad range of seriously injured claimants have such a need, not least those who by virtue or traumatic brain injury and/or spinal cord injury are wheelchair dependent but also, for instance, claimants with lower limb amputations.

The correct legal test to apply

3. It is well established at the highest level that the task of the court in assessing damages for personal injuries is to arrive at a figure, whether lump sum or PPO[3], which represents as nearly as possible full compensation for the injury which the claimant has suffered; the purpose of the award is to put the claimant in the same position, financially, as if he had not been injured.[4]

4. In the context of a claim for damages, as here, to meet a need arising from the claimant's injury, the appropriate question for the court is "what is required to meet the claimant's reasonable needs?".[5]

5. In a case such as this, it is to be assumed that the claimant has established by evidence that he requires special accommodation to meet his reasonable needs. This is key. The claimant is entitled to recover sufficient damages to meet his established need for special accommodation.

6. So the court's obligation is to see that the damages to which it holds the claimant is entitled are sufficient to enable the claimant to be provided, at no extra cost to himself, with that special accommodation. Otherwise, the claimant will not have been provided with enough damages to meet his reasonable needs.

7. The principle of restitution means that the court should strive not to provide any element of betterment for the claimant. Sometimes this cannot be avoided: see, for instance, *Harbutt's Plasticine v Wayne Tank and Plump Co.* [1970] 1 QB 447 and the other cases referred to at fn 15 to 4.11 of the Law Commission's Report "Damages for Personal Injury: Medical, Nursing and Other Expenses; Collateral Benefits" and *McGregor on Damages* (19th ed.) at 2-007. If the claimant obtains an incidental benefit in respect of unavoidable betterment, it should be ignored in the assessment of damages.[6]

8. This is because the court must address the issue from the point of view of the claimant, rather than that of the tortfeasor. As put by Lord Hope in *Longden v British Coal Corpn.* [1998] AC 653 at 670:

> "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

[3] A periodical payments order pursuant to s.2 of the Damages Act 1996.
[4] It suffices to refer to *Livingstone v Rawyards Coal Co.* (1880) 5 App. Cas. 25 per Lord Blackburn at 39 and *Wells v Wells* [1999] 1 AC 345 per Lord Lloyd at 364.
[5] See *Sowden v Lodge* [2005] 1 WLR 2129 per Longmore LJ at [94] and also per Pill LJ at [11]ff.
[6] And see the summary of the law given by Lord Hope in *Lagden v O'Connor* [2004] 1 AC 1067 at [34].

> *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."

9. The observation in *Roberts v Johnstone* that "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"[7] is, at best, an incomplete statement of the law. The object is accurately to provide such damages as enable the claimant to meet his reasonable needs; this may, for the reasons set out above, involve leaving the claimant or his estate with a betterment (often referred to in this context as a windfall).

10. PIBA would also call into question the appropriateness of relying on the observation of Lord Woolf in *Heil v Rankin* [2001] 2 QB 872, a case of non-pecuniary damages, to the effect that awards of damages must be at a level which does not result in an injustice to the defendant.[8] The court's task, in the case of pecuniary damage, is to determine the amount of damages that meet the claimant's reasonable needs; once that calculation is done, there is, as Lord Lloyd put it in *Wells*[9] "no room for a judicial scaling down."

11. There is, however, room for a defendant to contend that the claimant has failed to mitigate his loss. Just such an argument was run in *Wells* in the context of the discount rate.[10] So if the defendant proves that the claimant should have taken steps to reduce the cost associated with meeting his need for special accommodation, he will not be entitled to recover the amount claimed but the lesser amount that would equally have met his reasonable need.

Has the claimant incurred a loss?

12. Where a claimant is living in rental accommodation and requires special, more expensive accommodation as a result of his injury, it is self-evident that he will incur a loss (being the difference between the rental cost of the special accommodation and of the pre-accident rental accommodation). The position is just the same where the

[7] Per Stocker LJ at 893B.
[8] An observation implicitly approved, but without argument, obiter by Tomlinson LJ in *Manna v Central Manchester University Hospitals NHS Foundation Trust* [2017] EWCA Civ 12 at [19]. And see the illuminating analysis of Warby J on this point in *A v University Hospitals of Morecambe Bay NHS Foundation Trust* [2015] EWHC 366 (QB) at [9]-[16].
[9] At 364.
[10] The HL rejected the defendant's contention that the claimant failed to mitigate her loss by not investing in equities: see at 366-367.

claimant is, prior to the accident, living in his own home and needs special accommodation at increased capital cost as a result of the accident.

13. Even where the claimant is wealthy and has ready access to his own funds so as to purchase the special accommodation, there remains a loss. If, as in *Roberts v Johnstone*, the court assumes that the new property will increase in line with RPI, it nevertheless remains the position that the claimant has put his own monies into a larger property to meet his own accident-related needs. But for the accident, had the claimant been so minded as to invest this private capital in property, he would have been in a position to rent out the property and so produce an income; a step he cannot now take as he needs the larger property to live in. In that way, the claimant's capital would be taken to increase in line with RPI and the claimant would benefit from rental income. A similar loss (of capital increase and income) would arise if the claimant had to withdraw funds from investments other than property. Whether viewed as a loss of investment return or loss of use of his capital, the claimant suffers a loss.

14. Experience tells that the vast majority of claimants are anyway not in a position to afford by independent means to purchase the special accommodation. They are, relative to the costs of special accommodation, impecunious. In *Lagden v O'Connor* [2004] 1 AC 1067, the House of Lords elected not to follow the rule laid down in *The Liesbosch* [1933] AC 449 and held that the claimant's impecuniosity should be taken into account when assessing damages. At para 61, Lord Hope held that:

> "The wrongdoer must take his victim as he finds him…. This rule applies to the economic state of the victim as it applies to his physical and mental vulnerability. It requires the wrongdoer to bear the consequences if it was reasonably foreseeable that the injured party would have to borrow money or incur some other kind of expenditure to mitigate his damages."

15. An impecunious claimant, who needs to borrow funds in order to fund the purchase of the special accommodation, clearly suffers a loss. The loss is not extinguished if the claimant, in fact, borrows from other damages awarded in respect of different heads of loss; that would impermissibly involve setting off one head of loss against another, a novel and wholly unprincipled approach. It may as well be said that the claimant has no claim for a wheelchair because he can afford to purchase one with his award of damages for loss of earnings.

16. Nor can the loss be ignored by the court because, by virtue of the change in the discount rate, the claimant will recover more than he would otherwise have done. That

is a reflection of the new discount rate more accurately reflecting the cost or loss to the claimant.

17. The court's assessment of a 'lost years' claim is also irrelevant to the assessment of damages relating to the cost of special accommodation. The heads of loss are distinct and it would be entirely unprincipled to permit assessment of one head to determine assessment of another. It would also lead to arbitrary outcomes as between claimants; the amount to be recovered for special accommodation then presumably being greater for a claimant without a 'lost years' claim than one with such a claim.

18. A rigid adherence to the *Roberts v Johnstone* formula produces the absurd result of there being no loss. This is the product of applying the negative discount rate as the measure of annual loss of use of monies when the claimant has, in fact, either lost the benefit of rental income on the capital or needs to incur borrowing costs. It is submitted that *Roberts v Johnstone* no longer applies. Even though the House of Lords held in *Wells* that the annual multiplicand should be calculated by reference to the discount rate, both sides had accepted that the correct approach was that adopted by the CA in *Roberts v Johnstone*.[11] So the HL did not itself determine that *Roberts v Johnstone* formed the correct (or only) basis for assessing damages relating to the purchase of special accommodation.

19. Accordingly, this court can distinguish *Roberts v Johnstone,* there being ample grounds for doing so, not least that:
    (a) The different social conditions that now apply: the cost of a mortgage had changed substantially, the investment potential of money (as determined by the discount rate) has changed from the time in *Wells* and so has the relative cost of a suitable property and a claimant's ability to purchase one out of interim damages.
    (b) The formula does not work to produce a just result when the discount rate is negative.
    (c) PPOs are now available, which limit the scope for obtaining a substantial lump sum interim payment with which to purchase special accommodation, and provide an alternative route to compensation for special accommodation.
    (d) The balance between the capital cost of special accommodation and PSLA awards is now markedly different.[12]

[11] See at 380F in the judgment of Lord Lloyd.
[12] Damages for PSLA will not exceed £337,700 (per Judicial College guidelines) and special accommodation is needed by claimants with a wide range of PSLA awards, from around £100,000 upwards. Special accommodation close to London can be expected to cost around £1m, sometimes more; the lowest figures, in some parts of the UK, are somewhere around £450,000; and, as a rough guide, a typical cost for special accommodation would be £750,000.

(e) Impecuniosity is a factor that the court can now take into account when assessing damages.

20. It is respectfully submitted that the court should distinguish *Roberts v Johnstone* given it fails to provide the claimant with such damages as meet his reasonable needs. The problems with the *Roberts v Johnstone* formula were recognised prior to the change in the discount rate.[13] In particular, it produced real hardship to claimants with short life expectancies.[14] Even using the 2.5% discount rate, a claimant with a life expectancy of 10 years had a multiplier of 8.86 and so could only recover 22.15% (2.5% x 8.86) of the increased capital cost. What the change in the discount rate has done is to render the approach taken in *Roberts v Johnstone* unworkable; it has forced the court's hand.

Routes by which the court can quantify the claimant's damages

PPO to fund interest-only mortgage

21. A claimant, facing the need to access capital to fund the special accommodation, could, in principle, obtain a commercial mortgage to do so. If the interest payments were met by the defendant for so long as the claimant lives, then the claimant would have obtained restitution with a high degree of accuracy. A PPO award can provide this, not least when the court can select an appropriate index of inflation.[15] In this context, it may be appropriate to apply the Index of Private Housing Rental Prices.[16]

22. The possibility of funding accommodation by a PPO was first proposed in 2008.[17] The proposal was adopted by the Civil Justice Council in its 2010 report on accommodation claims.[18] Nevertheless, to the best of our knowledge, there has never been a case yet when such a PPO has been agreed between parties (let alone ordered by the court). One factor behind this is essentially a practical one: it has proven hard to find a mortgage lender willing to provide such a product.

23. A PPO takes the issue of the claimant's life expectancy out of the equation. It enables the claimant to obtain special accommodation even where he has a short life expectancy and avoids the need for the defendant to pay for any capital element at all. A strong steer from this court as to the merits of utilising PPOs in this context may encourage

[13] See the Law Commission report of November 1999 and the Civil Justice Council report of 2010.
[14] Such as mature spinal cord injury clients. The 2017 paper "Long term survival after traumatic spinal cord injury: a 70 year British study" Spinal Cord (2017) 1-8 gives life expectancy figures for a 60 year old male paraplegic of 14.8 years and a 60 year old male with C1-4 tetraplegia, Frankel A-C, of 8.4 years (as compared to the general population with a life expectancy of 22.6 years. The figures for females are only slightly higher.
[15] See *Thompstone v Tameside and Glossop Acute Services NHS Trust* [2008] 1 WLR 2207.
[16] An experimental index published by the ONS since 2011.
[17] See "Accommodating periodical payments orders into housing claims" Robert Weir, Journal of Personal Injury Law (2008) 146-153.
[18] See at 5.1ff.

litigants to focus harder on this possible solution; no doubt, if one mortgage lender provides a suitable product, others will then follow.

24. It is right to note that in a case of a long predicted life expectancy and where the claimant does indeed live out his life expectancy, the defendant may very well pay in excess of the capital sum needed to purchase the property outright. In such a case, it would surely be open to the defendant to elect to offer to pay the claimant the full capital sum instead of making a PPO. That would be a matter for the insurer. The fact that the overall sum may, over a number of years, exceed the capital cost is not, of itself, a factor against the making of a PPO – it is part of the quid pro quo of any PPO under which the amount of the claimant's damages are linked to the period of his life.

Payment of a loan to meet the extra capital cost with charge over claimant's property

25. The Law Commission considered this to be the best option for reform.[19] It has the great advantage over the *Roberts v Johnstone* approach[20] that the claimant is provided with the funds to purchase his special accommodation. So the claimant's actual need for special accommodation is met. It meets the problem by recognising, as the Law Commission noted at 4.10, that the claimant's loss is a capital expense and not an annual loss.[21]

26. The Law Commission highlighted the practical issues that come with imposing a charge on the claimant's property at 4.14. As part of that analysis, the Law Commission proposed at 4.14(iv) that the amount to be repaid to the defendant (on the claimant's death) should reflect changes in the market value of the property. If that is right then the defendant would have to accept the possibility of being repaid a lower amount in the future than the amount of capital loaned.[22]

27. Whilst the logic of such an approach is clear, it is questionable whether the claimant's estate should be held to such an arrangement: the claimant may elect to conduct considerable improvements on the property and it would be expensive to calculate (and potentially litigate) the costs associated with such changes, which should plainly be discounted. PIBA favours repayment simply of the capital sum loaned (and regardless of the value of the property at the date of the claimant's death); alternatively, payment

[19] At 4.13.
[20] Pre-discount rate change to a negative figure.
[21] Unless the alternative solution of a PPO is employed in which case the loss can be approached as an annual loss whilst continuing to meet the actual need by providing the claimant with the means to borrow the necessary funds so as to purchase the special accommodation.
[22] This is a real possibility, not least in a case where the claimant dies after a short number of years.

of the capital sum loaned plus interest on the loan at a suitable index of inflation over the duration of the loan.[23]

28. PIBA does not accept that the complexities associated with the loan/charge scheme are such as to make it virtually unworkable in practice: the conclusion reached by the Law Commission at 4.15. No doubt, as with PPOs, a standard form or model order would, within a short space of time, become adopted and approved by the court. This scheme would provide a measure of damages to a high degree of accuracy which delivers a practical solution to the claimant and avoids any argument about windfall. Its benefits to claimants and defendants alike, especially in low life expectancy claims, are obvious.

Rental arrangements

29. In a minority of cases, claimants welcome renting a property for life. Cases have been approved under which the rental costs have been paid by way of a PPO.[24] The author of this paper has settled one case in which the defendant insurer purchased a property in which the elderly tetraplegic claimant is living (on a peppercorn rent) for life, the claimant keeping his pre-accident owned home and being free to rent it out if he chooses.[25]

30. PIBA recognises that the vast majority of claimants prefer to own their own home. The arrangement under which an insurer purchases a home and rents it out to the claimant for life does provide the claimant with security for life. It can be an attractive option to both claimant and defendant in cases of short life expectancy, not least where the claimant is so brain damaged as not to comprehend the loss of independence felt by many who rent, rather than own.

Capital sum to meet mortgage interest costs

31. Logically, the lump sum corollary to the PPO award is a sum representing the annual cost of interest on the mortgage providing the capital sum multiplied by the claimant's life expectancy. Whereas the *Roberts v Johnstone* formula is fixed on the (discount rate x capital sum) as the annual cost, here the award more accurately reflects the actual annual cost to the claimant of borrowing the needed capital.

32. The difficulty with this approach is that, where the claimant's life expectancy is short, it will still not provide the claimant with damages such as to meet his reasonable needs, by enabling him to move into special accommodation without additional cost. For this

[23] Such as RPI.
[24] See, for instance, *JM v Aylward* (2015) lawtel, a settlement approved by Owen J.
[25] And under which the defendant insurer agreed to extend the tenancy to the later of the death of the claimant and his wife.

reason, this proposed solution is not favoured by PIBA. It also makes calculation of the lump sum dependent on assessment of life expectancy.[26]

33. In the case of a very long life expectancy, this approach will give rise to an award of capital exceeding the capital cost of the special accommodation. In such a situation, the claimant would be failing to mitigate his loss if he did not accept the lesser sum of the full capital cost.

34. If such an approach were to be adopted, it is respectfully submitted there should be a single rate fixed by the court to be applied to every case in the interests of certainty and predictability. No doubt there would be a test case at which evidence could be adduced of mortgage interest rates before such a rate was set. If market conditions then changed sufficiently, it would be open to a party in the future to apply for a change to the rate fixed by the court.

Capital sum less PSLA

35. PIBA cannot support quantifying damages by reference to a lump sum, representing the additional capital sum, less the amount recovered for PSLA. Such an approach is unprincipled and arbitrary in the extreme. As set out above, the amount awarded for PSLA simply cannot be set off against the claim for damages in this way. PSLA are awarded for loss of a different kind and the courts should not endorse their being applied across to the quantification of a different head of loss. Further, it would lead to the greatest level of unfairness between claimants: a below-knee amputee's accommodation cost would be discounted by around £100,000 whereas the more seriously injured tetraplegic or cerebral palsy/catastrophic brain injury client would face a reduction of up to £300,000 plus.[27]

Capital sum simpliciter

36. The claimant needs such damages as will enable him to fund the purchase of special accommodation. The two options that deliver this without providing any[28] element of betterment are the PPO and the loan/charge arrangements.[29] These options, therefore, produce a more accurate assessment of damages than payment over the capital sum to the claimant.

[26] An inexact science and an assessment that is fairly bound to be wrong in any individual case.
[27] The Judicial College guidelines recommend awards of £81,920 to £111,180 for a below-knee amputation and the maximum severity award is £337,700.
[28] Or any significant.
[29] Neither will enable the claimant to obtain the property if the claimant is entitled only to recover a proportion of his damages but this is a feature of every case of partial recovery. In *Sowden v Lodge* [2005] 1 WLR 2129, the Court of Appeal held that the effect of contributory negligence on how a claimant would actually spend his damages was irrelevant to the court's task of assessing damages.

37. The court can order that the defendant meet the special accommodation cost by a PPO; it is charged by s.2(1)(b) to consider the making of a PPO when awarding any damages for future pecuniary loss. It is not obvious that the court has the power, as such, to order that there be a loan of monies coupled with a charge against the property to be purchased and numerous ancillary clauses.[30]

38. A solution does, however, present itself to the court. If the defendant offers a suitable PPO and/or a loan/charge arrangement, the issue will be put before the court as to whether a claimant, who refuses such offers, has mitigated his loss. If the court considers that any such offer is one that the claimant should reasonably accept, then the claimant's claim will be so limited. Any such offer, to be effective, should be one which is open for acceptance, in effect, post judgment on the basis that the court makes such a finding on mitigation.

39. If, on the other hand, the defendant fails to make any such offer to the claimant (or the court anyway finds that it is not appropriate to make a PPO), then the question arises as to how the court can compensate the claimant so as to meet his undoubted claim for special accommodation. The default position is payment of the entire capital sum, there being no other way in which the court can provide the claimant with the funds to purchase the special accommodation.

40. Once the court establishes that accommodation claims should be resolved by payment of the full capital sum, subject to arguments about mitigation, it is envisaged that defence insurers[31] will rapidly react and embrace the PPO and loan-charge schemes.[32] The prospect then opens up of a just solution being available to address the conundrum that is the claim for accommodation costs.

30 August 2017

ROBERT WEIR QC
Chair of PIBA

[30] The court could, however, make an order for payment of the capital sum over to the claimant if the claimant/his deputy had provided an undertaking to the court to repay the monies after the death of the claimant, to put a charge on the property and so on.
[31] And other professional defendants such as governmental bodies, including NHS Resolution.
[32] Practical difficulties may arise at the outset and require litigating but it is envisaged that the courts will shortly provide clarity for future cases.

DARRYL ALLEN QC
Vice-Chair of PIBA